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World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead

Kenneth F. Ripple*

and

Mollie A. Murphy**

I. Introduction

During its past several terms the Supreme Court of the United States has, after a long period of inactivity, engaged in a reexamination of the constitutional limitations on state court jurisdiction.¹ Last term, in World-Wide Volkswagen Corp. v. Woodson,² this reexamination reached a new plateau. Woodson significantly elucidated the constitutional policy considerations underlying this area. Yet, as so often occurs in constitutional litigation, the resolution of old doubts has also brought into sharper focus other yet unresolved issues.

This article has two purposes. First, it will assess the significance of Woodson in the overall doctrinal development of jurisdictional standards. Second, it will suggest several areas in which Woodson may provide an important conceptual stepping stone for further doctrinal growth.

II. The Woodson Case

In 1977 while traveling through Oklahoma, members of the Robinson family were severely injured when their Audi was struck in the rear and burst into flames. Alleging that their injuries had resulted from defective design and placement of the Audi’s gas tank, the Robinsons, New York residents, instituted suit in an Oklahoma state court. In addition to suing the automobile’s manufacturer, they named as defendants the various corporations in the Audi distribution chain, including World-Wide Volkswagen Corporation (Audi’s regional distributor for the New York, New Jersey and Connecticut areas) and Seaway Volkswagen, Inc. (the local dealer from whom the Robinsons had purchased the car one year before). World-Wide and Seaway refused to acknowledge Oklahoma’s jurisdiction and entered special appearances, asserting that their contacts with the state were not sufficient to meet the minimum constitutional standard and that Oklahoma’s attempt to exercise jurisdiction over them violated due process.³

The Oklahoma courts rejected this position, although the evidence re-

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² 444 U.S. 286 (1980).

³ 444 U.S. at 286-87.
vealed no business activity by either World-Wide or Seaway within the state, no solicitation or advertising "in any media calculated to reach Oklahoma," and no showing that "any automobile sold by World-Wide or Seaway ever entered Oklahoma." Instead, the Oklahoma Supreme Court sustained jurisdiction through a broad interpretation of foreseeability. The court reasoned that, since an automobile is mobile by nature, its use in Oklahoma is a foreseeable consequence of its sale. Since World-Wide and Seaway derived substantial income selling automobiles which could be used from time to time in Oklahoma, the court found the trial court had correctly concluded that the defendants "derive[d] substantial revenue from goods used or consumed" in Oklahoma. This connection with the state was sufficient to meet the constitutional minimum and sustain Oklahoma's exercise of jurisdiction.

On certiorari, the Supreme Court began its analysis in traditional fashion through the pen of Justice White. Invoking the due process clause of the fourteenth amendment, the Court held that a state seeking to exercise personal jurisdiction over a nonresident defendant must have "minimum contacts" with the defendant and the subject matter of the litigation. This minimum contacts requirement embodies two policy considerations: (1) protection for "the defendant against the burdens of litigating in a distant or inconvenient

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4 Id. at 289.
5 Id.
6 World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978). Defendants World-Wide and Seaway had entered special appearances in the Oklahoma district court. When that court first rejected their constitutional challenge to the court's jurisdiction, and later denied their motion for reconsideration, the defendants sought a writ of prohibition from the Oklahoma Supreme Court. 444 U.S. at 289.
7 585 P.2d at 354. The Oklahoma Supreme Court upheld the district court's jurisdiction on the basis of the state long-arm statute. OKLA. STAT., tit. 12 § 1701.03(a)(4)(1961). The statute provides in relevant part:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . .

Although this statute could have been interpreted to preclude an exercise of jurisdiction over the distributor and retailer as a matter of state law, Justice White noted that the Oklahoma court did not distinguish between statutory and constitutional standards "probably because § 1701.03(a)(4) has been interpreted as conferring jurisdiction to the limits permitted by the U.S. Constitution." 444 U.S. at 290.
9 Justice White was joined in his majority opinion by the Chief Justice and Justices Stewart, Powell, Rehnquist, and Stevens. Justices Brennan and Marshall filed dissenting opinions. Justice Blackmun joined Justice Marshall's opinion and also filed a separate dissent.
10 U.S. CONST. amend. XIV, § 1 provides in relevant part: "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 . . . ."
11 "As has long been settled, and as we reaffirm today, 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." 444 U.S. at 291 (citation omitted).

The Supreme Court first articulated the "minimum contacts" approach to jurisdiction in International Shoe Co. v. Washington, 326 U.S. 310 (1945). In that case a Delaware corporation challenged the power of a Washington state court to adjudicate a suit brought by the State of Washington against the corporation to recover unpaid contributions to the state unemployment compensation fund. In sustaining Washington's assertion of jurisdiction over the corporation, the Supreme Court held that although International Shoe had no office in Washington, and neither delivered goods nor maintained a stock of merchandise there, the salesmen's activities in the state were neither "irregular nor casual." Id. at 320. They were instead systematic and continuous, and as such were sufficient to establish the requisite contacts between the defendant, the forum, and the litigation. For a further discussion of International Shoe, see text accompanying notes 42-45 infra.
The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, supra, 316 U.S. at 316, quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." 326 U.S. at 317, 66 S.Ct. at 158.

Id.

In its discussion of these policies, the Court acknowledged that the commercial developments which had originally motivated the relaxation of jurisdiction requirements had only "accelerated" since the advent of International Shoe. Yet the Court stated:

Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers . . . . But [they] also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. at 293.

12 444 U.S. at 292. The Court further explained:

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14 Id. at 295.

15 Id.

16 See text accompanying note 7 supra.

17 444 U.S. at 296.

18 Id.

19 198 U.S. 215 (1905). Harris involved three parties: Epstein, a resident of Maryland; Balk, a resident of North Carolina; and Harris, also a resident of North Carolina. Harris owed money to Balk who was indebted to Epstein. While Harris was traveling through Maryland, Epstein garnished Harris's debt to Balk. The Maryland court rendered a judgment against Harris which he paid. Thereafter, Harris was sued by Balk for the same sum. Harris asserted the payment of the Maryland judgment in defense, claiming the chattel's claim on the ground that the Maryland court had no power to garnish the debt. Id. at 221. However, the Supreme Court held that Harris's debt was a type of property owned by Balk and that its location was that of the debtor. Thus by obtaining personal jurisdiction over Harris, the Maryland court had acquired the power to garnish the debt even though it could not subject Balk himself to its jurisdiction.

This long-criticized holding was finally abandoned by the Supreme Court in Shaffer v. Heitner, 433 U.S. 186 (1977). In that case a shareholder filed a shareholder's derivative suit in a Delaware court for a director's breach of management duties. Jurisdiction was based on a statute permitting courts to adjudicate director's breach of management duties. Jurisdiction was based on a statute permitting courts to adjudicate


20 Perhaps the most celebrated offspring of Harris v. Balk is the New York case of Seider v. Roth, 17...
Instead, the Court stated that foreseeability in the jurisdictional context concerns itself with whether a "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." These connections arise when a defendant "purposefully avail[s]" himself of the privilege of conducting activities in the forum state. In the Court's view, this definition of the criterion for satisfying due process standards serves two purposes. First, an individual or corporation has notice of the probability of being subject to suit in those states in which it has chosen to engage in substantial activity. Second, certainty and predictability are added to the legal system, allowing "potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

Applying this foreseeability criterion, the Court found that Oklahoma's assertion of jurisdiction did not meet due process standards. World-Wide and Seaway made no attempt either to serve the Oklahoma automobile market or to place their products "into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." The Court suggested that jurisdiction would have been constitutional had the defendants made such attempts, since these activities would have provided them with

N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). In that case two New York residents were injured in an automobile accident in Vermont. They brought a negligence action in New York state court against the driver of the second car, a Canadian, premising jurisdiction on the attachment of the defendant's New York-based insurer's contractual obligation to defend and identify their insured. The New York court upheld the attachment and the exercise of jurisdiction, despite the fact that the defendant had no other contacts with the state of New York, on the basis that the contractual obligation of an insurer doing business in New York, is a debt owed the insured, and is thus property subject to attachment under the New York statutes. Like Harris, Seider-type jurisdiction was heavily criticized and consequently abandoned by many states. See, e.g., Rush v. Savchuk, 444 U.S. 320, 327 n. 13; Belcher v. Government Employee Ins. Co., 282 Md. 718, 387 A.2d 770 (1978); Johnson v. Farmers Alliance Mut. Ins. Co., 499 P.2d 1387 (Okla. 1972). The Supreme Court meanwhile had declined to hear cases presenting the same issue. E.g., O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978), cert. denied 439 U.S. 1034 (1978). This past term, however, addressing the Seider question in Rush v. Savchuk, 444 U.S. 320 (1980), the Court held that a state may not constitutionally exercise quasi-in-rem jurisdiction over a defendant whose only contact with the forum state is that his contractually obligated liability insurer does business within the state.

Rush involved an automobile accident in which Savchuk, Rush's passenger, was injured. At that time, both Rush and Savchuk were residents of Indiana. Savchuk subsequently moved to Minnesota and instituted an action against Rush in the Minnesota state courts. Because Rush had no contacts with Minnesota, Savchuk utilized a Minnesota statute to garnish Rush's liability insurer's obligation to defend and indemnify Rush. However, rejecting the statute as an inappropriate basis of jurisdiction, the Court held that the Minnesota statute and the Seider analysis upon which it was based permit an impermissible focus upon the relationship of the insurer to the forum. Proper jurisdictional evaluations under the minimum contacts standard require an assessment of the defendant's contacts with the forum state. 444 U.S. at 331-32. Since under Shaffer the mere presence of the defendant's property within the forum does not "support the state's jurisdiction," Shaffer, 433 U.S. at 209, the fact that a defendant's insurer does business within the state will not in itself create a constitutional basis of jurisdiction. 444 U.S. at 328. The Court noted that, unlike the ownership of property which may "suggest the existence of other ties" to the forum, Shaffer, 433 U.S. at 209, an insurance company's doing business in the forum state "suggests no further contacts between the defendant and the forum."

21 Woodson, 444 U.S. at 297 (citations omitted).
23 444 U.S. at 297.
24 Id.
25 See text accompanying notes 21 and 22 supra.
26 444 U.S. at 298.
27 Id. Here the Court cited with approval Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), Gray involved an allegedly defective valve which had been sold by its Ohio manufacturer to a Pennsylvania business. The Pennsylvania company incorporated it in a hot water
sufficient notice of their amenability to suit and since Oklahoma had a substantial interest in the safety of interstate products offered its residents. But no constitutionally significant relationship between the forum state and the defendants was created by the possibility that buyers of the defendants’ automobiles might use them in Oklahoma, or by the possibility that the defendants might receive substantial revenues from the sale of their products because of their capability for use in distant states.

III. The Doctrinal Contribution of Woodson

The two policy themes of the Woodson Court’s due process inquiry—concern for interstate harmony through respect for state sovereignty and concern for fundamental fairness to the defendants—are hardly innovations with respect to constitutional limitations on jurisdiction. For the past one hundred years, in cases whose names are familiar to every lawyer, the Supreme Court’s emphasis on one or the other of these themes has had an almost dialectic quality. Woodson is significant because it represents the Court’s most serious effort to date to harmonize these policy concerns. The significance of this effort can be best appreciated by examining the Court’s earlier efforts to create a firm doctrinal basis for its jurisdictional holdings.

The Supreme Court’s early jurisdictional cases are traditionally explained in terms of their “tests” of “presence” and “minimum contacts.” These “tests” are only relevant, however, insofar as they reflect the constitutional policy concerns controlling the Court’s due process inquiry. Nevertheless, preoccupation with them has retarded focusing attention on the underlying policy concerns. A better approach to the cases is to resist the temptation to rely upon the Court’s articulated “tests” and to concentrate instead on the constitutional policies supporting the Court’s holdings.

A. “Presence” and State Sovereignty

In Pennoyer v. Neff the Supreme Court, through Justice Field, approached
the issue of jurisdictional limitations as one controlled by "two well-established principles of public law respecting the jurisdiction of an independent State over persons and property." First, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." Second, "no State can exercise direct jurisdiction and authority over persons or property without its territory." Therefore, a state's exertion of judicial authority over a person not present within its boundaries was nothing less than an attempt by the state to give "extra-territorial operation to its laws." In the Court's view, such an attempt constituted "an encroachment upon the independence of the State in which the person...[is] domiciled...[to] be resisted as usurpation." Thus, while Pennoyer established the presence test, its fundamental concern was state sovereignty.

However, neither Pennoyer's test nor its underlying policy concern was to remain unaltered. As communication and commerce became increasingly interstate in character, state boundaries diminished in commercial importance, and lower courts found themselves in a difficult position. Although the Supreme Court had established a test of seemingly simple application, its test was ill-suited to the needs of an economy impatient to eliminate territorial restrictions hindering the movement of commerce. Mechanical application of the test often produced absurd and unfair results. To avoid these results, the courts developed "escape devices" which, while articulating a result in terms of "presence," introduced flexibility into jurisdictional standards. One such device was the fiction that a corporation doing business in a state was "present" in that state and thus subject to service of process. A second judicial fiction deemed an out-of-state motorist's use of a state's highways to be his appointment of a particular state official to act as his agent in accepting process. This agent could then be served within the state and thereby meet the presence standard of Pennoyer.

B. "Minimum Contacts" and Fairness to the Defendant

Judicial manipulation of Pennoyer's presence test clouded the relationship had recovered a judgment against Neff, the respondent, for services rendered. The judgment was satisfied by a sheriff's sale of Neff's land in Oregon. Neff subsequently brought an action to recover his land against Pennoyer, the purchaser. Neff claimed that the judgment rendered against him was invalid because he was a nonresident and no proper service of process had been made upon him.

34 Id. at 722.
35 Id.
36 Id.
37 Id. at 723.
38 Id.
39 Traditional examples of this mechanistic approach include Grace v. McArthur, 170 F. Supp. 442 (E.D. Ark. 1959), in which Arkansas obtained jurisdiction over the defendant when he was served with process while flying over the state; and Peabody v. Hamilton, 106 Mass. 217 (1870), in which the nonresident defendant, en route to New York from Nova Scotia, was served with process while on board a British mail steamer in Boston harbor. A third case, Fauntleroy v. Lum, 210 U.S. 230 (1908), graphically illustrates the absurdities resulting from rigid application of the presence test. In that case, Mississippi was required to give full faith and credit to a Missouri judgment in which the relevant Mississippi law, according to Ehrenzweig, had been either deliberately disregarded or seriously misinterpreted. Ehrenzweig, supra note 19, at 290. The case involved "acts of residents of Mississippi, done within [the] State, which were violative of the public policy of the State and which were criminal." 210 U.S. at 241 (White, J., dissenting). For a further discussion of the problems caused by the presence test, see Ehrenzweig, supra note 19.
between the concept of presence and the underlying policy concern of state sovereignty. When the Supreme Court addressed the question again in *International Shoe Co. v. Washington*, the link between "presence" and the concern for state sovereignty became even more obscure. The Court in *International Shoe* declared that "presence" was merely a "symbol" for the defendant's contacts with the forum and the litigation, and that contacts not amounting to presence could suffice to meet the demands of due process. The Court observed that due process demands could be met "by such contacts of the corporation with the state of the forum as 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." Although this arrangement produced a straightforward minimum contacts test, it also created doctrinal ambiguity with respect to the continued viability of state sovereignty as a significant constitutional policy concern. While the cases following in the wake of *International Shoe* provided a more refined definition of "minimum contacts," their contribution to the resolution of this question was marginal at best.

For example, Justice Black's laconic, fact-specific opinion in *McGee v. International Life Insurance Co.* acknowledged both state sovereignty and fairness to the defendant, but gave little indication of their relative importance. *McGee* upheld California's assertion of jurisdiction over a nonresident whose only activity in the state concerned the contract at issue in the litigation. In one sense, the opinion affirmed *International Shoe* 's basic "fairness to the defendant" rationale. The Court's commentary on the diminished burden most defendants faced in litigating in foreign jurisdictions, and its remark that mere inconvenience would not constitute a denial of due process, are most easily construed as a liberal interpretation of the minimum contacts test. At the same time, however, Justice Black observed that *Pennoyer* placed "some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries." Citing *Pennoyer*, Justice Black noted that the contract at issue "had [a] substantial connection" with California and that

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42 326 U.S. 310 (1945). For a general discussion of International Shoe, see note 11 supra.
43 326 U.S. at 316-17.
44 Id. at 317.
45 The ambiguity was compounded by the Court's expression of the new test:
[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." 326 U.S. at 316 (citations omitted) (emphasis in original).
This language left open the possibility that presence alone was an alternative to "minimum contacts."
46 355 U.S. 220 (1957). In *McGee*, plaintiff-petitioner was the beneficiary of a life insurance policy purchased by her son, a resident of California. Defendant-respondent was a Texas insurance corporation which had agreed to assume the obligations of the company from which the son had procured the policy, and offered to insure the son on the terms of his previous policy. The son accepted the offer and paid his premiums to the Texas corporation. Upon his death, petitioner sought payment on the policy. When the insurance company refused to pay the benefits, petitioner brought suit in a California court. The California court rendered a judgment against the insurance company, which then challenged the court's power to adjudicate the dispute on the grounds that it had no contacts with California other than the insurance contract being sued upon.
47 "[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." 355 U.S. at 223.
48 "Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process." 355 U.S. at 224.
49 Id. at 222.
50 Id. at 223.
the State therefore had a "manifest interest" justifying its protection of its citizens. Six months later, the Court in *Hanson v. Denckla* issued a warning signal to the lower courts designed to insure that equal emphasis was given to the second word of the *International Shoe* test: minimum contacts still required meaningful contacts. The Court did little, however, to clarify the relationship between the two policy concerns articulated in the earlier cases. Like *McGee*, *Hanson* referred obliquely to both state sovereignty and fairness to the defendant without adequately describing their interrelationship or their relative importance. While acknowledging the evolution of jurisdictional standards from the "rigid rule of *Pennoyer v. Neff*," *Hanson* noted that the remaining restrictions were more than a guarantee of immunity from inconvenience or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State which are a prerequisite to its exercise of power over him.

After *Hanson*, the Supreme Court entered an era of benign neglect with respect to the constitutional limitations on jurisdiction, leaving the lower courts to wrestle as best they could with the process of further refining the concept of minimum contacts. Unfortunately, the resulting interpretations reflected a disregard of *Hanson*'s warning and an emphasis upon the "minimum" aspect of the standard.

**C. The Current Reassessment Begins**

When the Supreme Court undertook its current reassessment of jurisdic-

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51 *Id.*
52 *Id.* The Court explained:
California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment-proof.

53 357 U.S. 235 (1958). *Hanson* concerned a dispute over the right to a trust created by a Florida resident when domiciled in Pennsylvania. The trust was established in Delaware and administered by a Delaware trustee. After her death, the settlor's will was probated in a Florida state court. The residuary legatees of the will claimed that the trust assets should pass to them and petitioned a Florida chancery court for a declaratory judgment to that effect. That court rendered such a judgment but failed to acquire personal jurisdiction over an indispensable party, the Delaware trustee. Meanwhile, the executrix of the will instituted a declaratory judgment action in Delaware state court. The Delaware court refused to give full faith and credit to the Florida decree because the Florida court had lacked personal jurisdiction over the Delaware trustee. Agreeing that the necessary personal jurisdiction had not been obtained, the Supreme Court held that jurisdiction over the trustee must meet *International Shoe's* minimum contacts standard. Satisfaction of the standard required "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." 357 U.S. at 253.

54 *Id.* at 251.
55 *Id.*
56 See text accompanying notes 53-55 supra.
tional principles in 1976, the theoretical ambiguities engendered by *International Shoe* and perpetuated by its progeny remained. The relative importance of state sovereignty and of fairness to the defendant was still largely undetermined. "Presence" had been analytically divorced from its roots in state sovereignty concerns, but its role within the framework of "minimum contacts" had received no further elaboration.\(^{58}\)

The first case of the modern reassessment, *Shaffer v. Heitner*,\(^ {59}\) resolved the latter issue. *Shaffer* made clear that the minimum contacts test of *International Shoe* was the measure of "all assertions of state-court jurisdiction."\(^ {60}\) Thus the presence of property in a state was an inadequate jurisdictional predicate, although that presence might "bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation."\(^ {61}\)

The question remained, however, whether the Court's concern for the role of state sovereignty in jurisdictional questions would be as effectively dismissed. In *Shaffer*, it appeared that such was the case. Writing for the Court, Justice Marshall declared that under the minimum contacts test of *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."\(^ {62}\) Justice Marshall found *Hanson* 's language concerning the "territorial limitations on the power of the respective States"\(^ {63}\) to be not inconsistent with this interpretation, but merely a reiteration of the truism that "the States are defined by their geographical territory."\(^ {64}\) Thus, after *Shaffer*, any consideration of a sister state's interests in the evaluation of judicial power seemed superfluous, and was perhaps precluded absent special circumstances.

A year later, in *Kulko v. California Superior Court*,\(^ {65}\) the Supreme Court confirmed *Shaffer* 's concern for fairness to the defendant as the controlling constitutional policy consideration. While it acknowledged that "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice"\(^ {66}\) should be considered, the Court emphasized that the "quality and nature" of the defendant's activity chiefly determined whether it

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58 See notes 11 and 45 supra.
60 Id. at 212.
61 Id. at 207.
62 Id. at 204.
63 357 U.S. at 251. See note 55 supra.
64 433 U.S. at 204 n. 20.
65 436 U.S. 84 (1978). *Kulko* involved a custody and support action brought by a California resident against her former husband, a New York resident. The couple had negotiated a separation agreement under which their two children spent part of the year with each parent and the mother was paid child support during those periods which the children spent with her. One of the children thereafter expressed a desire (in which her father acquiesced) to live most of the year with her mother contrary to the terms of the separation agreement. Three years later the other child moved to California, and the mother brought suit in a California court seeking permanent custody and increased child support payments. The father challenged the California court's jurisdiction, claiming he had no contacts with the state sufficient to meet the constitutional standard. The California court rejected the father's claim on the ground that by acquiescing in his child's desire to live in California he had availed himself of the benefits of the state and derived direct economic advantage therefrom. *Kulko* v. Superior Court, 19 Cal. 3d 514, 324-25; 554 P.2d 353, 358; 138 Cal. Rptr. 586, 591 (1977) (en banc).
66 436 U.S. at 92.
was "reasonable" and "fair" to require the defendant to conduct his defense in that state.\textsuperscript{67}

D. Woodson's "Harmonization"

Having emphasized fairness to the defendant in both \textit{Shaffer} and \textit{Kulko}, the Supreme Court might have been expected to resolve \textit{Woodson} on the same basis. \textit{Woodson}'s facts certainly permitted such an approach.\textsuperscript{68} However, writing for the Court, Justice White confronted the long-standing ambiguity regarding the theoretical basis of the Court's prior jurisdictional decisions and presented an analysis which represented the first serious attempt to harmonize the two policy concerns of protecting "the defendant against the burdens of litigating in a distant or inconvenient forum"\textsuperscript{69} and assuring 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."
\textsuperscript{70} The Justice referred to these concerns as "related, but distinguishable."\textsuperscript{71} \textit{Woodson}'s significance lies in its exposition of how these concerns are "related" and how they are "distinguishable."

How "related" the concepts are in the Court's view is apparent from the discussion in \textit{Woodson} of possible unfairness to the defendant. Justice White stresses that the reasonableness of an exercise of jurisdiction may not be determined by simply assessing the "burden on the defendant."\textsuperscript{72} In "an appropriate case," that burden must be considered in light of other relevant factors: the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining an efficient resolution to the controversy; and the shared interest of the several states in furthering fundamental substantive social policies.\textsuperscript{73} Yet when Justice White turns to the second policy consideration, "the principles of interstate federalism,"\textsuperscript{74} many of the same factors again predominate.\textsuperscript{75} Indeed, in applying these factors, the Justice makes no attempt to distinguish between their effect on fundamental fairness to the defendant and their effect on interstate federalism.\textsuperscript{76}

\textsuperscript{67} \textit{Id.}, citing \textit{International Shoe}, 326 U.S. at 319.
\textsuperscript{68} The Court might easily have proceeded under the traditional due process test of \textit{International Shoe}. Since the petitioners carried on no activities in Oklahoma, making no sales, engaging in no advertising, and making no attempt to serve the Oklahoma market, they availed themselves of "none of the privileges and benefits of Oklahoma law." 444 U.S. at 295. Thus, there existed no minimum contacts among the defendants, the forum and the litigation sufficient to sustain Oklahoma's exercise of jurisdiction over World-Wide and Seaway under the constitutional standard established in \textit{International Shoe}.
\textsuperscript{69} 444 U.S. at 292.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.} at 291-92.
\textsuperscript{72} \textit{Id.} at 292.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 293.
\textsuperscript{75} In speaking of the "principles of interstate federalism embodied in the Constitution," Justice White stressed that the "sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States . . . ." 444 U.S. at 293. Thus, "States through their courts [might] not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." \textit{Id.} at 292. The factors discussed by the Court with respect to the "protection against inconvenient litigation" also seem supportive of this federalism concept: "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." \textit{Id.}
\textsuperscript{76} See 444 U.S. at 295-99.
Had the Court's analysis ended at this point, Woodson would have shed little new light on the theoretical ambiguity plaguing earlier jurisdiction cases; it would have indicated only that concerns of interstate federalism should be appropriately weighed with concerns for fairness to the defendant. But Woodson went a step further. Despite its explicit approval of Shaffer's abandonment of the presence test, it subtly but emphatically transformed Pennoyer's concern for state sovereignty into a far broader concept. After Woodson, "state sovereignty" is no longer a self-contained quality designed simply to preserve the dignity of the individual state. Rather, it has been recast as an essential element of interstate federalism—a relationship preserved only when "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." Indeed, noted the Woodson court, this interstate federalism concern could justify denial of jurisdiction even when there is no unfairness to the defendant and when the forum seeking to assert jurisdiction is more convenient than any other.

Here Woodson stops. Having emphasized the role of interstate federalism, the Court gives only the vaguest idea of what this emphasis will mean in concrete application. Yet, the Court has indicated its jurisprudential vector sufficiently to permit an assessment of the impact of the constitutional policies set out in Woodson upon the Court's resolution of future jurisdictional problems.

IV. Woodson's Impact on Future Jurisdictional Standards

Although Woodson is hardly the Supreme Court's last word on personal jurisdiction, its stress on the requirements of interstate federalism warrants a fresh look at several jurisdictional predicates which, until now, have been generally accepted despite their inadequate theoretical foundations.

A. Transient Jurisdiction

Unlike most other legal systems of the Western world, American courts have traditionally asserted jurisdiction over a defendant solely on the basis of his presence within the boundaries of the state at the time he is served with process. The historical roots of such "transient" jurisdiction have been hotly debated. Yet, for many years, its constitutionality was not questioned. Cer-
tainly, it fit comfortably within the judicial philosophy reflected in the presence test of *Pennoyer* and was compatible with Justice Holmes's comment that the "foundation of jurisdiction is physical." Even *International Shoe*, with its minimum contacts approach, gave no firm indication that the validity of transient jurisdiction had been diminished. First, as noted above, *International Shoe* contained a textual loophole which preserved the presence test: the minimum contacts test governed only if the defendant were "not present within the territory of the forum." Second, although *International Shoe* and its progeny addressed the question of corporate presence, they left unresolved the question whether their rationale applied equally to individual defendants. *Shaffer* and *Kulko* made clear, however, that the minimum contacts test applied to both corporate and individual defendants and supplied the standard against which all assertions of jurisdiction must be measured. Thus, as the scholarly commentary on *Shaffer* indicated, the survival of transient jurisdiction after *Shaffer* seemed improbable. It was simply too difficult to find the required relationship among the forum, the defendant and the subject matter of the litigation where the defendant's presence in the state was not related to the litigation and where no other connection between the state and the litigation existed. Certainly the policy consideration so strongly relied upon in *Shaffer*—protection of the defendant from litigation in an inconvenient forum—was ill-served under this mode of jurisdiction. Indeed, there was a distinct potential for unfairness in requiring a person with no continuing relationship to the forum to litigate a matter which also had no relationship to the forum.

At first glance, it may seem that *Woodson*’s emphasis on the rights of states would breathe new life into the concept of transitory jurisdiction. But in transforming *Pennoyer*’s concept of state sovereignty into a broader concern for interstate federalism, *Woodson* did not necessarily adopt *Pennoyer*’s "territorialist" view of jurisdiction. The *Woodson* Court’s explicit approval of *Shaffer*’s abandonment of the presence test and its condemnation of the

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The second historical source, the concept of the transitory action, is generally considered to have originated with Blackstone’s comment that in actions "for injuries that might have happened anywhere, as debt, detinue, slander and the like, the plaintiff may declare in what county he pleases, and then the trial must be in that in which the declaration is laid.” 3 W. BLACKSTONE, COMMENTARIES *294. See, e.g., Boote, An Historical Treatise of an Action or Suit at Law 97 (4th ed. 1805); 1 PAINE & DUES, NEW YORK PRACTICE 88 (1st ed. 1930); and Genin v. Grier, 10 Ohio 209 (1840). For an in-depth discussion of the validity of these concepts as historical authority for the transient rule, see Ehrenzweig, supra note 19, at 293-303.

83 McDonald v. Mabee, 243 U.S. 90, 91 (1917). See also Hanson, 357 U.S. at 246.
84 See note 45 supra.
85 326 U.S. at 316.
86 See text accompanying notes 59-61 supra.
88 See text accompanying note 62 supra. Different considerations of fundamental fairness to the defendant may govern, however, when a federal court exercises in personam jurisdiction over a foreign transient with respect to an alleged violation of the law of nations. Cf. Filartiga v. Pena-Irala, No. 79-6090 (2d Cir. June 30, 1980) (assuming the validity of transient jurisdiction or jurisdiction based on temporary residency under a short-term visitor’s visa, while sustaining the federal district court’s subject matter jurisdiction under the Alien Torture Statute, 28 U.S.C § 1350, over a claim for damages based on allegations of torture in a foreign country).
89 See text accompanying notes 78-79 supra.
"analogous" proposition that "[e]very seller of chattels . . . in effect, appoint[s] the chattel his agent for service of process," confirm that the Court's emphasis on interstate federalism does not include approval of jurisdiction based on mere presence.

A proponent of transient jurisdiction must now face the serious question of whether such a jurisdictional basis would precipitate the strain on the interstate system which Woodson condemns. More precisely, from two distinct analytical perspectives, Woodson seems to have delivered the final blow to transitory presence as a predicate of jurisdiction. First, an assertion of transient jurisdiction deprives another state having "minimum contacts" with the dispute of its opportunity to resolve the matter in its own courts. This overreaching of judicial jurisdiction was Justice White's explicit concern in Woodson. Second, an assertion of judicial jurisdiction on the basis of transitory presence makes possible significant strains on the federal structure by inhibiting regular economic relationships among the states. As Professor Schlesinger has noted:

For the very reason that it breathes an isolationist spirit of self-help and self-sufficiency, the rule [of transient presence] may have appealed to American courts in pioneer days. But how can a rule having such an origin provide the subtle cooperative adjustments of competing jurisdictional claims which are necessary in order to promote further growth of a teeming interstate and international commerce in the second half of the twentieth century.

The judicial overreaching possible under the transitory presence theory implicates the dangers to interstate relations which the Woodson Court condemned when it noted that the "economic interdependence of the States was foreseen and desired by the Framers." Whether the out-of-stater finds himself the object of discriminatory taxes, discriminatory trade barriers, or the exercise of judicial power by a state unrelated to him or to the dispute in question, the impact on interstate harmony is the same.

B. "General Predicates" of Jurisdiction

Woodson did not address whether the general jurisdictional bases, originally premised on Pennoyer's "presence" analysis, remain constitutional. Despite International Shoe's minimum contacts test, an exercise of jurisdiction by the state of a defendant's domicile or residence has long been considered constitutionally permissible. Similarly, a corporate defendant has been assumed to be

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90 444 U.S. at 296.
91 "The concept of minimum contacts . . . acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." 444 U.S. at 292.
93 444 U.S. at 293.
96 See, e.g., Miliken v. Meyer, 311 U.S. 457 (1940) (rehearing denied, 312 U.S. 712 (1941) (Wyoming judgment based on a summons handed to Wyoming domiciliary in Colorado held entitled to full faith and credit and Wyoming deemed to have valid jurisdiction over its domiciliary). See also Mounts v. Mounts, 181
amenable to the jurisdiction of a state where the corporation "continually and systematically" does business. In all probability, jurisdiction based on domicile or residence will continue to be sustained by the Court after Woodson. The "fairness to the defendant" consideration is satisfied since the defendant has the requisite "contacts, ties, or relations" with the state of his domicile and can properly be expected to answer for his actions there. The "interstate harmony" consideration seems likewise satisfied, since a state has a legitimate interest in ensuring that its domiciliaries and residents are amenable to the jurisdiction of its courts. And while other states may also have an interest in serving as a forum, Woodson does not mandate that the most appropriate forum be chosen. Thus, unless the plaintiff's choice of forum is restricted and he cannot obtain "convenient and effective relief" in the defendant's state of residence, there would seem to be no constitutional reason to prevent that state from exercising jurisdiction on the basis of the defendant's domicile or residence.

C. Long-Arm Jurisdiction—The Nonresident Corporate Defendant

It is more difficult to assess in the abstract the actual impact of Woodson on traditional forms of long-arm jurisdiction. This difficulty is compounded by the Supreme Court's apparent assumption that the same factors are relevant in assessing the concerns of both interstate federalism and fairness to the defendant. Woodson cautions lower courts to be more sensitive to matters of interstate federalism, and such an attitudinal shift by the courts can be expected. However, there will almost certainly be more concrete manifestations of the new doctrinal balance struck in Woodson. In all likelihood, the Court's reformulation of the foreseeability test will be the focal point in litigation.

Indeed, the Supreme Court has already been confronted with one such significant instance. Shortly after its decision in Woodson, the Court denied certiorari in a case involving the amenability to suit of a nonresident corporate defendant based on contractual dealing with a resident plaintiff. Justice White, the author of Woodson, dissented from denial of certiorari. He described the issue as one which had "deeply divided the federal and state courts."

Professor Weintraub has noted that the use of "doing business" as a generally affiliating nexus for jurisdiction purposes requires a preliminary review of the forum's jurisdictional statute. Some state statutes restrict the use of this jurisdictional predicate to causes of action arising out of forum business, while others permit its use in actions unrelated to the business activities in the forum. See R. Weintraub, Commentary on the Conflict of Laws 147 (2d ed. 1980).
The cases cited by Justice White reveal, perhaps not unsurprisingly, that the division in the courts is more fact-specific than doctrinal and usually arises when a resident seller attempts to sue a nonresident purchaser in the seller’s jurisdiction pursuant to a long-arm statute. Before Woodson, the issue had been whether the purchaser’s contracting for certain goods or services provided sufficient “minimum contacts” with the forum to permit the exercise of jurisdiction. Results therefore turned on the significance which the particular court placed on such occurrences as: (1) which party initiated the transactions, (2) the degree to which the purchaser communicated with or visited the office of the buyer, (3) whether the goods were delivered FOB at the seller’s location in the forum, (4) whether the contract specified that the law of the forum was to govern, (5) whether the purchaser controlled or had specific knowledge of the place of the seller’s performance, and (6) whether the nonresident purchaser inspected the goods at the seller’s location before acceptance.

It was perhaps more than a coincidence that it was the author of Woodson who dissented from the Court’s denial of certiorari on this issue. Woodson’s more precise articulation of the theoretical basis of the constitutional limitations on jurisdiction, and its formulation of a more concrete standard of foreseeability, may help clarify standards in this area. In deciding whether to

104 In his dissent from the denial of certiorari in Lakeside Bridge and Steel, Justice White collected the federal and state court cases arguably in conflict with the lower court decision:
- Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (CA10 1977);
- United States R. Equip. Co. v. Port Huron & Detroit R. Co., 495 F.2d 1127 (CA7 1974);
- Product Promotions, Inc. v. Coutant, 495 F.2d 485, 494-499 (CA4 1974);
- Ajax Realty Corp. v. J. F. Zook, Inc., 495 F.2d 818 (CA4 1972), cert. denied, 411 U.S. 966, 95 S.Ct. 2148, 36 L.Ed.2d 687 (1975);
- In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (CA2 1972);
- O’Hare Int’l Bank v. Hampton, 437 F.2d 1173 (CA7 1971);
- Electro-Craft Corp. v. Maxwell Electronics Corp., 417 F.2d 365 (CA8 1969);
- Manufacturers’ Lease Plans, Inc. v. Atkinson Draughon College, 115 Ariz. 358, 565 F.2d 864 (1977) (en banc);
- Colony Press, Inc. v. M. J. Fleeman, 17 Ill.App. 3d 74, 308 N.E.2d 78 (1974);
- Miller v. Glendale Equipment & Supply, Inc., 344 So.2d 736 (Miss. 1977);
- McIntosh v. Navaro Seed Co., 81 N.M. 302, 466 P.2d 868 (1970);
- State ex rel. White Lumber Sales, Inc. v. Salmonetti, 252 Or. 121, 448 F.2d 571 (1968) (en banc);
- Proctor & Schwartz, Inc. v. Cleveland Lumber Co., 228 Pa.Super. 12, 323 A.2d 11 (1974);

Id. Courts have found it easier to sustain jurisdiction over a nonresident seller. As the Iowa Supreme Court said in Rath Packing Co. v. International Meat Traders, Inc., the plaintiff can “rely on the rule that an act outside the forum which produces consequences in that state is sufficient to give it judicial jurisdiction.” 181 N.W.2d 184, 188 (Iowa 1970). The Court also noted that the state has an interest for damages sustained from a product brought into the state. 181 N.W.2d at 189.

105 See, e.g., Pedi Bares, Inc. v. P & C Food Mkts., Inc., 567 F.2d 933 (10th Cir. 1977).


108 See, e.g., O’Hare Int’l Bank v. Hampton 497 F.2d 1173 (7th Cir. 1971).

109 See, e.g., In-Flight Devices Corp. v. Van Dusen Air Inc., 466 F.2d 220 (6th Cir. 1972).


111 See text accompanying notes 68-81 supra.

112 See text accompanying notes 16-30 supra.
subject a foreign corporate purchaser to jurisdiction after Woodson, a court must consider not only whether such an exercise of jurisdiction is fair to the defendant, but also whether it is compatible with the state’s obligation “to the principles of interstate federalism.” The “foreseeability criterion” of Woodson appears to embody this new concern for interstate federalism as well as the concern for fairness to the defendant. Viewed in this light, “foreseeability” provides a significant guideline in out-of-state purchaser cases and, indeed, seems to have been anticipated by some state courts. It would be difficult to argue that it is either fundamentally unfair to a defendant purchaser or a burden on the interstate system to subject a commercial enterprise to the jurisdiction of a state into whose courts it reasonably expected to be haled.

Woodson’s foreseeability criterion hardly provides a “litmus test” for jurisdictional issues in contract cases involving foreign purchaser defendants. It does, however, substantially diminish the present uncertainty by permitting a more precise factual assessment than that exhibited by the cases cited by Mr. Justice White. Woodson repeatedly emphasizes “purposefulness”; the foreign corporation’s having taken steps which can be construed objectively as exhibiting an intent to submit to and to seek the protection of the jurisdiction of the forum state. Defendants must be able “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” Within these guidelines, it seems clearly insufficient to premise jurisdiction on the mere fact that the foreign corporation entered into a contract by mail or electronic communications with the resident plaintiff and thereby, in some abstract way, affected the economy of the plaintiff’s home state.

One of the most explicit ways a nonresident defendant could manifest an intent to be subject to a particular state’s jurisdiction is by specifically electing to be governed by the substantive law of that jurisdiction. Some of the state

113 444 U.S. at 293.
114 Id. at 296-97. See also note 112 supra.
115 444 U.S. at 293-94, 297. In discussing the states’ obligation to respect the sovereignty of their sister states, the Woodson Court emphasized the “orderly administration of the laws.” 444 U.S. at 294, quoting International Shoe, 326 U.S. at 319. The Court returned to that phrase several paragraphs later, declaring that “the foreseeability that is critical to due process analysis is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” 444 U.S. at 297. This foreseeability criterion can be treated as a specific embodiment of the interstate federalism concern of Woodson as well as of the fairness to the defendant concern.
117 See text accompanying notes 105-10 supra.
118 444 U.S. at 296-99.
119 Id. at 297.
decisions noted in Justice White’s dissent appear to have relied, at least in part, on such a declaration.\textsuperscript{122} Such a clear statement by a nonresident defendant that it seeks the protection of the forum and expects to have matters affecting the transaction litigated within that forum, although not dispositive,\textsuperscript{123} seems worthy of great weight.

V. Choice of Law—Is Woodson Relevant?

A. The Problem

In his famous Cardozo Lecture at Columbia University in December 1944,\textsuperscript{124} Justice Jackson lamented the Supreme Court’s inattention to the federal constitutional limitations on choice of law rules. It is difficult, he said, “to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution.”\textsuperscript{125} For Justice Jackson, the Court’s insistence on national cohesion in matters of political power and economic control stood in ironic contrast to its tolerance of “the most localized and conflicting system of any country which presents the external appearance of nationhood.”\textsuperscript{126}

The years since the Justice’s lecture have seen the continuation of this paradox. During the past decade, the Court has manifested in other doctrinal areas a pronounced, if somewhat uneven, concern for interstate harmony.\textsuperscript{127} It has shown little sympathy for protectionist activity\textsuperscript{128} and a distinct willingness to base its decisions on the actual economic impact of the arrangement in issue regardless of its label.\textsuperscript{129} Yet Justice Jackson’s comment remains true today; it


\textsuperscript{123} There are circumstances, however, where the parties’ choice of law may not indicate an expectation to be subject to the courts of that jurisdiction. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, Comment f (1971). “[W]hen contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed.” Parties may couple such a choice of law provision with a jurisdiction-selecting clause indicating that both parties will submit themselves to the jurisdiction of a particular tribunal. See generally Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

\textsuperscript{124} Jackson, Full Faith and Credit: The Lawyer’s Clause of the Constitution, reprinted in 45 COLUM. L. REV. 1 (1945).

\textsuperscript{125} Id. at 28.

\textsuperscript{126} Id. at 31.

\textsuperscript{127} See, e.g., Thomas v. Washington Gas Light Co., 444 U.S. 962 (1980) (the full faith and credit clause does not bar supplemental award under District of Columbia Workman’s Compensation Act to injured employee who had previously received award under Virginia Workman’s Compensation Act); Reeves, Inc. v. Stake, 100 S.Ct. 2271 (1980) (South Dakota’s policy during cement shortage of confining sales of state-produced cement to South Dakota residents is not violative of commerce clause); Hicklin v. Orbeck, 437 U.S. 518 (1978), (privileges and immunities clause of article IV does forbid ”Alaska Hire” statute requiring preference for Alaskans in all employment dealing with oil and gas leases); Baldwin v. Fish & Game Comm’n, 436 U.S. 371 (1978) (privileges and immunities clause of article IV does not forbid a state’s favoring its own citizens in a hunting licensing scheme).


\textsuperscript{129} See, e.g., Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (upholding state legislation forbidding a producer or refiner of petroleum products from operating a retail service station); Austin v. New Hampshire, 420 U.S. 656 (1976) (striking down New Hampshire “Commuters Income Tax” as implementing a tax structure discriminatory to out-of-state residents).
is "easier for the Court to put aside parochialism and think in terms of a national economy or of a national social welfare than to think in terms of a truly national legal system." In choice of law, the obscure, vacillating case law which precipitated Justice Jackson's remarks was distilled in the early '60s to the toothless rule that

[w]here more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.

In Shaffer, the Court went out of its way to remark that a mere interest in the subject matter of the litigation may suffice to permit a state to apply its own law, even though such an interest would never be a sufficient predicate for jurisdiction.

It is always risky to speculate about the reasons for the Supreme Court's activity or inactivity within a particular area of our national jurisprudence. However, it is probably safe to assume that the Court's inactivity in the area of choice of law was due to several factors. First, to the extent that choice of law rules were linked to the conceptualism of the vested rights theory of jurisprudence, the establishment of rigid constitutional standards for those rules would have transformed all choice of law principles into constitutional rules. Second, while the "interest analysis" approach to choice of law underwent its tumultuous early development, it would have made little sense for the Supreme Court to retard its growth through the imposition of constitutional rules. In most states today, the interest analysis approach has not only replaced the fixed rules grounded in vested rights conceptualism but has itself matured to the point where new developments have leveled off.

Because the prudential reasons for adhering to a 'laissez-faire' policy toward constitutional limitations on choice of law no longer exist, the time may well be ripe for the Court to focus on the federal constitutional limitations on state choice of law rules. Certainly, no court would approach this task eagerly. The early cases on constitutional limitations in choice of law offer little

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130 Jackson, supra note 124 at 33.
131 The federal constitutional limitations on choice of law have been addressed by the Supreme Court in four basic doctrinal settings: the due process clause of the fourteenth amendment; the full faith and credit clause of article IV; the equal protection clause of the fourteenth amendment; and the commerce clause. These lines of authority are set forth in R. Weintrob, Commentary on the Conflict of Laws 495-547 (2d ed. 1980); Martin, Constitutional Limitations on Choice of Law, 61 CORNELL L. REV. 183 (1976); Kurgis, The Roles of Due Process and Full Faith and Credit in Choice of Law, 62 CORNELL L. REV. 94 (1976).
134 For a summary of the vested rights theory of jurisprudence and its effect on the early American conflict of laws theory, see R. Leflar, supra note 96, at 5-6.
135 See, e.g., Wells v. Simonds Abrasive Co., 345 U.S. 514, 516 (1953) (where the Court upheld the constitutionality of the forum's applying its own statute of limitations despite the common law exception that a time limitation be considered substantive when closely linked to the substantive cause of action.) For the Court, "[d]ifferences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis of constitutional distinctions. . . ." Id. at 518.
guidance. Although the best scholars on the Court and in the academic world have attempted to address Justice Jackson’s criticism that these cases were “less penetrating and less constructive... than in other fields,” even a brief review of the principal cases evokes William Prosser’s remark about the “quaking quagmire” of conflict of laws.

B. The Possible Role of Woodson

A functional relationship between jurisdictional and choice of law standards has always been acknowledged, albeit imprecisely, by courts and scholars. As Justice Jackson noted:

[It is more than a coincidence that nowhere else in the modern world is judicial authority so dispersed among disjointed and insular units, nowhere else is the place of trial so regulated as a by-product of territorial limits on jurisdiction, and nowhere else does litigation present such a multitude and complexity of controversies over conflict of laws.]

In his recent illuminating article, Professor Martin described the situation more graphically:

When the approach that allows a state to apply its own law in marginal cases is augmented by expanded bases of jurisdiction and the mechanism of the class action, the combination raises the specter of massive invasions by one state into the policies of another, rigidly enforced by the rules of full faith and credit to judgments. The results thus obtained would be attributable not to a rational process of comparing interests but to a race to the courthouse.

Just as other jurisdictional refinements have eliminated questionable choice of law decisions, after Woodson, this functional relationship between jurisdiction and choice of law may well eliminate one of the most questionable

137 See text accompanying notes 124-33 supra. The Martin-Kurgis debate, see note 131 supra, sharply illustrates the difficulty of relying on earlier case law.
138 See, e.g., Carroll v. Lanza, 349 U.S. 408, 414 (Frankfurter, J., dissenting).
140 Jackson, supra note 124 at 34.
141 “[T]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.” Prosser, Interstate Publication, 51 MICH. L. REV. 959, 971 (1953).
142 Jackson, supra note 124, at 23.
143 Martin, supra note 131, at 230.
144 Rush v. Savchuk, 444 U.S. 320 (1980), eliminated jurisdiction based on the attachment of property in the state when there is no connection between the property and the cause of action. See note 19 supra. Rush also eliminated the possibility of such a forum’s applying its own law to resolve the dispute. Rush would thus have precluded the questionable use of New York law in Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973), since in that case jurisdiction was based on a Rush-type attachment. Rosenthal v. Warren, 342 F. Supp. 246, 248 (S.D.N.Y. 1972).
choice of law situations. Most courts asserting jurisdiction over a defendant on the basis of transient presence apply the law of some other jurisdiction with a closer relationship to the problem, using either traditional choice of law rules or a variation of the interest analysis approach.\(^{145}\) However, a forum asserting jurisdiction on the basis of transitory presence might compound the imposition on its sister states by also insisting on the application of its own substantive law\(^{146}\) simply because it is the forum's law or because the forum considers it "the better law."

The elimination of transient presence as a basis of jurisdiction because of interstate comity concerns would also preclude any choice of law decision further violating the same constitutional policy. Similarly, to the extent that \textit{Woodson} indicates a more restrictive interpretation of traditional long-arm jurisdiction,\(^{147}\) chauvinistic choice of law decisions would also be eliminated. To borrow from Professor Ehrenzweig,\(^{148}\) the elimination of an "improper" forum by preventing the exercise of jurisdiction based on transitory presence automatically precludes that forum's application of an "improper" law, its own.

Despite recognition of this functional relationship between jurisdiction and choice of law, the precise nature of the doctrinal relationship between these two areas has remained undefined. Some commentators\(^{149}\) and the Court itself\(^{150}\) have acknowledged that jurisdictional and choice of law inquiries are governed by the same factors, but have assumed that the qualitative appraisal of those factors differed depending on the inquiry: the jurisdictional inquiry focused on fairness to the defendant while the choice of law inquiry focused on such institutional concerns as interstate harmony, using either due process or full faith and credit analysis.

With \textit{Woodson}'s emphasis on interstate federalism as an important policy consideration in the delineation of jurisdictional standards, there would seem at first glance to be a distinct convergence of the theoretical underpinnings of jurisdiction and choice of law analysis. The Court's emphasis on "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"\(^{151}\) and "the shared interest of the several States in furthering

\(^{145}\) When jurisdiction is truly based on "transient presence," the forum will have no other connection with either the cause of action or the defendant. See text accompanying notes 82-83 \textit{supra}. Therefore, under the traditional "fixed" choice of law rules (\textit{lex loci delicti}, \textit{lex loci contractus}), such a forum would apply the law of the state of the tort, of the making of the contract, or of the performance of the contract. Under the more modern choice of law methodologies such as "center of gravity" or "government interest analysis," the forum also ought to apply the law of a state with more interest in the subject matter of the litigation. For an up-to-date summary of these various choice of law theories, see R. \textit{Leflar, supra} note 96, at 173-222.

\(^{146}\) See Ehrenzweig, \textit{A Proper Law In a Proper Forum: A "Restatement" of the "Lex Fori Approach,"} 18 \textit{OKLA. L. REV.} 340, 350-52 (1965). See, e.g., Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972) (Kentucky court, exercising jurisdiction over an Ohio defendant by personal service, applied Kentucky law rather than Ohio guest statute for accident occurring in Ohio and resulting in death of Kentucky resident).

\(^{147}\) See text accompanying notes 100-23 \textit{supra}.

\(^{148}\) Ehrenzweig, \textit{supra} note 146, at 350.


\(^{150}\) For instance, in \textit{Shaffer}, Justice Marshall went out of his way to reject specifically "the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute." 433 U.S. at 215. While a state's demonstrated "interest" in the matter might support a choice of law determination, it would not necessarily support an assertion of in personam jurisdiction where the touchstone was whether the state would be "a fair forum for this litigation." \textit{Id.} See also \textit{Hanson v. Denckla, 357 U.S. 255, 254 (1958)}.

\(^{151}\) 444 U.S. at 292.
fundamental substantive social policies”152 invokes the same values which have controlled most of the Court’s inquiries into the constitutional limitations on choice of law.153 With the rejuvenation of the interstate federalism aspect of jurisdictional due process, the constitutional criteria for “what law may govern and what law court may act”154 ought to approach congruity.

There are problems with this prognosis, however. *Hanson v. Denckla*, while acknowledging the importance of interstate federalism155 (although certainly not to the same extent as *Woodson*),156 also distinguished the principles governing jurisdiction and choice of law.157 Furthermore, although interstate federalism considerations may have traditionally influenced constitutional limitations on choice of law, the present Court has shown little concern for these considerations in the choice of law context.158 Consequently, rather than indicating a possible convergence of the controlling constitutional concerns in jurisdiction and choice of law, *Woodson* may signify only that the Court’s sensitivity to the aggregate effect of jurisdiction and choice of law rules on interstate relations is increasing.159

In short, it is the combined jurisdiction-choice of law decision which should reflect the concerns of interstate federalism and fairness to the defendant. For example, when a trial court bases its jurisdiction on domicile,160 residence,161 or continuously and systematically doing business,162 reviewing courts should be far more sensitive to the requirements of interstate federalism in scrutinizing the choice of law rule selected by the court. Although it might be both fundamentally fair and compatible with interstate federalism to require a defendant to answer for all litigation in a particular forum, it may offend principles of interstate federalism if that forum resolves the dispute according to its own substantive law.163 While the forum’s connection with the defendant may

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152 Id.
154 Leflar, supra note 139, at 707.
155 See text accompanying note 55 supra.
156 See text accompanying notes 77-81 supra.
157 Hanson v. Denckla, 357 U.S. 235, 254 (1958) A state “does not acquire that jurisdiction by being the ‘center of gravity,’ of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law.” Id. at 254.
158 See Nevada v. Hall, 440 U.S. 410, 421-27 (1979) (neither the full faith and credit clause nor general principles of interstate comity require California to recognize the limitations on Nevada’s statutory waiver of its immunity in suit against Nevada in California court with respect to California accident).
159 As Professor Weintraub has noted:

What choice-of-law rules are desirable depends in large part on the current scope of judicial jurisdiction. The proper breadth of a court’s jurisdiction, in turn, should be decided with reference to what law that court will apply if it adjudicates the case in issue.

R. Weintraub, supra note 97, at 93.
160 See note 96 supra.
161 See note 96 supra.
162 See note 97 supra.
163 The Supreme Court has the opportunity to resolve this question in *Allstate Ins. Co. v. Hague*, 100 S. Ct. 1012 (1980). This case involves a Wisconsin accident in which Hague, a Wisconsin resident, was killed when the motorcycle he was riding collided with a car owned and operated by an uninsured Wisconsin resident. At the time of the accident, Hague owned an Allstate policy covering his three automobiles. The policy included uninsured motorist coverage to the limit of $15,000 for each automobile. Wisconsin law does not permit “stacking” uninsured motorist coverage and would only permit one recovery of $15,000. Hague’s widow married a Minnesota resident and established a residence in Minnesota. Having been appointed personal representative of the estate of her deceased husband in Minnesota, Mrs. Hague brought a declaratory action in Minnesota seeking an adjudication against Allstate that Minnesota law, which permits “stacking,” would apply. Allstate continuously and systematically does business in Minnesota. The Minnesota court held that Minnesota law applies. Hague v. Allstate Ins. Co., 289 N.W.2d 43 (Minn. 1979).
be strong, its connection with the subject matter of litigation may be minimal.

Scrutinizing jurisdiction-choice of law decisions in their totality would avoid the danger which appears to have cooled the Supreme Court’s desire to deal with constitutional limitations on choice of law. There is little danger that such scrutiny would “constitutionalize” choice of law rules, since at most it would require states choosing to exercise jurisdiction on some basis other than their connection with the litigation to adopt a choice of law rule which would not impose their own substantive policies in the resolution of the dispute.

Beyond this, the influence of Woodson upon future choice of law decisions by the Supreme Court will probably be more attitudinal than doctrinal. Because the manifold constitutional issues which the Court confronts each term often involve common constitutional policy concerns, the Court’s work in one doctrinal area sheds a “cross-light” on other areas involving the same policy concerns. The Court’s new interest in interstate federalism may thus lead it to more carefully examine cases posing choice of law problems. The Court need not wait long to begin this examination, since many choice of law decisions of relatively recent vintage and of questionable merit have had interstate federalism implications. Such cases may meet a more critical judicial eye at the Supreme Court in the future.

VI. Conclusion

Conclusions about the long-term doctrinal contributions of Woodson must necessarily be tentative. While instant analysis—whether of Presidential speeches, professional football plays or Supreme Court decisions—seems to be the vogue, a proper respect for what Justice Frankfurter termed “the
rhythm" of constitutional adjudication requires that a more extensive critique of the case’s significance await its exposure to subsequent litigation. As its holding receives the renewed scrutiny implicit in the common law method of precedent and stare decisis, Woodson’s lasting significance will become more evident.

This article has set forth the doctrinal contributions of Woodson to the Supreme Court’s exploration of the constitutional limitations on jurisdiction and choice of law. It has suggested that the Court formulated in Woodson a new doctrinal formula of jurisdictional limitation which confirms the dual policy concerns of interstate federalism and fairness to the defendant and then takes significant, albeit preliminary, steps to harmonize those concerns. This article has also suggested that Woodson provides a basis from which the Court may more boldly address concrete jurisdictional problems.

By transforming the state sovereignty concern of Pennoyer into a broader concern for interstate federalism, Woodson has displaced the theoretical basis of transient jurisdiction. Its impact on other areas of jurisdiction may be less dramatic but no less significant. Although the general predicates of jurisdiction will almost certainly survive, future case law will likely stress foreseeability as an embodiment of both interstate federalism and fairness to the defendant. This emphasis on “fairness” and “federalism” in jurisdictional matters should lead to a greater acknowledgement of both the practical and the doctrinal affinity of jurisdiction and choice of law matters. While there is little basis for suggesting that the Court will (or ought to) merge jurisdiction and choice of law considerations, it would be appropriate for the Court to approach jurisdiction and choice of law decisions as a totality, appraising their aggregate effect on fairness and federalism.

Although Woodson could serve as the basis for this doctrinal and practical consolidation, the Supreme Court’s behavior pattern requires a note of caution. Many cases have falsely seemed upon their rendition to be the “last word” in personal jurisdiction. In the choice of law area especially, the Court has shown a distinct lack of enthusiasm for bold doctrinal strokes. Woodson’s capacity to effect the changes suggested in this article depends largely upon how sustained an interest the Court demonstrates in the constitutional value of interstate federalism in the juridical relations of the sister states. If interstate federalism is to affect the broad spectrum of jurisdiction-choice of law decisions, it must be translated into specific and workable criteria which avoid the problems of overconstitutionalization.

The Supreme Court has established in Woodson a foundation for comprehensive and lasting doctrinal development. But the strength of that foundation and the shape of the superstructure it will support are, at this point, beyond the capabilities of sterile academic measure. If the Supreme Court shows a sustained interest in the area and if lower courts set about the work of

167 Frankfurter, The Supreme Court, reprinted in P. KURLAND, FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 448 (1970). Wrote the Justice, “[a] rhythm, even though not reducible to law, is manifest in the history of Supreme Court adjudication. Manifold and largely undiscerned factors determine general tendencies at the Court . . . .”

168 See text accompanying notes 130-31 supra.
implementing its policies in appropriate contexts, a new stability may soon characterize the chronically elusive areas of constitutional limitations on personal jurisdiction and choice of law.