THE ALIEN DEFENDANT AND *IN PERSONAM* JURISDICTION: WHEN THE *INTERNATIONAL SHOE* DOES NOT FIT

I. INTRODUCTION

As alien[1] persons increasingly frequent the United States,[2] the need to establish uniform jurisdictional procedures over aliens is crucial. At present, however, standards governing *in personam* jurisdiction over aliens are in a state of disarray.[3]

Reform is necessary. Because of inconsistencies in courts' jurisdictional analyses, aliens are unable to determine whether they are susceptible to liability in the United States.[4] Further, alien governments, perceiving an inequitable administration of jurisdiction, are less likely to enforce American judgments,[5]

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1. As used throughout this note, "alien" refers to persons from a country other than the United States. "Foreigner" refers to persons from a state other than the forum state.

2. In 1970, 4,431,900 aliens were admitted to the United States; by 1987, that number had risen to 12,421,100. Aliens include:

> [V]isitors for business or pleasure, students and their spouses and children, foreign government officials, exchange visitors and their spouses and children, international representatives, treaty traders and investors, representatives of foreign information media, fiancees of United States citizens and their children, officials of the Northern Atlantic Treaty Organization (NATO), and aliens in transit.

U.S. DEP'T COM., STATISTICAL ABSTRACT OF THE UNITED STATES 1989 (109th ed. 1989).

In California, every year, an additional 175,000 alien-born persons go to work. Schreiner, *Foreign Workers*, 9 AM. DEMOGRAPHICS 47, 48 (1987).

3. In coping with alien defendants courts have vacillated among three fundamental jurisdictional approaches. The prevailing method is to treat alien and foreign defendants alike for jurisdictional purposes. The Supreme Court adhered to such a methodology in Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984), a general jurisdiction case, where the justices did not overtly acknowledge the defendant's alien status. *See also* Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).

A second method, which tends to restrict a state's jurisdictional reach over alien defendants, is to give enhanced scrutiny to fairness considerations when contemplating asserting jurisdiction over alien defendants. The Supreme Court, in Asahi Metals Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987), adopted this approach, but ultimately was unwilling to overthrow traditional jurisdictional analyses. Other courts, however, have adopted this more restrictive stance with greater enthusiasm. "[W]hen the nonresident defendant is from a foreign nation, rather than from another state in our federal system, the sovereignty barrier is higher, undermining the reasonableness of personal jurisdiction." Pacific Atl. Trading Co. v. M/V Main Express, 758 F.2d 1325, 1330 (9th Cir. 1985).

A third method, which generally expands a state's jurisdictional reach over alien defendants, is to adopt a pure national contacts basis of determining jurisdiction. Several lower courts have espoused this standard. *See, e.g.*, First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (E.D. Tenn. 1962); Cyromedics, Inc. v. Spembly, Ltd., 397 F. Supp. 287 (D. Conn. 1975) (both courts adopted the national contacts test for divining jurisdiction). *See infra* notes 86-90 and accompanying text.

For the various means in which courts treat alien defendants, *see* Degnan & Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HAST. L.J. 799, 804-07 (1988).

4. "[F]oreigners often will be unfamiliar with the jurisdictional devices used by the United States courts, and thus surprised by the need to defend in a United States forum." Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 32 (1987).

5. Jurisdiction becomes irrelevant once alien governments become unwilling to enforce judgments rendered in this country. If the processes for asserting jurisdiction are perceived as insensitive and self-serving, then the successful plaintiff's judgment runs a considerable risk of going unsatisfied because of a foreign government's reluctance to cooperate. Degnan & Kane, *supra* note 3, at 844-54.

and are more likely to respond with retaliatory measures.[6] Moreover, the integrity of the judicial system of the United States is compromised by the current diffuse means of establishing jurisdiction over alien defendants. Finally, the present methods of determining jurisdiction are at odds with international notions of sovereignty.[7]

This note discusses the shortcomings inherent in courts' traditional approach to asserting *in personam* jurisdiction over aliens, and proposes a jurisdictional methodology to alleviate such shortcomings. Part II examines the contemporary judicial assessment of jurisdiction and the alien defendant. Part III proposes that foreign and alien defendants should be treated differently in the jurisdictional context. Part IV advocates that a national contacts basis be used to determine jurisdiction. Finally, part V extols heightened due process standards in light of national contacts jurisdiction.

II. THE ALIEN DEFENDANT AND CONTEMPORARY *IN PERSONAM* JURISDICTION

Debate flourishes as to whether courts should adjust jurisdictional analyses when considering alien, as opposed to foreign, defendants. Some critics espouse the same analyses regardless of the defendant's status as foreigner or alien.[8] Others insist that courts should adopt more expansive measures when contemplating jurisdiction over alien defendants.[9] Still others call for a more restrictive approach to jurisdiction over aliens.[10]

The Supreme Court has offered little guidance regarding jurisdiction in the international context. The watershed *in personam* jurisdiction case, *Pennoyer v. Neff*,[11] provides a backdrop against which the contemporary alien defendant may be usefully juxtaposed. In *Pennoyer*, Mr. Mitchell, an attorney in Oregon, served process on Mr. Neff, who was domiciled in California, for failure to pay legal fees. Mr. Neff failed to appear, and the Oregon court entered judgment by default in favor of Mr. Mitchell. Subsequent to the judgment, Mr. Neff acquired property in Oregon. Pursuant to a writ of execution, the sheriff attached Mr. Neff's Oregon property in order to satisfy the judgment against Mr. Neff. Mr. Pennoyer purchased the property at a judicial sale. Mr. Neff then sued Mr. Pennoyer, claiming that the original default judgment rendered against him was invalid for lack of jurisdiction.[12] As such, the court had no authority by which

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6. Belgium, Italy, Austria, and Portugal have enacted retaliatory statutes. These statutes provide that courts may assert jurisdiction over aliens only in circumstances where the courts of the alien's home country could assert jurisdiction. Born, *supra* note 4, at 15.

7. *See infra* text accompanying notes 66-76.

8. Seidelson, *A Supreme Court Decision and Two Rationales that Defy Comprehension: Asahi Metals Indus. Co., Ltd. v. Superior Court of California*, 53 BROOKLYN L. REV. 563, 581-84 (1987).

9. Many of these critics rely on a national contacts theory with no ameliorative language. *See* Hay, *Jurisdiction Over Foreign-Country Corporate Defendants*, 63 OR. L. REV. 431, 433-435 (1984). *See also* Richardson, *The Outer Limits of In Personam Jurisdiction Over Alien Corporations: The National Contacts Theory*, 16 GEO. WASH. J. INT'L L. & ECON. 637, 651-57 (1982).

10. These critics usually emphasize foreign policy considerations and fairness concerns. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). Professor Gary Born suggests reasons for restricting jurisdiction over aliens while retaining a national contacts test. Born, *supra* note 4, at 21-34.

11. 95 U.S. 714 (1877).

12. *Id.* at 719.

to initiate the attachment process. The United States Supreme Court agreed with Mr. Neff, holding that an attempt by a state to exercise jurisdiction over a nonresident without service of process within the state is invalid.[13]

Justice Field, writing for the majority, said, "[e]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory,"[14] and "no state can exercise direct jurisdiction and authority over persons and property without its territory."[15] Thus, when devising concepts of interstate jurisdiction, the Court focused on notions of judicial power. According to *Pennoyer*, the state's authority as a sovereign depends in large degree upon the presence of a defendant or a defendant's property within its borders.

Sixty-eight years later, in *International Shoe Co. v. Washington*,[16] the Supreme Courts' preoccupation with power to adjudicate gave way to fairness considerations. In *International Shoe*, the Court introduced its bifurcated test to resolve jurisdictional questions. That test has now become an omnipresent jurisdictional incantation:

[D]ue process requires only that in order to subject a defendant to a judgement *in personam*, if he not be present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'[17]

Over the past four and a half decades, courts have been steadfast in applying the *International Shoe* test to jurisdictional questions, regardless of whether the defendant is a foreigner or an alien.[18] In resolving *in personam* jurisdiction questions, courts look to a connection among the forum, the defendant, and the litigation. If the defendant's contacts with the forum give rise to litigation and exceed a minimum threshold, the defendant is subject to the forum's judicial authority, so long as the assertion of jurisdiction is consistent with notions of fairness. This formula lumps all defendants, be they foreigners or aliens, into one broad group.

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13. "It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy." *Id.* at 734.

14. *Id.* at 722.

15. *Id.*

16. 326 U.S. 310 (1945). Subsequent Supreme Court cases involving *in personam* jurisdiction questions borrow heavily from the standards set forth in *International Shoe*. In Kulko v. Superior Court of California, 436 U.S. 84 (1978), the Court held that Mr. Kulko lacked sufficient contacts with California to assert jurisdiction over him. In World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980), the Court held that as defendant, a New York automobile distributor, did not wilfully direct its product to Oklahoma, its contacts with the state were too attenuated to assert jurisdiction. In Burger King v. Rudzewicz, 471 U.S. 462 (1985), the Court held that if a dispute arises from a contract which shows a substantial connection with the forum state, the state may assert *in personam* jurisdiction over the nonresident. In Asahi Metals Indus. Co. v. Superior Court, 480 U.S. 102 (1987), the Court, while splitting on whether the defendant had requisite contacts with California, held that fairness considerations obviated the assertion of jurisdiction over the defendant.

17. *International Shoe*, 326 U.S. at 316. In applying the minimum contacts test, courts consider whether the defendant benefitted from the state's laws, whether the defendant benefitted economically and/or socially from interacting with the state, whether the defendant's activities were quantitatively or qualitatively substantial, whether the defendant's activities caused an effect in the state, whether the defendant wilfully associated itself with the state, and whether the defendant could foresee that its acts would cause an effect in the state.

18. "The United States Supreme Court's new jurisdictional decisions do not depart from the 'minimum contacts' test originally established by *International Shoe Co. v. Washington*." Hay, *supra* note 9, at 431 (1984).

The Supreme Court has not entirely discounted the possibility of adjusting the jurisdictional analysis, however, when the defendant is an alien. For example, Justice Harlan, dissenting in *United States v. First Nat'l City Bank*,[19] observed, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field, ..."[20] The Court again intimated, in *Scherk v. Alberto-Culver Co.*,[21] that the presence of an alien party requires heightened scrutiny because "[t]o determine that American standards of fairness . . . must [automatically] govern the controversy demeans the standards of justice elsewhere in the world and unnecessarily exalts the primacy of United States law over the laws of other countries."[22]

Two major contemporary jurisdiction cases voice sympathies that seem especially germane to the alien defendant. Although involving interstate parties, in *World-Wide Volkswagen v. Woodson*,[23] the Court suggested that fairness considerations would be given considerable deference:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[24]

The Court provided its most definitive statement to date regarding the alien defendant and jurisdiction in *Asahi Metals Industry Co. v. Superior Court*.[25] Justice O'Connor, in that part of her opinion joined by seven other members of the Court,[26] stated, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[27] And further, according to the majority:

The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.[28]

Justice O'Connor concluded that the distance the alien defendant must travel to defend itself, California's *de minimis* interest in litigating the dispute, and

19. 379 U.S. 378 (1965).

20. *Id.* at 385 (Harlan, J., dissenting). Professor David Seidelson contends that these words should be limited to the facts of the case. Seidelson, *supra* note 8, at 582-83.

21. 417 U.S. 506 (1974).

22. *Id.* at 517 n.11 (1974).

23. 444 U.S. 286 (1980).

24. *Id.* at 294.

25. 480 U.S. 102 (1987).

26. Justice O'Connor announced the judgment of the Court. Seven members of the Court joined in Part II-B of the opinion, which focused on fairness considerations. *Id.* at 113. Justice O'Connor's stream of commerce doctrine, Part II-A of the opinion, was joined by three justices. *Id.* at 108. Justice Brennan's stream of commerce interpretation was joined by three justices. *Id.* at 116. Justice Stevens posited his own analysis and was joined by two other justices. *Id.* at 121.

27. *Id.* at 114.

28. *Id.* at 115.

intractable choice of law difficulties, were all factors militating against the finding of jurisdiction.[29]

Although *Asahi* indicates that courts may treat alien defendants differently from foreign defendants, if the decision does not signify a new trend, it is an aberration. The Court had ample opportunity to address concerns flowing from the presence of an alien party in *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*,[30] — as well as in such general jurisdiction cases as *Helicopteros Nacionales de Columbia, S.A. v. Hall*[31] and *Perkins v. Benguet Consolidated Mining Co.*[32] — but chose to evade the question. Thus, while Justice O'Connor tested the outer bounds of the minimum contacts test in *Asahi*, the Court appears to be content to analyze all personal jurisdiction questions within the framework devised in *International Shoe* and in its progeny.[33]

Lower courts, however, have not been so reluctant to draw attention to the differing effects foreign and alien defendants may impart on jurisdiction. Although many courts refuse to differentiate the extraterritorial status of defendants,[34] others are prone to alter their jurisdictional analyses when contemplating alien defendants.[35]

The courts that are willing to recognize a difference between foreign and alien defendants may be divided into two groups: one group restricts jurisdictional reach; the other group expands jurisdictional reach. Those courts which emphasize the fairness branch of the *International Shoe* test generally shrink the breadth of jurisdiction over alien defendants,[36] while those courts which emphasize the minimum contacts branch of the *International Shoe* test in conjunction with a pure national contacts approach to jurisdiction generally enlarge the scope of jurisdiction over alien defendants.[37]

III. THE ALIEN DEFENDANT AND SPECIAL JURISDICTIONAL CONSIDERATIONS

Valid reasons exist for treating foreign and alien defendants alike when evaluating jurisdiction.[38] One scholar has presented at least five reasons for doing

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29. *Id.* at 114.
30. 456 U.S. 694 (1982).
31. 466 U.S. 408 (1984).
32. 342 U.S. 437 (1952).
33. Hay, *supra* note 18.
34. Degnan & Kane, *supra* note 3, at 804 n.26 (1988).
35. *Id.* at 804-07 nn.27-32.
36. Insurance Co. of North Am. v. Marina Salina Cruz, 649 F.2d 1266 (9th Cir. 1981), involved a controversy between an American insurer and a Mexican shipyard. In denying the assertion of jurisdiction the court said, "[w]e do conclude that sovereign status of a defendant militates against the reasonableness of jurisdiction . . . ." *Id.* at 1272.
37. In Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), a New York corporation sued Nigeria and its central bank in a breach of contract action. The court stated, "[t]he relevant area in delineating contacts is the entire United States, not merely New York." *Id.* at 314. In ignoring the defendant's contacts with a particular state, the court concluded:

> [We] must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interests of the United States in hearing the suit.

Id. at 314.
38. "At a time when a significant portion of the products used in this country, and a significant

so.[39] First, merely because a party is an alien does not mean that greater burdens will be encountered in litigating in the United States.[40] Second, alien competitors should not be given a competitive advantage in conducting business in the United States. Third, aliens make a voluntary decision to import their products into the United States market, and as such they are required to compete on the same footing with other companies operating in this market. Fourth, neither Congress nor the Executive have acted to constrain judicial assertion of personal jurisdiction over alien defendants. Fifth, courts of other major industrial nations have sweeping jurisdictional provisions.[41]

The nature of a jurisdictional decree might additionally suggest that courts ought not to adjust their analyses in the instance of the alien defendant. Unlike substantive deficiencies, a failure to establish jurisdiction leaves an injured party with no legal recourse to resolve the controversy. Thus, more demanding jurisdictional standards could work undue harm on domestic plaintiffs by denying them a "day in court."[42] Moreover, other doctrines may answer any hardship encountered by the alien defendant. For example, unfairness that redounds to the alien from haling it into American courts might be ameliorated by resort to federal venue laws and the doctrine of *forum non conveniens*.[43]

There are reasons, however, to expand jurisdiction over alien defendants. First, as to questions of jurisdiction, courts afford alien persons diluted constitutional protection. While the Constitution recognizes aliens as persons and grants them rights pertaining thereto, the Fourteenth Amendment affords states greater constitutional recourse.[44] Aliens, as entities distinct from states, cannot benefit as readily from the protective provisions of the fourteenth amendment. Therefore, as to aliens, the restraining force of constitutional guarantees afforded United States citizens is diluted so that courts arguably can cast the jurisdictional net a greater distance.

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portion of the component parts of such products, are manufactured abroad, I would have thought that there was a substantial need for asserting jurisdiction over those foreign [alien] defendants." Seidelson, *supra* note 8, at 583.

Moreover, the American Law Institute's Revised Restatement of Foreign Relations Law supports this position: "[T]he criteria for claims arising out of judicial jurisdiction are basically the same for claims arising out of international transactions or involving a nonresident alien as a party." RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 note 1 (Tent. Draft No. 6, 1985).

39. Dessem, *Personal Jurisdiction After Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 82-84 (1987).

40. Professor Dessem gives the example of a Canadian corporation in Windsor, Ontario, defending a claim in a Michigan court as opposed to a Hawaiian manufacturer defending a claim in a Louisiana court. *Id.* at 82.

41. Professor Dessem also uses France as an example. "French courts will entertain a suit brought by a French citizen against any defendant, anywhere in the world, regardless of contacts with France." *Id.* at 84. Article 126 of the Code of Civil Procedure of the Netherlands expresses the same sentiment. *See* von Mehren & Trautman, *supra* note 10, at 1137.

42. Richardson, *supra* note 9, at 652.

43. Degnan & Kane, *supra* note 3, at 824-834.

44. "But the Fourteenth Amendment as it has evolved in the jurisdiction context provides protections in addition to and quite apart from these procedural fairness guarantees to persons. Specifically, it protects the concerns of sister states of this Union from transgressions by each other." *Id.* at 813-14.

Second, in the international arena, a new jurisdictional test may be warranted. The state assumes much less jurisdictional significance when the judicial inquiry extends to the international realm. As such, it may be thought an inappropriate jurisdictional unit. Instead of the state, then, the nation becomes the appropriate jurisdictional unit. Under this theory, the court expands the minimum contacts inquiry of *International Shoe* to the entire nation. Thus, the alien defendant which might have escaped the assertion of jurisdiction under the traditional analysis could be haled into court if its interaction with the nation surpassed the minimum contacts threshold. "It [the national contacts theory] is not very different from that developed in the state jurisdiction context - we simply cast the net further."[45]

Finally, there are reasons to restrict jurisdiction over alien defendants.[46] First, the alien defendant suffers many practical burdens when haled into the United States by a court, thus compounding the magnitude of fairness considerations. Among other hardships, the alien defendant will likely have to travel farther than the foreign defendant, cope with unfamiliar legal processes, gather evidence at great inconvenience and cost, and communicate in a non-native language.

Further, the assertion of jurisdiction over aliens carries with it a number of extrajudicial consequences. The court's jurisdictional decision affects not only the parties to the controversy, but has far-reaching effects on other countries. Alien governments will view expansive jurisdictional proclamations as a threat to their sovereignty, instilling the impetus to react negatively. Such adverse reactions could assume any number of forms: public condemnation of the United States, retaliatory judicial or political responses, trade sanctions, or a general disavowal of American initiatives abroad.[47] These concerns are especially pronounced given the heightened interdependent nature of contemporary global affairs.

Such considerations are reminiscent of the concerns about sovereign authority that the Court voiced in *Pennoyer*. This is not surprising, for relations among states in the 1870s mirror relations among nations in the 1990s.

Although modern jurisdictional analyses suggest that the *Pennoyer* court deferred excessively to the foreign sovereign at the expense of the injured

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45. *Id.* at 820.

46. *See* von Mehren & Trautman, *supra* note 10, at 1127-28. *See also* Born, *supra* note 4, at 21-34.

47. Because exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns, these claims can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields. Equally important, exorbitant jurisdictional claims can frustrate diplomatic initiatives by the United States, particularly in the private international law field. Most significantly, these claims can interfere with United States efforts to conclude international agreements providing for mutual recognition and the enforcement of judgements or restricting exorbitant jurisdictional claims by foreign states.

Born, *supra* note 4, at 29.

Professors von Mehren and Trautman allude to similar problems:

> Nonetheless, in establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate, and convenient. To a degree it must take into account the views of other communities concerned. Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals.

von Mehren and Trautman, *supra* note 10, at 1127.

plaintiff,[48] the case involved interstate parties. As such, the combined weight of the Full Faith and Credit Clause[49] and the Privileges and Immunities Clause[50] could be brought to bear. But the constitutional protection of these clauses does not extend to alien defendants, thereby heightening concerns about fair play and comity.[51] Because legal uniformity and reciprocity are not formally recognized in the international arena, jurisdictional assertions over alien defendants run the risk of promoting discord.[52]

Moreover, the federal government has a constitutional interest in assuring that state courts do not defeat federal interests.[53] This is an especially germane concern in the context of international commerce. According to one commentator, "[b]ecause '[f]oreign commerce is preeminently a matter of national concern,' state legislation affecting foreign commerce is generally subject to more searching constitutional scrutiny than legislation affecting interstate commerce."[54]

The harm that the state visits upon federal interests is not constrained to legislation or commerce. Any instance of a state court meddling in international affairs affords cause for suspicion.[55] A considerable risk of derogating federal

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48. The test enunciated in *International Shoe*, 326 U.S. 310 (1945), represents a considerable erosion of the conservative jurisdictional principles propounded in Pennoyer v. Neff, 95 U.S. 714 (1877). Under the *Pennoyer* analysis, in order to assert jurisdiction, a court required that the defendant be present in the state at the time of service of process, or that the defendant have residence or citizenship within the state, or that the defendant consent to service of process, or that process be served on an agent of the defendant within the forum state.

The *Pennoyer* decision, however, must be viewed in an historical context. Technology and modes of transportation were comparatively crude in the late nineteenth century. Thus, assertions of jurisdiction imposed great burdens upon an extraterritorial defendant.

49. 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 by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.
U.S. CONST. art. IV, § 1.

Additionally, the alien is beyond the purview of 28 U.S.C. §1378 (1948).

50. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

51. Permitting broad jurisdictional power beyond state borders is possible in the federal system because states do not stand as sovereign entities in the same sense as foreign nations, and because the Supreme Court has authority to resolve controversies between states. The same practice is not appropriate in the international context, however, because sovereignty principles remain intact despite the growth of international commerce.
Richardson, *supra* note 9, at 656.

52. von Mehren & Trautman, *supra* note 10, at 1126. *See also* Born, *supra* note 4, at 27-34.

53. "State law and policy must yield to federal control of federal relations. . . ." DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 297 (1964). The Constitution empowers courts to subordinate state interests to federal interests in certain circumstances.
This clause [U.S. CONST. art III, § 2, cl. 1], extending the federal judicial power to all cases involving federal questions (in conjunction with the 'supremacy' clause [U. S. CONST. art. VI, § 2]), is the legal basis of the claim of the Supreme Court of the United States to possess authority to declare acts of Congress and of state legislatures unconstitutional and void by reason of conflict with the federal Constitution.
Id. at 336.

54. *See* Born, *supra* note 4, at 31.

55. In the 1950s and 1960s some states enacted statutes preventing residents of communist countries from inheriting property. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968), wherein the United States Supreme Court reversed the Oregon Supreme Court, holding that prohibiting legatees residing in communist countries from inheriting property was unconstitutional because it represented an unacceptable intrusion by "the State into foreign affairs and international relations, matters which the Constitution entrusts solely to the Federal Government." *Id.* at 432, 441.

interests arises when allowing a state unbridled power to assert jurisdiction over alien defendants.[56]

The presence of an alien defendant calls for more restrictive jurisdictional standards in yet another sense. Here the focus is not on the ramifications of the decision beyond the actual dispute, but directly on the alien defendant. Although it has been argued that existing due process inquiries are sufficient to ensure the alien defendant a fair resolution of the controversy,[57] the burdens suffered by the alien defendant in litigating in the United States are so significant as to justify more intense due process scrutiny.[58] Indeed, the *Asahi* Court, while operating within an existing due process framework, tested the outer limits of that framework. By calling attention to the parties' unfamiliarity with judicial processes in the United States,[59] the practical obstacles an alien defendant encounters when litigating abroad,[60] and the attendant cultural dissimilarities,[61] the Court presented the possibility that reconstituted due process considerations might be appropriate for alien defendants.

Beyond this, procedural mechanisms for determining jurisdictional preferences ignore the alien defendant. In a conflict arising in different counties of the same state, one party might well encounter disproportionate hardship. Traditionally, such hardship is borne by the plaintiff because of fears that if it were otherwise, the plaintiff could unduly harass the defendant.[62] When disputes encompass out-of-state persons, however, the procedural bias in favor of the defendant is vitiated,[63] and it becomes so attenuated as to be indiscernible in the

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56. Such concerns contributed to Justice O'Connor's decision to deny jurisdiction over the alien defendant in *Asahi*. A court, the justice noted, "[m]ust also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'" 480 U.S. 102, 113 (1987) (quoting from *World-Wide Volkswagen*, 444 U.S. at 292).

57. Professor Siedelson argues that the purpose of due process in the jurisdictional context is to protect persons from unfair surprise. Existing due process provisions, he concludes, adequately insulate the alien defendant from such surprise. Siedelson, *supra* note 8, at 572-78.

58. Professor Hay notes, "[t]he plaintiff who is required to litigate abroad obviously will be more inconvenienced than a plaintiff who must litigate in a Sister State." Hay, *supra* note 9, at 433. This must also hold true for the alien defendant required to litigate in the United States. Professors Degnan and Kane observe:

> The Ninth Circuit has issued several opinions expressing the notion that the reasonableness criteria must be applied with caution in the international context, suggesting that factors of particular significance are: the potential travel burden on the alien defendant, the burden on the plaintiff if the alternative forum is another country, and the notion that the sovereignty barrier may be higher when a foreign national is defending.

Degnan & Kane, *supra* note 3, at 805 n.27.

59. *Asahi*, 480 U.S. at 114.

60. *Id.*

61. *Id.*

62. von Mehren & Trautman, *supra* note 10, at 1128 n.14.

63. In Hess v. Pawlowski, 274 U.S. 352 (1927), the Court held that asserting jurisdiction in Massachusetts over a Pennsylvania defendant was appropriate. The controversy arose out of an automobile accident in Massachusetts. In asserting jurisdiction, the Court propounded the legal fiction that by driving on the roads of Massachusetts, the defendant had implicitly assented to the appointment of the state's registrar as its agent. Thus, process could be served on the agent to hale the defendant into court in Massachusetts. *Id.* at 356-57.

In time, courts eschewed concocting legal fictions and increasingly justified selecting the place of litigation on convenience considerations. Factors militating in favor of asserting jurisdiction over an extraterritorial defendant include the application of the forum state's law to the dispute, preventing

international context. Once a dispute traverses state borders, the controlling factor governing the location for settling the controversy, at least as to *in personam* jurisdiction questions, is generally where the grievance arose.

Such a resolution is tolerable in regard to foreign defendants, but it does not acknowledge the disparate burdens the alien defendant suffers when litigating in another country. While an out-of-state defendant may encounter slight differences in the laws of the forum state, the alien defendant may well encounter an entirely different judicial system.[64] Further, because of language barriers, the unassisted alien defendant may not comprehend even the rudiments of the complaint lodged against it. Moreover, regardless of distance, the very act of crossing a national border, as opposed to a state border, is fraught with significance.[65] Finally, when the due process tests are identical for alien and foreign defendants, plaintiffs having a tenuous grievance with an alien defendant have no disincentive to attempt to hale the alien into court. Given the many burdens the alien defendant faces, it may feel compelled to settle out of court, rather than face the onerous obstacles endemic to transnational litigation.

Because of foreign relation concerns, federal sovereignty concerns, the nefarious burdens borne by alien defendants, and procedural inadequacies, courts are justified in treating foreign and alien defendants differently. The means of doing so will be considered in the following two parts.

IV. THE ALIEN DEFENDANT AND A NEW JURISDICTIONAL ORDER: THE NATIONAL CONTACTS TEST

American courts' predominant use of the *International Shoe* test in resolving disputes concerning aliens cannot be rectified with the international order. Both branches of the *International Shoe* test — minimum contacts and fairness — owe their fundamental existence to fourteenth amendment due process concerns. In *International Shoe* and its progeny, the Supreme Court repeatedly called attention to the fourteenth amendment;[66] so much so that it resonates throughout contemporary *in personam* jurisdiction cases.

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excessive burdens from inuring to the allegedly wronged plaintiff, the availability of evidence and witnesses, and the state's interest in protecting its citizens.

64. Consider, for example, the tremendous difference between the Anglo-American conception of law and the Japanese conception of law. Whereas law in the Anglo-American tradition is viewed as an essential means of shaping society and establishing order, the ordinary Japanese citizen views law as a detestable thing which can only cause dishonor. *See* Y. NODA, INTRODUCTION TO JAPANESE LAW 159 (1976). *See also* G. KOSHI, THE JAPANESE LEGAL ADVISOR 17-39 (1970) (explanation of the practical difficulties an alien defendant might encounter when litigating a criminal matter in Japan).

65. It is a well recognized international custom that when crossing most national borders a passport is usually required, a search of the person and their belongings may be performed, a fee may be imposed, and different currency must often be acquired. (citations omitted).

66. "Whether 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." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). "'The constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established 'minimum contacts' in the forum State.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). "The due process clause of the Fourteenth Amendment limits the power of a state court to render a valid judgement against a nonresident defendant." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

In the procedural context, the state is the fundamental focus of the fourteenth amendment due process clause.[67] In the international setting, however, the state, as a subsection of a federalist nation, does not exist for jurisdictional purposes.

> In the international order there is no such thing as Oklahoma. Oklahoma is an address, not a state. It is a fabled land in a musical comedy, where the corn grows as high as an elephant's eye and wind goes sweeping across the plain. But it is just as mythical as Ruritania. It fields no army, sails no navy, prints no stamps and coins no money. Most important of all, it has no diplomatic relations and can conclude no treaties. In short, it lacks every single attribute of a 'state' for international purposes.[68]

The fourteenth amendment, and in turn the *International Shoe* test, came into being because of concerns over uniform due process in a federalist nation. Such concerns, however, belong to the United States, not to a distant country.[69] Another country recognizes the judicial posture of the United States, not the judicial relations among its states. As it has been interpreted, the fourteenth amendment ensures constitutional guarantees among the states; it says nothing about relations between the states and aliens. In regard to alien defendants, then, the Court's preoccupation with minimum contacts and "traditional notions of fair play and substantial justice"[70] is fundamentally misguided.

Notwithstanding the Court's recognition that the United States exists as one sovereign in the international arena,[71] since its seminal decision in *International Shoe* to the present date, the Court has been unduly parochial in its approach to *in personam* jurisdiction.

To illustrate, consider *Asahi*. The controversy arose when Gary Zurcher, accompanied by his wife, lost control of his motorcycle and collided with a tractor because of an allegedly faulty tire.[72] Mrs. Zurcher died and Mr. Zurcher suffered serious injuries.[73] Although Mr. Zurcher's claim against the motorcycle manufacturer was settled out of court, one of the defendants, Cheng Shin Rubber Industrial Co., Ltd. ("Cheng Shin"), a Taiwanese tire manufacturer, impleaded Asahi Metals Indus. Co. ("Asahi"), the Japanese manufacturer of the tire's valve stems.[74] The only parties remaining in the subsequent litigation were Cheng Shin and Asahi.

Although the Court did note special concerns flowing from the alien status of the parties, it still observed traditional interstate analysis to resolve the

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67. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

68. Degnan & Kane, *supra* note 3, at 813.

69. *Id.*

70. International Shoe Co. v. Washington, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

71. In Chae Chan Ping v. United States, 130 U.S. 581 (1889), the Supreme Court stated that "[f]or local interests, the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Id.* at 606.

72. *Asahi*, 480 U.S. at 105.

73. *Id.*

74. *Id.* at 106.

jurisdictional controversy. In particular, as the accident occurred in California, the Court examined the defendant's contacts with California.[75]

The Court's preoccupation with Asahi's contacts with California is inappropriate. Asahi's contacts with California are meaningful only to the extent that they reveal Asahi's contacts with the United States. Cheng Shin, for example, did do business in California. Whether its tires ended up in the southwestern region of the United States demarcated as California or the southeastern region of the United States demarcated as Florida, however, is not of primary significance to the company, nor should it be to the courts. The company merely sought a market where its products could be sold profitably. That market was foremost the United States, and less significantly, those areas where the product could be sold most lucratively. Cheng Shin thus dealt with the United States as a sovereign, and California as an address.

But consider *Asahi* with altered facts. Instead of California, suppose the accident occurred in Montana where the Zurchers were vacationing.[76] Further, assume that Asahi — selling, for example, one million valve stems in the United States annually — sells no valve stems in Montana and otherwise has no contacts with the state. Thus, under the *International Shoe* test, the Zurchers would likely be unable to assert *in personam* jurisdiction over Asahi in Montana. Such an anomalous result indicates the impropriety of basing jurisdiction on the fortuity of a defendant's contacts with the state. Instead, contacts with the United States — the internationally cognizable judicial unit — should be controlling. The Court's traditional jurisdictional analysis neglects international realities and derogates notions of fairness in the global order.

The nature of international transactions and notions of sovereignty demand a theory of jurisdiction in accord with the international order. The national contacts theory most accurately reflects international realities. Surprisingly, however, courts largely ignore this theory of jurisdiction.

One of the most serious impediments to adopting the national contacts theory is statutory formulation and interpretation. To obtain jurisdiction, a court requires service of process pursuant to an appropriate statute.[77] A statute explicitly allowing national contacts jurisdiction, however, does not exist at the federal level.[78]

Rules 4(e) and 4(d)(7) of the Federal Rules of Civil Procedure address extraterritorial service of process. The difficulty of employing Rule 4(e) to

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75. Asahi does not do business in California. It has no office, agents, employees, or property in California. It does not advertise or otherwise solicit business in California. It did not create, control, or employ the distribution system that brought its valves to California. There is no evidence that Asahi designed its product in anticipation of sales in California.

Id. at 112-13.

76. This hypothetical may recall the facts of World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). But *World-Wide Volkswagen* involved no alien parties. Further, the plaintiffs asserted the action against a United States distributor, not the alien manufacturer. At any rate, if the plaintiffs in *World-Wide Volkswagen* had sought an action against the alien manufacturer, it had such significant contacts with the forum state that it was likely susceptible to the assertion of general jurisdiction.

77. *See* Richardson, *supra* note 9, at 642.

78. Professor Cohen has proposed the enactment of a federal statute explicitly empowering the courts to apply the national contacts theory. Such a statute would mimic state long arm statutes, but expand the territory in which contacts are considered to national borders. *See* Cohen, *In Personam Jurisdiction in Federal Courts Over Foreign Corporations: The Need for a Federal Long-Arm Statute*, 14 DEN. J. INT'L L. & POL'Y 59 (1985).

facilitate the operation of the national contacts theory rests in its insistence that "whenever a statute or rule . . . provides (1) for service of a summons, or a notice . . . service may be made *under the circumstances and in the manner prescribed in the statute or rule.*"[79] Rule 4(d)(7) suffers from a similar shortcoming; namely, "it is also sufficient if the summons and complaint are served *in a manner prescribed by the law of the state in which the district court is held* . . . ."[80] Although the language of Rule 4(d)(7) may contemplate broader jurisdiction than that of Rule 4(e) because it lacks the Rule 4(e) restriction "under the circumstances," several courts have held that these statutes preempt the adoption of a national contacts theory of jurisdiction.[81]

The provisions direct the court to the state's long arm statute. Thus, the inquiry becomes whether the defendant had sufficient contacts with the state to energize the state's long arm statute. In effect, then, because of statutory language and interpretation, the state becomes the focus of the jurisdictional question. Consequently, we have come full circle: the fourteenth amendment and the tests derived from *International Shoe* and its progeny control the controversy, although the defendant is alien.

No court suggests the national contacts test is unconstitutional. In fact, even those courts that refuse to adopt the test still concede its constitutionality. "[I]t is not unfair nor unreasonable as a matter of due process to consider the nationwide contacts of an alien defendant in determining whether jurisdiction exists."[82]

The problem rests in the lack of statutory authorization. Although many courts admit the value of the test, perceiving it to be conceptually valid, they feel too procedurally constrained to actually use it.[83]

Notwithstanding the statutory obstacle, some commentators have urged that the Federal Rules of Civil Procedure currently empower courts to use the national contacts test. One scholar has contended that Rule 4(d)(7):

> [A]dopts provisions by reference so that the ensuing law is federal law. The words "law of the state" are used in the rule simply to identify the provision to which reference is made. . . . [T]he effect is to include the state provisions in the Federal Rules of Civil Procedure as fully as though they had been quoted at length therein.[84]

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79. FED. R. CIV. P. 4(e). (emphasis added).

80. FED. R. CIV. P. 4(d)(7). (emphasis added).

81. *See, e.g.*, DeJames v. Magnificence Carriers, Inc., 491 F. Supp. 1276 (D.N.J. 1980), *aff'd*, 654 F.2d 280 (3d Cir. 1981); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977); Edward J. Moriarity & Co. v. General Tire & Rubber Co., 289 F. Supp. 381 (S.D. Ohio 1967).

82. *DeJames*, 491 F. Supp. at 1283.

83. In *Edward J. Moriarity & Co.*, the court said:

> [W]e feel that the appropriate inquiry to be made in a federal court where the suit is based on a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the Fifth Amendment. . . . Unfortunately, this course has not been left open to us by the federal rules or statutes. That is, neither Congress nor the Supreme Court has provided a statute or rule whereby substituted service may be made upon an alien corporation having certain minimum contacts with the United States.

289 F. Supp. at 390.

84. *See* Richardson, *supra* note 9, at 646.

Under this rubric, the state's long arm statutes are incorporated into the Federal Rules of Civil Procedure such that contacts and notions of fairness are evaluated on a national scale.[85]

Some courts find this reasoning persuasive. In *First Flight Co. v. National Carloading Corp.*,[86] the court upheld the use of the national contacts theory provided reference could be made to a federal or state statute amenable to incorporation into the Federal Rules.[87] In *Cryomedics, Inc. v. Spembly, Ltd.*,[88] the court observed that Connecticut's long arm statute voiced due process concerns commensurate with the United States Constitution.[89] As such, the court was authorized under FED. R. CIV. P. Rule 4(e) to extend the jurisdictional inquiry to national borders, and proceed under a fifth amendment due process analysis.[90]

Other courts have permitted the use of a national contacts test while evading the statutory question. In *Centronics Data Computer Corp. v. Mannesmann, A.G.*,[91] the court considered jurisdiction on a national contacts basis without addressing whether the court was statutorily empowered to do so.[92]

Thus, some courts, even those concluding that the statutory authority is dubious, find the national contacts theory so compelling that benefits flowing from its implementation outweigh grave enabling concerns. This is the proper conclusion. After balancing equities, the national contacts theory is too meritorious not to be put to use.

Above all, the national contacts test comports with the reality of the international order.[93] Of almost equal significance, it offers the United States a uniform method of determining jurisdiction over aliens.[94] Moreover, comity concerns would be less susceptible to attack as the national contacts theory is sired by a sovereign cognizable in the international arena.[95] Further, the theory would prevent anomalous results when the alien defendant has substantial contacts

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85. *Id.*

86. 209 F. Supp. 730 (E.D. Tenn. 1962). This case requires qualification because process was served within the forum state. As such, pursuant to FED. R. CIV. P. 4(d)(3) the court could apply the fifth amendment's more expansive due process considerations.

87. *Id.* at 740.

88. 397 F. Supp. 287 (D. Conn. 1975).

89. *Id.* at 288.

90. *Id.* at 292. *See also* Holt v. Klosters Rederi A/S, 355 F. Supp. 354, 357 (D. Mich. W.D. 1973) (the court adopted a national contacts test in this admiralty case, analyzing minimum national contacts under the fifth amendment).

91. 432 F. Supp. 659 (D.N.H. 1977).

92. *Id.* at 664.

93. "As already noted, it [the national contacts theory] is doctrinally sound, and . . . it is consistent with international notions of the allocation of jurisdiction between sovereign nations." Degnan & Kane, *supra* note 3, at 818.

94. "[T]he national contacts approach would promote greater uniformity of treatment in actions involving federal rights since the jurisdiction of the federal court would not depend upon the liberality or conservatism of the laws of the state in which the court sits." DeJames v. Magnificence Carriers, Inc., 491 F. Supp. 1276, 1283 (D.N.J. 1980), *aff'd*, 654 F.2d 280 (3d Cir. 1981).

"Using state long-arm statutes to obtain jurisdiction over aliens effectively enables state legislatures to establish the requisite level of contacts and thus to intervene in an area that properly demands direct congressional supervision." Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 484 (1981).

As these comments indicate, the national contacts test preempts the inequities that aliens face when confronted with a confusing array of state long arm statutes.

95. *See* Richardson, *supra* note 9, at 655.

with the United States, but virtually none in the state where the aggrieved plaintiff's injury occurred. Finally, alien corporations would be unable to skirt liability (or to squander their resources) by modulating their business activities in various states in order to prevent assertions of jurisdiction.

In expanding the jurisdictional inquiry to national borders, however, alien defendants are much more susceptible to assertions of jurisdiction. Such an effect is in direct conflict with the previously noted due process and policy concerns that devolve from haling an alien defendant into court. In order to resolve this tension, ameliorative language must be incorporated into the national contacts test.

V. THE NATIONAL CONTACTS TEST WITH A TWIST

A bare application of the national contacts test, absent countervailing modifications to limit the compass of its reach, poses serious problems. By instituting a pure national contacts test, courts expose aliens to greater risks of assertion of jurisdiction.[96] Consequently, a pure test exacerbates international harmony and due process concerns.[97] Thus, the national contacts test, though necessary, requires refinement.

Two scholars have suggested that the doctrine of *forum non conveniens* would be adequate in coping with any inequities that attend the national contacts theory.[98] The doctrine, however, does not sufficiently account for foreign policy interests or fairness difficulties that stem from implementing an unfettered national contacts test.

The scholars correctly identify two problems that would arise in connection with relying on *forum non conveniens* to alleviate fairness burdens. First, they note that states may adopt their own interpretation of *forum non conveniens*, thereby hobbling the uniformity flowing from the national contacts theory.[99] Second, procedural technicalities could defeat the doctrine's application in that *forum non conveniens* would be waived if not raised at the outset of litigation.[100]

These drawbacks do impinge on the effectiveness of using *forum non conveniens* as a due process counter to the national contacts theory; however, the doctrine has more fundamental failings. First, under the doctrine, the presumption is that courts will honor the plaintiff's choice of forum.[101] This is a

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96. "Under the aggregate contacts test [the national contacts test], defendants are subject to suit in a greater number of districts than under *International Shoe* principles. Indeed, if jurisdiction over a defendant exists under the test, it exists in every state, regardless of the defendant's contacts with that state." Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 484 (1981).

97. Asserting jurisdiction over aliens presents a host of difficulties, including damaging foreign relations, cheapening notions of sovereignty, and dispensing with vital due process considerations. Implementing a test that expands jurisdiction over aliens magnifies these problems. *See supra* notes 5, 51-65, 67-76 and accompanying text.

98. Degnan & Kane, *supra* note 3, at 824-834.

99. The authors propose, however, that a national contacts standard of *forum non conveniens* could be devised to counter the problem. *Id.* at 831.

100. To counteract this shortcoming, the authors suggest that courts should allow *forum non conveniens* motions provided they are filed "as soon as the facts realistically reveal that it is a legitimate objection." *Id.* at 832.

101. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) ("But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.") *Id.* at 508.

considerable burden for the defendant to overcome given that courts generally require little substantiation of convenience to defeat *forum non conveniens* arguments, especially when the plaintiff is an American citizen.[102]

Second, the doctrine lacks the sophistication necessary to cope with problems that arise when courts assert jurisdiction over aliens. *Forum non conveniens* exists to insure that the selection of a forum has some basis in convenience. Such considerations as the ease of obtaining evidence, the presence of witnesses, and the place where the controversy arose, figure into *forum non* determinations.[103] These considerations do not sufficiently counterbalance the concerns that arise when courts assert jurisdiction over aliens. Although convenience concerns may address some due process considerations, they fail to account for the extrajudicial difficulties inherent in transnational litigation.[104] Most glaringly, criteria to establish convenience are inadequate to account for intrusions on an alien country's sovereignty.

Another scholar proposes a different methodology to counter the expansive jurisdictional effects of the national contacts theory.[105] Professor Gary Born suggests that the reach of the national contacts theory should depend on whether the controversy involves a federal question or a state law question.[106] In the former case, he contends that a pure national contacts test is appropriate; whereas in the latter instance, he contends that the court should analyze state as well as federal contacts.[107]

This approach gives short shrift to policy and due process concerns in the case of federal questions, and misconstrues notions of international sovereignty in the case of state law questions. In the first instance, a pure national contacts test would foist intolerable burdens on the alien defendant. Because asserting jurisdiction over an alien provokes serious and multiple reactions abroad, and because an alien defendant faces unique hardships when haled into American courts,[108] a pure national contacts test would aggravate international tensions and work undue hardship on the alien defendant.

In the second instance, requiring state and federal contacts in the case of state law questions contradicts the fundamental rationale of the national contacts test. As noted, in the international order, states in a federalist union exist as

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102. "In any situation, the balance must be very strongly in favor of the defendant, before the plaintiff's choice of forum should be disturbed, and the balance must be even stronger when the plaintiff is an American citizen and the alternative forum is a foreign [alien] one." (citations omitted) Olympic Corp. v. Societe Generale, 462 F.2d 376, 378 (2d Cir. 1972).

In Piper Aircraft v. Reyno, 454 U.S. 235 (1981), the Court dismissed on *forum non conveniens* grounds a wrongful death action brought by Scottish plaintiffs in a Pennsylvania federal district court. One of the compelling reasons for dismissal was the fact that the plaintiffs were not citizens of the United States.

103. *See Gulf Oil Corp.*, 330 U.S. at 508.

104. Justice Jackson also mentioned factors of public interest that must be considered when making *forum non conveniens* determinations. The Court's factors, however, do not adequately address the compelling sovereignty concerns which attend asserting jurisdiction over alien defendants. *Id.* at 508-09.

105. *See* Born, *supra* note 10, at 36-42.

106. *Id.* at 39-42.

107. *Id.* at 40-42.

108. *See supra* notes 62-65.

locations in countries, as addresses, as regions where business is conducted, as places to vacation. States, of themselves, do not exist as independent sovereigns capable of promulgating laws recognized in the international arena.[109] To invoke the national contacts test and then to require state contacts is incongruous. Moreover, such a distinction between federal and state law questions would compound forum shopping problems. It would encourage claimants to characterize their dispute as entertaining a federal question, thus imposing additional burdensome determinations upon courts.

The national contacts theory of jurisdiction is necessary because, in reflecting the international order, it permits fairness to be visited upon the international community. Justice will flow from this more perfect conception of jurisdiction. Unbridled, however, the national contacts theory would aggravate the sensitive concerns that accompany assertions of jurisdiction over alien defendants. This attendant evil, however, is curable — we should not throw the baby out with the bath water. The task, then, is to ameliorate the problem of overly broad jurisdiction without undermining the national contacts theory. The most judicious means of doing so, in terms of appeasing the international community and assuring fairness, is to require a higher due process threshold for obtaining jurisdiction over aliens than for foreigners.

The precise contours of the modified national contact theory's enhanced due process test are difficult to ascertain and would inevitably require juridical refinement. The degree to which to bolster due process restraints on jurisdiction is a troublesome determination, but certainly not beyond formulation. Because the national contacts test utilizes a jurisdictional unit of immense dimensions, due process limitations must be enhanced to meet the consequences of the expanded jurisdictional playing field.

Formulating new limits on the assertion of jurisdiction is necessarily a tremendous challenge, but the parameters within which to sculpt the new jurisdictional analysis can be traced fairly precisely. The implementation of the national contacts theory will require greater due process scrutiny than the minimum contacts test affords, yet less due process scrutiny than is required to assert general jurisdiction. Namely, in order to hale an alien defendant into a court of the United States, the alien must have conducted its affairs so as to have more than minimum contacts with the nation, but need not have carried on its business in the United States continuously and systematically.

A distillation of the amalgam of the minimum contacts test and the general jurisdiction test produces a due process standard that comports well with the national contacts theory of jurisdiction. Although any number of labels might be affixed to this intermediate level of jurisdiction, hereinafter it will be referred to as the "substantial contacts test."[110]

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109. Degnan & Kane, *supra* note 3, at 813.

110. In Burger King v. Rudzewicz, 471 U.S. 462 (1985), the Court alluded to a jurisdictional test that approximates this notion of substantial contacts:

> [T]his 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself*

To determine whether an alien defendant has satisfied this substantial contacts test, a court might ask the following questions. Has the alien defendant purposefully or knowingly directed its activities toward the United States?[111] Does the alien defendant conduct its affairs in the United States continuously and systematically?[112] Has the alien defendant entered into contracts in the United States?[113] Has the alien defendant agreed to arbitrate disputes in the United States or to use the laws of the United States?[114] Does the United States have a pronounced interest in deciding the controversy?[115] Do logistical factors such as presence of witnesses, availability of evidence, or cost of attendance at trial, *overwhelmingly* favor trying the case in the United States?[116] Alternatively, would the alien defendant suffer little inconvenience by being haled before a United States court?

An affirmative response to any of these questions is not determinative of jurisdiction, nor do all of the questions require a positive answer to assert jurisdiction. The questions are touchstone inquiries which a court must consider when the jurisdictional unit expands to the national borders. If a court ascertains that the alien defendant's conduct and contacts with the United States were sufficiently significant to warrant suit in the United States, then the court should exercise its authority to hale the alien into its jurisdiction. If, however, the alien defendant's contacts with the United States are not substantial, the alien should not be commanded to set foot on American soil.

VI. CONCLUSION

Courts have compelling reasons to discard traditional analyses when contemplating *in personam* jurisdiction over alien defendants. When a United States court asserts jurisdiction over an alien defendant, a host of unique due process considerations travel with the alien on the obligatory journey to the United States. The judicial baggage cast upon the alien defendant runs a grave risk of proving too cumbersome to carry. Numerous difficulties confront the alien defendant including, *inter alia*, onerous practical and logistical burdens of defending a suit in a distant and unknown judicial setting; the chore of deciphering a confusing array of state long arm statutes; extrajudicial concerns touching upon foreign relations; and public policy worries such as the derogation of international commerce.

These intractable difficulties reveal the severe inadequacies of extending traditional *in personam* jurisdiction analyses to the international sphere. The jurisdictional tests posited in *International Shoe*, and its progeny, were spawned

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that create a 'substantial connection' with the forum State. (citations omitted).
Id. at 475 (emphasis added).

Although, this language intimated that the Court might impose a rigorous standard for asserting *in personam* jurisdiction, the majority ultimately retained the *International Shoe* test for jurisdiction.

111. *See Asahi*, 480 U.S. at 111-112.

112. This is the test used to establish general jurisdiction. *See generally* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984). Under the national contacts theory, however, continuous and systematic contacts are evaluated on a nation-wide basis.

113. *See Burger King*, 471 U.S. at 478-480.

114. *See Scherk v. Alberto-Culver Co.*, 417 U.S. at 519-520.

115. *See Asahi*, 480 U.S. at 113-116.

116. *See Gulf Oil Corp.*, 330 U.S. at 508.

from the inevitable interstate controversies that arise in any federalist union. The minimum contacts and fundamental fairness tests are the product of ferment within our nation. Such tests ought not to enjoy the light of judicial cognizance when courts are thrust into jurisdictional determinations of an international magnitude.

Most problematic, the test developed in *International Shoe*, and refined in its progeny, focuses on the state as the elemental jurisdictional unit. But the state has very limited significance as a sovereign in the international arena. It is the nation, not the state, that is the appropriate jurisdictional unit for international controversies. Thus, to promote uniform and analytically correct notions of jurisdiction in the international arena, courts should adopt a national contacts standard of jurisdiction.

A bare national contacts test, however, is inadequate. When jurisdiction is expanded beyond the national border, the risk of unfairly dragging the alien defendant into a court of the United States is magnified. To best alleviate this unwanted effect, a higher due process threshold than that currently used for asserting *in personam* jurisdiction should accompany the national contacts test.

Consequently, to assert jurisdiction over an alien defendant, courts must show that the alien had substantial contacts with the United States. While the precise contours of the substantial contacts test will be crafted through judicial refinement, the realm of substantial contacts is located between the traditional minimum contacts and general jurisdiction tests.

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