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JURISDICTION OVER PERSONS, THINGS AND STATUS

Kenneth M. Murchison*

Over the last hundred years American courts frequently have struggled with the problem of developing an adequate theory to determine when a court has jurisdiction to render a judgment binding on the parties to a lawsuit. The issue remains significant because of the continuing validity of one of the rules that can be traced to the vererable case of Pennoyer v. Neff:1 A judgment is valid under the due process clause and entitled to enforcement under the full faith and credit clause only if the court had jurisdiction with respect to the lawsuit at the time the action was initiated. In applying this rule, Pennoyer sharply distinguished between actions in personam and actions in rem. It permitted a court to exercise in personam jurisdiction only when the defendant was served personally with process within the

1. 95 U.S. 714 (1877). In 1813 the Supreme Court ruled that, since the congressional statute implementing the full faith and credit clause gave a judgment the same effect it would have had in the state where it was rendered, the court that was receiving the judgment could not refuse to enforce it because the court rendering it lacked jurisdiction. Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813). Accord, Hampton v. M'Connell, 16 U.S. (3 Wheat.) 234 (1818). Mr. Justice Johnson's dissent in Mills argued for the limited exception to challenge jurisdiction that ultimately was accepted in Pennoyer; his language sounds much like that later used by Mr. Justice Field in Pennoyer: There are certain external principles of justice which never ought to be dispensed with, and which Courts of justice never can dispense with but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits. 11 U.S. (7 Cranch) at 486 (Johnson, J., dissenting). In their commentaries Kent and Story (the author of the Court's opinion in Mills later accepted the Johnson dissent as a gloss on the Mills doctrine concerning the full faith and credit clause. 1 J. Kent, Commentaries on American Law 261 n.b (2d ed. 1832); 3 J. Story, Commentaries on the Constitution 183 (1833). By 1850 the Supreme Court had adopted it as well. See Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873). See generally Williams v. North Carolina, 325 U.S. 226, 227-29 (1945; Corwin, Out-Haddocking Haddock, 93 U. Pa. L. Rev. 341, 346-48 (1945).

2. U.S. Const. amend. XIV, § 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

3. U.S. Const. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may be general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

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territorial boundaries of the state or voluntarily appeared; but dicta, later accepted as dogma, allowed a court to issue binding in rem judgments whenever the property that formed the basis for jurisdiction was attached or otherwise brought within the jurisdiction of the court at the beginning of the action.

Although Pennoyer's distinction between in personam and in rem actions was an enduring one, courts and legislatures gradually whittled away the prohibition against rendering binding in personam judgments unless the defendant was served with process within the state's boundaries. Finally, in 1947 the Supreme Court promulgated a new rule in *International Shoe Company v. Washington.* A court can exercise in personam jurisdiction over a nonresident defendant who was not served with process within the state whenever the defendant has sufficient minimum contacts with the forum state for that state to exercise jurisdiction consistent with traditional notions of fair play and substantial justice.

During the same period that the Supreme Court was expanding the power of state courts to exercise in personam jurisdiction over nonresidents, it also approved quasi-in-rem jurisdiction as an alternate device for reaching the absent defendant who owned property within the state. In quasi-in-rem jurisdiction, the court based its jurisdiction on the presence of property within the state, but the dispute did not concern the title to the property as it did in the in rem action. Instead, it concerned the defendant's liability on an unrelated cause of action. In these actions the defendant's contacts with the forum state were irrelevant; the presence of the property alone was sufficient.

During the last several terms the Supreme Court has again

4. 95 U.S. at 733:
   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.

5. *Id.* at 727: "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act." *See id.* at 733. The issue before the Court in *Pennoyer* was the validity of a personal judgment against Neff. Thus, the statements regarding in rem actions were not essential to the Court's decision.


returned to the question of when a state court has jurisdiction to render binding judgments against nonresident defendants. The general thrust of the Court's recent decisions has been to check the common tendency of state courts to expand the limits of their jurisdiction. For one thing the Court has applied the *International Shoe* test to *quasi-in-rem* actions. *Shaffer v. Heitner* held that a state cannot exercise *quasi-in-rem* jurisdiction with respect to defendants who do not have sufficient minimum contacts with the forum state to satisfy traditional notions of fair play and substantial justice; in January 1980 the Court applied the *Shaffer* holding to preclude a court from establishing jurisdiction over a nonresident merely because his insurance company does business within the forum state where the plaintiff resides. Other recent decisions have limited a state court's ability to render binding judgments over a nonresident in support proceedings and tort actions.

This distinction between direct and indirect impacts led Mr. to develop a unified framework for approaching the problem of jurisdiction over the particular lawsuit. It begins with *Pennoyer* to discover the basic principles on which jurisdiction rested during the late nineteenth century. After tracing the application and modification of *Pennoyer* in the twentieth century, it identifies the new principles established by the modern Supreme Court decisions and suggests how these principles should be applied in specific situations that have arisen in the past and are likely to arise again. Finally, it tries to place the jurisdictional cases within the broader framework of American legal thought during the twentieth century.

**Pennoyer v. Neff: The Territorial Principle**

**The Supreme Court's Decision**

A brief summary of the facts giving rise to the Supreme Court's decision in *Pennoyer* should suffice for the purposes of this article. J. H. Mitchell sued Marcus Neff in an Oregon state court "upon a demand for services as an attorney." Neff, a nonresident of Oregon, was never personally served with process in the state; instead, Mitchell relied on constructive service by publication and Neff's ownership of property in Oregon as the basis for the court's jurisdiction. When Neff failed to appear in the action, Mitchell recovered a $300 default judgment. To execute the judgment, he had Neff's Oregon

property seized and sold at a sheriff's sale. Pennoyer purchased the property at the sale, and Neff then sued Pennoyer in circuit court for the district of Oregon to recover possession of the property. 12

On appeal the Supreme Court held that Neff was entitled to the property because the Oregon courts lacked jurisdiction to render the original judgment pursuant to which the sheriff's sale was conducted. Relying in large measure on concepts drawn from customary international law, Mr. Justice Field began his mini-treatise on the jurisdictional issue with "two well established principles of public law respecting the jurisdiction of an independent state over persons and property": first, "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"; and second, "that no State can exercise direct jurisdiction and authority over persons and property without its territory." 13

The first of these principles, each state's positive authority within its own territorial boundaries, recognized broad powers in every state, including the powers
to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts should be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. 14

Mr. Justice Field recognized that a state's actions with respect to persons and property within its boundaries "often affect persons

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12. Relying on defects in following Oregon's statutory requirements for obtaining the affidavits required to obtain an order of publication and to prove publication, the circuit court also had found the judgment against Neff invalid. Mr. Justice Field noted that a majority of the Supreme Court would have reversed the decision of the circuit court if the defects in the affidavits were the sole basis for decision since one affidavit satisfied the statutory requirement and the sufficiency of the other could not be collaterally attacked. 95 U.S. at 720-21.

13. Id. at 722. For these two principles Mr. Justice Field relied on Joseph Story's treatise on the conflict of laws. Id., citing J. STORY, COMMENTARY ON THE CONFLICT OF LAWS c. 2 (1834). Story's concepts were subtle transformations of the theories of the continental jurist Ulrich Huber. Continental political theory, therefore, was elevated to constitutional mandate resulting in Pennoyer's rules of jurisdiction based on territory. See Hazard, A General Theory of State-Court Jurisdiction, 1965 SUP. CT. REV. 241, 258-61; Zammit, Quasi-in-rem Jurisdiction: Outmoded and Unconstitutional?, 49 ST. JOHNS L. REV. 666, 669-70 (1975).

14. 95 U.S. at 722.
and property without it."15 Thus, the state court could require persons within the state's boundaries to execute documents in a form sufficient to transfer title to the property outside the state or it could satisfy the claims of its own citizens against nonresidents out of the property of nonresidents when the property was located within the state. But, according to Mr. Justice Field, no just objection could be taken to these extra-territorial impacts, for they did not amount to a violation of the independence of any other state; only a "direct exertion of authority" upon persons and property outside the state, such as by attempting to give state laws extra-territorial effect or to assume an extra-territorial jurisdiction for the state's courts, amounted to a violation of the second principle that protected the "independence of the State in which the persons are domiciled or the property is situated . . . ."16

This distinction between direct and indirect impacts led Mr. Justice Field to emphasize that a state court's authority to affect a nonresident who owned property within the state was limited to its authority over that property; "the inquiry . . . [into the nonresident's obligations to a citizen of the forum state] can . . . be carried . . . [on] only to the extent necessary to control the disposition of the property."17 If the defendant had no property within the state, the plaintiff had to establish jurisdiction in personam, that is, based on its authority over the defendant's person. It could establish this authority either by personal service of process on the defendant within the state or by his voluntary appearance before the state's tribunals. Substituted service of process by publication was insufficient.

After outlining the essential elements of establishing in personam jurisdiction, Mr. Justice Field next considered what steps were necessary to establish in rem jurisdiction, that is, jurisdiction based on the presence of property within the state. Specifically he addressed the question of whether the court had to take formal control of the property "by attachment or some other equivalent act" at the outset of the proceedings or whether the court could first establish the nonresident's liability and then seize and sell the property.18 He concluded that preliminary attachment was required; to hold otherwise "would introduce a new element of uncertainty in judicial proceedings," by making jurisdiction depend on the factual situation existing after the rendering of judgment rather than at the com-

15. Id. at 723.
16. Id.
17. Id.
18. Id. at 727-28.
mencement of the action. "The contrary is the law," he asserted; "the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."  

Of course, determining the rules for exercising jurisdiction did not dispose of the dispute between Neff and Pennoyer. The court also had to address the question of the effect to be given to Mitchell's judgment pursuant to which Pennoyer had purchased the property. As Mr. Justice Field stated the issue, the court had to decide the "force and effect of judgments rendered against nonresidents without personal service of process upon them, or their voluntary appearance . . . ." 20 The question had arisen most frequently with respect to attempts to enforce such judgments in other states under the full faith and credit clause of the federal Constitution. The decisions addressing this question had established the rule that a judgment was entitled to full faith and credit only if the court rendering it had "jurisdiction of the parties and of the subject matter," 21 although they were unclear as to whether the judgment was entitled to enforcement in the state in which the judgment was rendered. 22 However, this ambiguity with respect to the judgment's enforceability in the state in which it was rendered did not affect Pennoyer. While federal courts were not "foreign tribunals" with respect to state courts, they were "tribunals of a different sovereignty . . . bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them." 23 Moreover, the Court also cited the recently adopted fourteenth amendment as offering an alternate basis for concluding that Mitchell's original judgment against Neff was not enforceable even in Oregon. According to Mr. Justice Field, the due process clause invalidated any attempt by a court to exercise personal jurisdiction over a defendant who was not "brought within its jurisdiction by service of process within the state, or his voluntary appearance." 24 Service by publication was an "effectual" substitute against nonresidents "only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court . . . or where the judgment is sought as a means of reaching such property or affecting some interest therein . . . ." 25

19. Id. at 728.
20. Id. at 729.
21. Id.
22. Id. at 732.
23. Id. at 732-33.
24. Id. at 733.
25. Id.
Having enunciated the applicable principles, the Court had only to apply them to the pending dispute. Since Mitchell's original judgment against Neff was based on service by publication unaccompanied by attachment of any property of Neff, the judgment was invalid and did not authorize the sale of the property in controversy. Therefore, the Court granted Neff's demand that he be restored to the possession of his property.

"To prevent any misapplication of the views expressed in this opinion," Mr. Justice Field included a brief addendum or postscript to his opinion recognizing three exceptions to the general jurisdictional rules he had articulated. First, the Court did not mean to forbid any state from authorizing its courts "to determine the status of one of its citizens towards a nonresident" even if the nonresident was not served or otherwise notified of the action. Second, the Court disavowed any intention to limit a state's authority to require that "a non-resident entering into a partnership or association within its limits, or making contracts enforceable there" appoint an agent for service of process for legal proceedings with respect to his activities or be subject to some prescribed form of service. Third, the Court expressed confidence that a state could validly establish special service procedures "on creating corporations or other institutions for pecuniary or charitable purposes . . . ."

The Strengths and Weaknesses of the Pennoyer Framework

As numerous scholars have recognized, Pennoyer is not completely satisfying from the standpoint of logical consistency. One may begin by challenging the appropriateness of using concepts derived from international law to define the authority of states in a federal system. In addition, the underlying principles relating to territoriality beg the question by introducing as axiomatic the fundamental distinction between direct and indirect effects of state authority. Finally, the immediate need to qualify the basic principles by exceptions to the system that the principles create suggests the principles themselves might be inadequate.

26. Id. at 734.
27. Id.
28. Id. at 735.
29. Id.
30. Commentators have argued that the intellectual construct of exclusive state sovereignty in the international sphere never was intended for application as a rule limiting the judicial jurisdiction of states within a federal union. E.g., Hazard, supra note 12, at 239-60. This acceptance of exclusive sovereignty, however, was the effect of Pennoyer's reliance on Story, whose notions were expansions of Huber's general theory.
31. Id. at 261-62.
Notwithstanding its logical shortcomings Pennoyer seemed to establish a jurisdictional framework consistent with common sense. The concept of territoriality provided a clear and reliable guide to the vast majority of situations. An individual was subject to state authority when either he or his property was within the state at the time the lawsuit was begun, and the court had to establish his presence by serving him personally or by attaching his property. Moreover, these concepts were probably reasonably consistent with the realities of life in the nineteenth century. Interstate transactions were still the exception rather than the rule, and allowing a state court to reach nonresidents only when the nonresident came within the state or chose to own property in the state was likely to produce a fair result in most cases. Of course, the nineteenth century had produced exceptions to the general pattern: some associations and partnerships did business across state lines even though the principals remained in a single state; husbands and wives might choose to live in separate states when marriages broke up; and corporations did not easily fit into a system in which jurisdiction was based on the concept of presence. But these problems properly could be viewed as aberrations in the normal scheme of life and could be handled, as Pennoyer recognized, by special exceptions to the general principle.

Finally, one also should note that Pennoyer did not articulate an independent requirement of notice as an indispensable element of due process. Nonetheless, the Pennoyer doctrine established a system that was reasonably calculated to ensure that the defendant knew that a lawsuit had been instituted against him in most instances. For in personam actions service of process on the defendant not only established his presence within the state but also informed him of the pendency of the lawsuit as did a voluntary appearance by the defendant. For in rem actions, the system was less error proof, but the assumption that formal attachment of a defendant’s property was also likely to bring the lawsuit to his attention seems fairly reasonable.

THE APPLICATION AND MODIFICATION OF THE TERRITORIAL PRINCIPLE

As every student of procedure knows, the territorial principle ultimately proved inadequate to solve problems of jurisdiction over the parties in interstate situations. But the reason for its inadequacy was the principle’s increasing unsuitability to modern life rather than its logical inconsistency. In the years following Pennoyer interstate business transactions expanded significantly. Moreover, the

32. See generally A. Chandler, Jr., The Visible Hand: The Managerial Revolu.
increasing use of automobiles, especially after 1920,\textsuperscript{33} enhanced personal mobility as well as the possibility of torts being committed by nonresidents who owned no property within the state and who were likely to have departed the state before the victim had any realistic possibility of serving the tortfeasor with process.

In the tradition of common law adjudication the Supreme Court accommodated Pennoyer to changing realities by refining the doctrine and expanding its exceptions rather than by abandoning it. Nonetheless, the tracing of these changes in the Pennoyer doctrine should not obscure its enduring aspects. For one thing, the Court has continued to accept the underlying principle that the validity of a judgment depends on whether the court had jurisdiction over the parties at the time the lawsuit was begun. Moreover, for two-thirds of a century the idea of territoriality (i.e., the physical presence of the defendant or his property within the jurisdiction) formed the core concept to which all the refinements and exceptions offered obeisance. In addition, the division of jurisdictional theory into \textit{in personam} and \textit{in rem} branches has also continued, as has the idea that cases involving the status of persons raised special problems that could not be handled completely within the customary doctrine.

\textit{In Personam Jurisdiction}

\textbf{Natural Persons}

Individuals provided the paradigm for which the territorial principle was designed because it was normally quite easy to determine if the individual was physically present within the state when the lawsuit began. Service of process by the sheriff verified the defendant's presence and also insured that the individual knew about the pendancy of the proceedings against him. But even cases involving natural persons occasionally presented problems for the Pennoyer framework. For one thing, the greater use of automobiles created difficulties by increasing the likelihood that persons would commit

\textsuperscript{33} See generally Nash, supra note 32, at 174-75; Robertson, \textit{History of the American Economy} 473-74 (2d ed. 1964); Soule, \textit{Prosperity Decade—From War to Depression: 1917-1929} 164-70 (1947).
torts outside the states where they normally resided. State legislatures responded to the problem by passing laws that attempted to establish jurisdiction over torts committed within the state by non-resident operators of motor vehicles. Relying on Pennoyer's recognition that a nonresident could consent to jurisdiction over his person, the Supreme Court upheld the new statutes in a series of decisions during the second and third decades of the twentieth century.

*Kane v. New Jersey* sustained a criminal conviction under a New Jersey statute that required a nonresident who operated a motor vehicle within the state to appoint the state's secretary of state as his agent upon whom process could be served for "any action or legal proceeding caused by the operation of his ... vehicle ...." The Court based its analysis on the state's broad power to regulate the use of motor vehicles, a power that "extend[ed] to nonresidents as well as residents" and included the ability to enact "reasonable provisions to ensure safety." In upholding the statute, Mr. Justice Brandeis' opinion relied on two factors: the "constant and serious dangers to the public" that attended the "movement of motor vehicles over the highways" and the "aid to securing observance of laws" that the ability to enforce criminal and civil penalties provided. In light of these factors the Court refused to "say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident owners, was essential to public safety," especially since the law was "not a discrimination against non-residents, denying them equal protection of the law." Of course, the New Jersey statute did not provide a perfect model. It suffered from at least two serious defects: it hindered interstate traffic in motor vehicles by requiring motorists to take action

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35. 242 U.S. 160 (1916).
36. Id. at 165 n.1, quoting 3 N.J. Comp. Stat. 3431-34, 3443 (Sections 16, 17, and 37 of the title on Motor Vehicles). The New Jersey statute also required the nonresident motorist to secure a New Jersey operator's license and to register his car in New Jersey. An earlier decision had upheld Maryland's right to apply its licensing and registration requirements to nonresident motorists, *Hendrick v. Maryland*, 235 U.S. 610 (1915), but the Maryland statute did not contain a provision appointing a state official to receive process for the motorists.
37. 242 U.S. at 167.
38. Id.
39. Id. The Court also rejected the argument that the New Jersey statute imposed an unreasonable burden on interstate commerce. Id. at 167-68.
prior to entering the state, and it did not grant the state court jurisdiction over the nonresident who failed to designate the secretary of state as his agent for service of process and who left the state before he was personally served. A Massachusetts statute of 1923 attempted to correct both inadequacies. It dispensed with the requirement that the non-resident actually appoint an agent for service and substituted a declaration that a nonresident's operation of a motor vehicle within the state itself operated as consent to the jurisdiction of the state's courts as to actions in which the nonresident was involved while operating the vehicle on the state's highways. The Massachusetts law also provided that driving in the state operated as the appointment of the state's registrar of motor vehicles as the driver's agent to accept service of process.

The 1927 decision of Hess v. Pawloski upheld the Massachusetts statute against the claim that it violated the due process clause of the fourteenth amendment. Although the Court's analysis of the constitutional issue began paying lip service to Pennoyer's rule that "[t]he process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him," Mr. Justice Butler's opinion quickly shifted to an emphasis on the "dangers to persons and property" that attended the use of motor vehicles. Because of these dangers the state had the authority to make and enforce regulations "reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways." The Massachusetts statute fell within this authority because it required "a non-resident to answer for his conduct in the State where arise causes of action alleged against him" and provided "a convenient method by which he may sue to enforce his rights." Since the statute made "no hostile discrimination against non-residents but tend[ed] to put them on the same footing as residents," it was permissible under the Kane rationale. Without really explaining why, the Court ruled that the power to exclude nonresidents unless they appointed an agent for service authorized the state to "declare that the use of the highway by the nonresident is the equivalent of the appointment of the registrar as agent on whom process may be served."

41. 274 U.S. 352 (1927).
42. Id. at 355.
43. Id. at 356.
44. Id.
45. Id.
46. Id.
47. Id. at 357.
ference between formal and implied appointment is not substantial," the Court declared, at least insofar "as concerns the application of the due process clause of the Fourteenth Amendment."45

A second problem area involving natural persons concerned whether a state's courts could exercise jurisdiction over non-residents with substantial business interests in the state. In *Henry L. Doherty & Company v. Goodman*46 the Supreme Court answered this question in the affirmative by again relying on a consent theory to uphold jurisdiction. The precise issue in *Doherty* was whether Henry L. Doherty, trading as Henry L. Doherty and Company, was amenable to suit in Iowa. Although Doherty was a citizen of New York, he had "established an office at Des Moines, Polk County, Iowa, and there through agents carried on the business of selling corporate securities throughout the State."50 Goodman sought a personal judgment against Doherty in a lawsuit arising out of his purchase of stocks from one of Doherty's Iowa employees. Relying on an Iowa statute that permitted service of process on an employee of an individual who had an office for the transaction of business in a county other than the one in which he resided,51 Goodman sought to establish jurisdiction by serving process on the district manager of Doherty's Iowa office.52

The Supreme Court upheld the authority of the Iowa courts to exercise jurisdiction under these circumstances. It accepted the Iowa Supreme Court's determination that, by establishing an office within the state, a nonresident defendant "thereby voluntarily appoints his own agent... as one upon whom substituted service in actions in personam, growing out of that office..., may be made..."53 The Supreme Court noted that "Iowa treats the business of dealing in corporate securities as exceptional and subjects it to special regulation" and that "Doherty voluntarily established an office in Iowa and there carried on this business."54 In view of these considerations the Court declared that "the questioned statute goes no

48. *Id.* The Court did distinguish between formal and implied appointment in cases involving service of process on corporations. See notes 64-72, *infra,* and accompanying text.
50. *Id.* at 625. The Court did not explain precisely what it meant in declaring Doherty a "citizen" of New York; presumably, it meant that he was a domiciliary of that state.
51. *Iowa Code* § 11,079 (1927).
52. 294 U.S. at 625.
54. 294 U.S. at 627-28.
farther than the principle approved by those [Hess and other recent] opinions permits."\(^{55}\)

A third question that the Court had to decide with respect to natural persons was whether a state could render a binding judgment against one of its domiciliaries who was temporarily out of the state and thus could not be personally served with process within the state; in other words, whether the territorial principle limited a court’s jurisdiction over its own domiciliaries. In *Milliken v. Meyer*\(^{56}\) the Supreme Court ruled that the state’s authority was not so limited. It upheld a state court’s jurisdiction that was based on service of process delivered to the absent domiciliary while he was outside the state.\(^{57}\) According to Mr. Justice Douglas’ majority opinion, the state’s authority over its domiciliaries was analogous to the national government’s authority over its citizens.\(^{58}\) Because the state “accords [the domiciliary] privileges and affords protection to him and his property by virtue of his domicile,” it retains the authority to exact reciprocal duties, including “amenability to suit within the state even during sojourns without the state . . . .”\(^{59}\) The majority justified this continuation of authority because of the responsibilities of citizenship that “arise out of the relationship to the state which domicile creates.”\(^{60}\) Since “[t]hat relationship is not dissolved by mere absence from the state,” the domiciliary’s duties are likewise “not dependent on continuous presence in the State . . . .”\(^{61}\)

**Corporations**

Corporations created even more difficulties once the Supreme Court held that *Pennoyer*’s territorial principle also applied to

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\(^{55}\) *Id.* at 628. The Court distinguished the seemingly contrary decision of *Flexner v. Farson*, 248 U.S. 289 (1919), on the ground that the individual served in *Flexner* was no longer a corporate agent when he was served. Professor Austin Scott was apparently the first to suggest this as the correct rationale for the *Flexner* decision. *See* Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 884-91 (1919).

\(^{56}\) 311 U.S. 457 (1940).

\(^{57}\) As plaintiff in a Wyoming suit, Milliken caused a summons to be issued by the district court of Carbon County, Wyoming. He also filed an affidavit alleging that Meyer was a resident of Wyoming living in Colorado and that he had remained out of Wyoming concealed himself to avoid service of summons. Meyer v. Milliken, 101 Colo. 564, 574-75, 76 P.2d 420, 425 (1937). A Wyoming statute provided for personal service outside the state on such a defendant. Wyo. COMP. STAT. §§ 5636 & 5641 (1920), quoted in *Milliken v. Meyer*, 311 U.S. 457, 459 n.3 (1940).

\(^{58}\) 311 U.S. at 463.

\(^{59}\) *Id.* at 463-64. For an earlier decision suggesting that this was the correct rule, *see* McDonald v. Mabee, 243 U.S. 90, 92 (1917) (dictum).

\(^{60}\) 311 U.S. at 464.

\(^{61}\) *Id.*
them. The basic difficulty was how to apply the concept of presence to a legal entity that existed only as a fiction of the law. The obvious response to this problem was to declare the corporation "present" in the state that created it, a response that was consistent with the prior Supreme Court decisions. This approach, however, did not provide a completely satisfactory solution for the problem of multistate corporations. The growing number of these corporations increased the likelihood that a person would acquire claims against one of them as the result of the corporation's activities outside the state of its incorporation. Requiring the plaintiff in such situations to travel to the defendant's state of incorporation to obtain jurisdiction hardly seemed reasonable when the defendant actually had caused the injury in the place where the plaintiff resided; not surprisingly, the Supreme Court regularly found ways to stretch Pennoyer's territorial principle to permit state courts to exercise jurisdiction over foreign corporations.

As in the case of natural persons the "consent" theory provided one means of reaching out-of-state corporations. Dictum in Pennoyer itself affirmed the holding of earlier cases that a state could require a nonresident business association to appoint an agent for service as a condition precedent to the transaction of business in the state, and seven years after Pennoyer, Mr. Justice Field expanded that concept. In St. Clair v. Cox he declared that a state could provide that conducting business within the state by a foreign corporation would operate as the appointment of the agents involved in that business to receive process on behalf of the corporation. According to Mr. Justice Field, such a provision amounted to a condition imposed by the state for the privilege of doing business within its borders, "and corporations that subsequently . . . [did] business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process." He did, however, limit this broad authority by extending it only to "litigation arising out of . . . [the foreign corporation's] transactions in the state."

64. 95 U.S. at 735-36 (1877). See text at note 28, supra.
65. 106 U.S. 350 (1882).
66. Id. at 356.
67. Id.
The Supreme Court gave state courts even greater authority when the state required the corporation actually to appoint an agent to receive process and the corporation complied with the statute. In those cases, the consent was not limited, as in St. Clair, to cases arising out of the defendant’s transactions in the state. The leading case was Pennsylvania Fire Insurance Company v. Gold Issue Mining Company, in which the Supreme Court allowed the Missouri courts to exercise in personam jurisdiction over a Pennsylvania insurance company; the suit arose out of a fire insurance policy covering buildings in Colorado that the company had issued in Colorado to an insured incorporated in Arizona. The insurance company also was licensed to sell insurance in Missouri, and, to obtain that license, had filed “with the Superintendent of the Insurance Department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the State.” The Missouri Supreme Court held that this power of attorney consented to jurisdiction from all suits regardless of whether they arose out of business done within the state. Accepting this construction of the Missouri statute, the Supreme Court ruled that it did not violate the fourteenth amendment’s due process guarantee.

Mr. Justice Holmes’ opinion for a unanimous court began with the premise that the corporation could have consented to jurisdiction in the specific case. Since the insurance company had “appoint[ed] an agent in language that rationally might be held to go to that length,” the state court’s construction of the power of attorney “did not deprive the defendant of due process of law even if it took the defendant by surprise. . . .” The Court specifically refused to apply the rule of the implied consent cases which limited the state court’s jurisdiction to suits arising out of the corporation’s transactions within the state. The consent in those cases, the Court ruled, was “a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defence [sic].” Here, by contrast, “a power actually . . . [was] conferred by a document,” and because “[t]he execution . . . [was] the defendant’s voluntary act,” it took “the risk of the interpretation that . . . [might] be put on it by the courts.”

68. 243 U.S. 93 (1917).
69. Id. at 94.
70. 267 Mo. 524, 184 S.W. 999 (1916).
71. 243 U.S. at 95.
72. Id. at 96.
73. Id.
An alternate method of asserting jurisdiction over foreign corporations was to find that they were "present" within the forum state and thus fell within Pennoyer's territorial principle. This route, for example, was the one that the Court followed in *St. Louis Southwestern Ry. v. Alexander*, holding a Texas railroad corporation subject to the jurisdiction of the New York courts because it maintained an office in New York at which it apparently solicited business and accepted a claim from its dissatisfied customer. The Court explained that a foreign corporation was present "within the jurisdiction of the court in which it was sued" only when "the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws there." Declaring its intention to decide the case before it "upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein," the Court declared that each case had to be decided "upon the facts brought before [the court]" and that no "all-embracing rule" could be laid down. In *Alexander* the foreign corporation had "an authorized agent attending to this and presumably other matters of a kindred character, undertaking to act for and represent the company, negotiating for it and in its behalf declining to adjust the claim made against it." This activity, the court held, "was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the District of New York, in which it was sued, and to make it subject to the service of process there."

Because both the consent theory and the presence theory ultimately required a determination of whether the defendant was "doing business" within the forum state, the question of what constituted "doing business" was widely litigated. Gradually, many courts came to use the "doing business" language to restate the test that courts claimed to be applying: In the absence of consent, a state could exercise *in personam* jurisdiction over a foreign corporation if and only if the corporation was "doing business" with the forum state.

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74. 227 U.S. 218 (1913).
75. *Id.* at 226.
76. *Id.* at 227.
77. *Id.* at 228.
78. *Id.*
79. See generally Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141-42 (2d Cir. 1930); Kurland, *supra* note 63, at 584-86.
80. See Kurland, *supra* note 63, at 585. Indeed, the prestigious American Law Institute endorsed this statement of the problem. See *Restatement, Conflict of Laws* § 92 (1934). For an attempt to explain the meaning of doing business, see
**In Rem Jurisdiction**

The development of *in rem* jurisdiction also raised problems requiring the refinement and expansion of *Pennoyer*'s territorial principle. Courts perceived little difficulty in using the territorial principle to bind the rights of nonresidents in suits to quiet title to real estate; indeed they indicated that the state where the property was located was the only one that could render a binding determination of title to real estate. They also were willing to allow a determination of the ownership of tangible personal property to bind persons outside the state; they accepted the dictum of *Pennoyer* by upholding quasi-*in rem* jurisdiction, in which a state based its jurisdiction on the attachment of the nonresident's property that was present within the state in a lawsuit in which the underlying dispute was unrelated to the property. But applying these concepts

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81. The suit to quiet title provided protection against repeated suits between the same parties respecting the same land. The original form of action is no longer used, but the name has been retained and applied to any equitable action to vindicate title to real property, especially statutory suits to determine adverse claims. H. McClintock, *Handbook of the Principles of Equity* § 192 (1948). A court may entertain such an action and issue a decree quieting title to land within the state even though a nonresident defendant is brought into the suit only constructively through service by publication. Arndt v. Griggs, 134 U.S. 316 (1890). See Knudson v. Litchfield, 87 Iowa 111, 54 N.W. 199 (1893); Tyler v. Judges of Court of Registration, 175 Mass. 71, 55 N.E. 812, *writ of error dismissed*, 179 U.S. 405 (1900). Tyler concerned the state's authority to issue a judgment with respect to property that would be binding against all the world. The 1898 Massachusetts statute establishing the state's Torrens system of land registration raised that problem graphically with respect to suits seeking authoritative determinations with respect to real property. In an influential opinion by Mr. Justice Holmes, the Massachusetts Supreme Judicial Court upheld the state's power to render a judgment that would have the effect of depriving "all persons except the registered owner of . . . any interest in the land . . . ." 175 Mass. at 72, 55 N.E. at 812. According to Mr. Justice Holmes, the court's "[j]urisdiction is secured by the power of the court over the res." 175 Mass. at 75, 55 N.E. at 813. Moreover, he emphasized that *Pennoyer* established no formalistic requirement that the property be attached prior to judgment. What mattered was form, not substance, and the Massachusetts requirement of an "immediate recording of the claim is entitled to equal effect [as a seizure] from a constitutional point of view." 175 Mass. at 78, 55 N.E. at 815.

82. See, e.g., Fall v. Eastin, 215 U.S. 1 (1909); Clarke v. Clarke, 178 U.S. 186 (1900). However, when a court had *in personam* jurisdiction over the parties, the rule could be circumvented by enjoining the losing party to execute the necessary documents to convey title. See Fall v. Eastin, 215 U.S. 1, 12-13 (1909); Tomaier v. Tomaier, 23 Cal. 2d 754, 760, 146 P.2d 905, 908 (1944). See generally Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

83. See, e.g., Loaiza v. Levy, 85 Cal. 11, 24 P. 707 (1890); Gassert v. Strong, 38 Mont. 18, 98 P. 497 (1908).

84. 95 U.S. at 727. See text at note 5, supra.

to intangible personal property raised difficult problems, beginning with the question of where such property was "present" for jurisdictional purposes. Thus arose the famous case of *Harris v. Balk*, the *bête noire* of many first year law students. Both Harris and Balk were residents of North Carolina, and Harris owed Balk $180. Balk in turn allegedly owed $300 to one Epstein, a third party who was a Maryland resident. When Harris visited Maryland, Epstein arranged to have a Maryland court issue a writ of attachment against him, attaching the $180 debt that Harris owed to Balk. Harris did not contest the attachment, and Epstein recovered a garnishment judgment allowing him to apply the $180 against the amount that he claimed Balk owed him. Balk then sued Harris in North Carolina to recover the $180 that Harris owed him; Harris pleaded the payment of the Maryland judgment as a bar to Balk's claim.

The legal issue in *Harris v. Balk* was whether the Maryland court had jurisdiction to attach Harris' debt to Balk and to order it applied to satisfy Balk's debt to Epstein. If the Maryland court had jurisdiction, the North Carolina court had to give the Maryland judgment full faith and credit; if the Maryland court lacked jurisdiction, its judgment was invalid and the North Carolina court could ignore it. Applying Pennoyer's territorial principle, a crucial question in deciding the jurisdictional issue was whether Balk had property in Maryland that was attached by the Maryland court at the start of Epstein's lawsuit against Balk. The Supreme Court ruled that he did, and it advanced the following argument: A debt is the property of the creditor, and it is located wherever the debtor happens to be. Since Harris was in Maryland, his debt to Balk (that is, Balk's property) was also in the state. Therefore, the Maryland court's seizure was adequate to establish jurisdiction up to the value of the property.

The court rejected Balk's claim that the debt retained its "situs" in North Carolina because Harris was only temporarily in Maryland when the attachment proceeding began. According to the Court, the expression "situs of the debt" was not helpful "when used in connection with attachment proceedings." Insofar as the term "situs" merely referred to "the place of the creation of the debt, that fact is immaterial;" insofar as it suggested "that the obligation to pay the debt can only be enforced at the *situs* thus fixed," it was "plainly untrue." The debtor's obligation to pay the debt "clings to and

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86. 198 U.S. 215 (1905).
87. *Id.* at 222.
88. *Id.*
accompanies him wherever he goes," and "[i]t is nothing but the obligation to pay which is garnished or attached." Since Balk could have used the Maryland courts to collect the debt from Harris while Harris was in Maryland, the debt was present in Maryland and it was subject to attachment by the Maryland court. The Maryland judgment disposing of the property thus attached, therefore, was entitled to full faith and credit.

One additional problem remained with respect to quasi-in-rem jurisdiction: What if the alleged debtor denied the existence of the debt? If the court agreed and released the attachment for that reason, was the creditor bound by that determination? New York Life Insurance Company v. Dunlevy confirmed that he was not. In Dunlevy a Pennsylvania judgment creditor attempted to seize Mrs. Dunlevy's interest in a life insurance policy at a time when she was a California domiciliary. The insurance company admitted the existence of the debt, but declared its inability to determine whether Mrs. Dunlevy or her father was entitled to the proceeds of the policy; it interpleaded both claimants, paying the debt into the register of the court. The Pennsylvania court then found that Mrs. Dunlevy's father was the rightful owner of the proceeds of the policy. It, therefore, ordered the amount deposited to be paid to him and dismissed the garnishment action. After the entry of this judgment Mrs. Dunlevy filed suit in the federal district court in California seeking to force the insurance company to pay her the cash surrender value of the policy. The company claimed that her suit was barred by the prior Pennsylvania judgment, which determined that her father was entitled to the proceeds of her policy.

The Supreme Court refused to regard the Pennsylvania proceedings as a bar. It conceded that the Pennsylvania court "had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company and if found to exist then to condemn and appropriate it so far as necessary to discharge the original judgment" and that even though she was "outside the limits of the State such disposition of the property would have been binding on her." But the insurance company's interpleader action went beyond that and tried to create the equivalent of a suit to quiet title to intangible personal property. This action the Supreme Court refused to permit because it would amount to "a final and conclusive adjudication of her personal rights," an adjudic-
cation that was not binding on Mrs. Dunlevy "unless in contemplation of law she was before the court and required to respond to that issue." 92 Since she had never appeared in the Pennsylvania action, the "proceedings in the Pennsylvania court constituted no bar to the action in California." 93

Status Jurisdiction

In Pennoyer Mr. Justice Field emphasized that the Court did not intend to deny a state authority to conduct "proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident." 94 But if jurisdiction in cases involving status was not to turn on the presence of the parties within the state, the Court still had to determine what standards would satisfy the requirements of the due process and full faith and credit clauses in these cases. This section briefly sketches some of the answers that the Supreme Court gave to these questions in the first half of the twentieth century. It traces the development of the jurisdictional rules concerning divorce and child custody and also explains how the courts analyzed the jurisdictional issue in lawsuits to enforce the support obligations that were often involved in divorce and custody proceedings.

Divorce

The attempt to fashion rules governing when a state court could exercise jurisdiction in divorce cases floundered on a problem not generally present in either the in personam or in rem cases—the Court’s desire to uphold a state’s substantive determination as to the circumstances under which its citizens should be allowed to divorce. 95 This substantive issue became entangled with the jurisdictional problem because of the wide diversity of divorce laws 96 and the

92. Id. at 521 (emphasis added).
93. Id. at 523.
94. 95 U.S. at 734. See note 27, supra, and accompanying text.
95. A similar concern for a state’s ability to establish a substantive rule governing title to real property located in the state formed the basis for the rule that only the state where the real property was located could render a binding adjudication as to title to the property. See notes 82-83, supra, and accompanying text. The desire to avoid federal interference with a state’s substantive rules relating to divorce also may explain the rule that the federal courts lack jurisdiction in divorce cases even when the parties are citizens of different states. See Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858) (dictum).
general rule that the substantive law of the forum applied in divorce cases.\(^7\) In a common situation a citizen of a state with strict divorce standards (for example, New York) would go to a state with lenient standards (for example, Nevada) to obtain a divorce and would then return to New York to live. If the Nevada judgment were entitled to full faith and credit, New York would have lost the power to enforce effectively its legislative determination that New York citizens should not be allowed to divorce except as its law provided. The desire to avoid this circumvention of a state's substantive divorce laws and thus to protect its territorial sovereignty was a common goal of judicial decisions,\(^8\) and one method to achieve this goal was to devise principles that would deny the divorce judgment full faith and credit.

One alternative for handling divorce cases was to require the court to demonstrate that it had \textit{in personam} jurisdiction over the defendant under \textit{Pennoyer}'s territorial principle. But \textit{Pennoyer} itself conceded the inequity of this rule. It would force a spouse whose marriage partner had deserted to another jurisdiction to follow the deserting spouse to his new home to acquire jurisdiction, an extremely harsh burden to impose on an innocent party to the divorce. Moreover, a deserted spouse who was unable to locate the deserting spouse could not secure a binding divorce judgment anywhere. Finally, not only would the application of normal \textit{in personam} rules treat the deserted spouse unfairly, it would also facilitate the circumvention of substantive divorce rules whenever both parties desired the divorce. The parties could travel to a state that would permit them to divorce, and the defendant could consent to the forum state's exercise of jurisdiction, thus foreclosing any attack on the merits in the state where the couple normally lived.

A second alternative was to treat the person in a status case as analogous to the \textit{res} in an \textit{in rem} action; thus, whenever a person was present within the jurisdiction, a court could enter a binding order declaring that person's status. This approach would have protected the deserted spouse whose continued presence within the jurisdiction would have conferred authority to issue a judgment concerning his status. But it would have also permitted the deserting spouse to obtain a divorce judgment in the state to which he fled. Thus, it would have greatly facilitated circumvention of substantive divorce laws. A spouse could go to a state willing to grant him a divorce, and that court would have jurisdiction over him by virtue

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\item \textit{Pennoyer}, supra note 96, at 327.
\end{itemize}
of his presence within the jurisdiction even if the deserted spouse objected. After having been granted the divorce, the deserting spouse could return to the state he left armed with the divorce judgment (a declaration of his status) that was entitled to full faith and credit. Of course, this last objection could have been avoided by permitting jurisdiction only when a party was domiciled within the state. But that limitation amounted to a rejection of the in rem analogy, for Harris had clearly indicated that presence, not permanence, was the crucial factor in in rem cases.

A third alternative was to analogize the divorce action to the action in rem but to classify the marriage relationship, not the person seeking dissolution, as the equivalent of the res that conferred jurisdiction. The principal difficulty in implementing this approach was ascribing “presence” to the marriage relationship; the key concept that solved this difficulty was the idea of the “matrimonial domicile,” or the place where the parties were domiciled when living as husband and wife.99 This approach had two virtues; it protected the deserted spouse by allowing a divorce in the state where the couple had formerly lived, and it precluded the parties to a marriage from avoiding the substantive law of the state in which they lived by a temporary sojourn in a state with more liberal divorce laws. However, this matrimonial domicile approach also had disadvantages. If the innocent party in the break-up of a marriage moved to another state (for example, the nonadulterous partner), that innocent party could obtain a divorce only by returning to the state of the spouse whose misconduct prompted the divorce action. Moreover, this limit on a state's ability to grant divorces to its domiciliaries seemed a restriction of state authority inconsistent with Pennoyer's assertion that states retained authority to grant judgments declaring the civil status of their citizens.

Perhaps because none of the approaches offered a completely satisfactory solution to the problem of divorce jurisdiction, the Supreme Court failed, during the late nineteenth and early twentieth centuries, to settle on a coherent theory to unite its decisions. Bell v. Bell100 demonstrated that the issue was more than a mere question of personal jurisdiction by overturning a divorce decree rendered after the husband had answered and voluntarily appeared in the proceedings, and a series of decisions appeared to suggest that either the domicile of one of the parties or the matrimonial domicile was sufficient to confer jurisdiction on a state's courts. Thus, Maynard v. Hill101 held that if the plaintiff was domiciled in the

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99. See generally Goodrich, Matrimonial Domicile, 27 Yale L.J. 49 (1917).
100. 181 U.S. 175 (1901).
101. 125 U.S. 190 (1888).
state, a divorce judgment was valid under the due process clause and could be enforced where it was rendered; Cheever v. Wilson\(^{102}\) required full faith and credit recognition of divorce judgments when the plaintiff was domiciled in the state and the defendant was served with process in the state; and Atherton v. Atherton\(^{103}\) ruled that a divorce judgment was entitled to full faith and credit when it was rendered in the state of matrimonial domicile following constructive service of process.

Haddock v. Haddock\(^{104}\) rejected this trend toward expanding divorce jurisdiction. In Haddock, the Court refused to require that a state grant full faith and credit to a state court judgment that was rendered by the state in which the plaintiff was domiciled following constructive service of process on the absent defendant. The Haddock opinion distinguished Maynard on the ground that holding a judgment valid under the due process clause did not necessarily mean that it was entitled to full faith and credit.\(^{106}\) To distinguish Atherton, the Court treated the issue as one involving in personam jurisdiction. The court rendering the judgment in Atherton was located in the matrimonial domicile, and thus the court had personal jurisdiction over the absent defendant because of his constructive presence in the state.\(^{106}\) By contrast, the court rendering the Haddock judgment was not located in the matrimonial domicile; the court, therefore, had no basis for finding the defendant "constructively present" in the state, and its judgment was not entitled to full faith and credit.\(^{107}\) To avoid the impression that it was treating the issue solely as one of personal jurisdiction, however, Haddock continued to cite Bell with apparent approval.\(^{108}\)

The net impact of Haddock was to establish a dual test for divorce jurisdiction. A judgment challenged in the state where it was rendered under the due process clause was valid so long as the plaintiff was domiciled in the state. Other states, however, had to accord a judgment full faith and credit only (1) if the plaintiff was domiciled in the state and (2) the court had personal jurisdiction over the defendant under Pennoyer's territorial principle, although

\(^{102}\) 76 U.S. (9 Wall.) 108 (1869). Cheever is also significant for its acceptance of the "modern" rule that, in some circumstances, a woman could establish a separate domicile from her husband. Id. at 123.

\(^{103}\) 181 U.S. 155 (1901).

\(^{104}\) 201 U.S. 562 (1906).

\(^{105}\) Id. at 574-75.

\(^{106}\) Id. at 581, 584.

\(^{107}\) Id. at 572.

\(^{108}\) Id. at 583. The Haddock opinion cited Bell for the proposition that domicile, not residence, was required to support divorce jurisdiction.
the rigidity of the territorial principle was mitigated somewhat by accepting the fiction that the defendant was always "constructively present" in the matrimonial domicile.

Custody

Decrees awarding guardianship of minor children comprised a second category of litigation handled under Pennoyer's exception for proceedings relating to status. Since Pennoyer referred to the ability of a state to declare the status of its domiciliaries, it was natural to import the criterion of domicile as the basis for jurisdiction in custody cases. The treatise writers of the early twentieth century sought this result by urging the domicile of the child as the sole basis for a court's custody jurisdiction, and the 1934 Restatement of Conflict of Laws accepted this view.

Despite its logical appeal several mid-twentieth century commentators argued that the Restatement rule failed to explain the decisions. For one thing, the inability of a minor to adopt a domicile of choice could produce unacceptable results by declaring the child's domicile to be the same as that of a parent who lived in a state other than the one in which the minor lived. For another, the domicile requirement effectively precluded a court from taking action to protect a minor who needed judicial protection but was only temporarily within its boundaries. The authors of the Restatement papered over this latter problem by authorizing such courts to make "temporary" custody awards based on the child's presence alone, but careful students of the cases concluded that state courts

109. Over the years, commentators occasionally have objected to the inclusion of custody cases within the category of status jurisdiction. E.g., Stansbury, Custody and Maintenance Law Across State Lines, 10 L. & CONTEMP. PROB. 819, 820-21 (1944); Stumberg, The Status of Children in the Conflict of Laws, 8 U. CHI. L. REV. 42 (1940). These objections appear to ignore the obvious reason for the classification: to fit custody cases within the unified theory of state court jurisdiction that Pennoyer had tried to create. If one continued to accept Pennoyer's superstructure, a refusal to classify custody cases as adjudications involving status would have required that jurisdiction in these cases be based on the principles relating to in personam or in rem cases.


111. RESTATEMENT, CONFLICT OF LAWS § 117 (1934).

112. See generally Ehrenzweig, Interstate Recognition of Custody Decrees: Law and Reason v. the Restatement, 51 MICH. L. REV. 345 (1953); Stansbury, supra note 109; Stumberg, supra note 109.

113. Traditionally, the child's domicile was the same as that of his father, but some courts modified this rule to provide that in cases where the parents had separated, the child's domicile was the same as the domicile of the parent with whom the child resided. Stansbury, supra note 109, at 821-22; Stumberg, supra note 109, at 54 n.37.

114. RESTATEMENT, CONFLICT OF LAWS § 118 (1934).
had generally circumvented both problems by a de facto substitution of the child's actual residence for the domicile requirement.\textsuperscript{118}

Another reason that the domicile rule failed to harmonize the existing decisions was the non-final nature of custody awards, which allowed courts to overturn them without expressly declining to give full faith and credit to the judgment of a sister state. Courts that issued custody awards invariably retained the right to modify the award in the future upon a showing of changed circumstances. Inasmuch as the full faith and credit clause only required states to give a judgment the same effect as it would have had in the state where it was rendered,\textsuperscript{116} most states asserted the right to modify the sister state's custody award when they found that circumstances had changed since the original judgment. The vagueness of this standard obviously gave courts substantial discretion to alter custody awards without challenging the duty to accord them full faith and credit.\textsuperscript{117}

This ability to change the custody award of a sister state court received Supreme Court endorsement in \textit{Halvey v. Halvey}.\textsuperscript{119} In affirming a New York judgment that amended a Florida custody award, the Supreme Court held that "[s]o far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree,"\textsuperscript{9} New York could do. Since Mrs. Halvey had not "shown

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\footnote{115. Stansbury, \textit{supra} note 109, at 823-24; Stumberg, \textit{supra} note 109, at 55. Cf. Ehrenzweig, \textit{supra} note 112, at 357 ([T]he "true rule" is "the court's discretion exclusively governed by the child's welfare").}
\footnote{116. Reynolds v. Stockton, 140 U.S. 254 (1891).}
\footnote{117. \textit{See generally} Ehrenzweig, \textit{supra} note 112, at 352.}
\footnote{118. 330 U.S. 610 (1947). In \textit{Halvey} a Florida court had granted custody of the Halvey's minor son to Mrs. Halvey. Just before this decree was entered, Mr. Halvey took the son back to New York without his wife's permission. A subsequent New York proceeding confirmed the award of custody to Mrs. Halvey, but gave the father visitation rights and required the mother to post a surety bond guaranteeing that she would honor the father's visitation rights.}
\footnote{119. 330 U.S. at 614. Some courts even went beyond the considerable discretion sanctioned by \textit{Halvey} and discerned a right to reexamine the merits of a custody award made by a sister state. These courts conceded that a prior order might be binding on the parents, but they argued that the state's relation of \textit{parens patriae} made its
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that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law;" she had failed to prove that the Florida decree received less credit in New York than it would have had in Florida.\textsuperscript{100}

The diversity of opinions concerning jurisdiction to award custody over minor children was exaggerated by the paucity of Supreme Court opinions unifying doctrine under either the full faith and credit clause or the due process clause. Indeed, \textit{Halvey}, the Court's leading decision of the first half of the twentieth century, implicitly encouraged courts to review the merits by sanctioning a right to change a sister state's custody award on the basis of changed circumstances. But several commentators suggested that the disharmony of the state court decisions was more apparent than real. At least one suggested that careful analysis of results rather than opinions suggested that courts generally refused to enforce the custody awards of sister states only when they were ruling in favor of functioning family groups within their borders; states did not use their power to assist their citizens who had secreted children out of the states where they normally lived.\textsuperscript{101}

\textbf{Support Awards}

Both divorce actions and child custody litigation often included demands for monetary payments in the form of alimony or child support. Since the support award was a money judgment, jurisdiction in the status suit was not necessarily sufficient to authorize the court to award support; courts assumed jurisdiction to make support awards only when they had jurisdiction over the person who was ordered to pay support or over some property from which the support could be collected. This rule caused few difficulties with respect to divorce, however. \textit{Thompson v. Thompson}\textsuperscript{122} confirmed the \textit{Haddock} rule, which required domicile and personal jurisdiction for divorce jurisdiction;\textsuperscript{123} this confirmation meant that any court authorized to render a divorce decree that was entitled to full faith and credit would have authority to render binding support orders as primary concern the welfare of the child as of the time its courts were considering the request for full faith and credit. Since the courts were concerned with protecting the child and not with legitimating prior custody awards, existing judgments had evidentiary value, but they were not conclusive as to what the child's welfare required. See Ehrenzweig, \textit{supra} note 112, at 353.

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  \item \textsuperscript{120} 330 U.S. at 615.
  \item \textsuperscript{121} Stansbury, \textit{supra} note 109, at 828-30. See Ehrenzweig, \textit{supra} note 112, at 357-59; Stumberg, \textit{supra} note 109, at 57.
  \item \textsuperscript{122} 226 U.S. 551 (1913).
  \item \textsuperscript{123} See text at note 108, \textit{supra}.
  \item \textsuperscript{124} 243 U.S. 269 (1917). See notes 84-89, \textit{supra}, and accompanying text.
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well. In addition, Pennington v. Fourth National Bank\textsuperscript{124} expressly authorized the use of \textit{quasi-in-rem} jurisdiction in suits seeking to establish support obligations.

Jurisdiction to make support awards in custody cases was less automatic. Of course, in many instances the custody award was connected with divorce jurisdiction, and the establishment of \textit{in personam} jurisdiction for the divorce decree would also establish it for the support award. But when the custody proceeding was not part of a suit to dissolve the marriage relationship, the person seeking support had to establish jurisdiction under Pennoyer's \textit{in personam} or \textit{in rem} rules.

\textbf{New Issues: Notice and the Opportunity to Appear}

\textit{Notice}

The increasing willingness to allow courts to exercise jurisdiction in cases involving nonresidents brought new issues to the surface. One such issue was the problem of notice. As indicated above, the territorial principle normally operated to provide notice to the defendant by insisting on personal service of process, formal attachment of property at the outset of the proceedings, or the defendant's voluntary appearance. But the various extensions of jurisdiction made these traditional forms of notice inadequate because they allowed courts to exercise \textit{in personam} jurisdiction over nonresident defendants who were never served with process and to base \textit{quasi-in-rem} jurisdiction on an attachment of intangible personal property that might be far less likely to come to the attention of the property owner. To guard against a nonresident being bound by a judgment in a lawsuit of which he had no knowledge, the Supreme Court increasingly enshrined the requirement of reasonable notice to the defendant as a second prerequisite to the exercise of jurisdiction.

Decisions upholding jurisdiction regularly emphasized that the statutory schemes made reasonable provisions for insuring the defendant knew of the pendency of the proceedings against him. Thus, in explaining the fairness of the Massachusetts statute that asserted jurisdiction over nonresident motorists in lawsuits arising out of their operation of motor vehicles within the state, Hess emphasized the statute required that the nonresident "actually receive and receipt for notice of the service of process and a copy of the process."\textsuperscript{125} Similarly, in \textit{Doherty & Company}\textsuperscript{126} the Supreme Court quoted with approval a portion of an earlier opinion of the

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125. 274 U.S. at 356.
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Iowa Supreme Court, which contained the following language concerning the state statute's provision for notice to nonresident businessmen:

It is required that the [defendant's] agent shall actually receive a copy of the notice of suit and that it shall be read to him.... The action must grow out of the business of that very agency. Ample time is given the defendant to appear and defend; there is not only "reasonable probability" but practical moral certainty that the defendant will receive actual notice of the pendency of the action.127

Indeed, the Supreme Court emphasized the reasonableness of the choice to serve the agent who was "manager of the appellant's office when the sale contract was made ... [and] when process was served upon him." 128 Finally, near the end of the unchallenged reign of Pennoyer's territorial principle, Milliken emphasized, in upholding the Wyoming statutory scheme that allowed a domiciliary who was outside the state to be served by mail, that "so far as due process is concerned" the test for the adequacy of notice is whether "the form of substituted service provided for such cases and employed is reasonably calculated to give ... [the defendant] actual notice of the proceedings and an opportunity to be heard." 129 If it accomplished these two purposes, it satisfied "the traditional notions of fair play and substantial justice ... implicit in due process." 130

On at least one occasion the Supreme Court went so far as to declare that actual notice of the proceedings in a particular case was insufficient if the statutory scheme lacked adequate assurances that notice would be provided in all cases. Wuchter v. Pizzuti 131 involved the New Jersey version 132 of the state statutes that asserted juris-

128. 294 U.S. at 628. The Supreme Court's opinion also emphasized that Iowa treated "the business of dealing in corporate securities as exceptional and subject[ed] it to special regulation." Id. at 627.
129. 311 U.S. at 463. See text at notes 56-61, supra.
130. Id.
131. 276 U.S. 13 (1928). Mr. Justice Brandeis filed a dissenting opinion in which Mr. Justice Holmes concurred. He argued that the due process objection was "an afterthought provoked by our decision in [Hess]," which had rejected the argument that had been the defendant's only objection considered by the courts below. By ruling on the notice issue at this late stage in the proceeding, he argued that the Court was denying New Jersey's courts any opportunity to place a favorable construction on the statute and thus to avoid any attacks of unconstitutionality. 276 U.S. at 25-26 (Brandeis, J., dissenting).
diction over nonresident motorists with respect to law suits arising out of their operation of motor vehicles within the state. The New Jersey law followed the common pattern of designating a state official as the nonresident defendant's agent to receive process, but unlike the Massachusetts statute sustained in *Hess*, it did not require the state official to forward the summons to the defendant. On the basis of this distinction, the Supreme Court framed the issue in *Wuchter* as follows: "Whether a statute, making the Secretary of State the person to receive the process, must, in order to be valid, contain a provision making it reasonably probable that notice of service on the Secretary will be communicated to the non-resident defendant who is sued."\textsuperscript{133}

The Court concluded that the law "should make a reasonable provision for such probable communication."\textsuperscript{134} Disavowing any intention to question the *Hess* doctrine, Mr. Chief Justice Taft's opinion for the Court emphasized that adequate notice was an independent requirement of due process. When this notice requirement was applied, the New Jersey statute was found wanting: "[T]he enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice of the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice."\textsuperscript{135} To hold otherwise would make it "entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody."\textsuperscript{136} Moreover, any "provision of law for service that leaves open such a clear opportunity for the commission of fraud . . . or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law."\textsuperscript{137}

To comply with due process, a statute had to satisfy the following standard. It must "require the plaintiff bringing the suit to show in the summons to be served the post office address or residence of the defendant being sued, and should impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant."\textsuperscript{138} Nor

\textsuperscript{133} 276 U.S. at 18.
\textsuperscript{134} Id. at 19.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 20.
was the Court's judgment altered by the fact that Wuchter had actual notice of the proceedings because he was personally given written notice. Since Wuchter "did not . . . appear in the cause and such notice was not required by the statute," actual notice could not "supply constitutional validity to the statute or to service under it."139

With respect to corporations, a similar notice requirement evolved. The court held that service of process on an agent of the corporation provided sufficient notice if the person served was one who was reasonably certain to convey the notice to corporate officers.140 The court also sustained statutes that allowed a foreign corporation to be served by serving process on a designated state official, but in this class of cases, the Court was less consistent with respect to notice. In Bond & Goodwin & Tucker, Inc. v. Superior Court,141 the Court went so far as to approve service on a state official even though the statute did not require him to notify the defendant and even though the defendant apparently never received actual notice. But an earlier per curiam decision142 applying the Wuchter rationale to statutory service provisions suggested that the Bond & Goodwin holding was limited to situations in which the corporation had executed a formal consent to the statutory provision for service.143

139. Id. at 24. The Court was not always so zealous to strike down statutes when the litigants had actual notice. See, e.g., Harris v. Balk, 198 U.S. 215 (1905). See also State ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361 (1933).
140. E.g., St. Louis Southwestern Ry. Co. v. Alexander, 227 U.S. 218 (1913); Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 255 (1909); St. Clair v. Cox, 106 U.S. 350, 360 (1882). Cf. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1934) (service on a business agent of a sole proprietorship held sufficient). The statutes requiring service on an agent of the corporation can be further subdivided into those requiring formal appointment of a process agent and those permitting service on an "actual agent" within the state. Eulette, Service of Process Upon Foreign Corporations—Constitutional Limitations Imposed by Judicial Construction of the Due Process Clauses, 20 CHI.-KENT L. REV. 287, 312 (1942). In either case, the due process standard was the same: "[S]ervice shall be had upon such representative in such a manner and with such adequate safeguards that it will be reasonably certain that the notice will, in fact, come to the attention of those individuals responsible for and controlling the management of the corporation." Id. at 313.
141. 289 U.S. 361 (1933). The Court distinguished the seemingly contrary rationale of Wuchter v. Pizzutti, 276 U.S. 13 (1928), with the following comment: "The power of the state altogether to exclude the corporation, and the consequent ability to condition its entrance into the state, distinguishes this case from those involving substituted service upon individuals. . . ." 289 U.S. at 365. For a discussion of the Wuchter holding, see notes 131-39, supra, and accompanying text.
143. Cf. 289 U.S. at 365 ("The fact that appellant qualified to do business in the State and complied with the registration statute also distinguishes cases of attempted service on a State official pursuant to a statute with which defendant had never com-
One of the most important questions of notice concerned suits to quiet title to real estate. Dictum in *Pennoyer* indicated that service by publication, when coupled with an attachment of the land at the outset of the proceedings, would serve "to inform parties of the object of proceedings taken"; and subsequent decisions allowed a state to "provide for the adjudication of titles to real estate within its limits as against non-residents who are brought in court only by publication." By accepting this service by publication, the Court allowed states to devise systems for cutting off the interests of unknown claimants who, by definition, could not be served personally. Although notice in such cases was often fictional, allowing service by publication helped to accomplish the goal of clearing land titles, and attainment of that goal required a binding determination against all potential claimants in the property. Indeed, an influential opinion of Mr. Justice Holmes when he was Chief Justice of the Massachusetts Supreme Judicial Court went so far as to describe the elimination of unknown claimants as the "chief end" of suits to secure land titles.

**Special and Limited Appearances**

As the courts gradually weakened *Pennoyer's* injunction forbidding a state from exercising *in personam* jurisdiction over a person

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144. See generally Culp, Constitutional Problems Arising from Service of Process on Foreign Corporations, 19 Minn. L. Rev. 375, 385-91 (1935); Eulette, supra note 141, at 315-16; Note, Constitutional Law— Jurisdiction—Substituted Service on Foreign Corporation Without Notice, 81 U. Pa. L. Rev. 469, 570 (1933). Courts sometimes construed statutes to require the public official to notify the defendant even in the absence of a specific statutory directive. E.g., Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907). At least one state court suggested that the failure of a statutory scheme to require the public official to notify the defendant would amount to a violation of due process. Gouner v. Missouri Valley Bridge & Iron Co., 123 La. 964, 967, 49 So. 657, 658 (1909): this law makes no provision whatever for . . . service on the defendant. the officer may decline to communicate with the person sued and give no notice whatever, not even by mail. A judgment might be obtained without the least knowledge of the person sued. Under the phrasing of the statute, the duty of the officer begins and ends in his office. If such a judgment were rendered, it could receive no recognition whatever at the place of the domicile.


146. Tyler v. Court of Registration, 175 Mass. 71, 73, 55 N.E. 812, 813 (1900). For a more complete description of the *Tyler* holding, see note 81, supra.
not personally served with process, the number of cases in which the jurisdictional issue became less certain, and thus litigible, increased. This shift created a serious dilemma for the litigant who desired both to raise a jurisdictional defense and to offer a defense on the merits. As Pennoyer suggested and other cases held, a voluntary appearance at the proceedings would amount to a consent to the court's authority, thus waiving the jurisdictional issue. On the other hand, the defendant forfeited his opportunity to offer a defense on the merits if a default judgment was entered because he declined to appear and a subsequent proceeding determined that the original court had jurisdiction over him. In short, to be certain to get an opportunity to present a defense on the merits, the defendant had to forego judicial consideration of the jurisdictional issue.

The inequity of requiring such a choice was generally conceded, and to avoid it the law used the procedural device of the special appearance, which allowed the defendant to appear solely to challenge the court's jurisdiction. In the term following its decision in Pennoyer, the Supreme Court approved the special appearance for use in federal courts, and despite an 1890 decision holding that the due process clause did not require a state to recognize a special appearance, the right was "generally recognized" in state courts even without statutory authorization.

Although the special appearance did permit the defendant to secure a judicial determination of the jurisdictional issue, it did not completely end the dilemma. Since in many states the overruling of a jurisdictional plea was not an appealable order, and offering any defense other than the jurisdictional one amounted to a general appearance that consented to the court's jurisdiction, an adverse decision by the trial court could force the defendant to decide whether to present his defense on the merits (which would constitute a general appearance and waive the jurisdictional claim) or to decline to pre-

150. Comment, Special Appearance in New York, 34 CORN. L.Q. 230, 230 n.6 (1948). Only Mississippi, Miss. CODE ANN. § 1881 (1942), and Texas, TEX. R. CIV. PRAC. art. 122 (1942), refused to recognize the special appearance. For a description of the Mississippi practice, see Note, Special Appearance in Mississippi, 19 MISS. L.J. 59 (1947). Despite the nearly unanimous approval of special appearances, there was much dispute as to exactly what constituted a special appearance. See, e.g., Note, Special Appearance in New York, 34 CORN. L.Q. 230 (1949); Note, Practice and Procedure—Appeals From Refusals of Motions to Dismiss—Special Appearances, 18 N.C. L. REV. 354 (1940).
sent a defense and appeal the final judgment on the jurisdictional question (which prevented him from litigating the merits if he ultimately lost the jurisdictional issue). To avoid this inequity, the 1938 Federal Rules of Civil Procedure and the rules of some states eventually allowed the defendant to defend on the merits without sacrificing the opportunity to seek appellate review of the jurisdictional issue.

Cases involving quasi-in-rem jurisdiction complicated the appearance issue because defendants tried to make two types of appearances without consenting to personal jurisdiction. First, they attempted to challenge the court's jurisdiction by attacking the validity of the attachment. Most courts regarded this approach as analogous to the special appearance in in personam cases and permitted it. Second, defendants who conceded the validity of the attachment sought the opportunity to protect the property by presenting the case on the merits without submitting to in personam jurisdiction, a procedural device that came to be known as the limited appearance. The Supreme Court never addressed the question on whether a defendant had a constitutional right to a limited appearance in cases involving quasi-in-rem jurisdiction. Moreover, although many states allowed limited appearances, a substantial number refused to do so.

*Cheshire National Bank v. James* was an influential early decision among those states that did permit limited appearances. Intimating that the issue involved the defendant's due process right to a hearing before a court disposes of his property, the Massachusetts Supreme Judicial Court quoted with approval language in a much older case that declared: "It would be unreasonable to oblige any man living in one state, and having effects in another state, to make himself amenable to the courts of the last state, that he might defend his property there attached." Although conceding that the language quoted was not part of an "exact adjudication," the court

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151. Of course, appellate review of the issue might be obtained under procedures permitting review of interlocutory orders or by virtue of an appellate court's extraordinary writ jurisdiction.
153. E.g., Colo. R. Civ. P. 12(b) (1941); Ky. R. Civ. P. 12.02 (1953); Minn. R. Civ. P. 12.02 (1952).
154. See Restatement, Judgments § 40 (1942).
nonetheless followed it because it stated a “sound principle” that was “decisive of the question at bar.”

The Cheshire rationale did not persuade everyone. Some courts and commentators found the countervailing arguments persuasive, thus creating a doctrinal impasse that the Supreme Court never resolved. Opponents of the limited appearance advanced at least three arguments against it: (1) The merits of the case involved a single set of underlying personal rights and liabilities, and different courts should not be allowed to give differing decisions as to that single set of underlying circumstances; (2) the limited appearance encouraged multiple litigation and thus interfered with the judicial economy goal of securing a final determination in the first proceeding; and (3) by contesting the plaintiff’s claim, the defendant manifested his willingness and ability to litigate the entire personal claim in the forum where his property was attached.

THE NEW MINIMUM CONTACTS PRINCIPLE

By the middle of the twentieth century the exceptions to Pennoyer had altered substantially the substance of the original doctrine. In form, the territorial principle remained the norm; a state could exercise jurisdiction over persons or property within its boundaries and had jurisdiction to determine the status of its citizens, but the state lacked jurisdiction over persons or property outside its boundaries or concerning the status of citizens of other states. But in practical terms the Supreme Court had increased significantly the ability of state courts to issue binding judgments against natural persons outside their borders, the actual problem with which Pennoyer was con-
cerned. Contrary to Pennoyer's declaration that "[p]rocess from the tribunals of one State cannot run into another State," the modern decisions permitted the functional equivalent of out-of-state process with respect to the nonresident motorists who committed torts while operating motor vehicles within the state, nonresident entrepreneurs whose business activities within the state gave rise to claims against them, and domiciliaries who were outside the state's territorial boundaries when the lawsuit commenced. Judicial opinions often used the language of consent to force these cases into the Pennoyer framework; but the language of consent was obviously a fiction, for this consent required neither the defendant's knowledge nor acquiescence.

With respect to corporations the exceptions were so great as virtually to eliminate the St. Clair holding that Pennoyer's territorial principle also governed when a corporation was amenable to suit. Here again the Court used the language of consent to preserve the Pennoyer framework, but this approach failed to provide a coherent theoretical framework for reaching all interstate corporations. Although early Supreme Court decisions indicated that a state could exclude foreign corporations from doing business within the state, this principle was subject to the important qualification that the commerce clause prevented a state from refusing to allow foreign corporations to carry on interstate commerce within its borders. Since the state's authority to require consent to jurisdiction was based on its power to exclude foreign corporations, the logical corollary to the limit on the power to exclude would seem to have been a holding that the state could not require corporations conducting interstate business to consent to the jurisdiction of the state's courts nor could it treat the carrying on of interstate business within the state as an implied consent. Of course, that logical step would have destroyed the usefulness of the consent theory for the very interstate corporations for which it was designed; it was, therefore, a logical step that the Supreme Court never chose to take.\textsuperscript{161}

The theoretical problem of the consent theory was not its only difficulty, however. Using the language of consent produced the absurdity of making the lawful-abiding corporation subject to wider claims of state jurisdiction than the corporation that failed to comply with the law. If a foreign corporation complied with the state law requiring it to designate an agent for service, the state

\textsuperscript{160} 95 U.S. at 727.

\textsuperscript{161} See International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); Kurland, supra note 63, at 581.
could treat that designation as consenting to jurisdiction in all cases. On the other hand, if the foreign corporation failed to designate an agent, the state could treat the conducting of the business as a form of implied consent to jurisdiction, but only as to claims arising out of the corporation's activity within the state.

The alternate theory of the corporation's "presence" was equally unsatisfactory in providing an explanation of when courts could exercise jurisdiction over foreign corporations. Not only was the attempt to ascribe locality to a non-physical, juridical person bound to be fictional, but as at least one commentator subsequently pointed out, it "necessarily rejected the theme of . . . [early Supreme Court decisions] that a corporation cannot exist beyond the limits of the state which created it."

Although the results of individual cases involving in personam jurisdiction seemed to represent reasonable responses to changing social patterns, some commentators as well as perceptive lower court judges increasingly recognized that Pennoyer's framework was no longer adequate to guide judicial decision-making with respect to when a state court could exercise in personam jurisdiction over nonresident defendants, especially when the defendant was a corporation. The 1945 decision of International Shoe Company v. Washington marked the beginning of a series of decisions in which the Court tried to formulate a new principle to explain more

164. Kurland, supra note 63, at 582.
165. See, e.g., Haffer, Personal Jurisdiction over Foreign Corporations as Defendants in the United States Supreme Court, 17 B.U.L. Rev. 639 (1937); Rothschild, Jurisdiction of Foreign Corporations In Personam, 17 Va. L. Rev. 129 (1930).
166. Probably the most widely quoted critic in the judiciary was Learned Hand. See Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930), quoted in International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). See also Farmers' & Merchants' Bk. v. Federal Res. Bk., 286 F. 566 (E.D. Ky. 1922).
167. 326 U.S. 310 (1945). Mr. Justice Black filed a separate opinion in which he argued that International Shoe's appeal should be dismissed as unsubstantial. He argued that "[t]he due process clause is not brought in issue . . . by appellant's . . . conceptualistic contention that Washington could not . . . bring suit against a corporation because it did not honor that State with its mystical 'presence.'" 326 U.S. at 323 (Black, J., concurring). Indeed, he urged that "[t]o read this into the due process clause would in fact result in depriving a State's citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation." Id. In his view, the correct approach was not to adopt the vague standard of "fair play" and "substantial justice" but to recognize that a State "has the power to protect . . . [its citizens] in their business dealings within its borders with representatives of a foreign corporation." Id.
accurately when a state could exercise jurisdiction over natural persons outside its borders and over foreign corporations. The defendant, International Shoe Company, was a Delaware corporation involved in sales of footwear to customers in several states. Its principal place of business was located in Missouri, but it "maintain[ed] places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington." International Shoe had neither manufacturing nor retail offices in Washington, although it did sell its shoes to persons in the state. The sales were arranged through sales personnel who resided in Washington, displayed samples of the company's footwear at various locations within the state, and solicited orders from prospective purchasers. The company structured the actual sales transaction to limit the authority of the sales personnel. They could not obligate the company, but merely solicited orders that the company's home office in Missouri had to accept. The company then shipped and invoiced the goods from points outside Washington, and collections were also made from these points. The company argued that these activities were insufficient to manifest its presence in Washington and that the state's courts could not issue a binding judgment obligating the company to make workmen's compensation payments covering its Washington sales personnel.

Mr. Chief Justice Stone's majority opinion began its analysis of the jurisdictional issue by reformulating the test to be applied. Recognizing the traditional reliance on a court's "de facto power" over the defendant as a "prerequisite to its rendition of a judgment personally binding him," the Chief Justice contended that the emphasis on power had shifted as the procedure for initiating actions changed from the capias ad respondum, which obligated the sheriff to take the defendant and hold him until he responded, to a simple

168. 326 U.S. at 313. For a more extensive summary of the facts, see Kurland, supra note 63, at 586-88. A 1907 Supreme Court decision had suggested that solicitation in a state was not sufficient by itself to render a corporation present within a state. Green v. Chicago, Burlington and Quincy Ry. Co., 205 U.S. 530 (1907). Later Supreme Court decisions, however, had held that a solicitation coupled with other activities by the corporation within the state would render a foreign corporation amenable to suit. See, e.g., St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913).

169. 326 U.S. at 315. For a more extensive summary of the facts, see Kurland, supra note 63, at 586-88. The Court also rejected the contentions that Washington lacked authority to force International Shoe to make workmen's compensation contributions, id. at 321-22, and that the state had imposed an unconstitutional burden on interstate commerce. Id. at 315.
notice to the defendant of his duty to appear.\(^{170}\) The new test of due process allowed a state court to exercise in personam jurisdiction over a nonresident who was not served with process within the state's territorial boundary whenever the nonresident defendant had "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"\(^{171}\)

With respect to corporations, the Chief Justice suggested that the new test merely made explicit the unarticulated basis of prior decisions. Conceding the non-utility of the presence concept to explain when a court had jurisdiction over a corporation, he contended that the terms "present" and "presence" had merely served as a shorthand summary of the real issue: whether the company had sufficient contacts with the forum state to "make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."\(^{172}\) Thus, when the activities of a corporation's agents in the state had "not only been continuous and systematic, but also . . . [gave] rise to the liabilities sued on," the cases uniformly held that the corporation was subject to the jurisdiction of the state's courts, and they were equally uniform in holding that "the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf" were insufficient to authorize the state's courts to exercise jurisdiction over the corporation in law suits based on claims "unconnected with the activities there."\(^{173}\)

Of course, gray areas remained. When the corporation's activity in the state was continuous but the claim was unrelated to the activity, one line of decisions held that "continuous activity of some sorts within a state . . . [was] not enough" to support jurisdiction as to an unrelated claim,\(^{174}\) but in other cases "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."\(^{175}\) Similarly, the cases split in deciding whether occasional acts within a state would

\(^{170}\) Id. at 316. Contrast with this language the famous aphorism of Mr. Justice Holmes that the "foundation of jurisdiction is physical power." McDonald v. Mabee, 243 U.S. 90, 91 (1917).

\(^{171}\) 326 U.S. at 316.

\(^{172}\) Id. at 317. To make this determination, one of the factors a court had to consider was "[a]n 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business." Id. at 317, citing Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

\(^{173}\) 326 U.S. at 317.

\(^{174}\) Id. at 318.

\(^{175}\) Id.
support jurisdiction on a claim that arose as a result of those acts. Although some of the decisions imposing liability in the last group of cases supported their holding by the "legal fiction" of the implied consent of the defendant, the decisions could be explained "more realistically" as a determination that the acts giving rise to liability "were of such a nature as to justify the fiction." \(^{176}\)

The test was not, the Chief Justice emphasized, "simply mechanical or quantitative"; nor was it merely a question of "a little more or a little less." \(^{177}\) The test was a qualitative one: "[w]hether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." \(^{178}\) Due process did not permit a state to render binding in \textit{personam} judgments "against an individual or corporate defendant with which the state has no contacts, ties, or relations." \(^{179}\) However, it did allow a state that extended the "benefits and protections" of its laws to a foreign corporation doing business within its borders to require the corporation to respond to suits brought to enforce obligations that "arise out of or are connected with the [corporation's] activities within the state." \(^{180}\)

Applying this minimum contacts test to the case before it, the Court concluded that the Washington courts could exercise jurisdiction. The company's activities in the state were "neither irregular nor casual" but were "systematic and continuous throughout the years in question," and the obligation that formed the basis for the lawsuit "arose out of those very activities." \(^{181}\) Hence, it was "evident that these operations establish[ed] sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which . . . [International Shoe] has incurred there." \(^{182}\)

\textbf{APPLICATION AND REFINEMENT OF THE MINIMUM CONTACTS PRINCIPLE}

\textit{International Shoe} was a seminal decision because of the Court's willingness to discard \textit{Pennoyer}'s territorial principle in determining

\begin{thebibliography}{182}
\bibitem{176} Id.
\bibitem{177} Id. at 319.
\bibitem{178} Id.
\bibitem{179} Id.
\bibitem{180} Id.
\bibitem{181} Id. at 320.
\bibitem{182} Id.
\end{thebibliography}
when a state could exercise jurisdiction over foreign corporations. But the new approach raised as many questions as it answered. For one thing, International Shoe had substantial contacts with Washington and the case involved a claim directly related to the contacts; thus, except for the Court’s reminder that the test was “qualitative” and not “quantitative or mechanical,” the case provided little guidance for the two classes of cases that the Court’s own summary indicated had proven troublesome in the past—(1) a defendant with continuous contacts in the forum state with a claim unrelated to the contacts, and (2) a defendant with a single contact or occasional contacts in the forum state but a claim arising directly from those contacts. Moreover, the Court’s opinion did not define clearly the reach of the new principle; it did not indicate, for example, whether the minimum contacts principle applied only to corporations or to individual defendants as well or whether it applied only to in personam jurisdiction or to in rem and status jurisdiction as well. Courts struggled with these questions over the next three and a half decades.

In Personam Jurisdiction

Traveler’s Health Association v. Virginia\textsuperscript{183} was the Supreme Court’s first major attempt to amplify the meaning of the new minimum contacts principle in one of the situations that International Shoe identified as particularly troublesome, a defendant with few contacts with the state but a claim arising directly from those contacts. The question in Traveler’s Health Association was whether the Virginia State Corporation Commission had jurisdiction to issue a cease and desist order against a non-profit Nebraska corporation that provided health insurance benefits to 800 members who lived in Virginia.

339 U.S. 643 (1950). In his concurring opinion, Mr. Justice Douglas also found the actions taken by Virginia consistent with “the traditional concept of due process.” 339 U.S. at 655 (Douglas, J., concurring). Noting that the state had a valid interest in protecting its citizens, he concluded that the use of members within the state to solicit the majority of the association’s Virginia business “operate[d] functionally precisely as though appellants had formally designated the Virginia members as their agents.” Id. at 654.

Mr. Justice Minton filed a dissenting opinion that Mr. Justice Jackson joined. He argued that the Court should not have even reached the due process question because “the Commission had in no way attempted to enforce the order” and thus the appellants had not been hurt. 339 U.S. at 655 (Minton, J., dissenting). On the merits, he distinguished Travelers from International Shoe on the ground that the earlier case had involved personal service on an agent within the state and contacts by agents within the state that made the company present there; by contrast, in Travelers, no agent of the defendant had operated in the forum state. Id. at 658-59. Justices Reed and Frankfurter joined the dissent on the merits but not with respect to the procedural point.

\textsuperscript{183}. 339 U.S. 643 (1950).
Virginia. The Court ruled that the Commission could issue an order binding on the Association even though the Association had no agents or property within the state, all of the Association's activities with Virginia members or prospects were conducted by mail, all membership association dues were payable in Nebraska, all claims were to be submitted in Nebraska, and all claims payments were issued in Nebraska.

In reaching this conclusion, Mr. Justice Black's majority opinion made two principal arguments. First, it recognized a broad state legislative power to regulate insurance contracts because of the state's "legitimate interest in all insurance policies protecting its residents against risks," including the desire to see "that those obligations were faithfully carried out." In light of these interests he concluded that the company's providing of health insurance benefits to a sizeable number of Virginia members gave it sufficient contacts with the state to satisfy International Shoe's minimum contacts principle. Second, Mr. Justice Black emphasized the heavy burden that might fall on individual policyholders if the state could not reach the foreign insurance corporation. Not only were health benefit claims "seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska lawsuit," but the "suits on alleged losses . . . [could] be more conveniently tried in Virginia."

Explicitly analogizing the new due process test to the common law doctrine of forum non conveniens, he concluded that the "Due Process Clause does not forbid a state to protect its citizens from such injustice."

Two years later, the Supreme Court had to apply the International Shoe principle to the other class of cases that Mr. Chief Justice Stone emphasized had called for careful qualitative judgment—a suit against a corporate defendant with substantial con-

184. The case technically involved the jurisdiction of a regulatory commission rather than a court, but Mr. Justice Black's majority opinion applied the same standards and expressly relied on International Shoe, 339 U.S. at 648, as did the dissent of Mr. Justice Minton. 339 U.S. at 658-59 (Minton, J., dissenting)
186. Id. at 649.
187. Id. at 649. The doctrine of forum non conveniens allows the court "discretionary judgment as to whether the suit should be entertained" in situations where there exist "at least two forums in which the defendant is amenable to process." Gulf Oil Co. v. Gilbert, 330 U.S. 501, 506-07 (1947). A court may use this discretion to prevent a plaintiff from placing a defendant at a disadvantage by choosing the least convenient forum. Id. at 508. See generally Barrett, The Doctrine of Forum Non Conveniens, 35 CALIF. L. REV. 380 (1947); Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 COLUM. L. REV. 1 (1929).
tacts with the forum state in which the claim was unrelated to the contacts. In *Perkins v. Benguet Consolidated Mining Company*, the defendant mining company was a Philippine business association, and the plaintiff was a dissatisfied stockholder who claimed the company had failed to issue her dividends and stock certificates rightfully due her. When the Japanese occupied the Philippine Islands during World War II, the company had ceased its mining operations on the islands; the company's president and general manager returned to his home in Ohio where he "did many things on behalf of the company" including maintenance of office files, handling of correspondence, payment of salaries, and the supervision of the rehabilitation of the company's Philippine properties after the war. In addition, the company maintained substantial bank accounts in Ohio during this period, appointed an Ohio bank as its stock transfer agent, and held several directors' meetings within the state.

After summarily rejecting plaintiff's claim that the due process clause required Ohio to exercise jurisdiction under these facts, Mr. Justice Burton's majority opinion turned to what it termed the "more serious question" of whether the requirements of due process precluded Ohio from exercising jurisdiction. Declaring that the "essence" of the minimum contacts principle was "one of general fairness to the corporation," the Court first noted that the company's Ohio activities were sufficiently "continuous and systematic" to have justified jurisdiction had the plaintiff's claim been directly related to the corporation's activities in the forum state as in *International Shoe*. But Mrs. Perkins' claim was not based on the Ohio activities; thus the case took the minimum contacts principle "one step further to a proceeding in personam to enforce a cause

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188. 342 U.S. 437 (1952). In a dissenting opinion, Mr. Justice Minton argued that the Court should not have granted the *Perkins* writ to consider the due process issue. He labeled the majority's opinion "an advisory opinion to the Ohio Supreme Court" because the state court's decision was based on adequate and independent state grounds that were sufficient to support its decisions regardless of how the federal question was resolved. 342 U.S. at 450 (Minton, J., dissenting).

189. The Court treated the association as a corporation for jurisdictional purposes. *Id.* at 439. The result would probably have been the same if the company had been regarded as an unincorporated business association. *See* H.L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).


191. *Id.* at 441. The Court rejected the argument that Ohio had to exercise jurisdiction on the basis of an earlier precedent declaring that the decision to make foreign corporations subject to service "is a matter of legislative discretion." *Id.* at 440, quoting Missouri Pac. R.R. v. Clarendon Boat Oak Co., Inc., 257 U.S. 533, 535 (1922).

192. 342 U.S. at 445-46.
of action not arising out of the corporation's activities in the state of the forum.'”

Mr. Justice Burton relied on *International Shoe's* “realistic reasoning” for the proposition that, under certain circumstances, continuous corporate activity in a state could authorize the state to exercise jurisdiction over a foreign corporation with respect to a claim unrelated to the activities within the forum state. He had, therefore, only to decide if “the business done in Ohio by the . . . mining company was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio.” After carefully summarizing the extent of the company's Ohio activities, he concluded that Ohio could exercise jurisdiction because the president's actions amounted to “a continuous and systematic supervision of the necessarily limited wartime activities of the company.”

In *McGee v. International Life Insurance Company,* the Court returned to the problem of a lawsuit arising directly from a corporation's minimal activities in the forum state. In 1948, International, a Texas-based insurance company, assumed the insurance obligations of an Arizona insurance company, Empire Mutual. Prior to the transfer of obligations Empire had insured the life of Lowell Franklin, a California resident, although Empire apparently never had an office or any agents in California. When International assumed the liabilities of Empire, it “mailed a reinsurance certificate to Franklin in California offering to insure him in accordance with the terms of the policy he held with Empire Mutual,” and “so far as the record . . . show[ed],” this was the only California insurance business in which International had ever engaged. Franklin accepted International's reinsurance offer, and from 1948 until 1950 he paid his premiums, mailing them from his California home to International's Texas office. After Franklin died in 1950, the beneficiary of the policy, Mrs. McGee, filed a claim with International; but the company denied it. Mrs. McGee then filed suit against

193. *Id.* at 446.
194. *Id.*
195. *Id.* at 447 (emphasis in original).
196. *Id.* at 448. The Court remanded the case to the Ohio Supreme Court for a determination of whether its courts had jurisdiction under the state's statute, *id.* at 449, and the Ohio Supreme Court subsequently ruled that state law did confer jurisdiction. *Perkins v. Benguet Consolidated Mining Co.*, 158 Ohio St. 145, 107 N.E.2d 203 (1952).
198. *Id.* at 221-22.
International in a California state court and recovered a default judgment.

Mrs. McGee could not collect her judgment in California, so she sought to enforce it in Texas. But the Texas court refused to give the California judgment full faith and credit. All parties agreed that, if the California court had jurisdiction over the defendant, "the Texas courts erred in refusing to give its judgment full faith and credit" and that the issue before the Supreme Court was whether the California court had jurisdiction to render a binding judgment. 199 But before Mr. Justice Black's opinion for an unanimous court considered that precise issue, he briefly reviewed the Supreme Court's attempt since Pennoyer to place "some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries." 200 The "clearly discernable" trend was, he declared, "toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents," a trend that he attributed at least in part "to the fundamental transformation of our national economy over the years." 201 Accompanying "this increasing nationalization of commerce" had been modern transportation and communications changes; these developments had "made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 202

Turning his attention more specifically to the case before him, Mr. Justice Black held that "the Due Process Clause did not preclude the California court from entering a judgment binding on [International]." 203 He derived this holding from the suit's basis in a "contract which had substantial connection with [California]." 204 The connection included the delivery of the contract in California, the mailing of premiums from California, and the insured's California residence at the time of his death. Moreover, as he had done in Traveler's Health Association, Mr. Justice Black emphasized the state's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." 205 Although he recognized that holding International amenable to suit in California might result in some inconvenience to the company, he rejected the
From *International Shoe* through *McGee*, the Supreme Court consistently had expanded the authority of state courts to render binding judgments against foreign corporations, but *Hanson v. Denckla*, rendered in the term following *McGee*, broke that pattern. In 1935 Mrs. Dora Bonner created a trust, reserving the trust income to herself for life and allowing her to name the remainderman beneficiary by *inter vivos* power of appointment or in her will. When she created the trust, Mrs. Bonner was a Pennsylvania domiciliary, but she executed the trust instrument in Delaware, and she named a Delaware bank as trustee. She later moved her domicile to Florida, where she carried on several bits of trust administration and, in 1949, executed a power of appointment over the remainder of the trust. At the same time she also executed her will, which gave the residuary legatees all property over which she had an unexercised power of appointment at her death.

After Mrs. Bonner died in Florida in 1942, the residuary legatees under the will filed suit in Florida seeking a determination that her attempt to exercise the power of appointment was ineffective and that they were entitled to the assets of the trust. Most of the beneficiaries of the trust named by the power of the appointment were Florida residents and were served with process in the state. The Delaware trustee was not served but was mailed a "Notice to Appear and Defend" together with a copy of the complaint; the trustee never appeared in the suit and a default judgment was entered against it. While the Florida suit was pending, the trust beneficiaries under the 1949 power of appointment commenced an action in Delaware seeking a judicial determination as to who was entitled to the trust assets. The Florida Supreme Court

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206. *Id.* at 224. He also noted that "[t]here is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear." *Id.*

207. 357 U.S. 235 (1958). Mr. Justice Black dissented and filed an opinion that Mr. Justice Burton and Mr. Justice Brennan joined. In arguing that the Florida court's assertion of jurisdiction did not offend due process, he stressed that state's interest in applying its own laws, the convenience of the forum for all, and the relationship between the transaction and the forum state. 357 U.S. 258-59 (Black, J., dissenting).

Mr. Justice Douglas also filed a dissenting opinion. He emphasized the state's interest in determining the distribution of Mrs. Donner's assets which include the power of appointment, as well as the nexus between the decedent-settlor and her trustee. He contended that these considerations gave Florida "the right to make the controlling determination even without personal service over the trustee," since the suit merely determined "interests in . . . intangibles" and did not seek "to impose liability on the Delaware trustee." 357 U.S. at 262-63 (Douglas, J., dissenting).
ruled first and held that the residuary legatees were the rightful beneficiaries of the trust. 208 The Delaware Supreme Court declared, however, that it was not bound by the Florida judgment because that judgment depended on the unconstitutional exercise of jurisdiction over the Delaware trustee; it ruled that the trust assets should pass to the beneficiaries named in the power of appointment. 209 Not surprisingly, the United States Supreme Court granted certiorari to both state courts. 210

Although the factual setting was thus intricate, the Court's majority treated the decisive issue as whether Florida could exercise jurisdiction over the Delaware trustee. 211 If so, Delaware erred in refusing to give the Florida judgment full faith and credit; if not, the Florida judgment was a nullity and the Delaware court, which had jurisdiction with respect to its suit, was free to decide the issue for itself.

A sharply divided Court ruled that Florida lacked in personam jurisdiction over the Delaware trustee. The majority opinion of Mr. Chief Justice Warren began its analysis of this issue by conceding that one could discern, in the transition from the "rigid rule" of Pennoyer to the "flexible standard" of International Shoe, a "trend of expanding jurisdiction over nonresidents." 212 Nonetheless, he declared that the trend did not herald "the eventual demise of all restrictions on the personal jurisdiction of state courts," because the restrictions were "more than a guarantee of immunity from inconvenient or distant litigation." 213 They resulted from "territorial limitations on the power of the respective States" that could not be overcome no matter how "minimal the burden of defending in a foreign tribunal." 214 The minimum contacts that International Shoe required were a "prerequisite to its exercise of power over [a defendant]." 215 Or, as the Chief Justice reformulated the International Shoe test later in the opinion, the defendant must by some act "purposefully [avail] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 216

208. Hansen v. Denckla, 100 So. 2d 378 (Fla. 1956). For a more complete description of the lower court proceedings, see Kurland, supra note 63, at 611-14.
211. 357 U.S. at 255.
212. Id. at 250-51.
213. Id. at 251.
214. Id.
215. Id.
216. Id. at 253.
In the case before him, the Chief Justice concluded that the Delaware trustee did not have the requisite contact with Florida.

The defendant trust company has no office in Florida, and . . . [has transacted] no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail.\textsuperscript{217}

He distinguished \textit{McGee} on the ground that the trustee had not “performed any acts in Florida that bear the same relationship to the agreement as the solicitation in \textit{McGee},”\textsuperscript{218} and he specifically rejected the suggestion that the Florida courts had jurisdiction over the nonresident trustee “because the settlor and most of the appointees and beneficiaries were domiciled in Florida.”\textsuperscript{219} A state court, he argued, “does not acquire . . . [in \textit{personam} jurisdiction over a nonresident] by being the ‘center of gravity’ of the controversy, or the most convenient location for litigation.”\textsuperscript{220} Since the issue concerned “personal jurisdiction, not choice of law,” the essential inquiry was whether the acts of the nonresident trustee were adequate to confer jurisdiction; he concluded that they were insufficient.\textsuperscript{221}

For two decades \textit{Hanson} remained the last major Supreme Court decision with respect to the jurisdiction of state courts. But \textit{Hanson} did not reverse the general trend of expanding state court jurisdiction,\textsuperscript{222} perhaps because it could be interpreted as an anomaly designed to do substantive justice in the particular case before the Court.\textsuperscript{223} At any rate, state courts continued the expansive trend—especially with respect to foreign corporations—although jurisdictional boundaries were never totally obliterated.\textsuperscript{224}

\textsuperscript{217} \textit{Id.} at 251.
\textsuperscript{218} \textit{Id.} at 252. Mr. Chief Justice Warren also relied on the state’s special regulation of insurance companies as a ground for distinguishing \textit{McGee}. \textit{Id.}
\textsuperscript{219} \textit{Id.} at 254.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.} This resolution of the jurisdictional issue made it unnecessary to decide the due process claim that the Delaware plaintiffs raised with respect to the merits—“that the contacts the trust agreement had with Florida was so slight that it was a denial of due process to determine its validity by Florida law.” \textit{Id.} at 254 n.27.
\textsuperscript{223} \textit{See} J. \textit{Cound}, J. \textit{Friedenthal} & A. \textit{Miller}, \textit{Civil Procedure: Cases & Materials} 141 (2d ed. 1974); Hazard, \textit{supra} note 13, at 243-44.
\textsuperscript{224} \textit{See}, e.g., Benjamin v. Western Boat Building Corp., 472 F.2d 723 (5th Cir. 1973); Safari Outfitters, Inc. v. Superior Court, 167 Colo. 456, 448 F.2d 783 (1968);
In two of its last three terms the Supreme Court has again returned to the question of the ability of a state court to exert in personam jurisdiction over an out-of-state defendant. Both decisions reiterated the Hanson theme that International Shoe did not signify an end to the significance of state territorial boundaries and emphasized the necessity of the defendant's contacts with the forum state as a prerequisite to the exercise of state court jurisdiction.

Kulko v. Superior Court involved California's attempt to increase the amount of child support that a New York domiciliary was required to pay. The Kulkos had lived together in New York prior to their separation in 1972. Following the separation, Mr. Kulko remained in New York but Mrs. Kulko moved to California. A separation agreement granted Mr. Kulko custody of the couple's children during the school year; but it gave Mrs. Kulko custody during vacations and required Mr. Kulko to pay Mrs. Kulko $3,000 per year in child support. The Kulko's daughter subsequently told her father that she wanted to remain in California with her mother, and Mr. Kulko arranged for her to do so. Somewhat later, the Kulko's son told his mother that he wanted to live with her, and Mrs. Kulko arranged for him to travel to California without consulting her former husband. Once she had assumed responsibility for the year-round care of the children, Mrs. Kulko filed an action in California seeking to increase the amount of support that the New York court had required Mr. Kulko to pay. The California Supreme Court held that its courts had jurisdiction to enter a modified support judgment against Mr. Kulko.


225. 436 U.S. 84 (1978). Mr. Justice Brennan filed a brief dissenting opinion that Mr. Justice White and Mr. Justice Powell joined. 436 U.S. at 101-02 (Brennan, J., dissenting). Although he refused to say that the majority's "determination against state-court in personam jurisdiction [was] implausible," he nonetheless dissented because his "independent weighing of the facts . . . [led him] to conclude, in agreement with the analysis and determination of the California Supreme Court, 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." Id. at 102.

226. The Kulkos were divorced later under a Haitian decree that incorporated the terms of their earlier separation agreement. 436 U.S. at 87.

The Supreme Court reversed. Mr. Justice Marshall's majority opinion confirmed that the minimum contacts principle applied to individuals as well as corporate defendants, but it emphasized the necessity for "a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum."\(^{228}\) In light of this requirement Mr. Kulko was not subject to the jurisdiction of California's courts because he "did not purposely derive benefit from any activities relating to the State of California."\(^{229}\) The majority dismissed Mr. Kulko's action in sending his daughter to live with her mother in California with the observation that 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."\(^{230}\) It also rejected the contention that California's exercise of in personam jurisdiction was justified by the financial benefit Mr. Kulko received from his daughter's presence in California.\(^{231}\) It found this financial benefit, "even if true," insufficient to support California's exercise of in personam jurisdiction for two reasons: "Any diminution . . . in [Mr. Kulko's] household costs resulted, not from the child's presence in California, but rather from her absence from . . . [his] home;" and "[a]ny ultimate financial advantage" to Mr. Kulko resulted "not from the child's presence in California, but from . . . [Mrs. Kulko's] failure earlier to seek an increase in payments under the separation agreement."\(^{232}\)

\(^{228}\) 436 U.S. at 91. Cf. id. at 100-01:

It cannot be disputed that California has substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children. But these interests simply do not make California a "fair forum," . . . in which to require . . . [Mr. Kulko], who derives no personal or commercial benefit from his child's presence in California and who lacks any other relevant contact with the State, either to defend a child-support suit or to suffer liability by default.

\(^{229}\) Id. at 96. The Court agreed with the California Supreme Court that neither two visits to California by Mr. Kulko in 1959 and 1960 nor the conducting of the Kulkos' marriage ceremony in California "for reasons of convenience" during one of those visits provided sufficient contacts to confer jurisdiction on California's courts. Id. at 93.

\(^{230}\) Id. at 94 (footnote omitted).

\(^{231}\) Id. at 94-95. Since the children were living in California, Mr. Kulko's expenses to support them presumably were reduced without a corresponding increase in child support payments.

\(^{232}\) Id. (footnote omitted).
Not only did the Court find that Mr. Kulko’s lack of any purposeful availment of the benefits of California law precluded that state’s exercise of jurisdiction, but it also ruled that California’s attempt to exercise jurisdiction was unreasonable and violated “basic considerations of fairness.” The “circumstances in this case clearly render[ed] ‘unreasonable’ California’s assertion of personal jurisdiction” because Mr. Kulko had not “visited physical injury on either property or persons within the State” nor did Mrs. Kulko’s claim arise “from the defendant’s transactions in interstate commerce, but rather from his personal, domestic relations.” In addition, the Court concluded that “basic considerations of fairness point decisively in favor of . . . [Mr. Kulko’s] State of domicile as the proper forum for adjudication of this case.” To support this conclusion, Mr. Justice Marshall emphasized Mr. Kulko’s long-time domicile in New York, which had also been the site of the matrimonial domicile, and his mere acquiescence in “the stated preference of one of his children to live with her mother in California.” This action, he declared, would not lead a reasonable parent to anticipate “the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away.” By contrast, insofar as California had legitimate interests “in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children of the State are to be raised,” those interests were protected adequately by the Uniform Reciprocal Enforcement of Support Act that “permits a California resident claiming support from a nonresident to file a petition in California and have its merits adjudicated in the state of the alleged obligor’s residence, without either party’s having to leave his or her own State.”

The Supreme Court’s most recent decision with respect to in personam jurisdiction, the January 21, 1980 decision in World-Wide Volkswagen Corp. v. Woodson, confirmed that the renewed inter-
est in the territorial limits of state court jurisdiction extended to corporate defendants as well as individuals. The defendants in *Woodson* were a New York automobile dealership, Seaway Volkswagen, Inc., and a New York corporation that was the distributor for the New York, New Jersey, and Connecticut area, World-Wide Volkswagen Corporation. The precise issue before the Supreme Court was whether an Oklahoma court could exercise jurisdiction over these defendants "in a products liability action, when . . . [their] only connection with Oklahoma . . . [was] the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma." The Court ruled that an Oklahoma court could not exercise jurisdiction under these circumstances because the defendants had "no 'contacts, ties, or relations' with the State of Oklahoma." Mr. Justice White's majority opinion proceeded from the premise that "a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State." This limitation on the jurisdiction of state courts served "two related, but distinguishable, functions": (1) protecting "the defendant against the burdens of litigating in a distant or inconvenient forum;" and (2) insuring "that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." The majority opinion noted that prior decisions had typically

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239. The plaintiffs also sued the manufacturer of the automobile and its importer, both of them remained as defendants in the Oklahoma suit despite the Supreme Courts' decision in *Woodson* 444 U.S. at 288.
240. *Id.* at 287.
241. *Id.* at 299.
242. *Id.* at 291.
243. *Id.* at 291.
described the first function of the minimum contacts principle, protecting against inconvenient litigation, "in terms of 'reasonableness' and 'fairness.'" According to Mr. Justice White, this "emphasis on reasonableness" allowed the Court to retain "the burden on the defendant" as a primary concern while also permitting consideration of other relevant factors such as "[1] the forum State's interest in adjudicating the dispute . . .; [2] the plaintiff's interest in obtaining convenient and effective relief . . .; [3] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and [4] the shared interest of the several States in furthering fundamental substantive social policies." As a practical matter, the variety of factors considered under this reasonableness standards substantially had relaxed "[t]he limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation," a trend "largely attributable to a fundamental transformation in the American economy."

Despite this relaxation of due process limits, the Woodson majority affirmed that the Court had "never accepted the proposition that state lines are irrelevant for jurisdictional purposes" and could not if it was to "remain faithful to the principles of interstate federalism embodied in the Constitution." Those principles, the Court declared, required "that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." This guarantee of sovereignty, in turn, "implied a limitation on the sovereignty of all of its sister States," a limitation that the Court never expressly defined, but which apparently consisted of the prohibition against a sister state exerting in personam jurisdiction over a defendant who lacked contacts with the state. Moreover, this limit on state sovereignty applied regardless of whether jurisdiction was appropriate under the tests of reasonableness or fairness; that is, it precluded the exercise of jurisdiction "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; [and] even if the forum State is the most convenient location for litigation."
This limit on state sovereignty formed the basis for the Woodson holding that Oklahoma could not exercise jurisdiction over the New York retailer or the New Jersey distributor. Neither defendant carried on any of its corporate activities in Oklahoma nor did either attempt to serve the Oklahoma automobile market, directly or indirectly. Thus, the only basis for jurisdiction was "the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma"; this circumstance was insufficient to establish "those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction."251

The Court expressly rejected the argument "that because an automobile is mobile by its very design and purpose it was 'foreseeable' that the . . . [plaintiff's] Audi would cause injury in Oklahoma."252 According to the majority, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."253 Although conceding that foreseeability was not "wholly irrelevant," the Woodson majority emphasized that "the foreseeability that is critical to Due Process analysis is not the mere likelihood that a product will find its way into the forum State."254 Instead, foreseeability embodies the requirement "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."255 This requirement permitted a state court to exercise jurisdiction over a non-resident corporation" if the sale of a product of a manufacturer or distributor is not simply an isolated occurrence, but arises from the efforts of the . . . [defendant] to serve directly or indirectly, the market for its product in other States."256 But "no such or similar basis for Oklahoma jurisdiction over . . . [the retailer and distributor]" existed in Woodson because neither corporation had sought to serve the Oklahoma market.257

251. Id. at 295.
252. Id. at 295.
253. Id. at 295.
254. Id. at 297.
255. Id. at 297.
256. Id.
257. Id. Nor was the Court persuaded by the argument that the Woodson defendants earned "substantial revenues from goods used in Oklahoma" since "the purchase of automobiles in New York, from which the petitioners earn[ed] substantial revenue, would not occur but for the fact that the automobiles are capable of use in distant states like Oklahoma." Id. at 298. According to the Court, major "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with the State." Id. at 299.
In Rem Jurisdiction

The adoption of the minimum contacts principle for in personam jurisdiction led to the growth of a considerable body of commentary arguing that a minimum contacts or fairness principle should be substituted for Pennoyer's territorial framework for in rem cases as well. This scholarly ferment directed little attention to suits to quiet title to real estate or to determine the ownership of tangible property because everyone appeared to concede that the state where the property was located would have jurisdiction in these cases under either principle. But commentators did argue that the flexible rule of International Shoe would permit the overruling of Dunlevy and allow a desirable expansion of in rem jurisdiction in cases involving claims to intangible property in which no state could exercise in personam jurisdiction over all the potential claimants.

Even more scholarly attention was directed at criticism of the exercise of quasi-in-rem jurisdiction in cases like Harris, which allowed states the authority to dispose of the property of nonresidents within their borders even in lawsuits to satisfy claims unrelated to the property. Now that International Shoe permitted a state's courts to exercise in personam jurisdiction over a nonresident defendant whenever the defendant had sufficient contacts with the forum state to "make it reasonable, in the context of our federal system of government, to require the . . . [defendant] to defend the particular suit which is brought there," critics of the Harris rule argued that its only function was to allow a state, merely because a person owned property within its borders, to adjudicate a contro-

258. But cf. Shaffer v. Heitner, 433 U.S. 186, 213 (1977) (in explaining why the Delaware courts lacked quasi-in-rem jurisdiction, the Court emphasized that the record did not indicate that the defendants has "ever set foot in Delaware" nor that "any act related to this cause of action [had] taken place in Delaware").

259. For a description of the Dunlevy holding, see notes 90-93, supra, and accompanying text.


262. 326 U.S. at 317.
versy that it was unreasonable to require the person to litigate there. This result, they contended, was inconsistent with an essential element of the International Shoe principle, the prohibition against a state rendering binding judgments "against an individual or corporate defendant with which the state has no contacts, ties, or relations." 263

The 1950 decision in Mullane v. Central Hanover Bank & Trust Company 264 appeared to support the position that the minimum contacts principle had replaced Pennoyer's emphasis on territoriality with respect to attempts to exercise jurisdiction, whether labeled in personam or in rem. Mullane involved a New York statutory scheme designed to provide an accounting binding on all claimants to trust funds administered by New York banks. 265 Objectors to the accounting in Mullane 266 argued that New York's courts lacked authority to "adjudicate at all as against those beneficiaries who reside without the State" because "the proceeding is one in personam in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust." 267 The Court swiftly rejected this challenge to state jurisdictional authority, and it did so without deciding whether the New York proceeding was in personam or in rem. "Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of the law, or on other issues," Mr. Justice Jackson's majority opinion refused to "rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis." 268 To the contrary, the majority was content to rely on the following justification:

[W]hatever 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 interest of all claimants, resident or nonresident." 269

263. Id. at 319.
266. The appellants in Mullane were the special guardians and attorneys that the court appointed for "all persons known or unknown not otherwise appearing who had or might thereafter have any interest" in the income or principal of the common trust fund. 339 U.S. at 310.
267. Id. at 311.
268. Id. at 312-13.
269. Id. at 313.
Despite the language of *Mullane* the Supreme Court never completely abandoned the distinction between actions *in personam* and those *in rem*, nor did it jettison the territorial principle in defining the limits of *in rem* jurisdiction. In *Hanson* the Court appeared to foreclose the use of the minimum contacts principle to expand *in rem* jurisdiction with respect to claims concerning rights to intangibles. Mr. Chief Justice Warren's majority opinion adhered to Pennoyer's territorial framework in explaining the reach of *in rem* jurisdiction by describing it as "[f]ounded on physical power" and "limited by the extent of . . . [the state's] power and by the coordinate power of sister States" and identifying its essential element as "the presence of the subject property within the territorial jurisdiction of the forum State." Although the Chief Justice conceded that "the situs of intangibles is often a matter of controversy," that issue was not a problem in *Hanson*:

The parties seem to assume that the trust assets that formed the subject matter of this action were located in Delaware and not in Florida. We can see nothing in the record contrary to that assumption, or sufficient to establish a situs in Florida.271

The *Hanson* majority also rejected the Florida court's holding that "the presence of the subject property was not essential to its jurisdiction."272 According to the Chief Justice, Florida's probate authority did not allow it to determine the validity of Mrs. Donner's *inter vivos* power of attorney because of "the contingent role of this Florida will,"273 which applied only if the power of appointment were ineffective. Such an expansion of probate jurisdiction was unacceptable, he declared, because it would grant probate courts "nationwide service of process to adjudicate interest in property with which neither the State nor the decedent could claim any affiliation."274

*Hanson* did not completely settle the question of whether the minimum contacts principle could be used to expand a state's ability to exert *in rem* jurisdiction. Only a week after *Hanson* was decided,

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270. 357 U.S. at 246. In the paragraph preceding the language quoted in the text the Chief Justice reaffirmed the utility of the *in personam* and *in rem* classifications, although he conceded that they did not "exhaust all the situations that give rise to jurisdiction." Id.
271. Id. at 246-47.
272. Id. at 247. *Hanson* also found Mrs. Donner's Florida domicile "equally unavailing as a basis for jurisdiction over the trust assets." Id. at 249. Declaring "the maxim that personality has its situs at the domicile of its owner" to be a "fiction of limited utility," the majority concluded that "[t]he fact that the owner is or was domiciled with the forum State is not a sufficient affiliation with the property upon which to base jurisdiction *in rem*." Id.
273. Id. at 248.
274. Id. at 248-49.
the Supreme Court denied certiorari in *Atkinson v. Superior Court*, a widely noted decision of the California Supreme Court that relied on the minimum contacts principle to approve the exercise of *quasi-in-rem* jurisdiction with respect to intangibles without an explicit determination that the property was physically present in California. In light of this denial, one could dismiss the apparent clarity of the *Hanson* language with respect to *in rem*, as well as *in personam*, jurisdiction as designed to achieve a just substantive result in the case before the court. In fact, at least two states relied on *International Shoe’s* fairness concept to stretch *quasi-in-rem* jurisdiction in tort cases; they characterized the alleged tortfeasor’s insurance policy as a debt that the company owed to the tortfeasor and allowed jurisdiction based on an attachment of the policy. The effect of this expansion was to permit the state’s courts to exercise jurisdiction over lawsuits based on automobile accidents occurring outside the state when the plaintiff was a resident of the forum and the alleged tortfeasor was insured by a company licensed to do business within the state.

Although the Court vacillated on the issue of whether the minimum contacts principle could expand *in rem* jurisdiction, the 1977 decision of *Shaffer v. Heitner* expressedly answered in the affir-

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276. See Cound, Friedenthal, & Miller supra note 223, at 141.
278. 433 U.S. 186 (1977). See Note, Shaffer v. Heitner: The Conceptual and Practical Effects 30 Baylor L. Rev. 183 (1978); Note, 13 Tulsa L.J. 82 (1977). Mr. Justice Powell filed a concurring opinion. Although he agreed with the Court’s extension of the principles of *International Shoe* to govern assertions of *in rem* jurisdiction as well as its determination that the defendants in *Shaffer* had insufficient contacts for Delaware to exercise jurisdiction, he preferred to reserve judgment as to “whether the ownership of some forms of property whose situs is indisputably and permanently located with a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State,” at least to the extent of the value of the property. 433 U.S. at 217 (Powell, J., concurring). In a separate concurring opinion, Mr. Justice Stevens urged that the holding be limited to a determination that the due process clause protected defendants “against ‘judgments without notice.'” 433 U.S. at 217 (Stevens, J., concurring). He argued that the requisite notice should provide both “actual notice of the particular claim” and a “fair warning” that the activity undertaken could subject a person to the jurisdiction of a foreign sovereign. According to Mr. Justice Stevens, the defect in *Shaffer* was the failure to provide “fair warning” that the ownership of stock would subject the defendants to the jurisdiction of Delaware’s courts.

Mr. Justice Brennan dissented. He agreed that the minimum contacts standard
mative the question of whether the minimum contacts principle limited a state's ability to exercise quasi-in-rem jurisdiction based on the presence of property within its borders. The basis for jurisdiction in Shaffer was a Delaware sequestration statute\(^7\) that allowed a state court "to compel the personal attendance" of a nonresident defendant by seizing his property within the state.\(^8\) In Shaffer, the plaintiff had sought to use the sequestration statute in a shareholder's derivative action to obtain jurisdiction over the nonresident directors of Greyhound Corporation, a corporation incorporated in Delaware. The property that was the subject of the sequestration order was stock options in the Greyhound Corporation; under state law, the stock of a Delaware corporation had a situs within that state.\(^9\)

Applying the Harris rule,\(^282\) Delaware's courts had little difficulty rejecting the jurisdictional challenges of the Shaffer defendants.\(^283\) The presence of their property within the state was sufficient to give Delaware's courts authority to dispose of the property in an unrelated dispute, and thus the defendants' contacts (or lack of contacts) with the forum state were irrelevant. The Supreme Court, however, refused to accept this "categorical analysis" because it was based on a faulty assumption of "the continued soundness of the conceptual framework founded on the century-old case of Pennoyer v. Neff."\(^284\)

should govern in all cases involving challenges to state-court jurisdiction; however, he declared that the majority's determination of whether minimum contacts were present was a mere "advisory opinion" because the Delaware judgment was based on a traditional analysis of quasi-in-rem jurisdiction. 436 U.S. at 220-21 (Brennan, J., dissenting). He also argued that, if it were appropriate for the Court to decide the minimum contacts issue on the existing record, the Shaffer defendants had sufficient contacts to allow Delaware to exercise jurisdiction over them. Id. at 222-28.


280. 433 U.S. at 193 (quoting decision of the Delaware Court of Chancery). Delaware did not recognize the limited appearance. See notes 155-59, supra, and accompanying text. To offer a defense on the merits, defendants whose property had been sequestered had to enter a general appearance thus subjecting themselves to in personam, liability. Id. at 195 n.12.


282. See notes 86-89, supra, and accompanying text.

283. Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976). The Delaware court also rejected the contention that the prejudgment attachment procedures violated the due process standards established by Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), but the Supreme Court never reached this question because of its resolution of the jurisdictional issue. 433 U.S. at 93.

284. 433 U.S. at 196.
JURISDICTION

After reviewing the Pennoyer holding in some detail, Mr. Justice Marshall's majority opinion in Shaffer described the quasi-in rem doctrine as an amelioration of the harshness of Pennoyer's in personam rules, which "favored nonresident defendants by making them harder to sue." But the intervening decades had expanded significantly the state's ability to exert in personam jurisdiction over a nonresident. As a result of the line of decisions extending from Hess to International Shoe, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer rest, became the central concern of the inquiry into personal jurisdiction."286

Mr. Justice Marshall acknowledged that "[n]o equally dramatic change has occurred in the law of governing jurisdiction in rem;" nonetheless, he detected "intimations that the collapse of the "in personam wing of Pennoyer has not left that decision unweakened as a foundation for in rem jurisdiction" in "[w]ell-reasoned lower court opinions,"287 as well as scholarly commentary288 and in the increasingly strict notice requirements that the court's decisions had imposed in cases in which jurisdiction was based on the attachment of property.289 In light of these developments, he concluded that "the time is ripe to consider whether the standard of fairness and substantial justice set forth in International Shoe should be held to govern actions in rem as well as in personam."290

The majority described the argument for applying the International Shoe standard to in rem jurisdiction as "simple and straightforward."291 Its basic premise was the acceptance of the Restatement's assertion that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction

285. Id. at 200.
286. Id. at 204.
288. 433 U.S. at 205, citing Hazard, supra note 13; von Mehren & Trautman, supra note 260; Traynor, supra note 261; Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 YALE L.J. 289 (1956); Developments, supra note 156.
290. 433 U.S. at 206.
291. Id. at 207.
over the interests of persons in a thing."

Acceptance of this premise led naturally to the conclusion that "to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'" Since International Shoe's minimum contacts principle established "[t]he standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause," that standard should govern the exercise of in rem as well as in personam jurisdiction. To preserve the Harris rule merely would perpetuate "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property" and would amount to "support[ing] an ancient form without substantial modern justification." Unwilling "to allow state court jurisdiction that is fundamentally unfair to the defendant," the majority opinion declared in sweeping terms "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny."

Applying the minimum contacts principle to the factual situation involved in Shaffer, the majority found insufficient contacts with the state to permit Delaware to exercise jurisdiction over the nonresident directors. Even though the property had a "statutory presence" in Delaware, the defendants' ownership of the property could not provide contacts with Delaware sufficient to support the jurisdiction of that state's courts because the "property . . . [was] not the subject matter of this litigation, nor . . . [was] the underlying cause of action related to the property." Moreover, the plaintiff neither claimed that the defendants had "ever set foot in Delaware" nor identified "any act related to his cause of action as having taken place in Delaware." Under these circumstances the Court was unwilling to rely solely on the defendants' "positions as directors and officers of a corporation chartered in Delaware" to "provide sufficient 'contacts, ties, or relations' . . . with that State to give its courts jurisdiction over [them]." The majority recognized that Delaware might have an interest in asserting jurisdiction in stockholder derivation actions to protect its ability to define the respon-

293. 433 U.S. at 207.
294. Id.
295. Id. at 212.
296. Id.
297. Id. at 213.
298. Id.
299. Id. at 213-14 (footnote omitted).
sibilities of corporate officers. That interest, however, did not authorize jurisdiction in Shaffer because of "the failure of the Delaware Legislature to assert the state interest that [the plaintiff] finds so compelling," the basis for jurisdiction under Delaware law rested not on the defendants' "status as corporate fiduciaries, but rather on the presence of their property in the State." Furthermore, "even if . . . [the plaintiff's] assessment of the importance of Delaware's interest . . . [was] accepted, his argument fail[ed] to demonstrate that Delaware . . . [was] a fair forum for this litigation," at most it demonstrated that Delaware's substantive law should govern the merits of the controversy. In conclusion, the majority declared that the defendants "have simply had nothing to do with the State of Delaware" since Delaware had "not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State" or "required . . . [the defendants] to acquire interests in . . . [the corporation] in order to hold their positions."

The decision in Shaffer understandably raised doubts as to the continued validity of the cases permitting a state court to exercise jurisdiction in tort suits against nonresidents by attaching the alleged tortfeasor's insurance policy. The initial results in the lower courts were encouraging; at least two state courts and the second circuit upheld insurance attachment jurisdiction in cases after Shaffer. But the arguments supporting those decisions failed to persuade the Supreme Court in Rush v. Savchuck, which invalidated Minnesota's attempt to base jurisdiction on an insurance attachment

300. Id. at 214.
301. Id.
302. Id. at 215.
306. 444 U.S. 320 (1980). Mr. Justice Brennan and Mr. Justice Stevens dissented. For a summary of Mr. Justice Brennan's dissent, which also applied to Woodson, see note 238 supra. Mr. Justice Steven's, dissent conceded that Shaffer precluded the assertion of quasi-in rem jurisdiction with respect to property that was located within the forum but had no relationship to the cause of action. Nonetheless, he argued that Shaffer did not preclude jurisdiction in Rush because the carrier did business in the forum and had contracted specifically in the attached insurance policy to defend against the very type of litigation that the case involved. 444 U.S. at 333 (Stevens, J., dissenting).
in a law suit between a Minnesota resident and an Indiana resident that arose as a result of an automobile accident in Indiana.\textsuperscript{307}

Mr. Justice Marshall again authored the majority opinion. It began its analysis with the \textit{Shaffer} directives that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in \textit{International Shoe} and its progeny" and that "[i]n determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'"\textsuperscript{308} Applying these directives to \textit{Rush}, the majority concluded that Minnesota could not exercise jurisdiction because the defendant "Rush . . . [had] never had any contacts with Minnesota."\textsuperscript{309} Indeed, "[t]he only affiliating circumstances offered to show a relationship among Rush, Minnesota, and this lawsuit is that Rush's insurance company does business in the State."\textsuperscript{310} This circumstance "suggest[ed] no further contacts between the defendant and the forum, and the record suppl[ied] no evidence of any."\textsuperscript{311}

The majority also rejected two other rationales to support jurisdiction in \textit{Rush}. First, it refused to uphold jurisdiction "by treating the attachment procedure as the functional equivalent of a direct action against the insurer."\textsuperscript{312} Mr. Justice Marshall gave two reasons for this reluctance: Under the insurance attachment schemes, "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee;"\textsuperscript{313} and the direct action analogy required an "assumption that the defendant has no real stake in the litigation," an assumption the majority opinion termed "far from self evident."\textsuperscript{314}

\begin{footnotesize}
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\item 307. The jurisdictional issue had a significant relationship to the merits in \textit{Rush}. Had Minnesota been allowed to exercise jurisdiction, its conflicts rules would have resulted in the application of Minnesota comparative negligence law in lieu of Indiana's contributory negligence rule and also might have refused to apply Indiana's guest statute. 444 U.S. at 325 n.8.
\item 309. 444 U.S. at 327.
\item 310. \textit{Id.} at 328.
\item 311. \textit{Id.}
\item 312. \textit{Id.} at 330.
\item 313. \textit{Id.} at 330-31.
\item 314. \textit{Id.} at 331. In a footnote, the Court gave some examples of circumstances in which the "nominal defendant" might have a substantial stake in the litigation:
A party does not extinguish his legal interest in a dispute by insuring himself against having to pay an eventual judgment out of his own pocket. Moreover, the purpose of insurance is simply to make the defendant whole for the economic costs of the lawsuit; but noneconomic factors may also be important to the defendant. Professional malpractice actions, for example, question the defendant's integrity and competence and may affect his professional standing . . . Further, one
\end{itemize}
\end{footnotesize}
Second, the majority also spurned the suggestion that sufficient contacts for Minnesota jurisdiction could be found “by considering the ‘defending parties’ together and aggregating their forum contacts in determining whether it had jurisdiction.”\(^{315}\) *International Shoe’s* requirements, Mr. Justice Marshall declared, had to be “met as to each defendant over whom a state court exercises jurisdiction.”\(^{316}\)

The *Rush* opinion closed by noting that the justification for jurisdiction shared a “common characteristic: ‘[T]hey shift the focus of the inquiry from the relationship among the defendant, the forum, and the litigation to that among the plaintiff, the forum, the insurer, and the litigation.”\(^{317}\) According to the majority, *International Shoe’s* minimum contacts principle forbade this approach. When “a defendant has certain judicially cognizable ties with a State,” *International Shoe* permitted consideration of a “variety of factors” to determine if a state’s exercise of jurisdiction would satisfy the fairness test.\(^{318}\) But when “the defendant has no contacts with the forum,” the due process clause precludes a state from making a binding judgment.\(^{319}\)

**Status Jurisdiction**

The Supreme Court never has brought the status cases completely within the umbrella of *International Shoe’s* minimum contacts principle. Indeed, the Court had not articulated any clear unifying principle in the status jurisdiction cases, nor has it ever ended the division between the due process and full faith and credit standards.\(^{320}\) The result has been somewhat of a hodgepodge—the divorce cases have significantly expanded the ability of a state to dissolve the marriage but not to end its financial obligations, while the custody decisions have made it difficult for a state to render any type of custody award that the Constitution requires a state court to treat as binding on a nonresident.

\(^{315}\) Id. at 331 n.20.
\(^{316}\) Id. at 331.
\(^{317}\) Id. at 332.
\(^{318}\) Id.
\(^{319}\) Id. at 332-33.
\(^{320}\) See H. CLARK, supra note 96, at 289-90; Corwin, Out-Haddocking Haddock, 93 U. PA. L. REV. 341 (1945).
Divorce

Even though the Supreme Court's decision in *Haddock v. Haddock* was criticized widely, even its dual requirements of domicile of one of the parties and *in personam* jurisdiction over both parties remained an accurate summary of the constitutional limits of divorce jurisdiction for forty years until *Williams v. North Carolina (Williams I)* overruled the requirement that the court acquire *in personam* jurisdiction over the defendant. *Williams* held that a state divorce judgment was entitled to full faith and credit if the plaintiff were domiciled in the forum state. It, therefore, reversed North Carolina bigamy convictions of two defendants who had returned to North Carolina after a three-month stay in Nevada during which they both received Nevada divorces, following constructive service of process on the absent spouses, and then married each other. The trial judge had charged the jury that North Carolina would not recognize a Nevada divorce decree based on substituted service when the defendant made no appearance. Expressly overruling *Haddock*, the Court declared that “[d]omicile creates a relationship to the state” authorizing the state to “alter within its own border the marriage status of the spouse domiciled there, even through the other spouse is absent,” and that a state court judgment exercising this authority is entitled to full faith and credit “if the form and nature of the substituted service . . . meet the requirements of due process.”

The North Carolina prosecutor refused to give up; however, he instituted a new bigamy action against the defendants in *Williams I*. A jury again convicted them after being charged that the recitation of Nevada domicile in the divorce decree was sufficient to support the inference that the defendants were domiciled there but it did

321. 201 U.S. 562 (1906). Even though *ex parte* divorce decrees rendered by a state where only one marriage partner was domiciled were not entitled to full faith and credit, a number of states recognized them as a matter of comity. *E.g.*, Crimm v. Crimm, 211 Ala. 13, 99 So. 301 (1924); Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684 (1914). See H. Goodrich, *Conflict of Laws* 348 (2d ed. 1938). The following articles are illustrative of the scholarly debate that *Haddock* generated. Beale, *Constitutional Protection of Decrees of Divorce*, 19 HARV. L. REV. 586 (1906); Beale, *Haddock Revisited*, 39 HARV. L. REV. 417 (1926); Bingham, *The American Law Institute v. the Supreme Court—In the Matter of Haddock v. Haddock*, 21 CORN L.Q. 393 (1939); McClintock, *Fault as an Element of Divorce Jurisdiction*, 37 YALE L.J. 564 (1928); Strahorn, *A Rationale of the Haddock Case*, 32 ILL. L. REV. 796 (1938); Vreeland, *Mr. and Mrs. Haddock*, 20 A.B.A.J. 568 (1934).


323. Id. at 290-91.


325. 317 U.S. at 299.
not compel such an inference. In *William v. North Carolina (Williams II)*, the Supreme Court affirmed the second set of convictions on the basis of an opinion that emphasized the state's territorial power, particularly its power to control the substantive law that governs those who live within its borders. Mr. Justice Frankfurter's majority opinion rested on two premises: (1) The full faith and credit clause precludes inquiry into the merits of a sister state's judgments "only if the court of the first State . . . [has] power to pass on the merits—has jurisdiction, that is, to render the judgment;" and (2) "under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile." Since the domicile of the parties was a jurisdictional requirement for divorce cases, a court could inquire whether domicile (the basis for divorce jurisdiction) existed prior to determining whether a divorce judgment was entitled to full faith and credit. Of course, even jurisdictional issues could not be relitigated "after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication" but this rule did not preclude relitigation by the state, which was not a party to the original litigation. Because the state "is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders," it had "a right, when asserting its own unquestioned authority, to ascertain the trust or existence of . . . [the] crucial fact [of domicile]."

Applying these principles, Mr. Justice Frankfurter concluded that North Carolina was not required to give full faith and credit to the Nevada divorce decrees because the North Carolina court gave the Nevada court's determinations the "appropriate weight" to which they were entitled and allowed the jury to overturn those determinations "only by relevant standards of proof." Although the Court recognized that because of its rule "persons may, no doubt, place themselves in situations that create unhappy consequences," it viewed that result as one "inevitable in a federal system in which regulation of domestic relations has been left with the States."
A companion case to Williams indicated that a spouse could also challenge the jurisdictional finding of domicile on which a divorce judgment was based. In Eisenwein v. Eisenwein the husband filed suit in Pennsylvania seeking to terminate a support order issued by a Pennsylvania court on the ground that a subsequent Nevada divorce decree extinguished his support obligation. The Pennsylvania Supreme Court refused to give the Nevada decree full faith and credit. It concluded that the defendant, Mrs. Eisenwein, had proved that her husband was not domiciled in Nevada when the judgment was rendered and that the Nevada court therefore lacked jurisdiction. The Supreme Court affirmed in a brief opinion. The majority insisted "[t]his case involves the same problem as that which was considered in [Williams II]" and thus concluded that "the considerations which controlled the result in [Williams II] govern this."334

In subsequent decisions the Court limited Williams II by reducing the occasions when a court, prior to giving a judgment recognition under the full faith and credit clause, could independently review the finding of domicile on which the court of a sister state based its jurisdiction. The starting point for analysis was Davis v. Davis, a pre-Williams II case holding that the parties could not relitigate the issue of domicile when the question had been fully explored in the original divorce action. But the pivotal case for limiting Williams II was Sherrer v. Sherrer, which precluded an

333. 325 U.S. 279 (1945). Mr. Justice Douglas filed a concurring opinion in which he emphasized that it was "important to keep in mind a basic difference between the problem of marital capacity and the problem of support." 325 U.S. at 281 (Douglas, J., concurring). When the parties to a marriage are domiciled in different states, the problem of marital capacity is one that involves many conflicting interest between the two states, but the problem of support is more clearly the concern of the state where the party seeking support is domiciled. Id. at 282. In later majority opinions, Mr. Justice Douglas expanded this distinction into the divisible divorce doctrine. See notes 366-93, infra, and accompanying text.

In a separate concurring opinion, Mr. Justice Rutledge announced his agreement with the argument set forth by Mr. Justice Douglas as well as his acceptance of the majority opinion as the natural application of the Williams II holding, from which he had dissented. 325 U.S. at 283 (Rutledge, J., concurring).

334. 325 U.S. at 279.

335. 305 U.S. 32 (1938).

336. 334 U.S. 343 (1948). In a dissenting opinion that Mr. Justice Murphy joined, Mr. Justice Frankfurter stressed the state's interest in "the continuance of termination of the marital relationship of its domiciliaries." Because of the importance that he attached to this interest, he would not allow "an arranged litigation between the parties in which [the state] was not represented" to foreclose the state from asserting this interest. 334 U.S. at 363 (Frankfurter, J., dissenting). He thus criticized the majority's interpretation of the full faith and credit clause on the ground that it threatened to give a "few states which offer bargain-counter divorces" the power to control the social
independent review of the domicile question in a situation where both parties appeared in the divorce action but the domicile issue was not really contested.

In Sherrer Mrs. Sherrer left Massachusetts, the place of the marital domicile, and went to Florida. She filed a lawsuit seeking a divorce in Florida, and her bill of complaint alleged that she was domiciled in the state. After receiving notice of the Florida action by mail, Mr. Sherrer retained a Florida attorney who entered a general appearance on his behalf and filed an answer denying Mrs. Sherrer's allegation that she was a Florida domiciliary. At the hearing on the merits Mrs. Sherrer offered evidence to prove her Florida domicile. Mr. Sherrer appeared at the hearing and testified with respect to a stipulation regarding custody, but his attorney did not cross-examine Mrs. Sherrer or otherwise rebut her evidence with respect to her domicile. The Florida court granted Mrs. Sherrer a divorce; in doing so, it specifically found that she was domiciled in Florida and that it had jurisdiction to grant the divorce. Mrs. Sherrer subsequently remarried and moved back to Massachusetts. When she returned, Mr. Sherrer filed an action seeking to have the Florida divorce declared invalid and the second marriage void. The Massachusetts courts refused to treat the Florida judgment as controlling on the jurisdictional issue and, after an independent examination of the facts, concluded that the Florida court lacked jurisdiction because Mrs. Sherrer was never domiciled in the state.

The Supreme Court reversed. Mr. Chief Justice Vinson's majority opinion began with the observation "that the proceedings in the Florida court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process." Indeed, Mr. Sherrer "was afforded his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of . . . [Mrs. Sherrer's] domicile." The more limited question in Sherrer was whether the finding of domicile by the Florida court could, "consistent with the requirements of full faith and credit, be subjected to collateral attack in the courts of a sister State in a suit brought by the defendant in the original pro-

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337. The complaint actually alleged that she was a "bona fide legal resident" of Florida, but the "Florida courts [had] construed the statutory requirement of resident to be that of domicile." 334 U.S. at 345 n.3.
339. 334 U.S. at 348.
340. Id. The Court also noted that the finding with respect to domicile was not subject to collateral attack in Florida.
Although the Court had never faced a situation precisely the same as the one in Sherrer, Davis was "clearly indicative of the result to be reached here." In conjunction with other similar cases, it stood for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.

According to the Chief Justice, these principles controlled Sherrer. If Mr. Sherrer "failed to take advantage of the opportunities afforded him, the responsibility . . . [was] his own." Under these circumstances the Court was unwilling to allow "the dereliction of a defendant" to "provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered."

Nor was the majority persuaded that divorce cases required a more lenient rule concerning collateral attack than other litigation because "the regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance." The Chief Justice recognized "the importance of a State's power to determine the incidents of basic social relationships into which its domiciliaries enter," but concluded that issue was irrelevant in Sherrer. Sherrer did not involve a "situation in which a State has merely sought to exert such power over a domiciliary," but was "rather, a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus present[ed] considerations which go beyond the interests of local policy, however vital." In this situation the Court's role did not involve a duty "to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters," but to apply the full faith and credit clause, which was "one of the provisions incorporated in to the Constitution by its framers for the purpose of

341. Id. at 349.
342. Id. at 351.
343. Id. at 351-52.
344. Id. at 352.
345. Id.
346. Id. at 354.
347. Id.
348. Id.
transforming an aggregation of independent, sovereign States into a nation."

Applying that clause in Sherrer, the majority concluded that, in refusing to recognize the Florida decree, "the Massachusetts courts have asserted a power which cannot be reconciled with the requirements of due faith and credit."

Later decisions expanded Sherrer by precluding collateral attack on divorce judgments by third parties whose claims were derived from their relationship to the original parties. Thus, Johnson v. Muelberger precluded the children of the marriage from challenging the jurisdiction of the court issuing a divorce decree when the court had in personam jurisdiction over both parents; Aldrich v. Aldrich refused to allow the estate of one of the parties to challenge the jurisdiction of the divorce court when Sherrer would have precluded the decedent from doing so. But the expansion of the Sherrer rule did not completely eviscerate Williams II. In Rice v. Rice the Court continued to permit a state to re-examine the jurisdictional finding of a sister state's court in situations in which the spouse challenging the jurisdiction was not subject to the in personam jurisdiction of the court rendering the divorce decree. Moreover, the Court has never decided whether Sherrer would apply to the type of lawsuit involved in Williams II, a state prosecution for the violation of its criminal laws.

**Custody**

During the second half of the twentieth century the constitutional restrictions on the ability of state courts to exercise jurisdic-

349. Id. at 354-55.
350. Id. at 355. A companion case, Coe v. Coe, 334 U.S. 378 (1948), applied Sherrer to a situation where the nonresident spouse entered an answer admitting the allegation of the divorce petition on which jurisdiction was based. Since there was no suggestion "that the decree of divorce in question is . . . [not] valid and final in the State in which it was rendered and, under the law of . . . [the husband's domicile], may not be subjected to the collateral attack permitted in this case," the decree was not subject to collateral attack outside the state where it was rendered. Id. at 383. "[H]ere, as in the Sherrer case, the decree of divorce is one which was entered after proceedings in which there was participation by both plaintiff and defendant and in which both parties were given full opportunity to contest the jurisdictional issues." Id. at 384. See Paulsen, *Divorce Jurisdiction By Consent of the Parties—Developments Since “Sher- rer v. Sherrer,“* 26 IND. L.J. 380 (1951):

"In theory, as far as federal law is concerned, the divorce decree of an American state is entitled to full faith and credit only if the divorcing state had jurisdiction of the subject matter by virtue of being the domicile of at least one of the parties. In practice, the decree of a state court which had personal jurisdiction over the parties to a marriage is entitled to full faith and credit so far as the couples are concerned."

tion in custody cases continued to be developed in the context of defining when a state had to give full faith and credit to the custody decrees of a sister state.\textsuperscript{354} For two reasons the extent of these restrictions remained minimal. As late as 1962, \textit{Ford v. Ford}\textsuperscript{355} affirmed the \textit{Halvey} rule\textsuperscript{356} that, since the full faith and credit clause only required that a judgment be given the same effect it would have had in the state where it was rendered, a court could modify the custody decree of a sister state whenever the courts of the state originally entering the decree could have done so. In addition, the Supreme Court ruled in \textit{May v. Anderson}\textsuperscript{357} that a custody decree was binding only on those persons who were subject to the personal jurisdiction of the court rendering the decree.

\textit{May} involved a Wisconsin decree that had awarded the father custody in an \textit{ex parte} divorce action. The decree awarded the mother certain visitation rights; several years later she kept the children when they came to visit her in Ohio. The father filed a habeas corpus petition in Ohio which was granted on the ground that the full faith and credit clause required Ohio's courts "to accept the Wisconsin decree as binding upon the mother."\textsuperscript{358}

The Supreme Court held that the Ohio court had misconstrued the requirements of full faith and credit. According to Mr. Justice Burton's opinion for the Court, the effect of the Wisconsin decree was to cut off "[r]ights far more precious to . . . [the mother] than property rights."\textsuperscript{359} He, therefore, concluded that her "right to custody of her children" should be denominated a "personal right" that could be extinguished only by a court exercising \textit{in personam} jurisdiction over her.\textsuperscript{360} Since the Ohio courts erroneously had given full faith and credit to the Wisconsin decree, the Supreme Court reversed the judgment and remanded the case for further proceedings.\textsuperscript{361}

Coupled with the \textit{Halvey-Ford} rule permitting modification of the custody decrees of sister states, \textit{May's} requirement, \textit{in personam}
jurisdiction before a custody decree was binding on an individual, provided substantial leeway for courts to circumvent the custody decision of sister states. Commentators frequently lamented the ease of avoiding a previous decree, but other observers, before and after May, argued that the decided cases failed to reveal the feared encouragement to child-snatching or unconcern for the value of a stable custodial environment to the child. At least two reasons explained why the results were less catastrophic than some anticipated. For one thing, judges often were reluctant to overturn considered custody decrees, especially when child-snatching was involved, regardless of whether the Constitution required full faith and credit recognition for the decree. In addition, the widespread adoption of the Uniform Child Custody Jurisdiction Act substantially limited, as a matter of state statutory law, a state's ability to exercise jurisdiction when a court in a sister state previously had rendered a child custody decree.

Support

The potential impact of Williams I on divorce-related support decrees was substantial. If the ability to grant a binding divorce decree encompassed the ability to render a binding judgment as to the post-divorce support obligations of the couple, one partner to the marriage could discard, simply by moving to a state with liberal divorce laws and no provision for alimony, all the unwelcome financial baggage associated with an unsatisfactory marriage. As a practical matter, such an approach would have permitted wealthy

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364. See H. CLARK, supra note 96, at 325.
365. UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 13 & 14. The Uniform Act basically requires a state to recognize and enforce the custody decree of another state if the first state had jurisdiction to render the decree. Modifications of the decree by the second state are prohibited, unless the first state's jurisdiction has ended or the first state has declined to exercise jurisdiction because of the inconvenience of the forum. A number of states have adopted the Act, and the number has climbed significantly in recent years. As of 1977, eighteen states had adopted the Act; by 1978, twenty-six had done so. See generally Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modification, 65 CALIF. L. REV. 978 (1977); Comment, Jurisdictional Guidelines in Matters of Child Custody: Kansas Adopts the Uniform Child Custody Jurisdiction Act, 27 KAN. L. REV. 469 (1979).
husbands to victimize non-working wives; but the Supreme Court
never endorsed this approach. Instead, the Court introduced the
concept of "divisible divorce," which distinguished a court's ability
to dissolve the marriage relationship from its ability to resolve the
financial responsibilities incidental to marriage dissolution.

A concurring opinion in Eisenwein first suggested the "divisible
divorce" distinction that eventually limited the reach of the
Williams I principle, which allows a state's courts to exercise
jurisdiction to dissolve the marital relationship if one of the parties
is domiciled in the state. In explaining why he concurred in Eisen-
wein while adhering to his dissent in Williams II, Mr. Justice
Douglas relied on what he termed "a basic difference between the
problem of marital capacity and the problem of marital support."366
He argued that the Court's task under the full faith and credit
clause was "to accommodate as fully as possible the conflicting inter-
ests of the two States."367 In cases raising the question of marital
capacity, the Court often faced "an irreconcilable conflict between
the policies of the two states," and it had to decide which "[o]ne
must give way in the larger interest of the federal union."368 But the
same conflict did not necessarily appear "when it comes to
maintenance or support."369 In this latter class of cases, "[t]he State
where the deserted wife is domiciled has a deep concern in the
welfare of the family deserted by the head of the household."370
Moreover, the refusal to grant full faith and credit to the support
aspect of the divorce decree imposed a much less onerous burden on
the spouse securing the divorce than would the court's refusal to
require recognition of the termination of the marriage: "If . . . [a hus-
band] is required to support his former wife, he is not made a
bigamist and the offspring of his second marriage are not bastard-
ized."371 According to Mr. Justice Douglas, this difference in impact
distinguished Eisenwein from Williams II and allowed the Penn-
sylvania court to "refuse to alter its former order to support or . . .
[to] enlarge it, even though Nevada in which the other spouse was
domiciled and obtained his divorce made a different provision for
support or none at all."372

366. 325 U.S. at 281. He relied on a recent law review article as authority for such
a distinction. Id. at 283, citing Radin, The Authenticated Full Faith and Credit Clause:
Its History, 39 ILL. L. REV. 1, 28 (1944).
367. 325 U.S. at 282.
368. Id.
369. Id.
370. Id.
371. Id. at 282-83.
372. Id. at 283.
Subsequent decisions converted Mr. Justice Douglas' concurring dictum into a holding. In *Estin v. Estin*1373 a New York court granted Mrs. Estin a separation decree and awarded her permanent alimony. Mr. Estin subsequently moved to Nevada and secured a divorce in that state. The Nevada decree made no provision for alimony, and so Mr. Estin discontinued his support payments. When Mrs. Estin filed suit to collect the arrears, he appeared and sought to eliminate the alimony provisions of the New York decree. Following *Williams II* the New York courts found that the Nevada divorce decree was valid because Mr. Estin was domiciled in Nevada when it was rendered, but they nonetheless refused to terminate the decree's prior support order.1374

Before the Supreme Court Mr. Estin argued that "the tail must go with the hide—that since by the Nevada decree, recognized in New York, he and . . . [Mrs. Estin] are no long husband and wife, no legal incidence of the marriage remains."1375 Echoing the theme of his *Eisenwein* concurrence, Mr. Justice Douglas began his analysis of the issue for the *Estin* majority by noting that allowing a state to change the "marital capacity" of persons "does not mean that every other legal incident of the marriage was necessarily affected."1376 He recognized that "[a]n absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind."1377 But he argued against such an absolutist view. "[T]here are," he asserted, "few areas of the law in black and white;" instead "[t]he greys are dominant and even among them the shades are innumerable."1378 Indeed, "the eternal problem of the law" has been to accommodate conflicting interests, and "[t]his is why most legal problems end as questions of degree."1379

In making the accommodation of interests with respect to the duty to give full faith and credit to the divorce judgments of a sister state, the *Estin* majority sharply distinguished a state's interest in the marital status of its domiciliaries from its interest in their support obligations. The question of marital status involved "the regularity and integrity of the marriage relation . . ., affect[ed] the legitimacy of the offspring of marriage . . ., [and was] the basis of

1373. 334 U.S. 541 (1948).
1375. 334 U.S. at 544.
1376. Id. at 545.
1377. Id.
1378. Id.
1379. Id.
These considerations had "long permitted the State of the matrimonial domicile to change the marital status of the parties by an *ex parte* divorce proceeding"; they were also the "considerations which in [Williams I and II] we thought were equally applicable to any State in which one spouse had established a bona fide domicile." But these considerations had little relevance to the question of whether the full faith and credit clause required New York to accept the Nevada divorce as a binding determination that the former husband no longer owed his wife any support obligation. Here the interests to be accommodated were significantly different. Not only was New York "rightly concerned lest the abandoned spouse be left impoverished," but the New York separation judgment was "a property interest of . . . [Mrs. Estin], created by New York in a proceeding in which both parties were present." The property thus created was an intangible, and "[j]urisdiction over an intangible . . . [could] . . . only arise from control or power over the persons whose relationships are the source of the rights and obligations." Since the domicile of the debtor within the forum state was insufficient to allow the state "to determine the personal rights of the creditor in the intangible," Nevada's position as the state of Mr. Estin's domicile did not give its courts jurisdiction to alter Mrs. Estin's rights under the New York judgment. The practical effect of this analysis was, as Mr. Justice Douglas recognized, "to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony." But this approach was acceptable because "[i]t accommodate[d] the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominate concern."

Nine years later the Court extinguished any lingering doubts about the extent of the divisible divorce doctrine in *Vanderbilt v. Vanderbilt.* In *Vanderbilt* the husband obtained a Nevada divorce decree, which was entitled to full faith and credit, before a New York court reduced his wife's right to support to a judgment. Mr.

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380. *Id.* at 546.
381. *Id.* at 547.
382. *Id.* at 547-48.
383. *Id.* at 548.
385. 334 U.S. at 549.
386. *Id.*
388. The New York court relied on the presence of Mr. Vanderbilt's property to authorize it to exercise *quasi-in-rem* jurisdiction. *Id.* at 417. *Shaffer v. Heitner,* 433
Justice Black's majority opinion recognized that this factor distinguished Estin, but treated the distinction as immaterial. Classifying Mrs. Vanderbilt's right to support under the law of New York as "a personal claim or obligation," the majority concluded that "the Nevada divorce court had no power to extinguish any . . . [such] right" because it lacked in personam jurisdiction over her. And since an essential element for jurisdiction was lacking, "the Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition."

The effect of Estin and Vanderbilt was to limit Williams I by restricting the impact that a divorce decree based on the plaintiff's domicile could have on the property rights of the nonresident spouse. But Simons v. Miami Beach First National Bank cautioned against too hasty a generalization that such an ex parte divorce decree could never affect property rights. Simons involved the question of whether a husband's valid Florida divorce, obtained in a proceeding wherein his nonresident wife was served by publication only and did not make a personal appearance, could extinguish constitutionally "her dower right in his Florida estate." The Court held that it could; "under Florida law no dower right survived the . . . [divorce] decree," and no constitutional prohibition precluded Florida from declaring "that dower rights in Florida property, being inchoate, are extinguished by a divorce decree predicated upon substituted or constructive service."

No similar distinction on the ability to issue support decisions

U.S. 186 (1977), would appear to preclude such jurisdiction today unless the defendant has sufficient contacts with the forum state to satisfy the minimum contacts test established by International Shoe.

389. 354 U.S. at 418. Cf. May v. Anderson, 345 U.S. 528 (1953) (right to custody of one's child is a personal right that can be extinguished only by a court able to exercise in personam jurisdiction over the parent). See notes 357-61, supra, and accompanying text.

390. 354 U.S. at 419.

391. 381 U.S. 81 (1965). Mr. Justice Harlan concurred in an opinion that interpreted Simons as a retreat from the principle that "an ex parte divorce can have no effect on property rights," a retreat that he favored. 381 U.S. at 87-88 (Harlan, J., concurring). In a separate concurrence that Mr. Justice Douglas joined, Mr. Justice Black argued that Simons represented no retreat from Estin and its progeny. Because the dower right vested only in "the legal wife of the husband when he dies," the divorce decree did not sever any existing right. 381 U.S. at 88-89 (Black, J., concurring). Mr. Justice Stewart and Mr. Justice Goldberg dissented, arguing that the writ should have been dismissed as improvidently granted since the only issues involved were questions of state law. 381 U.S. at 89 (Stewart, J., dissenting).

392. 381 U.S. at 82.

393. Id. at 85.
governed custody cases. To issue a custody decree entitled to full faith and credit, May required that the court have in personam jurisdiction over the parent; if the court had such jurisdiction, it could also order the parent to pay support. But Kulko revealed that the achievement of in personam jurisdiction could prove difficult when the parents lived in different states, and Shaffer now appeared to preclude the Pennington approach of quasi-in-rem jurisdiction to reach a defendant over whom a state could not exercise in personam jurisdiction.

Two developments mitigated these difficulties. First, state courts developed the doctrine of "continuing jurisdiction," which allowed a court, with in personam jurisdiction over the parties to a divorce or custody suit, to retain in personam jurisdiction for future modification of its decrees even though one of the parties later moved from the state. No Supreme Court decision ever explicitly endorsed this doctrine, but at least one state court has recently found it to be consistent with International Shoe's minimum contacts principle. Second, all states adopted some version of the Uniform Reciprocal Enforcement of Support Act, which offered a mechanism for a litigant to secure a support order against a nonresident in the nonresident's home state without the necessity of physically going to the state. Indeed, the availability of the uniform act was a principal reason that the Supreme Court concluded in Kulko that it would be unfair to allow California to exercise jurisdiction over the nonresident husband.

394. See notes 225-37, supra, and accompanying text.
395. See notes 278-303, supra, and accompanying text.
397. But see Kulko v. Superior Court, 436 U.S. 84, 95 (1978) (Court indicated that New York, where the parties lived together and obtained their original custody decree was the appropriate state to alter the original support order).
398. Parker v. Parker, 382 So. 2d 201 (La. App. 2d Cir. 1980). Cf. RESTATEMENT (SECOND), CONFLICT OF LAWS § 26 (1971) (continuing jurisdiction recognized so long as the absent party receives "[r]easonable notice and reasonable opportunity to be heard").
399. H. CLARK, supra note 96, at 206. A plaintiff invokes the procedures of the Act by filing a complaint in the court where he resides. The court of this initiating state then decides whether the petition "sets forth facts from which it may be determined" (1) that "the defendant owes a duty of support" and (2) that "a court of the responding state may obtain jurisdiction over the defendant." Id. at 207. If adequate facts are alleged, then the initiating state forwards the petition to the responding state where the duty of support will be adjudicated and, if necessary, enforced. Id. at 206-12.
400. 436 U.S. at 98-100. See notes 225-37, supra, and accompanying text.
Notice and the Opportunity to Appear

Notice

The Supreme Court increasingly categorized reasonable notice to the litigants as an independent requirement of due process in all litigation. Indeed, *International Shoe*'s concept of "traditional notions of substantial justice and fair play," which ultimately defined the state's authority to exercise *in personam* jurisdiction over nonresidents, was itself derived from earlier decisions applying the same test to judge the adequacy of notice in situations in which the state's ability to reach the nonresident was conceded. Moreover, modern decisions also confirmed that the notice requirement applied to state attempts to exert *in rem* or status as well as *in personam* jurisdiction.

*Mullane* was the leading decision confirming that the notice requirement was identical in *in personam* and *in rem* cases; it was also the decision that most clearly articulated the standard to be applied in judging the adequacy of a statutory scheme for providing notice. As indicated above, *Mullane* concerned a New York judicial proceeding designed to provide a definitive accounting of the actions of trustees of "common trust funds," which were combinations of small trust estates into larger funds for investment administration. The New York statute establishing the accounting proceedings require two forms of notice. First, "[a]t the time the first investment in the common fund was made on behalf of . . . [any] participating estate," the trustee had to mail to all known beneficiaries a statement advising them that the trustee could file for accountings "twelve to fifteen months after the establishment of the fund and triannually thereafter," and that he would publish notice of these

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404. Decisions expanding the right of state courts to render status judgments entitled to full faith and credit regularly emphasized that the state procedures for notice were constitutionally acceptable. See, e.g., Sherrer v. Sherrer, 334 U.S. 343, 348 (1948); Williams v. North Carolina, 317 U.S. 287, 299 (1942).
405. See notes 264-69, supra, and accompanying text.
proceedings in a newspaper." After dismissing the contention that New York lacked authority to render judgments binding on all claimants, Mr. Justice Jackson turned to the notice issue. Although he acknowledged that "[p]ersonal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding," he refused to require personal service in all cases. Recognizing that "the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined," he affirmed that it would be unjustifiable to place a "construction on the Due Process Clause which would place impos-

ible or impractical obstacles in the way." The problem involved balancing the admitted interest of the state against the "individual interest sought to be protected by the Fourteenth Amendment." In striking that balance, the Court applied the following standards: The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections[,] . . . must be of such nature as reasonably to convey the required information, . . . [and] must afford a reasonable time for those interested to make their appearance." If these standards were met, "the constitutional requirements . . . [were] satisfied." But, Mr. Justice Jackson emphasized, "when notice is a person's due, process which is a mere gesture is not due process." The notice must involve a procedure that "one desirous of actually informing the absentee might reasonably adopt to accomplish it." Judged by these principles, the notice provided by the New York statute was inadequate. The publication associated with the

407. Id. at 310.
408. Id. at 313.
409. Id. at 313-14.
410. Id. at 314.
411. Id.
412. Id. at 315.
413. Id.
414. Id. Cf. McDonald v. Mabee, 243 U.S. 90, 92 (1917): "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."
accounting proceeding simply was not "a reliable means of acquainting interested parties of the fact that their rights are before the courts," nor was it "reinforced by steps ... [such as the attachment of tangible property] likely to attract the parties' attention to the proceeding." Mr. Justice Jackson conceded that earlier decisions also had permitted "resort to publication as a customary substitute ... where it is not reasonably possible or practicable to give more adequate warning." Under the principle of these decisions, New York's notice by publication was sufficient as to two classes of beneficiaries, those "whose interests or whereabouts could not with due diligence be ascertained" and those "whose interests are either conjectural or future or ... do not in due course of business come to knowledge of the common trustee." But Mullane imposed a stricter requirement "[a]s to known present beneficiaries of known place of residence." For these beneficiaries, "[e]xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." Because the names and addresses of the beneficiaries were available readily, the Court was unwilling to accept notice less likely to provide actual notice than "ordinary mail to the record addresses."

The Court emphasized that the interest of practicality applied even as to known beneficiaries, for, as to them, the Court refused to require personal service. Because "the rights of each ... [beneficiary] in the integrity of the funds and the fidelity of the trustee are shared by many other beneficiaries[,] ... notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all." Under these circumstances, the "reasonable risks that notice might not actually reach every beneficiary are justifiable." But despite this practical approach, the Court found the New York scheme invalid for its failure to establish reasonable means for notifying known beneficiaries. The defect, Mr. Justice Jackson emphasized, was not the failure "to reach everyone," but the

415. 339 U.S. at 315-16.
416. Id. at 317.
417. Id.
418. Id. at 318.
419. Id.
420. Id.
421. 339 U.S. at 319.
422. Id.
failure to choose a procedure "reasonably calculated to reach those who could easily be informed by other means at hand."\textsuperscript{423}

**Opportunity to Appear**

Modern decisions produced few, if any, startling developments with respect to the type of appearances that litigants were authorized to enter. State courts remained virtually unanimous in allowing special appearances,\textsuperscript{424} but the Supreme Court never held that the due process clause required a state to allow litigants to challenge the jurisdiction of its courts without thereby consenting to the very jurisdiction they were challenging.\textsuperscript{425} Fewer states embraced the limited appearance for quasi-in-rem jurisdiction.\textsuperscript{426} However, the question of whether the limited appearance should be allowed seemed to lose much of its significance in light of Shaffer's rule that a state could exercise quasi-in-rem jurisdiction only if the defendants had sufficient contacts with the forum state to make it reasonable to require them to litigate the matter there.

**CRITIQUE OF CURRENT DOCTRINE**

*An Attempt at Explanation*

**The Basic Principle**

The most important element of the Supreme Court's recent forays into the problems of state court jurisdiction appears to be Shaffer's affirmation that all assertions of state court jurisdiction are to be determined according to the standards of the minimum contacts principle established by International Shoe and its progeny. The significance of this approach is that, by focusing on "the relationship among the defendant, the forum, and the litigation,"\textsuperscript{427} the Court has established a unified, functional approach for considering the numerous problems that have been solved in the past by characterization of the proceedings as involving in personam, in rem, or status jurisdiction. The new approach thus permits a re-unification

\textsuperscript{423} Id.

\textsuperscript{424} See notes 150-59, supra, and accompanying text. For a commentary critical of the approach of the Federal Rules, which allow a party to appear generally without waiving his right to appeal an overruled motion to dismiss for lack of jurisdiction over the person, see Note, Special Appearance in California, 10 Stan. L. Rev. 711 (1958).

\textsuperscript{425} For an argument that the refusal to allow a special appearance would violate modern notions of due process, see Developments, supra note 156, at 992-93.


\textsuperscript{427} 433 U.S. at 204.
of jurisdictional theory that has not been possible since the early twentieth century when the widespread acceptance of exceptions to the Pennoyer framework began. In essence, the new theory focuses on the very practical question of whether the forum state should be able to render a decision binding on this particular defendant in this particular litigation.

The Supreme Court's recent decisions have unfortunately failed to clarify the precise nature of the minimum contacts principle that is now to be applied universally. Particularly confusing is the reference in Woodson to the concept of state sovereignty as a limit on the jurisdiction of the courts of sister states. Exactly what this concept means is difficult to decipher, although it obviously represents an attempt to provide a narrower limit to state court jurisdiction. A majority of the Court seems to have concluded that the limits suggested by terms such as reasonableness and fairness are insufficient, perhaps because of a concern over the natural tendency of a state court to conclude that it is always a fair forum in suits filed by its own domiciliaries. But giving content to the sovereignty language of Woodson is particularly difficult since Shaffer demonstrates that the Court unequivocally has rejected Pennoyer's notion that sovereignty always confers jurisdiction with respect to things located within the state's borders.

In practical terms the new emphasis on sovereignty seems to be a demonstration that Hanson remains a viable guide for the limits of state court jurisdiction, and not merely an aberrational decision designed to do justice in a specific case. The core of the Hanson limitation is the idea that, although the minimum contacts principle requires the forum to be a convenient one, convenience alone is not sufficient to confer jurisdiction. Before addressing the convenience question, a court must first determine that the specific defendant, who is to be bound by the judgment, has contacts with the forum state that "make it reasonable, in the context of our federal system," to require him to litigate the matter there. Hanson defined this preliminary inquiry in terms of the requirement that the defendant have "purposely availed" himself of "the benefits and protections" of the laws of the forum state. Although there is some language in subsequent cases that the defendant actually must have

428. 444 U.S. at 293.
429. See notes 207-21, supra, and accompanying text.
431. 357 U.S. at 253.
engaged in activities within the forum state, the Woodson dicta, that would allow a state court to exercise jurisdiction over a defendant who attempts, directly or indirectly, to serve the state's market for a product, indicates that the new sovereignty limit is not a requirement of minimal presence but one of foreseeability: The defendant's conduct with respect to the forum state must have been such that he could reasonably have foreseen that he would be required to defend his conduct there.

**Application of the Principle to Particular Lawsuits**

Defining the general parameters of the new principle that is to govern state court jurisdiction provides only the starting point for determining how it will be applied to the various situations that have proved troublesome in the past. Although one can easily recognize the artificial nature of the traditional distinctions between *in personam*, *in rem*, and status jurisdiction, it nonetheless seems reasonable for this survey to analyze the problems in terms of attempts to impose liability on a person (whether individual or corporation) without regard to any specific property of the defendant, to use the defendant's claims to property as a basis for jurisdiction, and to determine the legal relationships and financial obligations of family members. In many respects new terminology such as that proposed by Professors von Mehren and Trautman would be preferable; but the reality seems to be that lawyers and judges will continue to think in terms of jurisdiction over persons, things, and status. And, in light of Shaffer, it is possible to think in such terms without erecting artificial barriers between the categories.

With respect to persons, the recent decisions largely eliminate any conceptual distinction between individuals and corporations. One would expect a corporation to serve a multi-state market more frequently than a natural person, but that expectation is the result of modern business realities and not legal conceptualism. In either case, the inquiry is the same; to the extent that natural persons engage in activities with respect to a state that they reasonably should foresee would require them to defend their conduct there, the state may exercise jurisdiction over them. Seen in this light, the recent decisions actually represent no retreat from the expansion of jurisdiction permitted in cases such as Hess and Doherty, but it

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433. 444 U.S. at 297-98.
434. von Mehren & Trautman, supra note 260, at 1124-36.
435. See notes 41-48, supra, and accompanying text.
436. See notes 49-55, supra, and accompanying text.
now should be possible to abandon the consent fiction on which those decisions largely were based and to use them to derive new subrules for applying the minimum contacts principle. Judged by the standards of *International Shoe* as modified by *Woodson, Hess* illustrates not a specific exception for automobiles, but an acceptance of a more generalized concept: When persons voluntarily come to a state, they reasonably can foresee that the state may require them to return to defend their actions while in the state, and requiring them to do so is consistent with our society’s notions of fairness. Similarly, *Doherty* does not depend on the state’s special regulation of the securities industry or any ability to condition an individual’s right to do business in the state. One might state its “true rule” thus: When individuals (or other noncorporate business forms) carry on businesses that serve customers within a state, they should foresee that the state will exercise jurisdiction over them with respect to litigation arising out of business with customers within the state and the state’s action in exercising jurisdiction meets contemporary standards of fairness and reasonableness. Under this restatement of the *Doherty* rule, one could also explain the Supreme Court’s hint in *Shaffer* that Delaware could exercise jurisdiction over corporate officers and shareholder derivative actions, if it passed a specific statute authorizing such jurisdiction. The defect in *Shaffer* was that the Delaware statute failed the test of foreseeability, not the test of fairness or reasonableness; a general sequestration statute was simply too unlikely to inform officers and directors that they would be subject to shareholder derivative actions if they owned stock in the corporations they serve.

*Kulko* suggests, however, that the ability of the minimum contacts principle to expand jurisdiction over natural persons is limited, perhaps to the *Hess* and *Doherty* exceptions; that is, requiring defendants to defend their actions taken within the state and forcing them to litigate matters with customers served in the state. In other situations, current constitutional preference reaffirms the traditional requirement that the plaintiff must seek out the defendant at his home and may not force him to litigate matters in the forum most convenient to the plaintiff.49

437. 433 U.S. at 216 n.47.
438. See notes 225-37, supra, and accompanying text.
439. See von Mehren & Trautman, supra note 260, at 1127-28. Sunderland, *The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188, 192 (1933). Professors von Mehren and Trautman suggest the following rationale for determining when to reverse this traditional rule: “[I]n any class of cases in which the controversy arises out of conduct that is essentially multistate on the part of the defendant, and essentially local on the part of the plaintiff an argument exists for reversing the jurisdictional preference traditionally accorded defendants.” von Mehren & Trautman, supra note 260, at 1167-68.
All of the Supreme Courts’ post-International Shoe decisions with respect to in personam jurisdiction have concerned the ability of state courts to exercise jurisdiction over persons who could not be served with process within the state’s borders. The Court never has addressed the question of whether the minimum contacts principle would limit a state’s ability to exercise jurisdiction over a person who was served with process during a temporary sojourn in the state, but the issue has arisen occasionally in the lower courts. Prior to Shaffer, the decisions commonly held that physical presence in the state, evidenced by personal service, was sufficient to confer jurisdiction.\textsuperscript{440} More recently, some commentators have recognized that Shaffer effectively destroys the logical underpinning of those decisions.\textsuperscript{441} The traditional rule derived from the first of Pennoyer’s positive assertions: Every state has jurisdiction over all persons and property within its borders.\textsuperscript{2} Now that Shaffer has rejected that axiom with respect to property, one can reasonably predict that the Supreme Court also will reject it with respect to persons in an appropriate case. Of course, situations in which a person, who is served with process within the state, will lack sufficient contacts with that state for its courts to exercise jurisdiction will be relatively rare. But they can occur in either exotic circumstances, such as airplane service, or in more mundane circumstances, as when an individual visits a state different from the one in which he allegedly committed a tort. Thus, while service of process should be sufficient to confer jurisdiction in the vast majority of cases, Shaffer will at least require an expanded analysis when the adequacy of the defendant’s contacts with the forum state is challenged.

\textsuperscript{440} E.g., Donald Manter Co. v. Davis, 543 F.2d 419 (1st Cir. 1976); Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959); Lee v. Baird, 139 Ala. 526, 36 So. 720 (1904); Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737 (1963).


\textsuperscript{442} 95 U.S. at 722. See note 13, supra, and accompanying text.
Diminished significance of presence as a jurisdictional concept for natural persons should not change Milliken's rule that the defendant's state of domicile is always an appropriate forum, for the defendant's domicile always should satisfy Woodson's dual test. First, the permanence of the attachment to a state that domicile implies means that the individual should foresee that this is a place that he should be expected to account for all his actions, wherever they might have occurred. Second, the defendant's ability to choose his domicile should preclude any finding that requiring him to litigate a matter there was unfair.

Not surprisingly, most of the litigation concerning the limits to jurisdictional authority has concerned corporations, because in the modern world the agents of corporations commonly engage in activities that can have consequences in different states. International Shoe recognized this reality and devised a test that emphasized economic reality over the fictions of presence and consent. But Hanson and Woodson—the Supreme Court's last two decisions involving corporations—reflect a determination to use the foreseeability concept as a means to limit expansion of jurisdiction over foreign corporations. Under the test established by these cases, a corporation is amenable to suit only in those states whose markets it has attempted to penetrate; thus, for example, vendors of products who serve only a limited market for a product that is marketed nationwide are amenable to suits only in the states whose markets they reach. But Woodson should not result in any substantial curtailment of jurisdiction in products liability suits against nationally-marketed products. Since the corporations that manufacture these products serve a national market, they should have sufficient contacts with all states to satisfy the foreseeability test; Woodson's favorable citation of a leading state court decision suggests that the Court, in balancing the burden of forcing the consumer to travel to a foreign forum...

443. See notes 56-61, supra, and accompanying text. Of course, the significant point in time is the time of service; that is, the defendant must be domiciled in the state at the time he is served with process. See Developments, supra note 156, at 941 n.202.

444. 444 U.S. at 298, citing Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). In Gray, the plaintiff filed suit in an Illinois court seeking to recover damages from a non-Illinois corporation for injuries that resulted from the defendant's negligent construction of a safety valve outside the state. The defendant had sold the valve, outside the state where American Radiator was located, and American Radiator then incorporated it into a water heater that was sold in Illinois to the plaintiff's employer. While the heater was being used in Illinois, it exploded injuring the plaintiff. The Illinois Supreme Court held that the corporation that manufactured the valve was amenable to suit in Illinois. It reasoned that "if a corporation elects to sell its products for ultimate use in an other state, . . . it is not unjust to hold it answerable there for any damage caused by defects in those products." 22 Ill. 2d at 442, 176 N.E.2d at 766.
against the burden of forcing a corporation to defend its conduct in
a market it serves, would judge the plaintiff’s forum to be a reason-
able one. Moreover, this approach to jurisdiction over manufacturers
probably will not vary even in situations like Woodson in which the
injury occurs in a state other than the one where the particular pro-
duct is sold. Because the product is marketed on a national basis,
the possibility of suit in all states is still foreseeable, and, in applying
the reasonableness or fairness aspect of the test, the relative burden
on the manufacturer and the consumer remain the same regardless
of where the sale took place.

Some pre-Woodson commentaries and cases suggested a con-
tectual difference between contract and tort cases in applying the
minimum contacts principle. Woodson does not appear to support
such an a priori distinction. Instead, it substitutes the functional
question of whether the suit arises out of an attempt to serve a par-
ticular economic market. This functional approach might restrict
liability in cases in which a purchaser outside of a normal market
area seeks out a seller to purchase goods. But, when a seller regu-
larly serves a given market or, as in McGee, actively seeks out the
market even for a single transaction, that state should be able to
exert jurisdiction over him whether the action is labeled contract or
tort.

A question not clearly resolved by the Supreme Court prece-
dents is what state or states always can exercise jurisdiction over a
corporation. The same reasons supporting domicile as a proper
forum for individuals—the permanence of the relationship and the
element of choice by the defendant—make the state of incorporation
an appropriate general forum for corporations. But Perkins sug-

445. E.g., Developments, supra note 156, at 925-28. Cf. Lewis, Suing a
Nonresident—The Reach of Louisiana’s Long-Arm Statute, 19 LA. B.J. 205 (1971)
(Louisiana courts interpret long-arm statute more broadly in tort than contract cases).

446. Compare Buckeye Boiler Co. v. Superior Ct., 71 Cal. 2d 893, 80 Cal. Rptr. 113,
2d 432, 176 N.E. 2d 761, 766 (1961), with Benjamin v. Western Boat Building Corp., 472
F.2d 723 (5th Cir. 1973).

447. See notes 197-206, supra, and accompanying text.

448. See notes 188-96, supra, and accompanying text. For a pragmatic approach to
solving the problem of a corporation with substantial business activities in several
states, see von Mehren & Trautman, supra note 260, at 1141-42. Some commentators
have tried to constrict the reach of Perkins by arguing that it is a jurisdiction-by-
necessity case; that is, that the Supreme Court approved jurisdiction in Ohio because
Mrs. Perkins lacked an alternate forum for her claims. Since the Philippine courts were
functioning by the time that Mrs. Perkins filed her claim in Ohio, the argument has to
be further refined to allow jurisdiction in the principal place of business only when the
plaintiff is suing a business entity created under the law of a foreign sovereign. See
Kurland, supra note 63, at 602; Developments, supra note 156, at 932. The Court’s opin-

gests that when a state is the predominant center of a corporation's business, that state also may serve as a general forum. As with the state of incorporation, litigating at the center of corporate activity seems foreseeable and does not seem to place an undue burden on the corporation.

In light of Shaffer, jurisdiction based on property normally should be limited to suits in which the property bears a substantial relationship to the litigation. This rule should largely eliminate quasi-in-rem jurisdiction as a practical matter, for in most cases the state's long arm statute would authorize jurisdiction in situations in which the defendant had sufficient contacts with the forum state to satisfy the minimum contacts test. Quasi-in-rem jurisdiction, however, might remain a viable source of judicial authority in two narrow classes of cases—those in which the litigation is directly related to the property even though title is not an issue and those in which the state could reach the defendant under the minimum contacts principle but the state's statutes conferring in personam jurisdiction failed to cover him. The approving citation of Atkinson in Shaffer suggests that the Court would be willing to countenance such an approach, at least when the litigation is designed to define the rights of various persons in property that bears a substantial relationship to the forum state.

The emphasis in Shaffer and Rush on the defendant's contacts with the forum state raises a potential analytical obstacle to suits to determine title to real estate because one can easily conceive of situations in which one or more of the potential claimants to the property have never set foot in the state where the property is located. But the misleading language of these opinions probably will pass to a well-deserved oblivion, as the courts focus on the triangular relationship among the defendant, the forum, and the litigation. The new test does not require presence as a minimum criterion of jurisdiction. To the contrary, it permits a state court to bind defendants when they reasonably could foresee they would be required to litigate a matter in the forum state and when the litigation in that forum is fair and reasonable. The suit to quiet title satisfies both prongs of the test. If a person claims an interest in real property

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450. 433 U.S. at 205.
451. Id. at 213. See 444 U.S. at 331-32.
located in the state, the localized nature of property law makes it foreseeable to expect him to defend his right to the property in that state; since the desirability of permitting a suit to quiet title against all the world generally is conceded, the state where the property is located is the most reasonable forum when the potential claimants are located in various states. 452

The permissibility of binding nonresidents in lawsuits to determine the ownership of personal property is less clear, for personal property is never so closely tied to a single state as is realty. But the application of the tests of foreseeability and fairness should permit a state to issue binding judgments of the rights of claimants to both tangible and intangible personality in appropriate cases. With respect to tangibles, one should properly focus on the relative permanence of its location within the state. 453 If it has remained within a state for some time or (when estates are being settled) if the former owner kept it within a state, one can argue persuasively that all who seek to assert rights in it should recognize the place of location as the place where those rights will be litigated and that the place of location is a reasonable place for resolving the conflicting claims of out-of-state claimants. On the other hand, the minimum contacts principle would not support jurisdiction when one claimant unilaterally moved property to another forum. Not only would it be difficult for other claimants to foresee being called upon to present their claims in the new forum, but allowing one party to manipulate jurisdiction by moving the property without the consent of other claimants seems to encourage deception inconsistent with our basic notions of fairness.

Intangibles present even more difficult problems because only in legal terms are they present anywhere. With respect to trusts, Mullane 444 and Hanson seemed to sanction the trustee's place of business as the appropriate forum to resolve conflicting claims to the property. Perhaps the emerging rule will be that the state in which the person exercising day-to-day control over the intangible is located permanently is normally an appropriate forum, since requiring a defendant to litigate his claims there is both foreseeable and

453. See Jellenik v. Huron Copper Mining co., 177 U.S. 1 (1900); Educational Studios, Inc. v. Consolidated Film Indus., Inc., 112 N.J. Eq. 352, 164 Atl. 24 (Ct. Er. & App. 1930). The Supreme Court has distinguished between property permanently and temporarily located in a state in defining the limits of state authority to tax the instrumentalities of interstate commerce. Union Refrigeration Transit Co. v. Kentucky, 199 U.S. 194 (1905). See also Brock & Co. v. Bd. of Supervisors, 8 Cal. 2d 287, 65 P.2d 791 (1937).
454. See notes 264-69, supra, and accompanying text.
fair. This rule would permit expansion of jurisdiction over claims to intangibles in cases such as *Dunlevy*\(^\text{455}\) in which the party exercising control over the intangible needs a single forum to resolve conflicting claims so that he may avoid the possibility of double liability.

Although the Supreme Court has not yet defined the parameters of divorce and custody jurisdiction by the minimum contacts standard, *Shaffer's* declaration that the principle is to govern "all assertions of state court jurisdiction" obviously opens the door for such a doctrinal development. In fact, the minimum contacts approach might well leave the current boundaries of state court jurisdiction with respect to these matters substantially intact, but it would provide a more coherent framework of analysis. It would also re-establish the due process clause as a significant limit on jurisdiction in divorce and custody cases, thus ending the anomaly that decisions in this area can be binding, at least theoretically, in the state where rendered but not elsewhere. Moreover, it also would permit a unified approach to the problems that traditionally have been treated as involving matters of status by focusing on the practical question of the appropriateness of allowing a particular state to exercise jurisdiction over a particular defendant in a particular lawsuit. Using the dual-pronged test established by *Woodson*, a state could bind a defendant in a "status" proceeding when the defendant can foresee that he would be required to litigate that matter in the particular forum and when the forum is a reasonable location for the particular dispute to be resolved.

As applied to the ability to grant a binding decree of divorce, the minimum contacts approach would permit a reasoned justification of both the full faith and credit rule of *Williams I*,\(^\text{456}\) which permits the state in which either party is domiciled to exercise jurisdiction in divorce litigation, and the estoppel doctrine of *Sherrer*,\(^\text{457}\) for in both cases the tests of foreseeability and fairness were satisfied. In light of the traditional authority of a state to regulate the marital status of its inhabitants and the modern ability of spouses to establish separate domiciles, the nonresident defendant should foresee that he may be required to go to the spouse's domicile to argue that the spouse is not entitled to have the marriage dissolved. The reasonableness or fairness aspect of the test is a more subjective determination, but the Court probably would conclude that the desirability of the plaintiff's having a convenient forum, and the state's interest in providing a mechanism for defining the marital status of

\(^{455}\) See notes 99-93, *supra*, and accompanying text.

\(^{456}\) See notes 322-25, *supra*, and accompanying text.

\(^{457}\) See notes 336-50, *supra*, and accompanying text.
its inhabitants, outweigh any inconvenience to the defendant; extreme geographical separation between the marriage partners probably would indicate that the law was doing no more than giving legal recognition to a de facto dissolution of the marital relationship.

Allowing a state to issue a judgment binding on a defendant who actually appears in a divorce suit also appears to satisfy both aspects of the Woodson test. If the defendant has a jurisdictional defense, he should expect to present that defense before defending on the merits, and limiting the defendant to a single forum in the divorce litigation does not appear unfair. Once this rule is accepted, the Johnson-Aldrich corollary, that parties claiming by virtue of their relationship to the defendant are also bound by the judgment, seems unexceptional. Of course, the Williams situation itself raises the theoretical problem of whether state prosecutions would be banned, although the increasing societal acceptance of divorce makes the likelihood of such a prosecution extremely small. If one occurred, the diminishing weight given to the state's interest in denying its citizens the right to divorce likely would result in the decision that the state also is bound by a sister state's judgment in which both marriage partners entered a general appearance.

The Court, however, also might permit divorce jurisdiction in other cases since the test would focus on the minimum contacts standard, not on domicile as a jurisdictional prerequisite. The most common situation probably would involve members of the military who often live outside their states of domicile. When a couple lives together outside the state or states where they are domiciled, allowing the state where they lived together to divorce them should be foreseeable, and in terms of convenience it should be the most reasonable forum of all. In addition, focusing on minimum contacts rather than solely on domicile as the basis for jurisdiction should provide a means for reducing the uncertainty that results from Williams II, which permits a collateral attack on an ex parte finding of jurisdiction. To reduce uncertainty, a state could establish


459. See notes 326-32, supra, and accompanying text.

460. According to one commentator, the minimum contact argument has surfaced at the state level in several post-Shaffer divorce cases. Leathers, The First Two Years After Shaffer v. Heitner, 40 La. L. Rev. 907, 913-16 (1980).
the more objective test of residence within the state for a suitable period as the basis for jurisdiction; if the residence were for a period sufficient to show a substantial connection between the plaintiff and the state, the minimum contacts standard should be satisfied. Of course, the Court would have to determine the minimum period of residence that would suffice (whether, for example, Nevada's short residency period would be adequate\(^\text{1}\), but the considerably longer residency requirement of most states\(^\text{2}\) certainly should be sufficient to show a substantial connection between the plaintiff and the state.

Adoption of the minimum contacts standard also would be consistent with the functional approach to support and property matters that is embodied in the divisible divorce doctrine. As suggested above, a party reasonably might expect that a state would choose to give legal recognition to the breakdown of an existing marriage to which one of its inhabitants is a party. But allowing that state to determine the relative financial obligations of the parties merely because one of them lived within its borders seems neither foreseeable nor fair. It strains credulity to suggest that a party to a marriage should foresee that he is agreeing to allow the partner to choose any state to settle the couple's property affairs merely because the partner unilaterally establishes a domicile there. In addition, judged by the reasonableness test, no strong reason for allowing the plaintiff to choose a forum unilaterally outweighs the burden of forcing the defendant to travel to an inconvenient forum.

Accepting the defendant's state of domicile as an appropriate forum for support judgments under the minimum contacts principle, however, inevitably does not mean that the plaintiff must go to the defendant's forum. To the contrary the plaintiff can choose any forum where the defendant has sufficient contacts with the state to make it reasonable "in the context of our federal system" for that state to issue a binding judgment concerning the particular dispute between the parties. Some forums that traditionally have been acceptable—for example, a state in which the defendant owns property or in which the defendant is served with process during a tem-


porary sojourn—might fail to satisfy the new principle; but the
state where the parties last lived together as husband and wife prob-
ably would be an appropriate forum under the Hess rule if only one
of the parties had established a new domicile. One could foresee
being required to litigate marital responsibilities in the state where
one lived as a partner to the marriage; the forum seems reasonable
because the state was one with whom the parties voluntarily estab-
lished contacts relating to the marital relationship that gives rise to
the disputed rights and obligations. Similarly, the minimum contacts
approach would encompass the Simons decision permitting a state
to adjudge a marriage partner's claims to property within the state
as a specific application of the rule that the decisions of a state as to
the ownership of property within its borders bind all claimants to
the property.

In lawsuits relating to custody, the minimum contacts principle
also should unify due process and full faith and credit limitations by
rejecting domicile as an indispensable criterion and focusing instead
on the relationship among the defendant, the forum, and the litiga-
tion. If the state is one with which both parties have adequate con-
tact (as for example, when one parent seeks to use the courts of the
other's state of domicile), the decree should be binding on both. But
May should be overruled explicitly when the court exercising
jurisdiction is located in the state where the child is living on a per-
manent basis. A parent should foresee that such a state would exer-
cise its parens patria powers on behalf of the child; it does not
seem unreasonable or unfair to expect the parent to travel to the
state where his child is living if he decides to exert his parental
rights, since an extreme geographical separation probably would
indicate either a limited de facto exertion of parental rights or an
ability to get to the state where the child resides without undue dif-
ficulty. On the other hand, the parent having physical control of the
child should not be allowed to secure a jurisdictional advantage
merely by moving the child to a more favorable jurisdiction. As a
minimum, the fairness aspects to the minimum contacts approach
should constitutionalize the statutory rule of the Uniform Child
Custody Jurisdiction Act that a court ordinarily should not exer-
cise jurisdiction to award custody to a party that brought a child
into its borders in violation of a valid custody decree.

463. This, of course, was the rule prior to Haddock. See Atherton v. Atherton, 181
U.S. 155 (1901).
464. See notes 391-93, supra, and accompanying text.
465. See notes 357-61, supra, and accompanying text.
466. UNIFORM CHILD CUSTODY JURISDICTION ACT § 8. Cf. Spencer v. Terebelo, 373
So. 2d 200 (La. App. 4th Cir. 1979) (allowing tort recovery for removal of child from
jurisdiction in violation of a valid custody decree).
With respect to support awards in custody cases, the new approach should produce results similar to those suggested for the financial aspects of divorce litigation. The defendant's domicile would be an appropriate forum, but so would any other state with which the defendant had substantial contacts directly related to the cause of action. As a practical matter, courts are likely to approve jurisdiction in at least two situations: when the state seeking to exercise jurisdiction was a state in which the parent and child lived before the parent refused to honor a support obligation, and when the state seeking to exercise jurisdiction is claiming "continuing jurisdiction" over a defendant who previously has litigated the support issue within its borders.

**Notice and Appearances**

The universalizing of the minimum contacts principle would re-emphasize the importance of notice as an independent requirement of due process. The standard of notice probably will be the one established by *Mullane*—one must use a means that would be used by a person actually trying to notify the defendant—but its application will vary with different circumstances. For example, the standard presumably will permit a state to dispense with traditional service of process in ordinary litigation, but only if the state substitutes a method (perhaps certified mail with returned receipt) that will be equally likely to advise the defendant that he is being sued. For trust accountings and other litigation with large numbers of potential litigants, the expense of providing notice will permit sending the notice by regular mail to the record address of persons with a known interest in litigation. Moreover, when an adequate means of providing notice is provided, the court should follow the traditional service of process cases and uphold the validity of the judgment even though the defendant failed to receive notice in fact. Naturally, one can expect courts in such cases to continue the well-established tradition of carefully searching the record for errors that might permit the defendant his day in court, but the Court should avoid an absolute requirement of notice in fact, because that

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467. See notes 405-23, supra, and accompanying text.
could permit a defendant to avoid civil liability merely by disregarding his mail.

The fairness aspect of the minimum contacts principle also argues for constitutionalizing the right to a special appearance, however denominated, in all litigation. Now that amenability to suit always depends on the fact-sensitive question of whether the defendant has sufficient contacts with the forum state with respect to this particular litigation, the defendant deserves an opportunity to present evidence on that matter without foregoing a defense on the merits if he fails to prevail on the jurisdictional issue. The contrary precedent of York v. Texas could be overruled as inconsistent with the new theoretical framework governing state court jurisdiction.

On the other hand, Shaffer's expansion of the minimum contacts approach to encompass all assertions of state court jurisdiction argues for an elimination of the limited appearance, for its existence depended on a system that used quasi-in-rem jurisdiction as an alternative to in personam jurisdiction. Now that a court can exercise in rem jurisdiction only when it is reasonable to require the defendant to litigate the matter in the forum state, the court that hears the dispute should be able to grant any relief that is appropriate in the matter over which it exercises jurisdiction.

Evaluation of Contemporary Dogma

The most fundamental aspect of the recent Supreme Court decisions—Shaffer's declaration that all assertions of state court jurisdiction should be judged according to the minimum contacts principle—merits commendation. A generation ago, International Shoe rejected the territorial principle on which the traditional in rem and in personam distinctions were based and expanded the reach of in personam jurisdiction over nonresidents to encompass all situations in which it was reasonable, in the context of our federal system, to require the defendant to litigate the matter in the forum state. In light of the widespread, modern agreement among legal scholars concerning the limited utility of any sharp conceptual distinction between personal and property rights, the continued approval of the exercise of quasi-in-rem jurisdiction over defendants who lack

471. 433 U.S. at 207.
sufficient contacts with the forum to satisfy the *International Shoe* test was an anomaly. Since these cases used property to confer jurisdiction over a defendant with respect to a cause of action that had nothing to do with the property, they found the functional equivalent of *in personam* jurisdiction (particularly in states that failed to recognize the limited appearance*4*) over a defendant who, by definition, had insufficient contacts with the forum state to justify that state's exercise of jurisdiction.

Of course, the change is in some respects a minor one, for after *Shaffer* as before, most litigation likely will focus on the application of the minimum contacts principle to specific factual situations. But even modest advances in the cause of justice deserve praise, and the *Shaffer* rule seems to qualify as such an advance. Moreover, as suggested above, the *Shaffer* universalization of the minimum contacts principle also opens the door to reaching status proceedings, the third traditional category of jurisdiction; this doctrinal development would provide both a defensible rationalization for most of the existing precedents as well as a coherent framework for addressing continuing problem areas.

Less deserving of unqualified praise is the Supreme Court's recent attempt in *Woodson* to refine the minimum contacts principle established in *International Shoe*. From an analytical standpoint, the attempt to clothe *Hanson*’s foreseeability doctrine in the language of state sovereignty*45* was unfortunate; it is difficult to see what rights of a state are violated by permitting another state to exercise jurisdiction over a particular lawsuit. The opinion suggests that the right of a state to exclude other states from exercising jurisdiction over

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474. 444 U.S. at 294. See *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958); Kurland, *supra* note 63, at 569:

In matters of personal jurisdiction of state courts, no less than in matters of the jurisdiction of the federal courts, doctrines of federalism have been subordinated by the Supreme Court to concepts of convenience. The result is another major step—in this instance, perhaps, a desirable one—toward the limitation of the federal principle.

(Footnote omitted). *But see* Hazard, *supra* note 13, at 265: "[W]hen adjudication of civil controversies does involve multistate elements, it is fatuous to think of any court having *exclusive* jurisdiction of anything. The jurisdictional problem exists precisely because there is no single tribunal that has exclusive jurisdiction in the territorial sense." (Emphasis in original).

475. Indeed, the modern estoppel decisions in cases involving divorce jurisdiction suggest that the Court currently is allowing consent to jurisdiction in divorce cases, which traditionally have been classified as problems of subject matter jurisdiction. Of course, the fairness aspect of the minimum contacts test might invalidate some agreements by which a party consents to jurisdiction for future claims. See von Mehren & Trautman, *supra* note 260, at 1138-39; *Developments*, *supra* note 156, at 944-45.
lawsuits rightfully belongs to the first state; but the Court never has applied such a limitation with respect to jurisdiction except perhaps in the confused maze of opinions defining the reach of divorce jurisdiction. Indeed, defining the right to exclude jurisdiction as belonging to the state (or states) that rightfully could exercise jurisdiction seems fundamentally inconsistent with the rule that a party can consent to in personam jurisdiction, a rule that the Supreme Court has shown no inclination to discard.

Once the garb of state sovereignty is discarded, however, the foreseeability element of the minimum contacts doctrine is more defensible as an attempt to preserve the traditional concept that ordinarily the plaintiff, the party who initiates the lawsuit, must go to the defendant's forum. Recognizing that a state court, bound only by general terms such as fairness or reasonableness, is generally likely to believe that it is a fair forum for virtually any litigation involving its inhabitants, Woodson erects the foreseeability requirement as a prerequisite for state court jurisdiction. It thus attempts to insure that a state does not ignore completely the defendant's interest in avoiding an inconvenient forum by emphasizing the considerations such as the plaintiff's right to a convenient forum and the forum state's interest in providing relief for its citizens. Although the new analysis does not insure that state decisions will always be correct, it at least forces the court to consider directly the defendant's interest in avoiding an inconvenient forum or, to use the Woodson language, his interest in avoiding a forum where he should reasonably not have been expected to litigate the matter.

Despite the virtues in the principles established by Shaffer and Woodson, the actual decisions in the cases before the Court were quite objectionable. Shaffer refused to allow Delaware to use its sequestration statute to establish jurisdiction in a shareholder's derivative action over the officers and directors of a corporation that chose Delaware as the state of incorporation. In the light of the many benefits that Delaware corporation law accords to officers and directors of its corporations, a decision that such persons have not

476. See, e.g., Del. Code Ann. tit. 8 §§ 141(e), 143, 145 & 326 (1974) (directors protected from personal liability when they rely in good faith on corporate books; corporation can make loans to corporate officers; corporation may indemnify officers and directors for legal fees incurred in good faith and in a manner reasonably believed to be in the best interests of the corporation; and corporate officer may, in some cases, recover against the corporations amounts paid in judgments in which the corporation is jointly liable). Of course, the benefits that inure to the corporation are legion. See generally E. FOLK, THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS (1972); Comment, Law for Sale: A Study of the Delaware Corporation Law of 1967, 117 U. PA. REV. 861 (1969).

477. 433 U.S. at 216.
received sufficient benefits from Delaware law to allow the state to exercise jurisdiction over them in a lawsuit directly related to their status as corporate fiduciaries seems little short of incredible, and it is a position never clearly adopted by the majority. But the alternative argument (manifested in the majority emphasis on Delaware's failure to adopt a specific statute conferring in personam jurisdiction in shareholder derivative actions and in Mr. Justice Stevens' concurring opinion suggesting that the Delaware statute failed the foreseeability test because the defendants could not reasonably foresee that Delaware would allow the use of its general sequestration statute to exercise jurisdiction over them in shareholder derivative actions, is equally unpersuasive. In fact, providing a means for exercising jurisdiction over corporate fiduciaries in shareholder derivative actions, and applying Delaware's substantive law to establish the liability of corporate fiduciaries who generally own substantial blocks of the corporate stock, had long been principal purposes of the Delaware sequestration statute. To hold that the use of the sequestration statute for precisely this purpose is unforeseeable is to permit the fiduciaries to wear blindfolds by permitting them to foresee only those applications of Delaware law that are found in the corporation code. Fortunately, however, the specific impact of this narrow approach should be short-lived; Delaware now has passed a statute expressly conferring jurisdiction over corporate fiduciaries in shareholder derivative actions. Since the foreseeability obstacle has been eliminated, the Court should resolve the fairness or reasonableness aspect of the minimum contacts principle in favor of jurisdiction.

Perhaps more disturbing is the Court's application of the foreseeability requirement in Woodson. Indeed, one can argue that it reflects the very defect that the Court tried to eliminate in Shaffer—deciding the jurisdictional issue on the basis of artificial legal conceptions distinguishing sellers, distributors, importers, and manufacturers rather than on a realistic analysis of the underlying economic relationships. Limiting a defendant seller's amenability to suit to the specific state or states he serves creates at least three unnecessary risks. First, nothing in the Woodson opinion limits it to the precise situation involved there, a suit filed against the vendor

478. Id. at 217-19.
of a consumer good by the purchaser who took it to a state that the vendor did not serve. Thus, Woodson apparently also bars a suit by an innocent third party who might be injured by a defect in the product, a result that seems particularly unfair because it forces a plaintiff, whose activities are localized entirely in the state where the injury occurred, to go to the place of business of a vendor who sells automobiles that are virtually certain to be used outside of the particular market that the vendor serves.\footnote{481. Accord, von Mehren & Trautman, supra note 260, at 1172. But see Developments, supra note 156, at 929-30.} Second, it may force a plaintiff who admittedly is injured in an accident, but is doubtful as to whether the proximate cause of the injury was a defective product or the negligence of a third party, to litigate his claims in alternate forums, and thereby run the risk of securing no recovery because the two forums reach inconsistent results, each concluding that the party over which it lacked jurisdiction was responsible for the accident. Fortunately, the practical application of this possibility will be relatively small since successful products liability actions against the manufacturer are more likely than those against the seller; but if the Court's small progress in Shaffer receives accommodation, the possibility of an occasional injustice permitted by Woodson is equally deserving of condemnation. Third, Woodson's narrow definition of foreseeability might mean that consumers will forego assertion of their legal rights in non-tort situations such as warranty claims because the cost of returning to the state where the sale took place is too great in light of the relatively limited amount of the potential recovery. In effect, Woodson reflects an extreme insensitivity to the modern consumer economy by enhancing the already considerable disparity in economic power between consumer and seller.

A far preferable test of foreseeability for consumer transactions would define the limits of the vendor's liability in terms of locations where he could reasonably expect the product to be taken and used. So long as the alleged injury occurred in such a location, the plaintiff could require the defendant to litigate his potential liability in the place where the alleged injury occurred. This approach would solve the difficulties inherent in the Woodson approach, and the burden it imposes on the vendor would not be an intolerable one. Of course, litigating in a far-off forum might be inconvenient for the defendant, but the cost of such litigation presumably would be spread over all consumers (through an appropriate adjustment in price\footnote{482. Of course, if a particular seller were unable to pass the cost on to his customers, he might be forced to accept a lower profit margin or perhaps to go out of business.}) rather than placed totally on the particular consumer who
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has experienced difficulty with the product. Some situations still would present difficulty because determining where a particular product foreseeably might be used would depend on a variety of factors; but the expanded approach at least would have the virtue of following International Shoe's vision of using economic reality, not legal conceptualism, to define the limits of a state court's jurisdiction.

Less objectionable than the applications of the minimum contacts principle in Shaffer and Woodson are its applications in Kulko and Rush.8 Kulko, of course, concerns liability arising out of a personal relationship rather than a commercial one; thus, allowing jurisdiction over the defendant would not permit any more equitable spreading of the cost of litigation. Moreover, the state seeking to establish jurisdiction is not attempting to impose liability on the defendant resulting from actions he took within the forum state, nor should the consent to a shift in custody to the parent in the forum state be regarded as the practical equivalent of such in-state acts. Even if one could overcome the substantial argument that a person could not be expected to foresee that this action would have the effect of conferring jurisdiction on the state to which the child was permitted to go, adopting such a rule would run counter to the current substantive policy of basing custody decisions on the best interests of the child.44 If agreeing to such a change in custody were adequate to confer support jurisdiction on a far-away forum to which a former spouse moved, the parent with legal custody would have a strong financial disincentive to permit such a change even when the change served the child's best interest. Finally, one should not ignore the existence of the Uniform Reciprocal Enforcement of Support Act, which makes it less costly for the plaintiff to secure judgment in the defendant's forum than for the defendant to travel to the forum chosen by the plaintiff. All in all, the Kulko plaintiff presented no compelling argument for disturbing the customary rule that the plaintiff must travel to the defendant's forum.

business. Such individual difficulties, however, merely would reflect an inability to bear all of the costs associated with a particular business.

483. See notes 306-19, supra, and accompanying text.

A similar conclusion is justified with respect to the Supreme Court's refusal to accept insurance-attachment jurisdiction in *Rush*. Analytically, the attempt to assert jurisdiction in *Rush* was unacceptable because the individual tortfeasor, who under *Shaffer* had to have sufficient contacts to satisfy the minimum contacts standard, had no connection with the forum state. Nor should one accept the superficially attractive appeal to economic reality—the argument that the insurance attachment cases really only involve the equivalent of a direct action against insurance companies, which are the defendants as a practical matter in modern tort litigation. The argument is ultimately unpersuasive for two reasons. First, it simply is not true that a person named as a defendant has no significant interest in the litigation. The most obvious problems of inadequate coverage or multiple exposure probably could be handled by an appropriate protective order, but securing such an order could involve considerable inconvenience, and possibly expense, for the plaintiff. Moreover, so long as tort liability is based on fault, a defendant may have non-economic interests such as professional pride or personal morality in avoiding a judgment that his fault caused injury to another. Second, the direct action analogy is an inapplicable one because none of the states that have attempted to exercise insurance-attachment jurisdiction permitted direct actions against the insurers of their own residents; thus, insofar as the insurance-attachment jurisdiction is the functional equivalent of a direct action statute, it represents an unreasonable attempt to grant plaintiffs who sue out-of-state tortfeasors a special procedural advantage that the state refuses to accord plaintiffs suing resident tortfeasors.485

In the divorce and custody cases, the fundamental error of the twentieth-century cases has been the failure to establish the due process clause as a significant standard for judging when a state can exercise jurisdiction. In fact, the emasculation of the due process clause seems to be a historical anomaly. It originated with *Haddock*'s attempt to limit a state's ability to grant divorces to its domiciliaries, but the Court failed to reestablish due process limits when it repudiated *Haddock* in *Williams I*.486 But whatever its origins, the disparity between due process and full faith and credit standards can be justified only by accepting *Pennoyer*'s nineteenth-century view of American society and ignoring the fundamental

485. But see Leathers, *supra* note 460, at 918-20. It is interesting to note that many of the decisions establishing the early exceptions to *Pennoyer*'s territorial principal emphasized that the exceptions did not impose special burdens on nonresident defendants, but merely treated them like resident defendants. *E.g.* Hess v. Pawlowski, 274 U.S. 352, 356 (1927); Kane v. New Jersey, 242 U.S. 160, 167 (1916).

transformation in our economic and social system that has led to the acceptance of the minimum contacts principle as establishing the constitutional standard for defining the limits of state court jurisdiction under both clauses. In light of Shaffer, the Court should reassert the due process clause as a meaningful limitation in the status cases by adopting the minimum contacts principle. As suggested above, this doctrinal development would permit a coherent framework for reconciling most of the existing precedents and permitting an orderly doctrinal development in the future.

Needless to say, bringing the status cases under the minimum contacts umbrella would not eliminate all uncertainties and ambiguities. Custody decrees, for example, are likely to remain subject to change, so long as our society regards the evils of relitigation less than the evils of continuing a custody arrangement that does not serve the best interests of the child. But adopting the minimum contacts standard would have the virtue of establishing a standard appropriate to the purpose that jurisdictional limits can reasonably serve: assuring that a defendant is bound by judgment only if litigation is conducted in a forum where it was reasonable to expect him to litigate the matter. To the extent that the Court desires to control the substantive law applicable to the dispute, as, for example, it has in the past tried to preclude states with liberal divorce laws from divorcing persons from states where divorce laws are more strict, it should do so by constitutionalizing the substantive conflict of law rules; for if history is any guide, the attempt to impose such limitations on jurisdictional authority of a state's courts merely will confuse jurisdictional doctrine without achieving the substantive purposes that were intended.

CONCLUSION

The development of jurisdictional concepts that is outlined in this article provides an intriguing illustration of the historicity of legal doctrine, or to put it another way, the possibility in a case law system of judicial adaptations of legal concepts to meet perceived changes in the reality of economic and social relationships. Indeed,

487. See Home Ins. Co. v. Dick, 281 U.S. 397 (1930). Cf. Developments, supra note 156, at 976 (suggesting that state courts be allowed to exercise divorce jurisdiction over nondomiciliaries if they apply the substantive law of one party's domicile).

488. A recent decision indicates that the Supreme Court remains reluctant to establish constitutional limits that would restrict a state court's power to choose what substantive law is to apply in a lawsuit over which the court has jurisdiction. Allstate Ins. Co. v. Hague, 101 S. Ct. 633 (1981).

489. For a more systematic attempt to relate jurisdiction to the whole of American history, see Kalo, Jurisdiction as an Evolutionary Process: The Development of Quasi
one reason that jurisdiction (absent the aberration with respect to status) remains such an important part of the first-year course in civil procedure in most law schools may be the comparative rarity of such "pure" case-law developments in the legislation-dominated twentieth century. Not only does a study of the evolution of jurisdiction demonstrate how judges mold the law over time, but the interrelated nature of the various changes forces the students to develop skills of analysis, analogy, and classification that will enable them to test the consequences that changing a particular jurisdictional rule has for the underlying theory that supposedly guides the development of the particular rules. Finally, the modern minimum contacts approach to jurisdictional problems introduces the student to the balancing concept, the weighing of various functional factors, which is so much a part of contemporary doctrine.\footnote{in Rem and In Personam Principles, 1978 DUKE L.J. 1147. This phenomenon is not confined, of course, to judicial development of the contours of the vague due process clause. It is a common feature attribute of doctrinal development that the author has traced in other areas of constitutional interpretation, see Murchison, Toward a Perspective on the Death Penalty Cases, 27 EMORY L.J. 469 (1978), as well as in non-constitutional areas. See Murchison, The Entrapment Defense in Federal Courts: Emergence of a Legal Doctrine, 47 MISS. L.J. 211 (1976).}

Seen in a more comprehensive framework, the growth of jurisdictional doctrine provides a summary in microcosm of important general themes in the development of modern American legal thought.\footnote{490. The quintessential expositor of the balancing approach was Benjamin Cardozo. See Schechter Poultry Corp. v. United States, 295 U.S. 495, 544 (1935) (Cardozo, J., concurring); Carter v. Carter Coal Co., 298 U.S. 238, 327 (1936) (Cardozo, J., dissenting); B. Cardozo, The Nature of the Judicial Process 98-141 (1927).} The origins of the doctrine are manifested in the formalism of the late nineteenth century, which accepted certain distinctions (e.g., in personam v. in rem; direct v. indirect) as axiomatic and self-defining.\footnote{491. The analytical framework for this concluding section is not original. The writer borrowed it from the materials presented at a National Endowment for the Humanities seminar led by Professor Morton Horwitz of Harvard University. Professor Horwitz thus deserves credit for any insights offered by this analysis although he is not responsible for any errors in the specific application of his analytical framework made herein.} But the rapid changes of the twentieth century rendered increasingly archaic not only these distinctions, but also the underlying concept on which they were based: the territorial autonomy of the American states. At first, the law responded by creating exceptions without altering the theory; it invented legal fictions (most commonly in the form of implied consent) that forced a new reality into the
traditional framework. As the chasm between theory and decided cases widened, legal realism—the distinctive American legal philosophy of the twentieth century—began to exert its classic argument that courts and scholars should focus on the actual decisions rather than the nominal superstructure; that is, the “ought” of jurisdictional theory should be developed from a careful examination of the “is” of twentieth century decisions.

In International Shoe the Supreme Court embraced the realistic argument and adopted the minimum contacts standard as a way of explaining “more realistically” the actual standards applied in previous decisions. The initial impact of the triumph of legal realism was an expansion of the ability of consumers, shareholders, and tort plaintiffs to force out-of-state defendants to come to the forum chosen by the plaintiff, an expansion that, except for the Hanson exception, continued for three decades. But the malleability of judicial decisions did not end with International Shoe, and in its most recent decisions the Court has transformed the expansive non-doctrine of International Shoe—the appeal to convenience and fairness—into a new theory to govern all assertions of state court jurisdiction. As was true with the theory originally articulated in Pennoyer, the aim of the new theory was not to expand the limits of jurisdiction, but to define and thus to limit the ability of states to issue binding judgments against out-of-state defendants.

Naturally, the new framework is not completely confining and may permit expansion of jurisdiction in some areas such as status jurisdiction. Nor should one expect this or any other legal theory to alter the legal system in a manner substantially out of accord with the national character of American society. But the central thrust of recent decisions is to limit jurisdiction; as a specific example, resurrecting the language of territoriality to establish a new requirement of foreseeability in lawsuits against corporations reflects an increased willingness to allow the cost of litigation to be borne by the individual plaintiff, rather than spread among all consumers by making the corporation bear the expense of cost of doing business.

493. The literature of legal realism is, of course, voluminous, but a few of the classic articles deserve mention. E.g., Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Frank, Realism in Jurisprudence, 7 AM. L. SCHOOL REV. 1063 (1934); Llewellyn, A Realistic Jurisprudence—The Next Step, 30 COLUM. L. REV. 431 (1930); Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222 (1931). See also White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 Va. L. Rev. 999 (1972).

494. 326 U.S. at 318.

495. Indeed, one might argue coherently that insensitivity to the realities of a consumer economy has been a consistent characteristic of the Burger Court. See, e.g.,
In a very real sense the recent transformation of International Shoe's principle for expanding jurisdiction into a device for limiting the authority of state courts is the reflection of a profoundly conservative element in legal realism, which usually is described as a radical legal philosophy. Although focusing on the "is" of decided cases to derive the "ought" for a theoretical framework initially may permit the overruling of older decisions that are inconsistent with the "real" trend of recent cases, it offers no standard for judging whether the realism of recent decisions conforms to existing social reality or whether another approach would produce more socially desirable results. Nor can the use of words like "reasonableness" or "fairness" satisfy the need for an external moral standard because such terms must derive their meaning from some substantive view of a just society. Without such a view, one lacks any effective basis to criticize the "is" (that is, the status quo), and the "is" itself becomes normative. This pattern is one that jurisdictional opinions reflect; International Shoe's "realistic" description of the "is" (how the Court had resolved the jurisdictional issues in earlier decisions) becomes in Hanson, Shaffer, and Woodson the "ought" or the substantive standard that limits future attempts to expand jurisdiction.

Understanding this conservative tendency does not deny the considerable utility of realism. If a goal of legal thought is to guide decision-making, judging the value of any theoretical framework requires an evaluation of how well it explains prior decisions and offers a usable approach to future decisions. But by making harmonization of the precedents along the ultimate goal of legal theory, one does not eliminate normative values from decision-making; one simply ascribes normative value to the status quo. The development of jurisdictional theory illustrates the consequences of the failure to articulate the normative values that the theory is to serve. Without such a substantive standard, disputes about which theory best serves "reasonableness" or "fairness" are ultimately unresolvable.


497. Ignoring this point seems to be the fundamental error of those who insisted on "neutral principles" to guide all constitutional adjudication. See generally Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959).
and the modern balancing approach can lead almost inexorably to legitimizing the economic and social power of existing society. If law is to serve broader goals and to establish standards by which the exercise of legal power is to be judged, a principal task of the legal scholar is to articulate the goals that society should pursue and thus to provide external standards by which the existing legal regime can be judged.


Equally fundamental is my belief that the conventional ways even of stating the choices between greater freedom or equality, on the one hand, and greater governmental power, on the other hand—and particularly the conventional emphasis on 'balancing interests' as the statesmanlike method of making such choices—are remarkably unilluminating as well as misleadingly ahistorical.

(Emphasis in original).