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PERSONAL JURISDICTION: THE HIDDEN AGENDAS IN THE SUPREME COURT DECISIONS

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INTRODUCTION

Personal jurisdiction is not an exciting topic. United States Supreme Court decisions on the subject—and they seem to come in bunches¹—seldom if ever, make headlines even in legal publications. The reasons for this general lack of interest are simple. Personal jurisdiction is a conceptually vague and complex topic which few laymen could comprehend even if it affected them directly. But, more importantly, few litigants are directly affected by personal jurisdiction decisions.² All that seems to be decided in personal jurisdiction cases is whether a particular defendant can be sued in a particular state. The plaintiff will either have to drop one of the defendants or sue in another state. Corporate defendants are generally indifferent to the location of the suit; whether suit is brought in San Francisco or Boston is immaterial since both have good restaurants.

Personal jurisdiction decisions can be important to litigants in an indirect but inevitable way. The forum chosen by the plaintiff

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1. The United States Supreme Court handed down five major decisions in the thirteen years between 1945 and 1958 and then did not address the topic for almost twenty years. *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In the past seven years the Court has decided five more important cases: *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868 (1984); *Calder v. Jones*, 104 S.Ct. 1482 (1984); *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978).

2. Lawyers, especially plaintiff's counsel, are often directly affected because a dismissal for lack of personal jurisdiction may necessitate refiling in another state which in turn may require counsel to turn the case over to a lawyer in the other state.

may offer advantages over the defendant which have nothing to do with logistics. Perhaps the most obvious advantage sought by the plaintiff is more favorable law. Many courts tend to apply their own law to a controversy even if another court hearing the case would apply its own law. Thus, jurisdiction becomes important to the parties because what often follows is the application of the forum's substantive law, which may increase the defendant's exposure to liability or give the plaintiff a remedy unavailable elsewhere. Jurisdiction decisions may also have an impact on other matters such as visitation agreements by divorced parents³ or purchasing decisions between foreign governments and United States suppliers.⁴

These indirect effects create a "hidden agenda" in most cases which otherwise seem to present rather sterile personal jurisdiction issues.⁵ This article uncovers the hidden agendas behind the major United States Supreme Court decisions rendered during the past thirty years. It suggests why those particular cases may have been selected for review and discusses why the Court has failed to develop a consistent, analytically sound approach to personal jurisdiction. Finally, the article suggests that the minimum contacts analysis for personal jurisdiction is fundamentally unsound and should be discarded. The Court should adopt, instead, a retrospective analysis which examines the specific unfairness of subjecting a particular defendant to personal jurisdiction in a particular state.

I. THE CONSTITUTIONAL BASIS OF PERSONAL JURISDICTION

Every discussion of personal jurisdiction must necessarily begin with *Pennoyer v. Neff*.⁶ This case established the Constitutional basis for limiting a state's exercise of personal jurisdiction. Mitchell, an Oregon attorney, performed some services for Neff but was not paid. He sued Neff, a California resident, in state court in Oregon and obtained a default judgment when Neff failed to ap-

3. *Kulko v. Superior Court*, 436 U.S. 84 (1978). See *infra* text accompanying note 90.

4. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868 (1984). See *infra* text accompanying note 209.

5. If there was no hidden agenda and the applicable statute of limitation had not yet run, a dismissal for lack of personal jurisdiction would simply mean that the same dispute would be litigated in another state. Under such circumstances, a corporate defendant would gain little by what would be essentially a change in venue. Given the cost involved of litigating the question of personal jurisdiction, it is not surprising that many defendants simply enter general appearances.

6. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

pear. Mitchell enforced the judgment by attachment and sale of a piece of Oregon property owned by Neff. Pennoyer purchased the property at the sheriff's sale and Neff sued him in federal court in Oregon to recover the property.⁷ The United States Supreme Court held that the Oregon court could not exercise personal jurisdiction over Neff since he was not an Oregon resident and was not personally served in Oregon. Furthermore, the Court stated that the Oregon court could not exercise in rem or quasi in rem jurisdiction over Neff's property since it had not been attached *prior* to judgment.⁸

Although the law of personal jurisdiction has changed markedly since Pennoyer, the underlying concept has not: the defendant must have some relationship with the state to enable the state to exercise personal jurisdiction over him.⁹

In *Pennoyer*, the Court identified

two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. . . . One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.¹⁰

The only applicable constitutional and statutory provisions at the time the *Pennoyer* dispute was being litigated was the full faith and credit clause¹¹ and the act of Congress implementing it.¹² These provisions apply only where a state court judgment is being enforced (or challenged collaterally) in another state.¹³ Neither the

7. *Id.* at 715-16. The Supreme Court seemed to have overlooked the fact that the land was obtained by Neff after the judgment had been rendered, a fact which would have been irrelevant had there been personal jurisdiction over Neff in the first place.

8. *Id.* at 733-36.

9. In *Pennoyer's* day the relationship had to involve either residency or presence (person, property or agent) within the state. *Pennoyer*, 95 U.S. at 731. Today the relationship may be the sale of goods, directly or indirectly, within the state. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

10. *Pennoyer*, 95 U.S. at 722. The Court acknowledged that "States of the Union are not . . . in every respect independent," but concluded that "except as restrained and limited by . . . [the Constitution], they possess and exercise the authority of independent States." *Id.*

11. U.S. CONST. art. IV, § 1.

12. 28 U.S.C. §§ 1738-1739 (1982).

13. In *Pennoyer*, the Court placed federal courts on equal footing with the courts of a different state:

constitutional nor the statutory provision required courts of one state to blindly enforce judgments rendered by other state courts in violation of the principles of public international law. The Court emphasized that the full faith and credit clause "was not designed to displace . . . those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another."¹⁴ Thus, while the full faith and credit clause would not require a state court to enforce a judgment rendered in another state which lacked personal jurisdiction over the defendant, it did not prevent the second state from doing so.

The most important aspect of this decision was its dictum:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgment may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.¹⁵

Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give them.

Pennoyer, 95 U.S. at 732-33.

14. *Id.* at 730, citing *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406 (1855).

15. *Pennoyer*, 95 U.S. at 733. This passage is dictum since the fourteenth amendment was ratified long after the judgment was rendered and the property sold and thus could not have been the basis for invalidating the first judgment unless the fourteenth amendment was to be given retroactive effect.

Since *Pennoyer*, the only constitutional basis for invalidating a state court judgment is that any judgment rendered by a state court lacking personal jurisdiction over the defendant constituted a denial of the defendant's constitutional right under the fourteenth amendment to due process of law. Although the Court has hinted that the improper exercise of personal jurisdiction by one state violates the sovereignty of other states which is somehow preserved by the Constitution,¹⁶ it has never invalidated a state court's exercise of personal jurisdiction on that basis. Moreover, it is well established that a defendant can always appear voluntarily and waive the court's lack of personal jurisdiction over him. Obviously, no individual defendant could waive the constitutional rights of one or more of the states. The conclusion is therefore inescapable—the *only* constitutional element in the law of personal jurisdiction is the defendant's right to due process of law.¹⁷

II. THE HIDDEN AGENDAS IN PERSONAL JURISDICTION CASES

A. *Minimum Contacts as a Basis for Personal Jurisdiction*

*International Shoe Co. v. Washington*¹⁸ ushered in a new analytical basis for a state's personal jurisdiction or, more properly, for the fourteenth amendment's limitation on a state's exercise of jurisdiction over a nonresident. Prior to *International Shoe*, jurisdiction over nonresidents who had not appeared or otherwise consented to jurisdiction had to be based on physical presence within the territory of the forum state.¹⁹ The requirement of presence could be satisfied by:

- (1) the presence of the defendant in the forum state;²⁰
- (2) the presence of an agent of the defendant in the fo-

16. See *id.* at 723; and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-93 (1980).

17. "The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (footnote omitted) (emphasis added).

18. 326 U.S. 310 (1945).

19. In this context, presence means an individual's presence within the state coupled with personal service while present if in personam and the presence of property within the state which has been subjected to attachment or sequestration if in rem or quasi in rem. *Pennoyer*, 95 U.S. at 730-36.

20. *Darrah v. Watson*, 36 Iowa 116, 121 (1873).

rum state, either:

(a) an agent for service of process actually appointed by the defendant;²¹ or

(b) an agent appointed by the state;²²

(3) the presence of property belonging to the defendant in the forum state, either:

(a) real or tangible personal property;²³ or

(b) intangible property.²⁴

Prior to *International Shoe*, a person or entity could avoid being subject to personal jurisdiction in a foreign state by:

(1) not entering the state;

(2) failing to qualify to do business in the state; and

(3) keeping all property of value and, if possible, all debtors, out of the state.

In *International Shoe*, the defendant, the International Shoe Company, a Delaware corporation with its principal place of business in St. Louis, Missouri, tried to structure its operations to avoid being subjected to jurisdiction in states like Washington which would have taxed the sales of its shoes. Although International Shoe maintained places of business in several states, it had no place of business in Washington. It sold shoes in Washington in a manner designed to avoid being subjected to either in rem or in personam jurisdiction in Washington.²⁵ At that time, courts could not enforce foreign state tax claims, and if Washington courts lacked personal jurisdiction over International Shoe, and if the company owned no property in Washington, the state could not

21. *National Equipment Rental v. Szukhent*, 375 U.S. 311, 318 (1964).

22. *Hess v. Palowski*, 274 U.S. 352, 356-57 (1927). This basis for personal jurisdiction over a non-consenting defendant had serious limitations and was difficult to apply. See, e.g., *Wuchter v. Pizzutti*, 276 U.S. 13, 18-24 (1928).

23. *Arndt v. Griggs*, 134 U.S. 316, 320-21 (1890) (real property).

24. *Harris v. Balk*, 198 U.S. 215, 221-23 (1905) (a debt). The state would exercise its dominion or control over the intangible property by exercising personal jurisdiction over the possessor of the property, often a debtor of the defendant.

25. International Shoe employed up to 13 salesmen who were directly supervised from St. Louis. They were given only one shoe of a pair as samples and were authorized to show their samples and to solicit orders which were sent to St. Louis for acceptance or rejection. Shipments were F.O.B. if accepted. *International Shoe*, 326 U.S. at 313-14.

force the company to make required contributions to the state unemployment compensation fund.²⁶

The company resisted Washington's efforts to collect unemployment compensation contributions through Washington state courts on both statutory and constitutional grounds. International Shoe contended: (1) it was not subject to the unemployment compensation laws because it was not an employer and did not furnish employment within the meaning of the state statute; (2) the state statute imposed an unconstitutional burden on interstate commerce; (3) service of process on its salesmen was ineffective notice; and (4) the due process clause of the Constitution prohibited Washington courts from exercising jurisdiction over it.²⁷ The state supreme court held that International Shoe's salesmen were employees within the meaning of the statute — a state law issue — and rejected all of the company's constitutional arguments.²⁸

Bound by the holdings of the Washington Supreme Court on the state issues, the United States Supreme Court faced only the constitutional challenges. It summarily rejected the interstate commerce argument.²⁹

The more difficult obstacle was *Pennoyer's* territorial limits on a state court's personal jurisdiction over a foreign corporation, a limitation which could prevent the State of Washington from collecting the unemployment compensation contributions which the Court had found it had an undeniable statutory and constitutional right to collect. The Court faced a serious problem: could it allow the defendant to escape the valid tax simply because it had cleverly designed its commercial activities in such a way that Washington was unable to exercise either in personam or in rem jurisdiction over it? The answer had to be "No."

But the existing law with respect to personal jurisdiction would not, at least without some manipulation, support jurisdiction over a nonresident not served with process within the state nor with any property of any real value in the state.³⁰ Forced to

26. Since the samples consisted of one shoe of each style, quasi in rem jurisdiction would have been impractical.

27. *International Shoe*, 326 U.S. 310.

28. *Id.* at 314-15.

29. *Id.* at 315.

30. The Court also approved of the service of process on the salesmen, but its opinion makes it clear that such service did not establish or create personal jurisdiction over the defendant, but merely was an effective method for transmitting notice to the corporation:

find a way to preserve Washington's unemployment compensation law, the Court developed a new test for jurisdiction based not on the presence of the defendant, but on the defendant's *contacts* with the forum state:

[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."³¹

A finding that the defendant's sales activities in Washington over a period of years were both systematic and continuous satisfied this minimum contacts test and allowed the Court to uphold Washington's attempt to collect its unemployment compensation contributions.

One can hardly quibble with the result in *International Shoe*, but while the threshold issue was personal jurisdiction, the hidden agenda was the need to give Washington courts the power to collect the taxes that the legislature had imposed. The old standard, presence, had been replaced by a new one, minimum contacts.

The next case in the modern development of personal jurisdiction, *McGee v. International Life Insurance Co.*,³² had a hidden agenda even more compelling than that of *International Shoe*. In 1944 Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company. Franklin's mother, Lulu B. McGee, was the beneficiary under the policy. Four years later, International Life Insurance Company took over Empire Mutual's insurance business and mailed a reinsurance certificate to Franklin in California offering to insure him in accordance with the terms of the Empire Mutual policy. He accepted the offer and paid premiums by mail to International Life's home office in Texas. Franklin died in 1950. Mrs. McGee sent proof of death to International Life, but it refused to pay, claiming

We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's "presence" there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual.

International Shoe, 326 U.S. at 320. (citations omitted).

31. *Id.* at 316.

32. 355 U.S. 220 (1957).

that Franklin had committed suicide. She sued International Life in a state court in California.³³ The defendant was served by registered mail in Texas, but it chose not to appear. A default judgment for the full amount of the policy was awarded to Mrs. McGee.³⁴ As she was unable to collect on the judgment in California, she went to Texas where she brought suit on the judgment in a Texas court.³⁵ The Texas court refused to enforce the judgment, holding the California court lacked personal jurisdiction over the Texas defendant.³⁶

Mrs. McGee turned to the United States Supreme Court for help. Would the Court hold that the California court had no jurisdiction over the Texas insurance company and make the poor widow,³⁷ who had already gone through the time and expense of one suit, relitigate her claim in Texas? Obviously not! The insurance company, which had been happy to sell insurance in California, but which would neither pay the claim nor defend its refusal to pay in California, became, like *International Shoe*, a corporate bad guy and the Court ruled against it.³⁸

Once again, however, the existing law presented an obstacle. The defendant's California activities consisted only of a single solicitation by mail followed by subsequent mailings of statements to the insured. Could this qualify as minimum contacts under *International Shoe*? Unfortunately, one can not be sure, for the opinion was written by Justice Black who had refused to accept the minimum contacts analysis embodied in *International Shoe*.³⁹ McGee gave Justice Black the opportunity to outline his own theory of personal jurisdiction. He was less concerned with the defendant's contacts with the forum than he was with the relationship between the cause of action and the forum; the state's interest in providing a remedy for its citizens; and the potential inconvenience to the

33. *Id.* at 221.

34. *Id.*

35. *Id.*

36. *Id.*

37. Actually there is no evidence that Mrs. McGee's husband was deceased, but such an assumption seems as justified as those often made by courts in personal jurisdiction cases. See for example, *Poyner v. Erma Werke GmbH*, 618 F.2d 1186 (6th Cir. 1980), *cert. denied*, 449 U.S. 841 (1980), where the court, without any evidence, concluded that the gun which injured the Kentucky plaintiff was sold to him in Kentucky by a Tennessee gun salesman.

38. *McGee*, 355 U.S. at 223-24. The present Court seems less sympathetic to widows and children. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868 (1984), where the Court deprived a group of widows and children of their award.

39. *International Shoe*, 326 U.S. 310, 322 (Black, J., dissenting).

poor widow:

It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State. The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. 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. Often the crucial witnesses — as here on the company's defense of suicide — will be found in the insured's locality. Of course 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.⁴⁰

Mrs. McGee was allowed to keep her judgment, but the decision did little to develop the constitutional limits on a state's judicial power.

The particular factual circumstances of *Perkins v. Benguet Consolidated Mining Co.*⁴¹ determined the outcome in another personal jurisdiction case. The plaintiff, Mrs. Perkins, claimed to be a stockholder in the defendant company, a "sociedad anonima," organized under the laws of the Philippine Islands.⁴² She brought suit in an Ohio state court to obtain dividends allegedly due her.⁴³ The defendant owned and operated gold and silver mines in the Philippine Islands, but its operations there were completely halted during the Japanese occupation. During the war, the president of the company, who was also its general manager and principal stockholder, returned to his home in Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept the company's office files there. He carried on correspondence relating to the business of the company and to its employees. He paid the company's three em-

40. *McGee*, 355 U.S. at 223-24 (citations omitted).

41. 342 U.S. 437 (1952).

42. There was a dispute as to whether the plaintiff or her estranged husband owned the stock and was entitled to the dividends. *Id.*

43. *Id.* at 439.

ployees there. He maintained two local bank accounts which carried substantial balances of company funds. Another Ohio bank acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home. From that office he directed the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. In spite of all this, the Ohio Supreme Court held that Ohio courts lacked jurisdiction over the company.⁴⁴ It reasoned that defendant's Ohio activities were limited in kind and degree and were not directly related to the plaintiff's claim.⁴⁵

But if the plaintiff was to have any redress in the foreseeable future, it would have to have been in *some* United States court, since the Philippine Islands were occupied by the Japanese army in a state of war. Perhaps the Court viewed the question in this way: Can the due process clause of the fourteenth amendment be used to bar a plaintiff's *only* available remedy? The Court had no choice but to hold that no constitutional barrier would preclude an Ohio court from exercising personal jurisdiction over the defendant under the unique circumstances of this case.⁴⁶ Once again, due to the uniqueness of the case and the lack of any clear rule or governing principal, the decision added uncertainty to the law of personal jurisdiction.⁴⁷

The next important personal jurisdiction case, *Mullane v. Central Hanover Bank & Trust Co.*⁴⁸ is seldom discussed as a personal jurisdiction case. Its notoriety results from its treatment of notice. Although the Court did not identify it as such, it is clearly a

44. *Id.* at 443.

45. *Perkins*, 342 U.S. at 441. The conceptual basis for refusing to do so was not clear. It may have been a belief that they were precluded from doing so by the fourteenth amendment as the United States Supreme Court presumed. Since the plaintiff was a nonresident of Ohio, the basis more likely was some form of *forum non conveniens*.

46. *Id.* at 448.

47. Some courts and commentators have viewed *Perkins* as a "general jurisdiction" decision. *Cornelison v. Chaney*, 16 Cal. 3d 143, 147, 545 P.2d 264, 267, 127 Cal. Rptr. 352, 355 (1976); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, 1872 n.9 (1984); *Lilly, Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 88-89 n.14 (1983); *Riback, The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506, 513 n.37 (1984). However, since the stock transfer agent was an Ohio Corporation and Mrs. Perkins claimed that the stock should have been reissued in her name, *Perkins* may actually be a specific or limited jurisdiction case.

48. 339 U.S. 306 (1950).

jurisdiction-by-necessity case. In January, 1946, the Central Hanover Bank and Trust Company established a common trust fund and in March, 1947, it petitioned the Surrogate's Court for settlement of its first account as common trustee. During the accounting period, a total of 113 inter vivos and testamentary trusts participated in the common trust fund, the gross capital of which was nearly three million dollars. The record did not show the number of beneficiaries nor their residences, but there were a large number of beneficiaries in New York and other states. A judicial decree would have extinguished all claims to the trust fund arising during the accounting period and would have precluded subsequent claims against the bank for mismanagement or fraud.

Obviously, the bank had to have some mechanism for closing-out accounting periods, determining claims and objections, and paying the income remaining to the beneficiaries. Since the beneficiaries resided in many states, if the bank could not sue them all in New York it would have to sue in each state to insure that the decree would bind all potential claimants.⁴⁹ The expense of such litigation would have been borne either by the trust company or by the beneficiaries. In order to preserve the usefulness of the common trust fund, the Court was forced to hold that the New York court had jurisdiction to bind the whole world:

It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.⁵⁰

The real issue was whether adjudication in New York, the only economically feasible way to administer the common trust, would be fundamentally unfair. Since it would not be, the scheme was upheld without any conceptual basis for upholding New York's jurisdiction over nonresidents.

49. See *Hanson v. Denckla*, 357 U.S. 235, 261 n.5 (1958) (Black, J., dissenting).

50. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Given the conceptual vagueness of the holding it is not surprising that it is seldom cited for its personal jurisdiction precedence and has not played a role in any subsequent United States Supreme Court decision on personal jurisdiction.

Undoubtedly the most obvious hidden agenda case is *Hanson v. Denckla*.⁵¹ The main characters in this family drama, which could provide a plot for a TV "soap," were Dora Browning Donner; her three daughters, Elizabeth Donner Hanson, Katherine N. R. Denckla and Dorothy B. R. Stewart; two grandchildren (the children of Mrs. Hanson), Donner Hanson and Joseph Donner Winsor; and two Delaware banks, the Wilmington Trust Company and the Delaware Trust Company. In 1935, while Mrs. Donner was a Pennsylvania resident, she established a revocable inter vivos trust with the Wilmington Trust Company.⁵² In 1944 she moved to Florida and five years later executed an estate plan destined to tie-up the estate in court for almost ten years. Mrs. Donner's goal seemed obvious and would have received the approval of King Solomon: She divided her 1.5 million dollar estate fairly evenly between her three daughters. To accomplish this, she made three appointments from her trust. She appointed \$200,000 to each of two trusts which Mrs. Hanson had previously established with the Delaware Trust Company for the benefit of her two children, Donner Hanson and Joseph Donner Winsor. Mrs. Donner left the balance of the trust corpus, over a million dollars, to her executrix, Mrs. Hanson. Her will, executed the same day, contained a residuary clause which provided that the balance of her estate, basically the \$1,000,000 appointed from her trust, should be paid in equal parts to two other trusts, one for the benefit of daughter Dorothy Stewart and the other for the benefit of daughter Katherine. In sum, daughter Elizabeth's children received \$400,000, daughter Dorothy \$500,000 and daughter Katherine \$500,000.

But Katherine and Dorothy were not satisfied; they wanted to split the whole estate between them, leaving nothing for sister Elizabeth or her children. Their plan was simple. If the appointment from the trust was ineffective, the entire estate would pass under the will and under the residuary clause they would get it all.

51. 357 U.S. 235 (1958).

52. *Id.* at 238. The power to revoke was not the only string she held on the trust. The corpus was composed of securities. Mrs. Donner reserved the income for life, and provided that the remainder should be paid to persons or trusts to be later designated by her. The trust agreement further provided that Mrs. Donner could change the trustee, and could amend, alter or revoke the agreement at any time. Mrs. Donner's continuing control over the administration of the trust was assured by a provision that only with the consent of a trust advisor appointed by her could the trustee (1) sell trust assets, (2) make investments, and (3) participate in any plan, proceeding, reorganization or merger involving securities held in the trust. *Id.* at 238-39.

A simple plan and one that nearly worked.

Although the trust and the appointments made under it were undoubtedly valid under Delaware law, there was a good chance that a Florida court would hold the trust invalid because Mrs. Donner had reserved too much power over the trustee and the trust corpus.⁵³ Since all interested parties, the three daughters and the two grandchildren, were residents of Florida there would be no difficulty getting personal jurisdiction over them in a Florida suit.

Katherine and Dorothy brought such a suit in the Florida Chancery Court seeking a declaratory judgment "concerning what property passes under the residuary clause of the will."⁵⁴ Elizabeth and her two children were named as defendants as were both the Wilmington Trust Company and the Delaware Trust Company.⁵⁵ The real defendants, Elizabeth Donner Hanson and her children, did not have many options. They started a parallel suit in Delaware, hoping that it would result in a final judgment *before* one was entered in the Florida suit.⁵⁶ They also could have tried to persuade the Florida court to use Delaware law, probably a futile effort, or they could have challenged the jurisdiction of the Florida court. Employing what turned out to be a brilliant tactic, they moved to dismiss the Florida suit contending that the exercise of jurisdiction over the Delaware trustees would offend the fourteenth amendment and that since, under Florida law, trustees were considered indispensable parties, the suit could not proceed without them. They won the first point but lost the crucial second one at the trial court level. The Chancellor ruled that he lacked jurisdiction over the nonresident defendants and the suit was dismissed as to them. However, he apparently did not consider the trustees to be indispensable parties as he proceeded without them. He went on to hold that the power of appointment was testamentary and

53. *Id.* at 238.

54. *Id.* at 240.

55. There were at least ten other nonresident defendants, but their absence did not play a role in this litigation, probably because their interests were contingent or remote and they were not considered to be indispensable parties. *Id.* at 241.

56. "After the Florida litigation began, but before entry of the decree, the executrix instituted a declaratory judgment action in Delaware to determine who was entitled to participate in the trust assets held in that State." *Id.* at 242. The parties were substantially the same as in the Florida litigation. "All of the trust companies, beneficiaries, and legatees except Katherine N. R. Denckla, appeared and participated in the litigation. After the Florida court enjoined executrix Hanson from further participation, her children pursued their own interests." *Id.*

void under the applicable Florida law. In a decree dated January 14, 1955, he ruled that the \$400,000 passed under the residuary clause of the will.

Delaware counsel had not been idle. In a decree dated December 28, 1955, the Delaware Chancellor ruled that the trust and power of appointment were valid under Delaware law, and that the trust corpus had properly been paid to the Delaware Trust Company for the grandchildren and the other appointees.⁵⁷

So there were two decrees, one from a Florida court holding the trust void under Florida law and the other from Delaware holding the same trust valid under Delaware law. At this stage in the litigation neither judgment was subject to any real constitutional challenge.⁵⁸ But for the subsequent action of the Florida Supreme Court, the litigation may have become a "race to final judgment" with the *first* final judgment being entitled to full faith and credit in the unfinished litigation.⁵⁹

The Florida Supreme Court, however, gave Chief Justice Warren the opportunity to make a just decision. It affirmed the Chancellor's conclusion that Florida law applied to determine the validity of the trust and power of appointment and that, under Florida law, the trust was invalid because the settlor had reserved too much power over the trustee and trust corpus.⁶⁰ Therefore, Mrs. Donner's appointments from the trust could not effectively pass the property nor could the appointments be given testamentary effect as they were not accompanied by the requisite formalities. However, the Florida court reversed the Chancellor's ruling that there was no jurisdiction over the trust companies and other absent defendants.⁶¹ It ruled that jurisdiction to construe the will carried with it substantive jurisdiction over the persons of the absent defendants even though the trust assets were not physically in the state.⁶² The Florida decree became final *first*, but the Delaware court refused to give it full faith and credit on the ground that the

57. *Hanson v. Wilmington Trust Co.*, 119 A.2d 901, 911 (Del. Ch. 1955).

58. Each court unmistakably had jurisdiction over the parties its decree purported to bind. There was no viable constitutional challenge to the use by each court of its own law to determine the validity of the trust. See *infra* note 66.

59. However, had the second court refused to give full faith and credit to the first court's judgment, its judgment, if not successfully challenged on direct appeals, would have been entitled to full faith and credit as well.

60. *Hanson v. Denckla*, ___ Fla. ___, 100 So. 2d 378 (1956).

61. *Id.*

62. *Id.*

Florida courts lacked personal jurisdiction over the Delaware trustees.⁶³

Both cases were then brought to the United States Supreme Court. The real issue was whether the Supreme Court would uphold the Florida judgment and allow Katherine and Dorothy to split the entire estate or whether it would invalidate the Florida decree (and uphold the Delaware judgment) thereby insuring the distribution of Mrs. Donner's estate among her children and grandchildren as she had intended. There was only one equitable result: Katherine and Dorothy could not be allowed to frustrate the will of their deceased mother and disinherit their niece and nephew.

The most direct way to prevent Katherine and Dorothy from keeping the entire estate would have been to hold that Florida could not constitutionally apply Florida law to invalidate a trust which was valid under the law of the state of its creation. But anyone who read the opinion in law school (and who could have missed it since it is included in nearly all civil procedure books) surely remembers that the case turned on personal jurisdiction not choice of law. And personal jurisdiction over whom? The Wilmington Trust Company!

Why would the Court decide this case on such an obscure issue? After all, as Justice Douglas correctly pointed out, the bank was "simply a stakeholder or an agent holding assets of the settlor to dispose of as she designated."⁶⁴ It certainly was not because the choice of law was not raised by the parties or considered by the Court. The Court mentioned "appellants' contention that the contacts the trust agreement had with Florida were so slight that it was a denial of due process of law to determine its validity by Florida law."⁶⁵ Its jurisdictional finding, however, made any consideration of choice of law unnecessary. Chief Justice Warren seemed determined to prevent the greedy sisters from getting more than their rightful share of Mrs. Donner's estate but he declined to con-

63. *Lewis v. Hanson*, 36 Del. Ch. 235, 128 A.2d 819 (1957).

64. 357 U.S. at 263 (Douglas, J., dissenting). Justice Douglas tried to point out to his colleagues precisely whose interests were going to be affected by this suit: "We must remember this is not a suit to impose liability on the Delaware trustee or on any other absent person. It is merely a suit to determine interests in those intangibles." *Id.* He might have added that all persons who had any real interest in those intangibles either lived in Florida or were subject to its jurisdiction.

65. 357 U.S. at 254 n.27.

sider the most obvious way of doing so. The truth must be that he did consider using the due process limitations on a state's choice of law but abandoned the idea as unworkable. Given the state of the law with respect to the constitutional limits on choice of law,⁶⁶ it seems quite unlikely that the Chief Justice could have commanded a majority had he relied on the constitutional challenge to Florida's choice of law.

A constitutional attack on the state's personal jurisdiction must not have seemed too promising either. One could hardly deny that Florida was not merely *a* convenient forum but undoubtedly *the* most convenient forum for resolving this dispute. Not only did the decedent and all of the principles reside in Florida, but the will was being probated there. And who could deny Florida's interest in adjudicating the claims of Florida residents to the estate of a Florida decedent? Even if it did no other business in the state, which seems highly unlikely, the Wilmington Trust Company had been managing Mrs. Donner's trust estate for the eight years she lived in Florida. Could it be successfully contended that its contacts with Florida were such that the exercise of personal jurisdiction over it would offend traditional notions of fair play and substantial justice? Finally, as the due process clause would probably not prohibit Florida from applying its own law, using the same provision to bar Florida jurisdiction would establish a dual standard for the fourteenth amendment.

None of these obstacles dissuaded the Chief Justice. He held that Florida could not constitutionally exercise personal jurisdiction over the Wilmington Trust Company.⁶⁷

66. During the early part of this century, the Supreme Court "came close to engraving in the Constitution the Vested Rights Theory associated with Professor Beale and the First Restatement." W. RICHMAN & W. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS*, 234 (1984). The vested rights theory requires that rights created by law in one state must be recognized in other states as well. Had this approach been continued, it seems likely that the Court would have held that Florida could not constitutionally apply its law to a trust created under Delaware law. But the Court, beginning in 1935 (*Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935)) and continuing to the present (*Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)), has virtually de-constitutionalized choice of law so that all that is required now is "a significant state contact with the dispute or a legitimate state interest in the outcome." W. RICHMAN & W. REYNOLDS, *supra*, at 238. Since Florida clearly had a significant contact with the dispute (the settlor and all major beneficiaries were Florida residents) and a legitimate interest in the outcome (property not subject to the appointments would pass under Mrs. Donner's will which was being probated in Florida) it could have constitutionally applied its own law to determine the validity of the trust and the appointments made under it.

67. 357 U.S. at 250-53.

As is sometimes the case in suits reaching the Court involving personal jurisdiction, the record was not as fully developed as it might have been.⁶⁸ Not only was there no evidence that the Wilmington Trust Company had other customers in Florida or had ever entered into any other business transaction which had any connection with Florida, there was also no reference to the fees which the Wilmington Trust Company charged for managing Mrs. Donner's trusts for the eight years. There was only a passing reference to the communications between Mrs. Donner and the Wilmington Trust Company. The inadequacy of the record permitted the Court to conclude that the Wilmington Trust Company lacked the essential minimal contacts with Florida.⁶⁹

While it is true that the case is distinguishable from *McGee* in that Wilmington Trust did not solicit Mrs. Donner's business after she moved to Florida, it did solicit her business while she was a Pennsylvania resident. More importantly, it continued to manage her estate after she had become a Florida resident.

The Court focused on whether "the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"⁷⁰ and concluded that it did not. But, if purposefully means volitionally, Wilmington Trust Company purposefully continued to serve as trust administrator for Mrs. Donner *after* she moved to Florida. Adding to the weakness of the Court's logic is its implicit assumption that only one who *initiates* the business in a state can avail itself of the benefit and protections of that state.

68. Plaintiff's counsel is responsible for the record, since plaintiff usually carries the burden of establishing personal jurisdiction over the defendants. In fairness, however, it must be pointed out that plaintiffs won in the Florida trial and appellate courts on what must have seemed at the time to have been an adequate record. Counsel might well have considered additional discovery and proof of jurisdictional facts to be a form of procedural over-kill.

69. The first relationship Florida had to the [trust] agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee*. But the record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*. Consequently, this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida.

357 U.S. at 252 (footnote omitted).

70. 357 U.S. at 253.

There were other factors to be considered. *McGee*⁷¹ and *Mullane*⁷² stressed that jurisdiction would be proper if the forum chosen was a particularly convenient one. Since Chief Justice Warren could not deny that Florida was *the* most convenient forum for all real parties of interest as it was the center of gravity of the dispute, he was forced to repudiate *McGee* and *Mullane* and to hold that such factors were irrelevant: "It [Florida] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation."⁷³ Since being the center of gravity is relevant for choice of law purposes, he had to admit that the court was establishing different standards for due process limitations on choice of law and due process limitations on personal jurisdiction. He added: "The issue is personal jurisdiction, not choice of law."⁷⁴ Finally, he dismissed Florida's obvious state interest in this litigation because the state had not manifested its interest by passing a special state long arm statute covering foreign trustees similar to the one California had for foreign insurance companies.⁷⁵

The judgment was void not only as applied to the trust companies as Florida *apparently* considered a trustee to be an indispensable party,⁷⁶ but it was also void as to all parties, even the

71. 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. Often the crucial witnesses — as here on the company's defense of suicide — will be found in the insured's locality. Of course 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.

355 U.S. at 223-24.

72. The thrust of the Court's opinion in *Mullane*, both with respect to jurisdiction and notice, was that the combined trust management authorized by the New York law was so desirable that unnecessary procedural roadblocks should not be put up which would make its administration economically impractical. *Mullane*, 339 U.S. 306, 313-14 (1950).

73. 357 U.S. at 254.

74. *Id.*

75. This case is also different from *McGee* in that there the State had enacted special legislation (Unauthorized Insurers Process Act) to exercise what *McGee* called its "manifest interest" in providing 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.

Id. at 252.

This suggests that California's present long arm statute which, rather than establishing special categories, extends state personal jurisdiction to the limits of the United States Constitution, is fatally flawed as it manifests no special state interest over any particular activities.

76. *Id.* at 254-55. The Florida Supreme Court did not address the issue because it

Florida residents. Chief Justice Warren's plan, however, was almost demolished by the seemingly innocuous suggestion by Justice Black that the matter be remanded to the Florida Supreme Court to determine whether the trustees in this case were absolutely indispensable.⁷⁷ The Chief Justice side-stepped the issue:

It is suggested that this disposition is improper — that the Delaware case should be held while the Florida cause is remanded to give that court an opportunity to determine whether the trustee is an indispensable party in the circumstances of this case. But this is not a case . . . where it is appropriate to remand for the state court to clarify an ambiguity in its opinion that may reveal an adequate state ground that would deprive us of power to affect the result of the controversy. Nor is this a circumstance where the state court has never ruled on the question of state law that we are deciding. Although the question was left open in this case, there is ample Florida authority from which we may determine the appropriate answer.⁷⁸

If the Florida authority was so ample and the resolution of the issue so free from doubt or ambiguity, why did the Florida chancellor hold to the contrary? In any event, the case was not remanded, the trustees remained indispensable parties, the Florida judgment was void in its entirety, and the greedy sisters lost.

These decisions did not produce a coherent, predictable and consistent body of law. *International Shoe* indicated that the defendant's activities in the forum state and the relative convenience of the forum state were the primary factors to be considered in determining if a state court could exercise personal jurisdiction over a nonresident defendant not personally served with process while in the forum state.⁷⁹ Although the defendant in *McGee* did engage in a single isolated activity within California by mailing a

found jurisdiction over the trustee.

77. *Id.* at 261-62 (Black, J., dissenting). The Florida trial judge had, in effect, held that they were not indispensable since he had determined that they were not subject to the court's personal jurisdiction and then proceeded to render a judgment against the other parties. The Florida Supreme Court did not directly hold that the trustees were indispensable — it mooted that question by finding jurisdiction over the trustees. The United States Supreme Court and the Delaware Supreme Court decided this crucial issue of Florida state law; the only Florida judge to ever address the issue directly found the trustees not indispensable.

78. *Id.* at 255-56 (citation omitted).

79. See *supra* note 31 and accompanying text.

letter to Franklin, the Court's opinion stressed the plaintiff's convenience and the state's interest in providing a forum.⁸⁰ *Hanson*, on the other hand, totally ignored both the obvious convenience of Florida as the place to resolve a family dispute among people living in Florida and Florida's interest in the administration of the estate of a Florida domiciliary. The Court found that the defendant's activities were insufficient to support the state court's exercise of personal jurisdiction.⁸¹ *Perkins*, clearly a most unique case, could be viewed as a jurisdiction-by-necessity case.⁸² *Mullane* added to the confusion by permitting the exercise of in personam jurisdiction over defendants who had no direct contact and certainly conducted no activities within the forum.⁸³ Although the conceptual basis for this decision was not articulated, it could also be categorized as a jurisdiction-by-necessity case since personal jurisdiction in New York was essential if common trust funds were to be viable.

Given this body of law, it is not surprising that state courts justified jurisdiction over nonresident defendants whenever they found that the balance of convenience tipped toward the plaintiff or where the state had a significant interest in the dispute. These factors are usually present when the plaintiff is a resident of the forum state.

B. *Limits on Minimum Contacts*

Almost thirty years passed before the United States Supreme Court decided three cases limiting the broad application of the *International Shoe* doctrine by state courts.⁸⁴ In *Kulko v. Superior Court*⁸⁵ the California Supreme Court had found personal jurisdiction over a New York resident because he engaged in the purposeful act of sending his daughter to California to live with her mother.⁸⁶ Although the United States Supreme Court decision prompted three dissents,⁸⁷ *Kulko* was an easy case: both the stated

80. See *supra* note 40 and accompanying text.

81. See *supra* note 69 and accompanying text.

82. See *supra* note 46 and accompanying text.

83. See *supra* note 50 and accompanying text.

84. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

85. 436 U.S. 84 (1978).

86. *Id.* at 89.

87. Once again the dissenting opinion was authored by Justice Brennan who by then had fully subscribed to the views of his former colleague, Justice Black. Justice Black es-

agenda (the technical analysis) and the hidden agenda (the policy considerations) pointed to the same answer. The central facts were neither complex nor disputed. Ezra and Sharon Kulko were married in 1959 during Ezra's three-day stopover in California en route to a tour of duty in Korea. At the time of their marriage, both were residents of New York. Immediately following the marriage, Sharon Kulko returned to New York, where she was joined by Ezra after his tour of duty had ended. Their two children, Darwin and Ilsa, were born in New York. The family resided in New York City until Ezra and Sharon separated.

Following the separation, Sharon moved to San Francisco, although she did return to New York City to sign a separation agreement which provided that the children would remain with Ezra during the school year but would spend Christmas, Easter, and summer vacations with Sharon.

This arrangement lasted less than a year. In the years that followed, Ilsa, by her own choice, spent the school year in California with her mother and spent vacations in New York with her father. Three years later, Darwin called his mother from New York and told her that he wanted to live with her in California. Without Ezra's knowledge or consent, Sharon sent a plane ticket to her son, which he used to fly to California. Within a month of Darwin's arrival in California, Sharon (now Mrs. Horn)⁸⁸ filed suit in a California court seeking an increase in child support and full custody of the children.

The California Supreme Court, which seldom had trouble finding a basis for personal jurisdiction where a California resident was the plaintiff,⁸⁹ strained to find jurisdiction here. The United States Supreme Court disagreed. Although Ezra had been sending

chewed technical analysis, preferring the fundamental fairness approach he so vehemently rejected in *International Shoe*. Although he deemed the issue close, Justice Brennan simply concluded that Mr. Kulko's "connection with the State of California was not too attenuated, under the standards of reasonableness and fairness implicit in the Due Process Clause, to require him to conduct his defense in the California courts." *Kulko*, 436 U.S. at 102 (Brennan, J., dissenting).

88. The Court tells us that: "Immediately after execution of the separation agreement, Sharon Kulko flew to Haiti and procured a divorce there . . . She then returned to California, where she remarried and took the name Horn." 436 U.S. at 87 (footnote omitted).

89. *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Kulko v. Superior Court*, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977), *rev'd*, 436 U.S. 84 (1978).

both children to California to stay with their mother during vacations and holidays, the Court rejected that factor for public policy reasons:

[T]o find personal jurisdiction in a State on this basis, merely because the mother was residing there, would discourage parents from entering into reasonable visitation agreements. Moreover, it could arbitrarily subject one parent to suit in any State of the Union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement.⁹⁰

Knowing that it had to find some minimum contact, the California Court had concluded that by sending his daughter to California to live with her mother on a permanent basis, Ezra had engaged in the kind of purposeful act which would subject him to jurisdiction. The United States Supreme Court again disagreed. It refused to

accept the proposition that appellant's acquiescence in Ilsa's desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws.⁹¹

These social policy considerations dictated the result. The California courts subjected Mr. Kulko to personal jurisdiction for doing what was socially desirable, allowing his daughter to live with her mother when she expressed a desire to do so. If the California Supreme Court's decision had been upheld, counsel for parents in similar situations would have to advise their clients not to allow the child to live with the parent of his or her choice because doing so might result in being subjected to personal jurisdiction in a distant state. The Court must have realized that jurisdiction based on the mere presence of the child and one parent would encourage this socially undesirable behavior.

Although *Hanson* had rejected any reliance on the convenience of the chosen forum, Justice Marshall mentioned that the Uniform Reciprocal Enforcement of Support Act⁹² provided a

90. 436 U.S. at 93 (footnote omitted).

91. *Id.* at 94.

92. 9A U.L.A. 643 (1979 & Supp. 1984).

mechanism for facilitating the procurement and enforcement of child-support decrees where the dependent children reside in a state that cannot obtain personal jurisdiction over the defendant.⁹³ The only obstacle to a finding of no jurisdiction was the California court's reliance on the so-called "effects test"⁹⁴ which was based on the Restatement (Second) of Conflict of Laws.⁹⁵ While first noting that the Restatement provision was not binding on it,⁹⁶ the Supreme Court then noted that the effects test "was intended to reach wrongful activity outside of the State causing injury within the State"⁹⁷ This led the Court to conclude that the Restatement test could not be applied to Ezra Kulko's California activities:

The cause of action herein asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations. It thus cannot be said that appellant had sought a commercial benefit from solicitation of business from a resident of California that could reasonably render him liable to suit in state court⁹⁸

As it did in *Hanson*, the Court focused on who initiated the forum related activities. Because it was Ilsa and Sharon who initiated their relocation to California, the Court refused to allow California to exercise personal jurisdiction over Ezra. Perhaps because Ezra was the passive participant in this little drama, the Court protected him from California's jurisdictional reach.

The hidden agenda is less obvious in *Shaffer v. Heitner*.⁹⁹ Heitner brought a shareholder derivative action against the officers and directors of the Greyhound Corporation and its subsidiary, Greyhound Lines. He contended that the defendants engaged in activities in violation of federal antitrust law which had resulted in civil and criminal penalties costing the two corporations more than 14 million dollars.¹⁰⁰ Jurisdiction over the officers and directors

93. 436 U.S. at 98-100.

94. *Kulko*, 19 Cal. 3d at 521, 564 P.2d at 356, 138 Cal.Rptr. at 589.

95. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

96. 436 U.S. at 96. Either Justice Marshall was directing his comments to legally unsophisticated readers or he was indicating his (or the Court's) hostility to the effects test.

97. *Id.* at 96.

98. *Id.* at 97.

99. 433 U.S. 186 (1977).

100. *Id.* at 190, nn. 2,3.

was based on the attachment or sequestration of Greyhound stock, bonds and warrants¹⁰¹ owned by them. A Delaware statute placed the situs of these instruments in Delaware,¹⁰² making it possible for a Delaware court to attach them. Some of the corporate officers, directors and employees were undeniably engaged in illegal conduct which ultimately caused the stockholders a significant financial loss.¹⁰³ Thus, it may seem surprising that the Court sided with Shaffer and the other officers and directors rather than with the shareholders.

However, there is a hint in the opinion that the Court was not particularly sympathetic to *this* shareholder suit. The Court noted that the plaintiff, Heitner, owned but a single share of Greyhound stock.¹⁰⁴ The Court's opinion does not reveal when Heitner purchased the share or why he only owned a single share, but one can assume that he purchased the single share either to qualify as the plaintiff in a derivative action suit or to give him standing to challenge the corporation's management.¹⁰⁵

In addition to its possible antipathy toward the plaintiff, the Court reacted negatively to the Delaware Supreme Court's admission that the main purpose of its sequestration procedure was

not to secure possession of property pending a trial between resident debtors and creditors on the issue of who has the right to retain it . . . [but is] used to compel the personal appearance of a nonresident defendant to answer and defend a suit brought against him in a court of equity.¹⁰⁶

The combination of three factors must have encouraged some members of the Court to upset the scheme: (1) a plaintiff who may have purchased a law suit; (2) a Delaware statute which fictionalized the stock of a Delaware corporation as being physically present in Delaware; and (3) another Delaware statute which blackmailed a nonresident defendant into entering a general appearance to avoid forfeiting his stock.

The Delaware scheme was not limited to the attachment of stock in a corporation which the defendant served as an officer or

101. *Id.* at 191-93.

102. DEL. CODE ANN. tit. 8, § 169 (1975).

103. See *supra* note 100 and accompanying text.

104. 433 U.S. at 189.

105. See FED.R.CIV.P. 23.1.

106. 433 U.S. at 193.

director. Theoretically, it could be used by a plaintiff in any suit to acquire jurisdiction in Delaware over any defendant who owned *any* stock in *any* company incorporated in Delaware.¹⁰⁷ This may explain the Court's hostility toward the Delaware scheme. However, the statute placing the location of stock in a Delaware corporation in Delaware did not provide a sound basis for invalidating the scheme;¹⁰⁸ all that remained was personal jurisdiction.

Again, a prior decision presented an obstacle. In *Harris v. Balk*,¹⁰⁹ the Court recognized the right of a state to exercise jurisdiction over the property of the defendant, tangible or intangible, located within the state. To avoid this obstacle, the Court focused on the two contacts Shaffer and the other officers and directors had with the state of Delaware: (1) They were (or had been) officers or directors of a company incorporated in Delaware, and (2) they owned stock in a Delaware corporation. The Court's primary discussion was directed to the second contact. It concluded that Delaware could not exercise jurisdiction on the basis of the mere presence of property unrelated to the cause of action.¹¹⁰ The Court acknowledged that "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction."¹¹¹ As examples, the Court referred not only to suits directly against the land (quiet title actions, mortgage foreclosure actions), but also to claims resulting from the use of the property, such as a claim for personal injuries suffered on defendant's land.¹¹² The real defect in the assertion of jurisdiction in this case was the lack of nexus between the stock ownership and the suit for breach of a corporate fiduciary duty.¹¹³

107. It does not seem far fetched to suggest that some of the members of the Court may have owned stock in some Delaware corporation which could have given Delaware quasi in rem jurisdiction over them in any lawsuit regardless of whether it had any relationship to Delaware.

108. Where are the property rights in a share of stock located? Is the situs where the owner of the share resides, or where the corporate assets are located or where the corporation has its principal place of business? Each of these alternatives, like the place of incorporation, is a fiction. Can the United States Constitution favor one over another? The Court wisely avoided constitutionalizing the situs of intangible property as it had done in *Harris v. Balk*, 198 U.S. 215 (1905).

109. 198 U.S. 215 (1905).

110. *Shaffer*, 433 U.S. at 213.

111. *Id.* at 207.

112. *Id.* at 208.

113. The Court conveniently ignored the strong probability that defendant's ownership of large amounts of Greyhound stock, bonds and warrants resulted *directly* from their cor-

The first contact, serving as officers or directors of a Delaware corporation, may have been theoretically sufficient to support personal jurisdiction over the defendants. The majority refused to consider it because "Delaware law bases jurisdiction, not on appellants' status as corporate fiduciaries, but rather on the presence of their property in the state."¹¹⁴ The inconsistency of this position is highlighted by the fact that attachment of property within the forum state had long been accepted as a basis for jurisdiction over nonresidents. Delaware apparently had regularly used it to acquire jurisdiction over nonresident officers or directors.¹¹⁵ Therefore, there was no need to enact a specific statute based on the defendant's role as an officer or director of a Delaware corporation.

While the Court usually avoids a determination that a challenged long arm statute is unconstitutional on its face, preferring to hold that it is unconstitutional as applied,¹¹⁶ here the Court, in effect, held the statute unconstitutional on its face.¹¹⁷ The generally accepted basis for upholding the facial constitutionality of a statute being applied in an unconstitutional manner is whether the statute could be applied constitutionally in certain circumstances.¹¹⁸ The Delaware statutory scheme is clearly subject to abuse and constitutional overreaching. However, its use to subject the stock of an officer or director of a Delaware corporation to derivative action claims is no more unconstitutional than using the activities of a defendant's salesmen within the forum state as a basis for finding jurisdiction to collect unemployment compensation contributions associated with the commissions received by the salesmen.¹¹⁹

porate positions or vice versa.

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

115. *Id.* at 214-15.

116. See *Kulko v. Superior Court*, 436 U.S. 84 (1978) and *Hanson v. Denckla*, 357 U.S. 235 (1958) where the Court dismissed appeals based on the unconstitutionality of the states' long arm statutes and reviewed the lower courts' decisions by writ of certiorari.

117. *Shaffer*, 433 U.S. at 216-17.

118. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

119. See *International Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945). The Court did not decide whether service as an officer or director can be made the basis for a state's exercise of personal jurisdiction. Actually the Court seems to have answered this question twice, once in the affirmative and once in the negative.

It [serving as an officer or director] does not demonstrate that appellants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State" . . . in a way that would justify bringing them before a Delaware tribunal. Appellants have simply had nothing to do with the State of Delaware.

The final decision in this group is *World-Wide Volkswagen Corp. v. Woodson*.¹²⁰ Superficially, the decision seems to serve no recognized social policy. Indeed, it seems contrary to the policy that every wrong should have a remedy and to the judicial policy that multiple litigation should be avoided whenever possible.

The facts are simple. Harry and Kay Robinson purchased a new Audi from a Massena, New York dealer, Seaway Volkswagen, Inc. A year or so later they set off for Arizona, but while traveling through Oklahoma they were involved in an automobile accident which severely injured Mrs. Robinson and their two children.¹²¹ They subsequently brought suit against Seaway, World-Wide Volkswagen (the regional distributor of Audi), Volkswagen of America (the United States importer) and Audi NSU Auto Union Aktiengesellschaft (the manufacturer of the car), claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system.¹²² Audi and Volkswagen of America entered general appearances, but World-Wide and Seaway

Shaffer, 433 U.S. at 216 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The Delaware legislature apparently thought differently for it responded to *Shaffer* by enacting a statute which subjects nonresident officers or directors to personal jurisdiction:

Every nonresident of [Delaware] who after September 1, 1977, accepts election or appointment as a director, trustee or member of the governing body of a [Delaware] corporation . . . or who after June 30, 1978, serves in such capacity . . . shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as his agent upon whom service of process may be made in all civil actions or proceedings brought in this state, by or on behalf of, or against such corporation, in which this state, by or on behalf of, or against such corporation, in which such director, trustee or member is a necessary or proper party, or in any action or proceeding against such director, trustee or member for violation of his duty in such capacity

DEL. CODE ANN., tit. 10, § 3114(a) (Supp. 1984). See *Pestolite, Inc. v. Cordura Corp.*, 449 A.2d 263, 265-66 (Del. Super. Ct. 1982) for a discussion of the statute.

120. 444 U.S. 286 (1980). *Rush v. Savchuck*, 444 U.S. 320 (1980) decided the same day, is not included in this analysis as the author believes the real issue in that case was not personal jurisdiction. The question was whether a state court can create the judicial equivalent of a direct action statute. See, e.g., *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). If so, can it be used when the cause of action did not occur in the forum state? In spite of the clear authority to the contrary, the Court refused to treat the insured (the named defendant) as a mere conduit and the proceeding as a direct action against the insurer. Instead, it asked whether a nonresident defendant (the insured) could be subject to personal jurisdiction on a claim arising outside the forum when his only contact was a policy with a company doing business in the forum state. After *Shaffer*, such a contact was insufficient.

121. 444 U.S. at 288.

122. *Id.*

challenged Oklahoma's exercise of personal jurisdiction over them.¹²³ The state supreme court, characteristically, upheld its own jurisdiction but the United States Supreme Court reversed.¹²⁴

The decision seemed unnecessarily anti-plaintiff to Justice Brennan.¹²⁵ After all, the plaintiffs had not purchased the Audi in order to bring this law suit (*Shaffer*). Nor had they taken it to Oklahoma in order to force the defendants to defend in an inconvenient forum (*Kulko*). Furthermore, there is no indication that they were seeking more than their rightful recovery (*Hanson*). Indeed, they choose *the* most convenient forum in a state which had a strong interest in resolving the dispute.¹²⁶

Was there a hidden agenda in this case? Why did the Court deny jurisdiction over Seaway and World-Wide? There are three reasons. First, Seaway and World-Wide may have been unnecessary parties to this law suit. The complaint's only allegation referred to by the Court was the defective design and manufacture of the auto's fuel system. Neither Seaway nor World-Wide were directly involved in the design and manufacture of the automobiles; they just sold them.¹²⁷ Of course, the distributor and the retailer

123. *Id.*

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

125. *Id.* at 309-11 (Brennan, J., dissenting).

The conclusion I draw is that constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary. Rather, as I wrote in dissent from *Shaffer v. Heitner*, minimum contacts must exist "among the *parties*, the contested transaction, and the forum State." The contacts between any two of these should not be determinative. "[W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction." Mr. Justice Black, dissenting in *Hanson v. Denckla*, expressed similar concerns by suggesting that a State should have jurisdiction over a case growing out of a transaction significantly related to that State "unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as 'traditional notions of fair play and substantial justice.'" Assuming that a State gives a nonresident defendant adequate notice and opportunity to defend, I do not think the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial.

Id. (footnotes and citations omitted) (emphasis in original).

126. While the Robinsons were not Oklahoma residents, the fact that the injury occurred in Oklahoma implies that there may have been resident creditors who might be paid only from a judgment in Robinsons' favor.

127. The case would have been very different if the plaintiff had alleged that Seaway

can be held liable if they sell a product that is dangerous or unsafe for its intended use. But why should either be made a target when both the manufacturer and the United States distributor have consented to jurisdiction and undoubtedly have the financial resources to satisfy any judgment based on defects in their product? Perhaps the Court concluded that these plaintiffs did not need Seaway and World-Wide in this suit to ensure a complete recovery and that the only reason for including them as defendants was either to harass them or to pressure the manufacturer and the United States distributor.

Second, given the posture of the case when the jurisdictional issue was raised, Oklahoma was not a particularly convenient forum. The plaintiffs apparently had recovered sufficiently to move on to Arizona and were not residents of Oklahoma at the time the suit would have been tried; the driver of the other car, who might have been an important co-defendant and who could only have been sued in Oklahoma, had been dropped from the suit.¹²⁸ Thus, the plaintiffs had a choice: they could sue the *major* defendants in Oklahoma or they could sue *all* defendants in New York.

Third, the social policy factor mentioned by the court was the protection of local merchants from the cost and disruption of suit in a distant state. The Court was concerned that a finding of personal jurisdiction in Oklahoma over this upstate New York car dealer would result in local businesses from all over the country being haled into distant courts.¹²⁹ It is not clear whether the Court was more concerned about the financial impact on small businesses or the potential disruption of interstate commerce. It certainly was not very concerned about the plight of the injured plaintiff.

The Court's rejection of Oklahoma's attempted assertion of jurisdiction was based on its technical analysis of a point first made in *Hanson*. The unilateral activity of the plaintiff or a third party "cannot satisfy the requirement of (defendant's) contact with the forum state."¹³⁰ Plaintiffs attempted to argue that it was foreseeable, that one who purchases a car in New York might drive it through Oklahoma. The Court did not deny that it was foresee-

had modified or even adjusted the fuel system in some way that may have contributed to the accident.

128. The Court noted that "[t]he driver of the other automobile does not figure in the present litigation." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 n.1 (1980).

129. *Id.* at 296.

130. *Id.* at 298 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

able, but held that foreseeability was simply not the appropriate standard.¹³¹ As there was no evidence in the record that Seaway sold automobiles outside the Massena, New York area or that World-Wide ever sold automobiles outside the tri-state area, neither company could be subject to jurisdiction in Oklahoma.

Although the plaintiffs may have been disappointed, justice was served: the plaintiffs were able to maintain their suit in Oklahoma against the only defendants they really needed and the small local merchants were allowed to go back home to carry on their businesses. *World-Wide Volkswagen* would seem to sound the death knell for the Restatement effects test¹³² as the effects of the alleged defective design occurred in Oklahoma.

C. *The 1984 Trilogy — Public Policy Considerations*

The three cases¹³³ decided in 1984 seemed to promise important developments in the law of personal jurisdiction by focusing directly on social policy factors and distinguishing between "general"¹³⁴ and "limited" jurisdiction.¹³⁵

In *Kulko* the Supreme Court acknowledged, apparently for the first time, that a state's exercise of personal jurisdiction might produce such an adverse effect on an important social or public policy that it might be inappropriate for the state to exercise its judicial jurisdiction. Had the Court allowed California to exercise personal

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

"[F]oreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. In *Hanson v. Denckla*, *supra*, it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally exercise jurisdiction over a Delaware trustee that had no other contacts with the forum State. In *Kulko v. California Superior Court*, 436 U.S. 84 (1978), it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

Id. at 295-96.

132. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

133. *Helicopteros*, 104 S.Ct. at 1868 (1984); *Jones*, 104 S.Ct. at 1482 (1984); *Keeton*, 104 S.Ct. at 1473 (1984).

134. General jurisdiction is jurisdiction over all causes of action, even those unrelated to the activities of the defendant which support personal jurisdiction. See von Mehren & Trautman, *Jurisdiction to Adjudicate*, 79 HARV. L. REV. 1121, 1136-63 (1966).

135. Limited or specific jurisdiction is jurisdiction only over causes of action directly arising out of defendant's activities in or with the forum. *Id.*

jurisdiction over Ezra Kulko simply because he had allowed his children to go to California to be with their mother, divorced parents might be reluctant to permit their children to travel to a distant state to visit the other parent for fear that by doing so they might establish minimum contacts with the state in which the other parent resides, thereby subjecting themselves to personal jurisdiction.¹³⁶

Similarly, subjecting publishers and reporters to personal jurisdiction in distant states where the newspaper or magazine might be distributed could have a chilling effect on the freedom of the press. This issue finally reached the Supreme Court in two of the three cases decided in the 1984 term: *Keeton v. Hustler Magazine*¹³⁷ and *Calder v. Jones*.¹³⁸ Not only did the Court pass up the chance to define or expand the role of public policy in personal jurisdiction cases, it held that social policy factors raised by the first amendment were *irrelevant* to personal jurisdiction cases: "[W]e reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause."¹³⁹

Although *Jones* and *Keeton* have many similarities, important differences exist, both from a public policy and from a technical point of view, that call for a separate analysis of each.

In the *Jones* case, the National Enquirer published an complimentary article about Shirley Jones, a professional entertainer who resided and worked in California.¹⁴⁰ She filed a libel suit, not surprisingly, in California, against the National Enquirer; its local distributing company; Iain Calder, the president and editor of the Enquirer; and John South, the reporter who wrote the article. Both

136. Lower courts have recognized similar problems in libel cases against newspapers and magazines. See, e.g., *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir.1966); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967). The concern was that subjecting publishers and reporters to personal jurisdiction in distant states where the newspaper or magazine might be distributed would have a "chilling" effect on the freedom of the press. The Second and the Fifth Circuit Courts of Appeals had established the rule that a greater degree of contacts was required to sustain personal jurisdiction over nonresident publishers than over other nonresidents. *New York Times*, 365 F.2d at 572; *Buckley*, 373 F.2d at 182-83. While the Court of Appeals for the Fifth Circuit incorporated this added burden in its fourteenth amendment due process analysis, the Second Circuit Court of Appeals found a separate barrier established by the first amendment. *Buckley*, 373 F.2d at 183.

137. 104 S.Ct. 1473 (1984).

138. 104 S.Ct. 1482 (1984).

139. *Keeton*, 104 S.Ct. at 1481 n. 12.

140. 104 S.Ct. at 1486-87.

the Enquirer and the local distributing company filed general appearances, but Calder and South challenged the California court's personal jurisdiction over them.

Factually, Calder had the better case for challenging personal jurisdiction. Calder, a Florida resident, had only been to California twice, once on a pleasure trip and once to testify in an unrelated trial. In contrast, South, although also a resident of Florida, had visited California frequently¹⁴¹ and, more importantly, had made a number of phone calls to California while researching the Shirley Jones article, including one to her home when he read the article to her husband.

The Court could have easily used a *McGee* analysis to uphold personal jurisdiction over South, by finding that he had minimum contacts with California either because of the phone calls or the disputed visit. However, such an analysis could not have supported personal jurisdiction over Calder as his contacts with California would have to be characterized as casual, isolated and totally unrelated to this law suit. Apparently not satisfied with personal jurisdiction over both the National Enquirer and South,¹⁴² the Court found it necessary to adopt a new jurisdictional theory, one it had declined to follow in *Kulko* and ignored in *World-wide Volkswagen*: the Restatement effects test.¹⁴³

The Restatement effects test has two parts, one that confers jurisdiction and one that limits it. The granting portion provides:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.¹⁴⁴

141. *Id.* at 1485. While South estimated he had made twenty visits during a four year period, a friend estimated his visits to California at six to twelve per year. *Id.* at 1485 n.3. The trial court found that one of the visits to California was in connection with the Shirley Jones article, but South strongly denied that he had ever come to California in connection with the article. *Id.* at 1485 n.4.

142. However, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court seemed satisfied that personal jurisdiction over the major corporate defendants provided an adequate remedy for the injured plaintiffs.

143. See *supra* note 80 and accompanying text. One might have supposed that the short shrift the Court gave the Restatement test in *Kulko* signaled a permanent rejection of it.

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

Citing *World-Wide Volkswagen*, which on its facts must be seen as a rejection of the effects test,¹⁴⁶ the Court concluded: "Jurisdiction over petitioners is therefore proper in California based on the effects of their Florida conduct in California."¹⁴⁶

Despite the inconsistency in the Court's analysis, the result is certainly not unpalatable. The *National Enquirer* was widely distributed in California.¹⁴⁷ Shirley Jones lived and worked in California; the article, if libelous, would have caused her harm in California. Both South and Calder knew and intended that the article would be widely read in California.

The *Keeton* case is more troublesome, although also a libel case. Had Kathy Keeton sued in New York, where she lived and worked, the case would have paralleled the Shirley Jones case. She filed suit in New Hampshire, where she neither lived nor worked. The distribution of the two magazines she was associated with, *Penthouse* and *Omni*,¹⁴⁸ provided her only contact with New Hampshire. The reason she filed suit in New Hampshire was simple: New Hampshire was the only state where her suit was not barred by the applicable statute of limitations.¹⁴⁹

The Court's personal jurisdiction analysis in *Keeton* was deceptively simple. The first step in the analysis was the assumption that a New Hampshire court could, without infringing the fourteenth amendment, exercise personal jurisdiction over a defendant who regularly sold its magazines in New Hampshire if the cause of action arose directly out of the in-state distribution of the magazine.¹⁵⁰ If Kathy Keeton had been injured by the distribution in New Hampshire of *Hustler* magazines allegedly libeling her, she

145. Plaintiffs contended that defendants' negligent acts in New York resulted in effects—their personal injuries—in Oklahoma, but the Court held that jurisdiction was lacking without even discussing the effects test. *World-Wide Volkswagen*, 444 U.S. at 299.

146. 104 S.Ct. at 1487.

147. The Court pointed out that more copies were sold in California than in any other state—slightly over 10% of total sales occurred in California, an important point if personal jurisdiction over the *National Enquirer* had been at issue. *Id.* at 1484-85.

148. Keeton is an associate publisher and senior vice-president of *Penthouse Magazine*, a major competitor of *Hustler Magazine*. She is also the editor of *Omni Magazine*.

149. N.H. REV. STAT. ANN. § 508:4 (1983). This was her second suit. The first, brought in Ohio where the magazine is published, was dismissed as being "time-barred" by both the Ohio and the New York statute of limitations which the court found applicable. *Keeton*, 104 S.Ct. at 1477 n.1. New Hampshire has a six year statute of limitations which it apparently applies regardless of where the cause of action arose.

150. 104 S.Ct. at 1478.

could sue there for damages resulting from those injuries.¹⁵¹ *International Shoe* implied that even casual and isolated activities can support personal jurisdiction in suits arising directly from such activities¹⁵² and *McGee* seems to add further support.¹⁵³

The law of libel, however, has developed something called the "single publication rule."¹⁵⁴ Although the Court states that the rule is for the protection of the defendants,¹⁵⁵ it primarily benefits plaintiffs in libel cases by freeing them from bringing separate suits in each state in which they were injured and from proving which damages were sustained in which state. The rule which allowed Shirley Jones to sue for all of her damages in California where she suffered the greatest amount of damages also allowed Kathy Keeton to sue for all of her damages in a state where she suffered little, if any, real damages. Instant general jurisdiction!

The establishment of general jurisdiction in libel cases is particularly undesirable as it would allow a plaintiff to choose the most inconvenient or most inhospitable forum in which to sue the publisher, editor or reporter whenever the publication is distributed nationally. There was no evidence of harassment here, unless one considers a second suit on the same cause of action, harassment. The opportunity for forum shopping, however, is almost unlimited. In sanctioning Kathy Keeton's blatant forum shopping, Justice Rehnquist approved such tactics, based on advantages other than a longer statute of limitations: "Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations."¹⁵⁶

As in prior cases, these decisions are only poorly disguised choice of law cases.¹⁵⁷ The direct effect of both decisions is to allow

151. If this were the extent of her recoverable claim, it seems unlikely that she would bother suing in New Hampshire because only 10,000 to 15,000 copies are distributed there and neither the extent or degree of her injury could have been very great.

152. *International Shoe*, 326 U.S. at 319-20.

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

154. RESTATEMENT (SECOND) OF TORTS § 577A(4)(1977). See, e.g., *Zuck v. Interstate Publishing Corp.*, 317 F.2d 727 (1963).

155. 104 S.Ct. at 1480. It may serve to protect defendants from harassment resulting from multiple suits. *Id.*

156. 104 S.Ct. at 1480.

157. The Court reminded us again that: "The issue is personal jurisdiction, not choice of law." *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1958)).

a state, other than the one where the wrongful conduct (writing, editing, printing, and publishing a libelous article) or the *real* injury occurred, to apply its law to some of the legal issues involved.

California was the obvious and logical place for Shirley Jones to file suit. There was no indication that she sought a procedural or substantive gain by filing there. To the extent that the *Jones* decision permitted the state of the plaintiff's residence or employment to apply its law regarding libel suits, it is consistent with general choice of law concepts.¹⁵⁸

The Kathy Keeton case is another matter altogether. The Supreme Court implied that New Hampshire could apply its substantive law to this suit:

[I]t is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State. . . . This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens. . . . New Hampshire may also extend its concern to the injury that in-state libel causes within New Hampshire to a nonresident.¹⁵⁹

More directly in point is that New Hampshire was permitted to apply its (long) statute of limitations to a tort which injured a non-resident and which caused minimal injury to her in New Hampshire.¹⁶⁰

Both cases rely on the Restatement effects test.¹⁶¹ In both cases, the alleged libelous publication in another state caused an effect in the forum state by injuring the plaintiff's reputation and employment potential in the forum state. The only problem with the application of the Restatement effects test to these cases is that jurisdiction is allowed not only with respect to causes of ac-

158. See *supra* note 66.

159. 104 S.Ct. 1479.

160. The damage apparently need not be great: "The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished." 104 S.Ct. at 1479. The Court goes on to infer that New Hampshire could have subjected the defendants to criminal prosecution for libel under the facts of this case. *Id.* Because criminal law does not follow the "single publication rule" the defendants could be criminally prosecuted in every state in which at least one copy was distributed.

161. See *supra* note 95 and text accompanying notes 143-44.

tion arising from these effects, but to causes of action resulting from effects occurring elsewhere. The two cases present both ends of the spectrum.

In the *Jones* case, the bulk of the effects and their resulting damage occurred in California. Even under a strict reading of the Restatement effects test (in the absence of the single publication rule), Shirley Jones could have sued in California for a very substantial part of her nation-wide (or world-wide?) damages since they would have occurred in California which was both her residence¹⁶² and her principal place of employment.¹⁶³ While it is admittedly difficult to identify the location of the effects of a libelous article distributed nationally,¹⁶⁴ it seems safe to assume that in the *Jones* case well over 50% occurred in California. Assuming that she won in California, she could then sue in other states where the effects and resulting damages were substantial, possibly relying on her California judgment to establish liability through the use of offensive collateral estoppel. Under such circumstances, fairness to both parties and judicial efficiency would seem to make it reasonable for the California court to exercise pendent personal jurisdiction over the entire suit. The single publication rule¹⁶⁵ would facilitate such a proceeding.

Under the same strict reading of the Restatement effects test, however, the New Hampshire court's jurisdiction would be limited to a claim for damages to Kathy Keeton's reputation in New Hampshire which the Court noted, "however small, [was] at least unblemished."¹⁶⁶ Realistically, only a small percentage of Keeton's damages occurred in New Hampshire,¹⁶⁷ a very different situation from the *Jones* case. Should New Hampshire courts be allowed to exercise pendent personal jurisdiction where the pendent claim is 200 times greater than the jurisdictional claim? In dealing with a

162. To the extent that the article, by damaging her reputation, had an impact on her socially, the greatest impact would have been in California where she was most socially active.

163. To the extent the article made her less employable, the greatest impact was in California.

164. One might allocate libel damages between states based on relative circulation or population.

165. See *supra* note 154.

166. 104 S.Ct. at 1479.

167. If impact were measured by population, New Hampshire, with a population of approximately 1 million people, would have been the source of approximately 0.4% of Keeton's damages.

different type of pendent jurisdiction in *United Mine Workers v. Gibbs*,¹⁶⁸ the Court emphasized that the primary claim must be substantial, at least as great as the asserted pendent claim.¹⁶⁹ Here "the New Hampshire tail is too small to wag so large an out-of-state dog."¹⁷⁰

Under generally accepted principles of offensive collateral estoppel,¹⁷¹ Keeton (unlike Jones) would not have been permitted to use the first judgment as a sword in subsequent cases, as collateral estoppel doctrine prohibits reliance on a prior suit when the amount involved in that suit was substantially smaller than the amount involved in the subsequent suit. While Jones should have been permitted to combine pendent personal jurisdiction and the single publication rule to bring in her non-California claims in the California suit, Keeton should not have been permitted to bring her non-New Hampshire claims in New Hampshire.

Indeed, the restrictive portion of the Restatement effects test prohibits the exercise of personal jurisdiction if the nature of the effects and the individual's relationship to the state make the exercise of such jurisdiction unreasonable.¹⁷² This approaches the standard formulation of *International Shoe* which focused on both the quality and quantity of the defendant's forum related activities. The nature of the effect as measured by the extent, importance or substantiality of the effects in the forum state, while supporting jurisdiction in *Jones*, would negate the exercise of personal jurisdiction in *Keeton*. The Court ignored this and focused only on the defendant's activities in the state:

[R]egular monthly sales of thousands of magazines [in New Hampshire] cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous. It is therefore, unquestionable that New Hampshire jurisdiction over a complaint based on those contacts would ordinarily satisfy the requirement of the Due Process Clause that a State's assertion of personal jurisdiction over a nonresident defendant be predicated on "minimum contacts" between the defendant and the State.¹⁷³

168. 383 U.S. 715 (1966).

169. *Id.* at 725.

170. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 36 (1st Cir. 1982).

171. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

172. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 (1971).

173. *Keeton*, 104 S.Ct. at 1478 (1984).

This begs the question. The real issue is not whether New Hampshire can exercise personal jurisdiction over a defendant on a complaint based on those contacts, but whether it can exercise jurisdiction over a suit which is almost entirely based on contacts with states other than New Hampshire.

International Shoe implied the existence of only two categories of jurisdictionally important activities: casual and isolated, and systematic and continuous. It recognized only two degrees of relatedness: those that arise directly out of defendant's forum activities and those that do not.¹⁷⁴ *International Shoe* held that a state court could exercise personal jurisdiction over a nonresident where its activities were systematic and continuous and the cause of action arose directly out of those activities.¹⁷⁵ In dicta, the Court stated that a single and isolated activity could not support personal jurisdiction over an *unrelated* cause of action.¹⁷⁶ Under *International Shoe*, a judicial "four-square" can be created as in Table I.

Extent of Forum Related Activities

<u>Relationship of Activities to Cause of Action</u>	<u>Causal and Isolated</u>	<u>Systematic and Continuous</u>
Directly Related	?	Jurisdiction Proper
Unrelated	Jurisdiction Improper	?

Subsequent decisions filled in the missing squares. *McGee* held that even a single isolated contact will support personal jurisdiction if the suit arises directly out of that single contact.¹⁷⁷ *Hanson*, on the other hand, can be seen as holding that even systematic and continuous activity (the Bank's continuous business relationship with Mrs. Donner after she moved to Florida) will not support personal jurisdiction when the suit does not arise from those activities.¹⁷⁸ Only *Perkins* allowed personal jurisdiction over unrelated disputes. *Perkins* is unique in two important respects: (1) almost all of defendant's wartime activities were being conducted in

174. 326 U.S. at 319-20.

175. *Id.* at 320.

176. *Id.* at 317.

177. 355 U.S. at 223.

178. *See Hanson*, 357 U.S. 235 (1958).

Ohio¹⁷⁹ and (2) there was no other available forum. *Jones and Keeton* may have changed this model by permitting jurisdiction over unrelated causes of action where the defendant's contacts with the forum are systematic and continuous (but nowhere near as pervasive as they were in *Perkins*) and where the unrelated causes of action are similar to the related ones.

Keeton's non-New Hampshire claims, which did not arise from any contacts the defendant had with New Hampshire, were conceptually identical to the New Hampshire portion of her claims. The Court's approach is reminiscent of the theory used by the California Supreme Court in *Cornelison v. Chaney*.¹⁸⁰ The defendant, a long distance truck driver, drove his truck to California on a regular and systematic basis, although the accident upon which the suit was based occurred outside California. The California court reasoned that although his contacts would not support general jurisdiction, they would support personal jurisdiction based on a substantial nexus between the cause of action and the defendant's California activities.¹⁸¹ Such a result is a logical extension of the *Keeton* holding. In *Keeton*, 1% of the plaintiff's claims occurred in New Hampshire and 99% outside New Hampshire. They all resulted, however, from the same type of activity that defendant intentionally conducted in New Hampshire: sales and distribution of magazines containing an allegedly libelous article. In *Cornelison*, eleven of the plaintiff's claims arose outside of California, but they arose from the same activities that defendant conducted in California, regular interstate trucking. This approach may result in a new hybrid category of personal jurisdiction. A state could exercise personal jurisdiction over a defendant who has significant, but not systematic and continuous, contacts in that state if the suit is based on activities similar to those which occurred in the forum state. It would be foreseeable that the defendant would have to defend such a suit in the forum.¹⁸²

Perhaps the most startling aspect of both *Jones and Keeton* is their adoption of the effects test, which the Court found inapplicable in *Kulko*¹⁸³ and, at least inferentially, in *World-Wide*,¹⁸⁴ since

179. 342 U.S. at 447-48.

180. 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

181. *Id.* at 149-50, 545 P.2d at 267-68, 127 Cal. Rptr. at 355-56.

182. *But see* Glater v. Eli Lilly & Co., 744 F.2d 213 (1st Cir. 1984).

183. *Kulko*, 436 U.S. at 97.

184. *World-Wide Volkswagen*, 444 U.S. 286 (1980).

application of the Restatement effects test would have permitted jurisdiction there.¹⁸⁵ Although it might have made the point more clearly, the Court in *Jones* distinguished between intentional torts and negligent torts, allowing use of the Restatement effects test only in the former: "[P]etitioners (defendants) are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California."¹⁸⁶

This approach is consistent with the comments which accompany the Restatement effects test. The comments indicate that the test was designed to cover cases where a nonresident intentionally injures a person within the forum, for example, by shooting across the state line, without having "purposely availed himself of the privilege of conducting commercial activities in the forum state."¹⁸⁷ If this approach were limited to intentional torts in which the bulk of the injuries occurred in the forum state, as in *Jones*, one could only applaud the decision for filling an obvious gap in the law of personal jurisdiction. Extending it to *Keeton* type cases distorts the purpose of the rule and allows its use to circumvent the law of the most appropriate court.

The final case in the 1984 trilogy is *Helicopteros Nacionales de Colombia, S.A. v. Hall*.¹⁸⁸ Its hidden agenda is more obscure. The defendant challenging personal jurisdiction, Helicopteros Nacionales de Colombia (Helicol), was a Colombian corporation with its principal place of business in Bogota, Colombia. A helicopter owned and operated by Helicol crashed in Peru, killing among others, four Americans. Their survivors and representatives (widows and children) sued Helicol and several other defendants in a state court in Texas for wrongful death.¹⁸⁹ Directed verdicts were rendered in favor of the other defendants. A million dollar judgment was rendered against Helicol in favor of the plaintiffs.¹⁹⁰ The Supreme Court took the case and invalidated the judgment, finding that the Texas court lacked personal jurisdiction over

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

186. 104 S.Ct. at 1487.

187. RESTATEMENT (SECOND) CONFLICT OF LAWS § 37 comment a (1971).

188. 104 S.Ct. 1868 (1984).

189. *Id.* at 1871.

190. *Id.* Thus, this case can immediately be distinguished from *World-Wide Volkswagen*. There, the two defendants found to be beyond the Oklahoma court's personal jurisdiction were, in a sense, nominal defendants, in that the plaintiffs could have obtained complete relief from the defendant who did not contest the Oklahoma court's personal jurisdiction.

Helicol.¹⁹¹

The Court's decision can hardly be said to achieve fundamental fairness or basic justice. The accident occurred more than eight years ago. The widows and children had a sizeable, but not outrageous, award which was obtained following a trial which was apparently fundamentally fair to Helicol. Now the plaintiffs must relinquish their hard won judgment.¹⁹² They will not be permitted to sue in any court of the United States. They are instead, relegated to a distant forum, such as Peru or Colombia, where a trial, if one is to be had, will be far different than the one which resulted in the million dollar verdict.¹⁹³

It might be stretching the point to call this a disguised choice of law case. Although the Court's opinion does not refer to the law used by the Texas court to find liability and to assess damages, one can assume that the Texas court used Texas law. Had the issue been properly raised and preserved for the Supreme Court review, the Court might have decided the case on choice of law.¹⁹⁴ However, the Court has adopted the doctrine that the state where an employment relationship is formed may apply its own law to determine the nature of the employees' claims for damages arising out of their employment or otherwise.¹⁹⁵ Therefore, the Court could not preclude a state from applying its own wrongful death law to give the beneficiaries of these employees a full recovery for their loss. So once again, the Court was forced to use the constitutional limits on personal jurisdiction as a means of preventing a state from using its law against a nonresident defendant.

It is difficult to understand why the Court took this case. Could it have been a concern for the fairness accorded to Helicol by the courts of the United States?¹⁹⁶ If so, should the Court not have been equally concerned over the fairness to be accorded the

191. *Id.* at 1874.

192. The widows and children did receive the proceeds of insurance policies procured by decedents' employer and workers' compensation benefits, but these were provided by the decedents' employer, not by Helicol.

193. Ten Colombian nationals were also killed in the crash. Their estates each received \$20,000-\$30,000. Telephone conversation with George E. Pletcher, Houston, Texas, counsel for the plaintiffs-appellants in *Helicopteros*.

194. *See supra* note 66.

195. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

196. One should not overlook the fact that the defendant received over five million dollars (deposited in its accounts in United States banks) from Consorcio/WSH for its flight services. 104 S.Ct. at 1870.

plaintiffs in a Colombian or Peruvian court?

Perhaps the Court thought this case was an especially good vehicle for confronting two important and unresolved issues in the area of personal jurisdiction: jurisdiction by necessity; and general or limited jurisdiction distinctions.

The Court discarded both issues. Jurisdiction by necessity, a concept arguably underlying the Court's opinion in *Perkins*¹⁹⁷ and *Mullane*¹⁹⁸ and referred to as recently as 1978 in *Shaffer*,¹⁹⁹ was rejected summarily in a footnote: "We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a more complete record."²⁰⁰

The Court inferred that the *only* impediment to a fair and complete judicial remedy in either Colombia or Peru might be the absence of personal jurisdiction over the United States defendants.²⁰¹ While the question of personal jurisdiction over the United States defendants is academically interesting, it is of no real importance here, since full liability was found to rest with Helicol.²⁰² The real question is whether Helicol, a Colombian corporation with the majority of its stock owned by the Colombian government, is entitled to immunity in Colombia? Perhaps suit could only be brought in the United States where recent legislation, the Foreign Sovereign Immunities Act of 1976,²⁰³ relaxes immunity where the foreign sovereign is engaged in various forms of commerce.

In its discussion of the second issue, the Court made the traditional general-specific (limited) jurisdiction distinction:

When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction. . . . [w]hen the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subject-

197. 342 U.S. 437 (1952).

198. 339 U.S. 306 (1950).

199. 433 U.S. 186, 211 n.37 (1977).

200. 104 S.Ct. at 1874, n.13.

201. *Id.*

202. 104 S.Ct. at 1871.

203. 28 U.S.C. § 1605 (1983).

ing the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.²⁰⁴

The Court then described general jurisdiction by reference to its earlier decision in *Perkins*, apparently suggesting, that *Perkins* was a general jurisdiction case and that activities similar to those involved in *Perkins* are necessary to support such general jurisdiction.²⁰⁵

The Court's formula raises two difficult questions: (1) what number of activities over what length of time are necessary to satisfy the systematic and continuous test, and (2) when does a cause of action relate to or arise out of forum activities. Plaintiffs' counsel permitted the Court to avoid resolving these difficult issues and destroyed any chance they had of winning by virtually conceding that plaintiffs' claims against Helicol did not arise out of and were not related to Helicol activities within Texas:

Respondents have made no argument that their cause of action either arose out of or is related to Helicol's contacts with the State of Texas. Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationships differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.²⁰⁶

The conclusion was predictable if not preordained: Helicol's contacts with Texas were simply too few to satisfy the systematic and

204. 104 S.Ct. at 1872 (citations omitted).

205. *Id.* Although the Court refers specifically to *Perkins*, the term "systematic and continuous" comes from *International Shoe*, 326 U.S. 310, 320 (1945). It may no longer be possible to effectively argue that general jurisdiction requires activities which exceed those found to be merely systematic and continuous in *International Shoe*.

206. *Helicopteros*, 104 S.Ct. at 1873 n.10. This concession seems especially surprising in view of the fact that Helicol's pilots, possibly including the one who was responsible for the fatal accident, were trained in Texas and the helicopter which crashed was manufactured and, assumedly, tested in Texas.

continuous contact requirement for general jurisdiction.²⁰⁷

However, there was a hidden agenda of great importance. The Solicitor General filed an amicus brief which supported the defendant and urged that making a foreign buyer amenable to jurisdiction in the United States on claims resulting from the use of the United States' products in the foreign state would discourage potential foreign buyers from purchasing goods in the United States.²⁰⁸ Given the current balance of trade deficit, any action which discourages the purchase of United States goods by foreign buyers would be contrary to the national interest. Although this point was raised by the United States, and could have been a major factor in the Court's decision, it was the ultimate hidden agenda as it was never mentioned in the Court's opinion.

III. THE CURRENT STATE OF THE LAW OF PERSONAL JURISDICTION: UNRESOLVED ISSUES

How have the hidden agendas in these personal jurisdiction cases changed the law? Consistency, coherency, and predictability are goals which the current state of the law of personal jurisdiction falls far short of reaching. The Court has left unresolved important questions arising from the use of the effects test and the minimum contacts analysis.

A. *The Use of the Effects Test*

The Supreme Court has finally adopted the Restatement effects test.²⁰⁹ This test allows the state in which an injury occurs to exercise personal jurisdiction over nonresident defendants who may have caused the injury. The adoption of this test is particularly significant because the Court had not applied it in prior cases where the effects or injury occurred in the forum state.²¹⁰ Do *Jones* and *Keeton* represent a fundamental change in the Court's position or are the cases distinguishable from *Kulko* and *World-Wide Volkswagen*? In rejecting the Restatement effects test in *Kulko*, the Court suggested that it was inapplicable to non-commercial intra-family disputes. There is no mention of the effects test in

207. *Id.* at 1872.

208. Brief for the United States as Amicus Curiae, *Helicopteros*, at 11-14.

209. *Jones*, 104 S.Ct. at 1487 (1984).

210. *World-Wide Volkswagen*, 444 U.S. at 297-98; *Kulko*, 436 U.S. at 97.

World-Wide Volkswagen, even though the plaintiffs' injuries occurred in Oklahoma, the forum state. The distinction may be found in *Jones* where the Court bases its holding on the conclusion that the defendants' "intentional conduct in Florida [was] calculated to cause injury . . . in California."²¹¹ While such an approach is consistent with the Restatement comments,²¹² it will make the existence of personal jurisdiction turn on whether or not the suit is based on an intentional tort or on an unintentional tort. Such a test will be difficult to apply since the distinction between the two is far from clear. Moreover, many unintentional torts can be converted to intentional torts by merely adding an allegation that the defendant intended the harm which resulted. Even breach of contract cases can be converted to intentional tort cases by adding a fraud count. When circumstances permit, astute counsel relying on the effects test will automatically add an allegation to the complaint which will present at least one intentional tort. This will then require the Court to develop a pendent personal jurisdiction theory, possibly modeled on *Gibbs*,²¹³ a concept which has already produced its own share of inconsistency and unpredictability.

B. *The Minimum Contacts Analysis*

International Shoe left two important questions open: (1) what are the absolute minimum contacts which will support personal jurisdiction over the defendant in a cause of action arising directly from the defendant's forum related activities, and (2) what level and type of contacts, if any, will support personal jurisdiction over the defendant when the cause of action is unrelated to the defendant's activities within the forum state? In the fifty years since *International Shoe*, little has been done to resolve either question.

As to the first question, case decisions based on hidden agendas have created inconsistent results. Intentionally sending a minor child to a foreign state to live permanently with her mother, thereby significantly increasing the mother's living expenses (while significantly reducing the father's), was held insufficient to support personal jurisdiction over the father in a suit for the added costs.²¹⁴

211. *Jones*, 104 S.Ct. at 1488.

212. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 37 reporter's note (1971).

213. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

214. *Kulko*, 436 U.S. at 93-94.

Voluntarily serving as an officer or director of a Delaware corporation was held insufficient to support personal jurisdiction over the officers and directors in a suit claiming that they had breached their duties to their stockholders.²¹⁵ Continuing to serve as the trustee for a settlor who moved to Florida was insufficient to support personal jurisdiction over the trustee in a suit brought in Florida to determine the validity of the trust agreement.²¹⁶ Contracting with a Texas firm to train its helicopter pilots was held insufficient to support personal jurisdiction in Texas over a foreign defendant when the claim resulted from a crash allegedly caused by pilot error.²¹⁷ On the other hand, a letter offering to continue an insurance policy on the life of a person living in California and mailed to the insured in California was sufficient to uphold personal jurisdiction over the out-of-state insurance company.²¹⁸ If principled distinctions can be made between these cases, neither the lower courts nor commentators have been very successful in doing so.²¹⁹

While the first issue is clouded by too many United States Supreme Court decisions, the second one has suffered from too few decisions. Some courts have erroneously viewed *International Shoe* as a general jurisdiction case.²²⁰ It is not a general jurisdiction case because the cause of action, an attempt to collect contributions to the state's unemployment compensation fund, clearly arose from the salesmen's activities in Washington, the same activities upon which personal jurisdiction was based. As the Court made clear in *Helicopteros*, the only real general jurisdiction case

215. *Shaffer v. Heitner*, 433 U.S. at 215-16.

216. *Hanson v. Denckla*, 357 U.S. at 254. This case may be explained on the theory that the cause of action did not arise from the trustee's forum related activity because the suit was between various beneficiaries and heirs of the settlor and not against the trustee for breach of its fiduciary duty. If this approach is followed, it is not surprising that the Court found defendants' activities insufficient to support general jurisdiction.

217. *Helicopteros*, 104 S.Ct. at 1874.

218. *McGee v. International Life Ins. Co.*, 355 U.S. at 223.

219. See *Vencedor Mfg. Co. v. Gougler Indus.*, 557 F.2d 886, 890 (1st Cir. 1977) ("There is no doubt that *Hanson* reduces the potential sweep of *McGee*, but it is not easy to find the boundary that *Hanson* draws."); Casad, *Long Arm and Convenient Forum*, 20 U. KAN. L. REV. 1, 7-8 (1971). (*Hanson* and *McGee* "seem contradictory and do not resolve the matter."); Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 93 (1983) ("In sum, *Hanson* was a retreat from both the reasonableness analysis implicit in *McGee* and from the view of 'minimum contacts' as being required only to assure that jurisdiction was not unfair to the defendant.")

220. See, for example, *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969), where the California Supreme Court seemed to treat both *International Shoe* and *Perkins* as general jurisdiction cases.

is *Perkins*.²²¹ Here, at least, the Court recognized the uncertainty, but left resolution for another day.²²²

While *Jones*, *Keeton* and *Helicopteros* may reflect a good faith attempt by the Court to resolve some of these issues with minimal deference to hidden agendas, the attempt is doomed to failure because most personal jurisdiction cases involve a hidden agenda of some sort. The failure is reflected in the absence of a consistent theory and in the lack of a consistent application of the basic minimum contacts approach. It is not irrelevant that the five most recent cases have had four different authors: *Shaffer*²²³ was written by Justice Marshall; *World-Wide Volkswagen*²²⁴ was written by Justice White; *Keeton*²²⁵ and *Jones*²²⁶ were written by Justice Rehnquist; and *Helicopteros*²²⁷ by Justice Blackman. It is also interesting that Justice Marshall, the author of *Shaffer*, dissented in the next case, *World-Wide Volkswagen* and Justice Blackman who also dissented in *World-Wide Volkswagen* authored *Helicopteros*. The only thread of consistency is Justice Brennan; he dissented or wrote special concurring opinions in all of them. The fundamental nature of Brennan's opposition to the recent developments in the law of personal jurisdiction is his belief that the Court has made the minimum contacts test into a constitutional imperative:

221. *Helicopteros*, 104 S.Ct. at 1872-73. *Perkins* can also be viewed as a jurisdiction-by-necessity case although the Court seemed to repudiate such a label when it suggested in *Helicopteros* that it has never "consider[ed] adoption of a doctrine of jurisdiction by necessity—a potentially far reaching modification of existing law . . ." *Id.* at 1874 n.13 (emphasis added).

222. [W]e decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

Helicopteros, 104 S.Ct. at 1873 n.10. In fairness to the Court, it seems likely that it agreed to review *Helicopteros* because it presented an opportunity for resolving at least some of these issues. When plaintiff's counsel conceded that the suit neither arose out of or related to defendant's purchase of the planes from a Texas company or the training of the pilots by the same Texas company, the case no longer presented such an opportunity.

223. 433 U.S. 186 (1977).

224. 444 U.S. 286 (1980).

225. 104 S.Ct. 1473 (1984).

226. 104 S.Ct. 1482 (1984).

227. 104 S.Ct. 1868 (1984).

The Court's opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State's interest in the case and fail to explore whether there would be any actual inconvenience to the defendant. The essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends "traditional notions of fair play and substantial justice." The clear focus in *International Shoe* was on fairness and reasonableness. The Court specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.

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. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations. *McGee v. International Life Insurance Co.*, for instance, accorded great importance to a State's "manifest interest in providing effective means of redress" for its citizens.

Another consideration is the actual burden a defendant must bear in defending the suit in the forum. Because lesser burdens reduce the unfairness to the defendant, jurisdiction may be justified despite less significant contacts. The burden, of course, must be of constitutional dimension. Due process limits on jurisdiction do not protect a defendant from all inconvenience of travel, and it would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom. Instead, the constitutionally significant "burden" to be analyzed relates to the mobility of the defendant's defense. For instance, if having to travel to a foreign forum would hamper the defense because witnesses or evidence or the defendant himself were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home for the duration of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.

That considerations other than contacts between the fo-

rum and the defendant are relevant necessarily means that the Constitution does not require that trial be held in the State which has the "best contacts" with the defendant. The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum. Under even the most restrictive view of *International Shoe*, several States could have jurisdiction over a particular cause of action. We need only determine whether the forum States in these cases satisfy the constitutional minimum.²²⁸

Perhaps Justice Brennan had Chief Justice Marshall's famous comment in mind: "[I]t is a constitution we are expounding."²²⁹ Since *Pennoyer*, the Supreme Court has based its decisions regarding when a state court can properly exercise personal jurisdiction over a non-consenting defendant on the full faith and credit clause and the fourteenth amendment.²³⁰ Since the Court has equated the two, the *real* issue in all such cases should be: Would the state's exercise of personal jurisdiction under all the facts of the case result in the denial of procedural due process to any party to the suit?²³¹ The essential elements of procedural due process include the following:

- (1) adequate notice;
- (2) an impartial tribunal;
- (3) an opportunity to present evidence;
- (4) counsel;
- (5) a decision based upon the record with an explanation

228. *World-Wide Volkswagen*, 444 U.S. 286, 299-301 (Brennan, J., dissenting) (citations and footnotes omitted).

229. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

230. As the Court has pointed out it does not have the authority to interpret a state's long arm statute. See *Helicopteros*, 104 S.Ct. at 1872, n.7.

231. This analysis rejects the possibility that the exercise of personal jurisdiction by one state might somehow violate the quasi-sovereignty enjoyed by other states under the Constitution because a defendant can waive *all* objections to a state's exercise of personal jurisdiction by making a general appearance, by filing a counterclaim, or by seeking other affirmative relief. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 37 (1971). Indeed, the Court has recently allowed the exercise of personal jurisdiction over a defendant in the absence of any evidence of minimum contacts when the defendants failed to respond to discovery designed to reveal such contacts. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). The Supreme Court could not hold that the exercise of personal jurisdiction by one state violated constitutional rights of other states, if those rights could be waived, intentionally or otherwise, by the parties.

of the result.²³²

A denial of due process cannot result from mere geographical inconvenience. It is simply absurd to suggest that due process can be measured on an odometer. More fundamentally, distance can not be a real factor in personal jurisdiction cases unless the Court is prepared to constitutionalize venue as well. If distance were a controlling factor, it would be more unfair to make a defendant travel from White River Junction, Vermont to Burlington, Vermont than to Lebanon, New Hampshire. Unless the defendant can only be sued at or near his residence, he will suffer exactly the same geographical inconvenience whether sued in a distant county or a distant state.

The requirements of notice and opportunity to be heard are irrelevant to personal jurisdiction because the Court has effectively separated the issues of notice and opportunity to be heard from personal jurisdiction and subjected them to independent constitutional scrutiny.²³³

Due process can be affected by issues involving choice of law, which, as the Court notes in *Keeton*, arise after personal jurisdiction has been established:

The question of the applicability of New Hampshire's statute of limitations to claims for out-of-state damages presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry.²³⁴

This judicial "Catch 22" means that the tendency of the forum to use its own substantive and procedural law cannot be a basis for finding a lack of personal jurisdiction.

The important procedural due process issue is whether the defendant is able to effectively present his claims and defenses in the forum chosen by the plaintiff. If so, the court has the power to exercise personal jurisdiction over the defendant, but should only do so if it is the most convenient available forum.²³⁵ If not, per-

232. J. NOWAK, D. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 499 (1978).

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

234. *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984).

235. It is conceivable that the refusal to grant a motion to dismiss or stay the proceedings based on forum non conveniens could be so arbitrary as to constitute a denial of due

sonal jurisdiction should be denied, if another forum is available which can and will allow both the plaintiff and the defendant to effectively present their cases.

Several circumstances exist under which litigation in a particular forum would deprive a party of the opportunity to effectively present its claims and defenses. The clearest example is the refusal of a forum to recognize the claim or defense. For example, the defendant might assert that plaintiff's contributory negligence is a complete bar to its negligence claim against the defendant, but the forum might reject the doctrine of strict contributory negligence and apply comparative negligence instead.²³⁶ However, this is a choice of law question, *irrelevant to personal jurisdiction*. If the forum state could use its law (or that of another state) without violating either the full faith and credit or due process clauses, then it must necessarily follow that the exercise of personal jurisdiction by the court could not violate due process as a result of the law which it would apply.

The problem, while conceptually unchanged, becomes even more subtle where the choice of law issue is undeniably procedural.²³⁷ For example, suppose the forum, in order to expedite litigation, has limited discovery and defendant contends that without more discovery, he will be unable to effectively defend the case. While the nonresident defendant might object to litigating in a forum which limits his opportunity to conduct discovery, a resident defendant and a nonresident who is unquestionably subject to personal jurisdiction in the forum would similarly object. The real issue is whether the restrictions on discovery constitute a denial of due process, not whether the selection of a forum with limited discovery constitutes a denial of due process. If, in an appropriate case, the United States Supreme Court were to hold that such restrictions did not prevent either party from adequately and effectively presenting their claims and defenses and, therefore, did not result in a denial of due process, then the selection of a forum which restricts discovery could not constitute a denial of due

process, although this argument would, in essence, merge the now separate doctrines of personal jurisdiction and forum non conveniens.

236. Defendant would undoubtedly contend that the forum it would have chosen would have applied strict contributory negligence.

237. The Supreme Court has wrestled with the procedural-substantive distinction in the context of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Compare *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), with *Hanna v. Plumer*, 380 U.S. 460 (1965).

process.

CONCLUSION

This article suggests a retrospective view of personal jurisdiction. Rather than trying to determine in advance whether a defendant can get a fair trial in the forum selected by the plaintiff, the question should be deferred until the case has been fully adjudicated in the state chosen by the plaintiff.²³⁸ The defendant would have no constitutional ground for challenging the judgment if: (1) the defendant has had a full and complete opportunity to present its claim and defenses; (2) the forum has used procedures which do not deprive the parties, resident or nonresident, of procedural due process; and (3) the substantive law chosen by the forum does not violate either the due process or the full faith and credit clause.²³⁹

Almost forty years ago, the Supreme Court, recognizing the changes in transportation and communication, took a bold step and repudiated the notion of strict territorialism and abolished the fiction of forum presence as the *only* basis for a state's personal jurisdiction.²⁴⁰ It should now drop the other shoe. The Court should eliminate constitutional limitations on personal jurisdiction altogether.²⁴¹ Instead, it should consider the effects of a particular court's exercise of personal jurisdiction over a nonresident defendant on interstate or international commerce,²⁴² freedom of the press²⁴³ and other important social or political factors.²⁴⁴ These are the hidden agenda factors which should be discussed and upon

238. Were the seventh amendment applicable to the states, it could be the basis for a claim that the nonresident defendant had been denied a trial by a jury of her peers. Because states could constitutionally abolish jury trials in civil actions this is not a substantial claim.

239. Congress could, of course, modify 28 U.S.C. § 1391 (1976 & Supp. 1984) and limit venue to the district in which the defendant resides. It could also modify 28 U.S.C. §§ 1404, 1441 to allow the defendant sued in a distant state to remove to federal district court and then have the suit transferred to the state in which the defendant resides.

240. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

241. In its place, the United States Supreme Court could promulgate a new rule of civil procedure perhaps modeled after the English Order 11 practice. See D. CASSON & I. DENNIS, *ODGER'S PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE*, 37-41 (1981).

242. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868 (1984).

243. See *Calder v. Jones*, 104 S.Ct. 1482 (1984); *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984).

244. Such as the willingness of custodial parents to allow their children to visit the non-custodial parents, cf. *Kulko v. Superior Court*, 436 U.S. 84 (1978).

which decisions should be based. Whether the defendant has or has not had minimum contacts with the forum state should no longer be the standard. The time has come to bury minimum contacts along with presence as the ghosts of times gone by.