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State Courts, Personal Jurisdiction and the Evolutionary Process

Mark A. Nordenberg*

I. Introduction

Pennoyer v. Neff needs no introduction. The decision has received extensive treatment in the legal literature and has been an integral part of the "initiation rites" for generations of law students. For the most part, both the scholarly commentaries and the student comments have been critical, and the doctrinal underpinnings of Pennoyer have been subject to some attack in the "real world" of judicial decisions as well. These judicial attacks, particularly in the past, have generally been less than direct, however. As a result, Pennoyer v. Neff remained a major force in the American law of jurisdiction for almost one hundred years after Justice Field penned the opinion.

The influence of Pennoyer was first significantly curtailed by the United States Supreme Court over thirty years ago in International Shoe Co. v. State of Washington. That influence may have recently been brought to an abrupt and final end. The Supreme Court in Shaffer v. Heitner not only reaffirmed past modifications to the Pennoyer framework of state court jurisdiction but also expressed doubt that the Pennoyer framework retains any measure of utility. International Shoe was named Pennoyer's successor.

The passing of Pennoyer has been greeted with resounding cheers, and Shaffer v. Heitner has already been enshrined as one of the landmark opinions in the American law of state court jurisdiction. It is difficult, however, to intelligently applaud the passing of the old without critically assessing the new. Shaffer v. Heitner must be examined to determine not only what it says about Pennoyer v. Neff but what it says about International Shoe Co. v. State of Washington as well.

The contributions of International Shoe to the growth of the American law of state court jurisdiction cannot be seriously questioned. The "minimum contacts" test of International Shoe provided for basic change in legal theory when change was desperately needed. It freed courts from the mechanical inquiries of the past and compelled their consideration and discussion of factors bearing upon fairness and justice in dealing with jurisdictional problems.

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1 95 U.S. 714 (1877).
2 326 U.S. 310 (1945).
The flexibility inherent in such a standard also generated a significant amount of uncertainty, however. Serious questions arose both as to the proper method for the immediate application of the minimum contacts test and as to the likely pattern for the future development of this area of the law. The level of uncertainty was raised, rather than lowered, by the Supreme Court itself when, in the same term, it decided *McGee v. International Life Insurance Co.* and *Hanson v. Denckla.* The opinions rendered in those cases appear to embody fundamentally different views of the constitutional restraints on state court jurisdiction over non-resident defendants.

*Shaffer* and the even more recent opinion in *Kulko v. Superior Court of California* are the most important personal jurisdiction decisions of the U.S. Supreme Court since *McGee* and *Hanson.* Fortunately, these later cases are more consistent in their approach than their two predecessors were. The message which they bear is not one which was widely expected, however. *Shaffer* and *Kulko* both strongly suggest that, after a century of continuous "jurisdictional growth," the new priority of the Supreme Court is the imposition of effective limits on state court exercises of jurisdiction.

II. The Growth of the American Law of State Court Jurisdiction

A. *Pennoyer v. Neff: Traditional Notions*

The dispute giving rise to *Pennoyer* was not complex. Neff, a resident of California, allegedly owed Mitchell, who was from Oregon, some $294.98. Mitchell, an attorney, initiated an action in the circuit court of Multnomah County, Oregon, seeking to recover that amount. The formalities of commencing the action included the publication of notice in an Oregon newspaper. No other preaction notice was given to Neff, although at some later time real property which he owned within the state of Oregon was attached. Mitchell obtained a default judgment, and the attached property was sold to Pennoyer. Neff then brought a second action, in federal court in Oregon, naming Pennoyer as the defendant and seeking to establish his title to the property, which he contended was worth more than $15,000, by claiming that the judicial sale to Pennoyer was invalid.

The legal problem facing the Supreme Court in *Pennoyer* was a straightforward one: Under what circumstances could the courts of a state constitutionally exercise judicial power over a non-consenting, non-resident defendant?

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7 The lower court in Neff v. Pennoyer, 17 F. Cas. 1279 (C.C. Ore. 1875) (No. 10,083) had found the state court judgment to be void because of failures to comply with state statutory provisions governing notice of the pending action. The statute in question provided for service by publication. The defects complained of were defects in the affidavit by which the order of publication was obtained and in the affidavit by which publication was proved. The Supreme Court held, however, that to the extent that any such failures to comply with the statute did exist they must be raised on appeal in the action itself and not by collateral attack in a subsequent proceeding. 95 U.S. at 720-21.
Justice Field's solution, displaying the influence of the writings of Joseph Story, was equally straightforward. In their simplest form, the basic rules emerging from the decision could be stated as follows:

1) The courts of a state may "directly" exercise judicial power over a non-consenting, non-resident defendant through an in personam proceeding only if that defendant was served with process while present in the state.

2) The courts of a state may "indirectly" exercise judicial power over a non-consenting, non-resident defendant through an in rem proceeding only if that defendant owns property which is present in the state and which is subjected to the control of the court at the time of the commencement of the action.

This seizure of property contemporaneous with the commencement of the proceeding in an in rem action is required both to insure a secure basis for jurisdiction and as one form of notice. The property seized need not be related to the

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9 The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below: but the position is assumed, that, where they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendants or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none.

95 U.S. at 727-28.

10 The notice-giving function was grounded in the premise that an owner of property is always in possession of that property. Therefore, if the property is seized to commence a lawsuit, the owner has necessarily received notice of the action.

With respect to this question, the Supreme Court reached a decision which clashed directly with what had been decided in the court below. The circuit court stated: "Nor does it appear to me that the state is bound in any case to provide for giving notice to the absent party by publication of the summons or otherwise. That matter pertains to the mode of proceeding over which the state has absolute control." 17 F. Cas. at 1281-82. Both the Supreme Court's opinion in Pennoyer and later opinions by that Court have made it clear that there are federal constitutional dimensions to the problem of giving notice.

With respect to the specific requirement that property be seized at the commencement of an in rem action, the circuit court had misgivings about preaction seizures and expressed a preference for the procedure followed in Mitchell v. Neff, where the property was not seized until later in the proceeding. In the words of the court, this later seizure was more desirable because "it does not permit the seizure or interference with the property of the non-resident until the right or claim of the citizen in or to it is satisfactorily established." 17 F. Cas. at 1281. Similar concerns were expressed in much more recent Supreme Court decisions dealing with provisional remedies. See the text accompanying notes 45-48 infra.

Neff, in support of his arguments that jurisdiction was lacking in the earlier case, cited as authority Galpin v. Page, 9 F. Cas. 1126 (C.C. Cal. 1874) (No. 5,206) a decision rendered by Mr. Justice Field in the Circuit Court for the District of California. The circuit court here distinguished that case before making the statements quoted above. Mr. Justice Field had the opportunity to reassert much of what had been said in Galpin in the Supreme Court's opinion in Pennoyer.
plaintiff’s claim, but the plaintiff’s recovery, if any, will be limited to the value of that property. Applying these rules to the facts of the case before it, the Pennoyer Court found the Oregon state court judgment to be invalid because Neff had not been personally served with process while in the state and his property had not been seized at the commencement of the action.

Apart from the simplicity of these rules, there are a number of things to note about the structure for state court jurisdiction thus created. First, according to Justice Field, the structure has its roots in the fourteenth amendment to the United States Constitution. Up to this point, the key constitutional provision as regards questions of jurisdiction had been the full faith and credit clause of article IV. That provision required that full faith and credit generally be given judgments of the courts of sister states when their enforcement was sought but permitted collateral attack upon such judgments if the rendering court lacked jurisdiction.

The existence or nonexistence of such a link will be acknowledged in this article, in part, by the use of terms distinguishing three different types of jurisdiction. An action in personam is an action in which the court’s jurisdiction does not depend in any way upon the exercise of control over the defendant’s property. The action is prosecuted “directly” against the defendant and might potentially subject him to a personal judgment in an unlimited amount. If property is seized in an in personam action, it will most commonly be seized after a judgment has been rendered in an effort to satisfy that judgment. An in rem action is an action in which the court’s jurisdiction does depend upon the court’s exercise of control over the defendant’s property at the commencement of the action and is an action in which the property seized is somehow related to the claim asserted by the plaintiff, usually because there is a dispute over title to the property. An action quasi in rem is an action in which the court’s jurisdiction does depend upon the court’s exercise of control over the defendant’s property at the commencement of the action but is an action in which the property seized is unrelated to the claim asserted by the plaintiff.

It should be noted that the above definitions are not universally, or perhaps even generally, accepted. The terms are, for example, defined as follows in Restatement, Judgments 5-9:

A judgment in rem affects the interests of all persons in designated property. A judgment quasi in rem affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of the claim against him.

The line between in rem and quasi in rem actions is clearly not drawn at the same point. It is submitted, however, that in terms of jurisdictional inquiry the line drawn in the above definitions is more meaningful and less cumbersome than the line drawn in the Restatement. Care should be taken to ascertain the precise meaning being given these terms when they are used in judicial opinions. The definitions contained in the Restatement are the ones used by the Shaffer Court. See notes 108 and 109 infra.

This limitation will always apply as regards a defaulting defendant. Whether or not the defendant exposes himself to an unlimited personal liability by appearing and defending in rem or quasi in rem action is discussed in the text accompanying notes 85-89 infra.

Neff’s property in Oregon could not have been seized at the commencement of Mitchell’s action against him because he did not own it at the time. The judgment in Mitchell v. Neff was rendered on February 19, 1866. The patent to the property was issued to Neff on March 19, 1866, one month later. 17 F. Cas. at 1280.

95 U.S. at 733. It is interesting to note that the Mitchell v. Neff judgment was actually rendered before the effective date of the fourteenth amendment.
After *Pennoyer*, the same jurisdictional defects could be challenged in the courts of the state rendering the judgment itself under the fourteenth amendment's due process clause. Because the standard to be applied is one flowing from the federal constitution, the United States Supreme Court has the power to ultimately determine whether or not the exercise of judicial power is permissible.

It appears from the opinion that the constitutional concerns with respect to jurisdiction over the parties or their property are two. First, in order to preserve each state's sovereignty, no state court should exercise power in a way which would interfere with the exclusive dominion which another state enjoys over the people and property found within its borders. In the view of the *Pennoyer* Court the Union consisted of states exercising substantially the authority of independent nations. In the words of the Court, "The independence of one implies the exclusion from power of all others. Therefore, every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory [and] no State can exercise direct jurisdiction and authority over persons or property without its territory." Second, and in the interest of fairness, no action should proceed without notice to the defendant, whether the action is in personam or in rem.

Each of these concerns is legitimate, and each retains some measure of importance today. What is most significant in terms of understanding *Pennoyer* and appreciating the need for change, however, is the manner in which those concerns were dealt with. One basic principle, again, is that a non-resident defendant must receive notice of the pending action. To send such notice across state lines would, however, be offensive to the other basic principle which embodies the *Pennoyer* concept of exclusive sovereignty. The solution is a very restrictive rule of in personam jurisdiction: the non-resident defendant must be served with process while in the forum state. This is a rule which in its simplicity entangles the very distinct problems of sovereignty and notice in an undesirable way.

15 The ability to challenge the judgment in the courts of the forum state itself is particularly important in a case like *Pennoyer* where the judgment could be satisfied by the sale of property found in the state. Although the jurisdictional objections were raised via a post-judgement collateral attack in *Pennoyer*, such objections, when raised in the forum state, would ordinarily be raised through pretrial motions. See, e.g., FED. R. Civ. P. 12.

16 Whether the jurisdictional challenge is raised in the forum state under the fourteenth amendment's due process clause or in another state under the full faith and credit clause, the constitutional standard is the same. Hanson v. Denckla, 357 U.S. 235, 255 (1958).

17 A court must also be concerned, of course, with subject matter jurisdiction, that is, the competency of the court to deal with the type of litigation presented in the case before it. 95 U.S. at 733. Subject matter jurisdiction posed no problems in *Pennoyer*.

18 95 U.S. at 722.

19 The form of notice required might traditionally vary, however, depending upon whether the action was one in personam or one in rem (or quasi in rem). In an in rem action, as has already been noted, property owned by the defendant is seized at the commencement of the action. Since a property owner was presumed, under the law, to be in possession of his property at all times, the seizure itself was one form of notice, and requirements for additional notice might, therefore, be less stringent in in rem actions than in in personam actions. Both the presumption referred to and the difference in notice requirements as outlined above have since been rejected by the United States Supreme Court. See Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); and Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).

20 The problem of sovereignty goes directly to the question whether the courts of a state should have the power to act in a particular case involving particular parties. The problem of notice, on the other hand, really arises only after there has been a determination that the basic power to act exists and relates to the procedures by which that power may be imple-
It is, in addition, a rule which, because of its restrictive nature, creates the need for a safety valve of sorts. Obtaining service upon a non-resident defendant within the forum state will often be a difficult, if not impossible, task, particularly if the defendant perceives the possibility of litigation and intentionally stays away. In response to this practical problem, the second half of the framework of jurisdiction is erected. If state court jurisdiction cannot be justified in terms of the direct exercise of power over the defendant himself in an in personam action because he cannot be found and served in the state, perhaps it can be justified in terms of the indirect exercise of power over the defendant through the direct exercise of power over his property in an in rem action, if he has property in the state.

This limited source of flexibility would not be enough, however. That it would not be enough was recognized by the Pennoyer Court itself when it identified certain categories of cases that might have to be governed by other, presumably less restrictive, rules. The true inadequacy of the tests became more apparent, however, only as time passed and a new century began. As society grew and became more mobile, transactions and occurrences were spawned which involved multi-state aspects not compatible with the doctrine of exclusive sovereignty which was so central to the Pennoyer scheme. The traditional rules of jurisdiction grounded in this doctrine of exclusive sovereignty became too confining.

The result was accommodation. Legal fictions were created so that the needs of the times might be met within the already aging framework of Pennoyer. The Supreme Court provided additional, and perhaps unneeded, flexibility in terms of "power over property" by holding in Harris v. Balk that a debt was a form of property which could be "seized" in order to create quasi in rem jurisdiction.

The entangling of these problems had its roots in "the medieval English requirement that a lawsuit could be initiated only by physically compelling the defendant to submit to the court's jurisdiction." Developments in the Law—State Court Jurisdiction, 73 HARV. L. REV. 909, 938 (1960) [hereinafter cited as Developments]. Actual arrest of the defendant was, of course, no longer a prerequisite to judicial action at the time of Pennoyer and Field's justification of his jurisdictional framework as a partial solution to the notice problem has been called a "dismal inspiration" which "has begotten difficulty ever since." Hazard, supra note 8, at 262.

21 See the Court's discussion at 95 U.S. 734-36 dealing primarily with jurisdiction in domestic relations cases and jurisdiction over nonresident business entities. 22 The inadequacy of the Pennoyer principles of exclusive sovereignty as the basis for a system of jurisdiction in a mobile society has perhaps been most succinctly described in Hazard, supra note 8, at 265.

There are doubtless other ways in which the Story principles can be understood that are equally true and enlightening. But the one context in which the principles are either not true or not enlightening is precisely that in which they have been typically invoked, that is, in the adjudication of civil controversies having multistate elements. If no multistate elements are involved, because either all elements are in a particular state or none of them is, the formulation of a jurisdictional principle is purely a scholastic exercise. Since in such a case there is no problem in reality, no boundaries of reality exist to confine conceptual imagination within contours of fact, policy, and definition that real legal problems entail.

On the other hand, when adjudication of civil controversies does involve multistate elements, it is fatuous to think of any court having exclusive jurisdiction of anything. The jurisdictional problem exists precisely because there is no single tribunal that has exclusive jurisdiction in the territorial sense.

23 198 U.S. 215 (1905).

24 In Harris v. Balk, Harris apparently had owed Balk a relatively small amount of money. Both men were from North Carolina. Balk, in turn, was allegedly indebted to Epstein, a
A greater need for change existed in the "power over people" sphere because of the increasing importance of the corporation in commercial affairs and the increasing popularity of the automobile as a means of transportation. As a result, courts wrestled with the concepts of "corporate presence"\(^2\) and the "implied consent" of non-resident motorists.\(^2\) These concepts enabled legal reality to keep pace with a changing society. Direct questions about the continued wisdom of the doctrine of Pennoyer were seldom asked, however, and legal theory lagged behind.


The first overt change in jurisdictional theory came almost seventy years after Pennoyer when the Supreme Court decided International Shoe Co. v. State of Washington.\(^2\) That decision signaled the birth of the "minimum contacts" theory of state court jurisdiction. It is a theory which places greater emphasis on fairness to the defendant in the selection of a forum than it does on problems of sovereignty. The "minimum contacts" test was articulated by the Court as follows:

Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. . . . But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due 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."\(^2\)

The Court then went one step further by explaining the relationship between "minimum contacts" and "traditional notions of fair play and substantial justice."

[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of resident of Maryland. Epstein, who wished to collect upon this debt, saw his golden opportunity when Harris traveled to Maryland, and he seized it. Knowing that he could not acquire in personam jurisdiction over Balk unless he brought suit in North Carolina, Epstein attempted to create a form of quasi in rem jurisdiction in Maryland by garnishing Harris, Balk's debtor, while he was present in the state. The Supreme Court thought the effort successful, stating that "[t]he obligation of the debtor to pay his debt clings to and accompanies him wherever he goes." 198 U.S. at 222.


27 326 U.S. 310 (1945). It should be noted that even prior to International Shoe there were two traditional alternatives to jurisdiction grounded in physical presence per Pennoyer. First, "actual consent . . . has always been regarded as a basis of jurisdiction in the common law, for the defense of lack of jurisdiction over the person has always been waivable by the defendant." Developments, supra note 20, at 916. Second, there was strong authority that "domicile" was an acceptable basis. See Milliken v. Meyer, 311 U.S. 457 (1940) and Blackmer v. United States, 284 U.S. 421 (1932).

28 326 U.S. at 316.
that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.29

A shift in the focus of the Supreme Court in evaluating the exercise of judicial power by a state court is apparent. A constitutional standard of fairness, rather than physical control, is the standard against which the exercise of in personam jurisdiction was measured.30 This shift also permitted the Court to treat the problem of notice separately, and the Court in International Shoe recognized the validity of notice sent across state lines.31 The importance of the decision and the jurisdictional theory which it made law cannot be overstated. At the same time, International Shoe, too, has its limitations, and these must be noted.

The key improvement of the new test is that “at least it puts the real question, and that is something.”32 Putting the real question is a virtue,33 and the

29 Id. at 319.
30 In applying that standard to the facts of the case before it, the International Shoe Court held that the state courts of Washington could validly exercise jurisdiction over the corporate defendant. Even though the defendant was incorporated under the laws of Delaware and had its principal place of business in Missouri, it did engage in certain sales activities in Washington, and the claims asserted in the lawsuit were for unemployment compensation tax obligations that were created by the activities of the salesmen within Washington.

The activities of the defendant corporation in the state of Washington were thought by the Court to be “continuous and systematic” and would presumably have been sufficient to uphold the exercise of jurisdiction under the theories being applied by courts before the birth of the “minimum contacts” test. The defendant’s contacts were described by the Court in 326 U.S. at 313-14:

During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state, and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose.

The ties of the defendant to Washington are clearly not insignificant. The decision to subject the defendant to jurisdiction in that state was not, therefore, a break from the past, in and of itself.

31 An agent of the defendant corporation had been served with process while within the state of Washington. In addition, the corporation had been served by registered mail in Missouri, and the Court seemed to place its stamp of approval on this alternate procedure. “Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.” 326 U.S. at 320.

The Pennoyer disapproval of notice sent across state lines had been repeated in later cases. See, e.g., Hess v. Pawloski, 274 U.S. 352, 355 (1927), where the Court stated: “The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery.” By recognizing the validity of notice sent across state lines, the Court added a dimension of flexibility to state court proceedings. The Court also probably increased the likelihood that defendants will actually receive notice. See, e.g., Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) where the Court found notice mailed across state lines to defendants to be preferable to notice by publication. Even in Hess the Court had upheld service on the defendant’s “agent” in the state only when accompanied by mailed notice to the defendant himself. See also, Wuchter v. Pizzutti, 276 U.S. 13 (1928).

32 The desirability of “putting the real question” in this area of the law may have first been articulated by Judge Learned Hand in Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2d Cir. 1930). In his opinion, which was referred to by the Supreme Court in International Shoe, Judge Hand described the appropriate jurisdictional inquiry as follows:

When we say, therefore, that a corporation may be sued only where it is “present,” we understand that the word is used, not literally, but as shorthand for
International Shoe test at least attempts to do that. Simplicity, predictability and ease of application are also virtues, however, but they were sacrificed, perhaps as a matter of necessity, in this opinion. Whatever may be their merits as constitutional standards, tests such as “fairness,” “justice” and “reasonableness” undeniably create a measure of uncertainty in terms of their future application.

An equally significant problem in terms of the growth of jurisdictional theory is the relatively limited scope of the International Shoe opinion. The minimum contacts test was not offered as part of a complete restructuring of even the “power over people” half of the Pennoyer formula for jurisdiction. Rather than superseding what had gone before, the minimum contacts test was created as a tool for further expansion of state court jurisdiction and was offered as a supple-

something else . . . There must be some continuous dealings in the state of the forum; enough to demand a trial away from its home.

This last appears to us to be really the controlling consideration, expressed shortly by the word “presence,” but involving an estimate of the inconveniences which would result from requiring it to defend where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts. Nor is it anomalous to make the question of jurisdiction depend upon a practical test . . . This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is “present,” but at least it puts the real question, and that is something. In its solution we can do no more than follow the decided cases.

45 F.2d at 141.

33 Perhaps the classic criticism of the tests applied prior to International Shoe, including the test of “corporate presence,” is contained in F. COHEN, THE LEGAL CONSCIENCE 35 (1960).

Clearly the question of where a corporation is, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation. Nor is it a question that demands for its solution any analysis of political considerations or social ideals. It is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, “How many angels can stand on the point of a needle?” Now it is extremely doubtful whether any of the scholastics ever actually discussed this question. Yet the question has become, for us, a symbol of an age in which thought without roots in reality was an object of high esteem.

Will future historians deal more charitably with such legal questions as “Where is a corporation?” Nobody has ever seen a corporation. What right have we to believe in corporations if we don’t believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc.). But this does not give us the right to hypothesize, to “thingify,” the corporation, and to assume that it travels about from State to State as mortal men travel (footnote omitted) (emphasis deleted).

34 Justice Black, in a separate opinion, criticized the standards adopted by the Court on constitutional grounds:

I believe that the Federal Constitution leaves to each State, without any “ifs” or “buts,” a power to tax and to open the doors of its Courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court’s notion of “fair play,” however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more “convenient” for the corporation to be sued somewhere else.

There is a strong emotional appeal in the words “fair play,” “justice,” and “reasonableness.” But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives.

326 U.S. at 324-25.

35 Since the bulk of civil litigation presumably consists of in personam actions, the lack of certainty accompanying the minimum contacts standard is probably the bigger problem for one dealing with jurisdictional problems on a day-to-day basis. In terms of jurisdictional theory, however, the bigger problem is probably the limited scope of International Shoe.
ment and not a replacement. As a result, certain undesirable aspects of the Pennoyer tests for in personam jurisdiction remained. In addition, the International Shoe opinion did not speak directly to the problems of jurisdiction based upon "power over property," and the distinctions between in personam, in rem, and quasi in rem retained their vitality.

The thirty years since International Shoe have been boom years for the law of state court jurisdiction. The period has seen the widespread adoption of state long arm statutes and the implementation of the minimum contacts theory. Litigants have advanced creative arguments for the expansion of state court power, and the courts have been largely receptive to those suggestions. This period of growth and expansion has not been subject to universal acclaim, however. Numerous commentators and a handful of courts have expressed dissatisfaction with existing jurisdictional theory. Common sources of discontent have been the difficulty of applying the minimum contacts test and the artificiality of the line drawn between actions grounded, since International Shoe, in "fairness to people" and those grounded, per Pennoyer, in "power over property." This period of growth has also been a period of relative silence on the part of the Supreme Court.

36 In the words of the Court, minimum contacts could now be applied as the standard, "if he [the defendant] be not present within the territory of the forum." 326 U.S. at 316. Presumably, therefore, if the defendant is found within the territory of the forum and served with process there, jurisdiction will be permissible under the older standards of presence and power and reference to minimum contacts and fairness is unnecessary.

37 The most undesirable aspect of the Pennoyer rule is probably that which holds that service of process upon the defendant while he is present in the forum state is not only a necessary condition, but is also an always sufficient condition, for the exercise of in personam jurisdiction there. See, e.g., Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) and Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens, 63 YALE L.J. 1099 (1956).

38 Unless a state's legislature has enacted statutory authorization, the courts of the state are generally powerless to exercise jurisdiction where the basis upon which jurisdiction is asserted did not exist at common law. See, e.g., Restatement (Second) of Conflict of Laws § 29, Comment C. "Long arm" statutes authorize courts to exercise jurisdiction in a manner consistent with the minimum contacts test. They also generally specify the means by which process may be served upon a nonresident defendant.

Long arm statutes may take a variety of forms. A few states have, for example, enacted the broadest provisions possible by permitting their courts to exercise jurisdiction on any constitutionally permissible basis. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West); N.J. REV. STAT. 4:4-4 (i); and R.I. GEN. LAWS § 9-5-33. Other states have enacted "single act" statutes which permit the exercise of jurisdiction over a non-resident defendant who has committed a specified act, provided that the claim being litigated arises from the act. See, e.g., FLA. STAT. ANN. § 48.193 (Supp. 1978) (West); ILL. ANN. STAT. ch. 110, § 17 (Supp. 1978); Md. Code Ann. § 96; N.M. STAT. ANN. § 21-5-16 (Supp. 1975); OHIO REV. CODE ANN. § 2307.38.2 (Supp. 1977) (Page); and VA. CODE § 8.01-328.1 (Supp. 1978).


40 Ehrenzweig, supra note 37; Hazard, supra note 8; Traynor, Is This Conflict Really Necessary?, 37 Tex. L. Rev. 657 (1959); von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121 (1966); Developments supra note 20.

III. The Framework of State Court Jurisdiction

A. The Nature of the Problem: "Power Over Property" v. "Fairness to People"

It was inevitable, however, that the continued exercise of jurisdiction based upon "power over property" would be challenged in the courts and that those challenges would eventually reach the Supreme Court's docket. It was also probably predictable, at least in the recent past, that the challenges might take one of two forms. As has already been noted, the Pennoyer Court envisioned that in an action based upon "power over property" the property would be "in the first instance brought under the control of the court by attachment or some other equivalent act." While the notice-giving function of this seizure diminished in importance as the fiction that an owner is in constant possession of his property was given less credence and as other means of providing notice were recognized, the theoretical importance of an early seizure to protect the basis of the court's jurisdiction remained. At the same time, however, the validity of such pre-hearing seizures could be challenged under emerging standards of procedural due process.

In a series of four cases decided between 1969 and 1975 the Supreme Court dealt with the constitutional problems posed by the use of provisional remedies. In those cases the plaintiffs had, prior to trial and without a hearing, seized property, at least arguably owned by the defendant, through the use of devices such as garnishment, replevin and sequestration. The purpose of the seizures was to secure the judgments that were sought by the plaintiffs. While it is difficult to reconcile the four opinions in a totally satisfactory manner, it is fair to say that one general message delivered by the Court was that such seizures of property prior to a hearing are constitutional only if the defendant is provided with certain significant protections. Those protections are not generally afforded defendants whose property is seized for the creation of in rem jurisdiction. A key unanswered question, then, was whether less demanding standards should apply merely because the property is seized to create jurisdiction rather than to secure a judgment.

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42 95 U.S. at 727.
43 As has already been indicated at note 19 supra the traditional dogma that notice requirements are significantly less strict in "power over property" actions than they are in "power over people" actions was rejected in Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). See also Schroeder v. City of New York, 371 U.S. 208 (1962) and Walker v. City of Hutchinson, 352 U.S. 112 (1956). Flexibility was added when the validity of notice sent across state lines was recognized. See note 31 supra.
44 See note 9 supra.
46 One attempt at reconciliation is made in Kay & Lubin, Making Sense of the Prejudgment Seizure Cases, 64 Kent. L.J. 703 (1976).
47 The Court in North Ga. Finishing, Inc. v. Di-Chem, Inc., the final case in the quartet, struck down a Georgia garnishment statute because it lacked the "saving characteristics" of the Louisiana sequestration statute which had been upheld in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Those "saving characteristics" included the participation of a judicial officer in the proceedings resulting in the seizure, the posting of a bond by the plaintiff, factual affidavits supporting the seizure, and the opportunity for both prompt review of the seizure and rebonding.
48 The typical argument that seizures to create in rem jurisdiction should be subject to a less stringent procedural due process test relied upon the Supreme Court's decision in Ownbey
In addition, it could be argued that the entire "power over property" branch of the framework for state court jurisdiction should be measured against the tests of *International Shoe* and that when so measured it would be found wanting. Despite the difficulties inherent in applying the minimum contacts test of *International Shoe*, its foundation, grounded in notions of fundamental fairness, was almost universally recognized as an improvement over the *Pennoyer* tests, which were grounded in notions of physical power. *Pennoyer* continued, however, to provide the underpinnings for in rem and quasi in rem jurisdiction, which depended solely on the seizure of property. Quasi in rem jurisdiction presented the greatest affront to the emerging standards of fairness. To continue to permit the seizure of property, unrelated to the claims asserted in the litigation, to be an always sufficient condition for the exercise of jurisdiction was glaringly inconsistent with the philosophy of *International Shoe*.

Special problems exist with respect to the exercise of quasi in rem jurisdiction based upon the seizure of intangible property because such exercises of jurisdiction are, in a very real sense, inconsistent not only with the doctrine of *International Shoe* but with the doctrine of *Pennoyer* as well. *Pennoyer*, again, stood essentially for the proposition that the jurisdiction of a state court depended upon physical control of either people or property. Physical control does have a "real world" meaning in an in personam action when used in reference to a defendant who is a natural person, as was the defendant in *Mitchell v. Neff*. As has already been noted, however, that "real world" meaning evaporates when the concept is applied to a corporate defendant.49 Similar problems exist in the realm of in rem and quasi in rem jurisdiction. As long as the property providing the court with its jurisdictional base is tangible property, such as the real estate involved in *Pennoyer*, the concept of physically controlling that property has meaning within the common understanding of those terms. The property does have a verifiable location, and it can be physically seized. The same cannot be said for intangible property. Such property is "located" where the law says it is located and can be "seized" only in a legal sense.

Courts and legislatures have, of course, made the situs and seizure determinations referred to above, at least with respect to certain types of intangible property. The Supreme Court itself made such a determination in *Harris v. Balk* when it gave its blessing to the "seizure" in Maryland of an obligation owed by one North Carolina resident to another North Carolina resident.50 The New York courts have made similar, but more recent and widely criticized, determinations by holding that a New York insurer's obligation to a non-resident insured can be seized in New York to create quasi in rem jurisdiction there.51 In making

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49 See notes 32 and 33 supra.
50 *Harris* is discussed at note 24 supra.
51 The creation of quasi in rem jurisdiction by the attachment of an insurance obligation was first upheld in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). There the plaintiffs, residents of New York, sued the defendant, a resident of Quebec, in New York. Jurisdiction was upheld since defendant's insurer did business in New York and the policy was, therefore, attachable there, even though the auto accident giving rise to the lawsuit
these determinations, however, the courts have been forced to stretch Pennoyer through the use of fictions in an undesirable way very similar to the stretching that occurred with respect to in personam actions prior to International Shoe.

One somewhat unique possibility for the exercise of quasi in rem jurisdiction over intangible property was created by the law of the State of Delaware. The Delaware Court of Chancery is directed by state law to seize property owned by a non-resident defendant which is present within the state, when requested to do so by the plaintiff. No relationship of any kind between the property seized and the pending action is required. The avowed purpose of the statute is to procure a general appearance by the non-resident defendant. No limited appearance is, therefore, permitted, and the court is authorized to sell the property in case of a default.

The utility of this procedure is greatly enhanced by a state statute which declares that the situs of all stock issued by Delaware corporations is Delaware, irrespective of the location of the stock certificates themselves. This provision is in direct conflict with § 8-317(1) of the Uniform Commercial Code, which has been adopted in the other forty-nine states, and is of particular importance because of the large number of corporations chartered in Delaware. It was a challenge to this procedure which led to the Supreme Court’s review of the American law of jurisdiction in Shaffer v. Heitner.

Shaffer was not, however, the first case in which a legal attack had been levelled against the Delaware procedure. The procedure had, in fact, been upheld against constitutional attack in a number of earlier Delaware state court cases.

Seider was reaffirmed in Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). In an opinion denying reargument in Simpson v. Loehmann, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968), the New York Court of Appeals limited Seider, however, by holding that the judgment in such a case could not exceed the face value of the policy even if the defendant appeared and defended. Subsequently, the Seider doctrine was upheld against constitutional attack in Minichielo v. Rosenberg, 410 F.2d 106 (2d Cir. 1969). The Seider doctrine has, however, generally been rejected in other states. See, e.g., Jaworski v. Superior Court, 17 Cal. 3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976).

The following description of that procedure is intentionally brief. For a complete discussion, see Folk & Moyer, Sequestration in Delaware: A Constitutional Analysis, 73 Colum. L. Rev. 749 (1973).

55 A limited appearance is one in which the defendant in an in rem or quasi in rem action goes beyond simply raising jurisdictional objections and defends the action on the merits. The maximum exposure of the defendant is, however, limited to the value of the property seized. The defendant will not be subject to a personal judgment in excess of that amount.
57 Del. Code Ann. tit. 8, § 169 provides: “For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.”
58 U.C.C. § 8-317(1) provides: “No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.”
59 In addition to the Delaware Supreme Court cases dealing with such challenges, which
The Delaware Supreme Court first considered an *International Shoe* challenge to the Delaware stock sequestration procedure in *Breech v. Hughes Tool Co.* There the non-resident defendant whose stock was sequestered asserted that constitutionally mandated standards of fair play dictated that the selection of a situs for intangible property be a reasonable one and argued that where there was no link between the property seized and the claims asserted the selection of Delaware as the situs was unreasonable. The Delaware Court was quick to reject these contentions, relying upon opinions of the United States Supreme Court which it felt established the power of Delaware to fix the situs of stock issued by Delaware corporations and largely ignoring any implications that *International Shoe* might have for the case.

The problem was raised again in *United States Industries v. Gregg* and was dealt with in a somewhat more direct manner by the federal district court there. In *Gregg* the non-resident defendant’s *International Shoe* attack was paired with the procedural due process attack, based upon lack of notice and an opportunity to be heard, which is referred to above. While the bulk of the district court’s efforts were directed toward the issues raised by this second challenge, it proved ultimately to be unproductive for the defendant. The district court also rejected the defendant’s *International Shoe* contentions. According to the court, the “minimal contacts” doctrine is not applicable where the plaintiff invokes the

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*NOTRE DAME LAWYER* [April 1979]

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quasi in rem jurisdiction of the court and the state of incorporation may constitutionally provide that the situs of the corporation's capital stock is in its home state. The court went on to hold that even though the statute in question is designed to produce a basis for in personam jurisdiction, it does not follow that the action was not one governed by the rules applicable to quasi in rem jurisdiction. In a later opinion, the court decided that the defendant had no right to make a limited appearance in the case.

The findings of the federal district court in Gregg—which were based in part upon the determinations of the Delaware Supreme Court in Breech—were embraced and reapplied by the Delaware Supreme Court in Greyhound Corp. v. Heitner, the decision reviewed by the U.S. Supreme Court in Shaffer. Again, the defendant's constitutional attack upon the Delaware procedure was two-pronged, and again the defendant met with a double-barreled rebuff. While the court dealt rather deliberately with the “prenotice seizure problem,” it dismissed the International Shoe claim as insignificant and adopted “the analysis made and the conclusion reached” by the district court in Gregg.

Shortly after the Delaware Supreme Court spoke in Greyhound Corp. v. Heitner, however, the Third Circuit Court of Appeals reversed the federal district court's decision in Gregg. The Court of Appeals dismissed the “cryptic conclusions” of the Delaware Supreme Court in Greyhound and the federal district court in Gregg, specifically holding that the standards of International Shoe were determinative in assessing the validity of the exercise of quasi in rem jurisdiction. The stage was thus set. The Supreme Court of Delaware and the Court of Appeals for the Third Circuit were in sharp disagreement with respect to an important matter of federal constitutional law. The dispute was not likely to go away, and its resolution by the Supreme Court was in order.

68 The court's view of the minimum contacts claim is made clear by one sentence from the opinion: “There are significant constitutional questions at issue here but we say at once that we do not deem the rule of International Shoe to be one of them.” 361 A.2d at 229.
69 United States Indus., Inc. v. Gregg, 540 F.2d 142 (3rd Cir. 1976).
70 The Third Circuit, in rejecting the holdings of the federal district court and of the Delaware Supreme Court stated, “We cannot accept the notion that the mere proliferation of unwarranted reliances on old cases suffices to settle a contemporary issue in a dynamic field of law.” 540 F.2d at 151. The court's conclusion with respect to the continued validity of jurisdiction based upon “power over property” was as follows:

We can only understand Mullane and Hanson as establishing a constitutional limit to state court jurisdiction wholly independent of the label—in rem, quasi in rem, or in personam—that may be affixed to that jurisdiction. And whether it be called affiliating circumstances or minimum contacts, we must assume that ultimately the test of International Shoe is determinative: that there be sufficient connection with the forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’ ” (cite and footnotes omitted).

540 F.2d at 154.

The Circuit Court's view of jurisdiction was also applied in Barber-Greene Co. v. Walco Nat'l Corp., 428 F. Supp. 567 (D. Del. 1977) a short time before the Supreme Court's decision in Shaffer.

71 It is clear that decisions of the United States Supreme Court involving questions of federal law are binding on state courts. Where a federal question has not been passed upon by the Supreme Court but only by a lower federal court, however, state courts may not be bound by the decision. See United States ex. rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970).
72 The United States Supreme Court denied certiorari in United States Indus., Inc. v. Gregg, 433 U.S. 908 (1977).
The improbable plaintiff in *Shaffer v. Heitner* was a minor owning one share of stock in the Greyhound Corporation. He brought a shareholder's derivative action, naming as defendants that corporation and Greyhound Lines, Inc., its wholly owned subsidiary, as well as twenty-eight individuals who had served as officers or directors of the corporations. The plaintiff's claims were instigated as a reaction to two earlier lawsuits in which the corporations were fined a total of $600,000 for contempt of court and were subjected to an adverse judgment in the amount of $13,146,090 plus $1,250,000 in attorneys' fees for anti-trust violations. The plaintiff contended that these liabilities resulted from breaches by the individual defendants of the fiduciary duties which they owed the corporate defendants.

Even though neither the plaintiff nor any of the individual defendants was a resident of Delaware, and even though the activities giving rise to the underlying corporate liabilities were centered in Oregon, the action was commenced in a Delaware Court of Chancery. In order to effectuate his jurisdictional choice, the plaintiff made use of DEL. CODE ANN. tit. 8, § 169 and DEL. CODE ANN. tit. 10, § 366. Pursuant to those provisions, the defendants were notified of the pending action both by registered mail and by publication, and, most important, 82,000 shares of Greyhound common stock belonging to nineteen of the individual defendants and having a value of approximately $1.2 million were "seized." Options belonging to two other individual defendants were also "seized."

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74 Between 1947 and 1956 Greyhound Corporation and Greyhound Lines, Inc., acquired eight bus companies in the western United States. All of these acquisitions were subject to Interstate Commerce Commission (I.C.C.) approval. Mt. Hood Lines, a competitor, opposed the acquisitions before the I.C.C. Greyhound officials then made certain representations to overcome the opposition. Specifically, they promised not to disturb existing traffic patterns, not to route passengers circuitously, to display Mt. Hood schedules, to advise passengers of the most direct routes (even if on competing lines) and to continue a through bus with Mt. Hood from Washington to California. The acquisitions were approved.

In 1964 Mt. Hood petitioned the I.C.C. to reconsider the acquisitions. It was found by the I.C.C. that Greyhound had violated some of the representations made in the earlier proceedings, and an order directing Greyhound to conform to its representations was issued. Greyhound then brought suit in federal district court to set aside the I.C.C. order. Not only were the corporations unsuccessful, but in an opinion at 363 F. Supp. 525 (N.D. Ill. 1973) they were found to be in contempt, and in an opinion at 370 F. Supp. 881 (N.D. Ill. 1974) sanctions were imposed. The finding and the sanctions were affirmed at 508 F.2d 529 (7th Cir. 1974).

Mt. Hood also brought a private action seeking a recovery under the federal antitrust laws in federal district court in Oregon. The district court's award of $13,146,090 was affirmed by the court of appeals in Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977). In an opinion delivered almost exactly one year after its opinion in *Shaffer v. Heitner*, the Supreme Court vacated the circuit court's judgment and remanded the case for further proceedings. The basis for remand was that the lower court had erred in holding that the Clayton Act's statute of limitations had been tolled by the government's intervention in the I.C.C. proceedings and that the action might, therefore, have been barred by the statute of limitations. 98 S.Ct. 2370 (1978).

75 The Greyhound Corporation is a Delaware corporation with its principal place of business in Arizona. Greyhound Lines, Inc., is a California corporation with its principal place of business in Arizona.

76 See note 74 supra.
77 See note 57 supra.
78 See note 53 supra.
79 "These seizures were accomplished by placing 'stop transfer' orders or their equivalents on the books of the Greyhound Corp." 433 U.S. at 192.
These twenty-one defendants entered a special appearance\textsuperscript{80} to challenge the court’s jurisdiction. Their attack on the Delaware court’s jurisdiction raised problems which have already been alluded to:

[T]hat the sequestration statute as applied in this case violates the Due Process Clause of the Fourteenth Amendment both because it permits the state courts to exercise jurisdiction despite the absence of sufficient contacts among the defendants, the litigation and the State of Delaware and because it authorizes the deprivation of defendants’ property without providing adequate procedural safeguards.\textsuperscript{81}

It might have been predicted that, when confronted squarely with the issue, the United States Supreme Court would express disapproval of the Delaware sequestration statute. What could not have been so easily foreseen was the form that the expression of disapproval would take and the impact that it would have upon the law of jurisdiction generally.

Supreme Court dissatisfaction with the line traditionally drawn between actions in personam and actions in rem had first been expressed on a much earlier occasion. In \textit{Mullane v. Central Hanover Trust Co.},\textsuperscript{82} the Court stated:

Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what really seems to have been a distinction in the substantive law of property under a system quite unlike our own . . . American courts have sometimes classed certain actions as in rem because personal service of process was not required, and at other times have held personal service of process not required because the action was in rem . . . .

But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis.\textsuperscript{83}

The seeds for change were, therefore, present. The line separating “fairness to people” from “power over property” was, however, called into question in a somewhat tangential way in \textit{Mullane},\textsuperscript{84} and a complete reevaluation of the permissible

\textsuperscript{80} A “special appearance” is one in which the defendant raises jurisdictional objections and does nothing more. Special appearances have been abolished in most jurisdictions in the sense that jurisdictional objections can ordinarily be joined with other defenses. See, e.g., \textit{Fed. R. Civ. P. 12}. In an in rem or quasi in rem action in a jurisdiction which does not permit a limited appearance, however, the assertion of other defenses would ordinarily expose the defendant to the possibility of a judgment exceeding the value of the property seized.

\textsuperscript{81} 433 U.S. at 189.

\textsuperscript{82} 339 U.S. 306 (1950).

\textsuperscript{83} \textit{Id.} at 312-13.

\textsuperscript{84} In \textit{Mullane} the trustee of a common trust created under the laws of New York brought an action in state court there to settle its accounts. The purpose of such an action is to cut off any claims which the trust beneficiaries might have against the trustee. The court appointed guardian for the income beneficiaries opposed the settlement of accounts and challenged the jurisdiction of the court.
bases for the exercise of judicial power by state courts was not forthcoming then.

Such a reevaluation was undertaken in Shaffer, and the traditional line of demarcation was erased. Even though the parties and the Delaware courts had both apparently viewed the procedural due process problems as presenting the more substantial challenge to the statutory procedure, the Supreme Court chose to rest its decision squarely on jurisdictional grounds. The Court spoke boldly and broadly, directing its attention to the minimum contacts issue, speaking to the basic structure of state court jurisdiction, and ignoring possibilities for less sweeping rulings that could have been used to achieve the same result in the case before it.

It must be borne in mind that the Delaware procedure applied in the Shaffer case gave rise to some rather specific and serious problems. First, the defendants were not entitled to make a limited appearance. By appearing and defending upon the merits of the quasi in rem action, they would be subjecting themselves to the personal jurisdiction of the Delaware court and exposing themselves to potential personal liabilities in excess of the value of the property seized. What this meant under the facts of the case is that the defendants were forced to choose between defaulting on the merits, thereby forfeiting well over $1 million in property “held” by the Delaware courts, or appearing and defending on the merits, thereby protecting that property to the greatest extent possible but risking potential personal judgments of close to $15 million.

The purpose of the Delaware procedure is to coerce a general personal appearance from the defendant, and in this kind of situation the statute works well.

In making his jurisdictional challenge the guardian argued that the action should be characterized as a proceeding “in personam.” One apparent advantage which he sought by advancing that argument was an increased likelihood that the New York courts would be held to lack the power to settle the accounts, at least to the extent that settlement would involve the cutting off of potential claims belonging to non-resident beneficiaries. If the action were thought to be a proceeding in rem, the power of the court to act would, under traditional rules of jurisdiction, flow from the presence of the trust assets in New York. If the action were thought to be a proceeding in personam, on the other hand, potential claims could presumably be cut off only with respect to those beneficiaries possessing the requisite minimum contacts.

The Court scarcely broke stride in dealing with this portion of the argument, holding that whatever the classification of the action, the interest of New York in regulating these trusts was a sufficient basis for the exercise of jurisdiction by its Courts. The bulk of the Court’s attention was instead directed to the second portion of the trustee’s argument: that if the action were thought to be in personam, service by publication would not suffice, though it might if the action were thought to be in rem. The Court rejected service by publication under the circumstances without attaching a jurisdictional label to the case.

In Jonnet v. Dollar Sav. Bank, the court struck down a Pennsylvania “foreign attachment” procedure because the seizure of the defendant’s property was neither preceded by notice and a hearing nor accompanied by adequate safeguards. The court rejected the argument that such protections need not be provided when the property is seized to create jurisdiction. Judge Gibbons, in a concurring opinion, found the exercise of jurisdiction based upon the seizure of the property to be improper when measured against the tests of International Shoe.

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The Supreme Court’s later decision on the statute of limitations issue in Mt. Hood Stages, Inc., referred to in note 74 supra diminishes the likelihood of a $15 million recovery. That possibility remains, however, and was even more likely at the time Shaffer was commenced and when the defendants had to decide whether or not to appear and defend.
Because of the natural reluctance to give up the stock and other property without a fight, the likelihood of coercing a general appearance from the defendants, once their property has been "seized," is very great. It has been suggested, however, that to condition the defendant's right to defend on the merits and thereby protect his property upon his submission to personal jurisdiction is violative of due process.\(^8\)

Despite this suggestion, existing case law is at best ambivalent with respect to even the desirability of a limited appearance and contains scant support for the proposition that a failure to provide for a limited appearance amounts to a breach of constitutional protections which must be afforded a defendant.\(^8\) Nonetheless, the court of appeals in *Gregg* had placed some reliance upon the absence of a right to make a limited appearance in striking down the Delaware procedure:

> [T]he non-resident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to in personam jurisdiction. Keeping in mind the admonition of *Mullane* that constitutional standards do not depend on "elusive and confused" state law classifications, we wonder whether this jurisdiction realistically ought to be considered as quasi in rem. The purpose of the Delaware procedure is to coerce the non-resident to submit to in personam jurisdiction.\(^8\)

The Supreme Court, however, attached importance to the lack of a provision for a limited appearance only with respect to the question of appealability.\(^9\)

A second, and even more basic, problem with the Delaware procedure which might have provided the basis for a narrower holding in *Shaffer* was the fact that jurisdiction was based upon the seizure of an intangible, the obligation of a

\(^8\) Developments, supra note 20, at 953-55.

\(^8\) "A question that has been the subject of considerable debate but little judicial action over the years is whether a defendant in an action commenced on a quasi-in-rem basis can appear for the limited purpose of defending his interest in the attached or seized property without exposing himself to a full in personam judgment." 4 *WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE* 511 (1969). Federal cases approaching the problem generally have done so from the perspective of what would be a desirable federal rule, not from the perspective of what might be constitutionally mandated. *See Dry Clime Corp. v. G. L. Edwards*, 389 F.2d 590 (5th Cir. 1968). *See also Blume, Actions Quasi In Rem Under Section 1655, Title 28, U.S.C., 50 MICH. L. REV. 1 (1951); Note, Effect of a General Appearance to the In Rem Cause in a Quasi In Rem Action, 25 IOWA L. REV. 329 (1940); and Note, The "Right" to Defend Federal Quasi In Rem Actions Without Submitting to the Personal Jurisdiction of the Court, 48 IOWA L. REV. 441 (1963).

\(^8\) 540 F.2d at 156.

\(^9\) The Court, according to its own characterization, was consistent with the "pragmatic" approach followed in the past in determining whether an order was "final" for purposes of appealability. Here the order was deemed final because "appellants would have the choice of suffering a default judgment or entering a general appearance and defending on the merits." 433 U.S. at 195 n.12.

Despite one commentator's observation that the *Shaffer* approach "would seem to indicate that the evil in *Harris v. Balk* was the unavailability of a limited appearance and not the assumption of jurisdiction," *Williams, The Validity of Assuming Jurisdiction by the Attachment of Automobile Liability Insurance Obligations: The Impact of *Shaffer v. Heitner* on Seider v. Roth*, 9 RUT-CAM. L. J. 241, 260 (1977), there is little in the opinion to support this position. In fact, as is noted in that article, there is language in the opinion directly to the contrary:

> It is true that the potential liability of a defendant in an *in rem* action is limited by the value of the property, but that limitation does not affect the argument. The fairness of subjecting a defendant to state-court jurisdiction does not depend upon the size of the claim being litigated.

433 U.S. at 207 n.23.
corporation to its shareholders. Jurisdiction based upon "make believe" seizures of this sort, as was discussed earlier,\(^91\) had been born in *Harris v. Balk*\(^92\) and had returned in what was described as "nightmarish form"\(^93\) in the series of New York cases beginning with *Seider v. Roth*.\(^94\) The Court, in describing the development of the law of jurisdiction, discussed *Harris* and noted that particular problems were created by jurisdictional exercises of its type.\(^95\) The seizure of the intangible in *Shaffer* is rendered even more unpalatable by the fact that the Delaware statute establishing a situs for the corporate stock is inconsistent with the rule which had been adopted by every other American jurisdiction.\(^96\) Once again, however, the Supreme Court looked beyond this more limited problem and chose to frame a broader rule governing jurisdiction based upon seizures of tangible as well as intangible property.

Finally, the Court might have limited itself to an assessment of the continued validity of jurisdiction based upon the seizure of property bearing no relationship to the controversy being litigated. While the property seized at the commencement of this action did arguably bear some relationship to the underlying dispute,\(^97\) the Court refused to recognize that relationship and chose instead to classify *Shaffer* as a quasi in rem action of the *Harris v. Balk* type, a particularly suspect class of cases.\(^98\) The problems posed by that type of case did not, however, mark the outer boundary of either the Court's concern or its proclamation.\(^99\)

It is possible, of course, to argue that the holding of *Shaffer* is implicitly limited by the factors referred to above. Such arguments undoubtedly will be made. Such arguments fail to take account of the nature and sweep of the clear language of this opinion, however. The Court, in painstaking fashion, analyzed the development of the American law of jurisdiction and questioned "the continued soundness of the conceptual structure founded on the century old case of *Pennoyer v. Neff*."\(^99\) It concluded that the entire "power over property" branch of the *Pennoyer* framework for jurisdiction should be scrapped and that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."\(^101\) The message delivered by the Court in *Shaffer* is a message of very general application.

The impetus for this fundamental change in jurisdictional theory was disclosed in two observations by the Court. The Court recognized that the exercise

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\(^91\) See note 24 supra.

\(^92\) 198 U.S. 215 (1905).


\(^95\) 433 U.S. at 201 n.18.

\(^96\) See U.C.C. § 8-317(1), which is set forth in note 58 supra.

\(^97\) The stock seized was, after all, stock in the defendant corporations. And, while stock ownership was apparently not a prerequisite to holding office or a directorship in the corporations, the two do often go hand in hand.

\(^98\) See the Court's opinion in 433 U.S. at 208-09.

\(^99\) The presence or absence of a relationship between the controversy being adjudicated and property owned by the defendant in the state will, however, be important in assessing the significance of property ownership as a "contact." See the text accompanying notes 106-18 infra.

\(^100\) 433 U.S. at 196.

\(^101\) Id. at 212.
of jurisdiction based upon "power over property" had always rested upon a fiction. In the words of the Court,

The case for applying to jurisdiction in rem the same test of "fair play and substantial justice" as governs assertions of jurisdiction in personam is simple and straightforward. It is premised on recognition that "[t]he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict Laws § 56, Introductory Note (1971) (hereinafter Restatement). This recognition leads to the conclusion that in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in International Shoe.102

Equally important was the Court's determination that the fiction relied upon in the past was no longer necessary.103 The expansion of in personam jurisdiction after International Shoe,104 coupled with the right to enforce judgments under the full faith and credit clause,105 provided plaintiffs with the tools needed to deal effectively with elusive defendants.

Despite the sweep of its opinion and its manifest desire to look beyond particularized problems in shaping a rule of general application, the Court did recognize that certain refinements in the application of the standard would be necessary. In addition, efforts to apply the broad rule of Shaffer to other fact situations will almost certainly result in both exceptions to and extensions of the rule announced. Any attempt to predict with certainty and to describe in detail possible minor variations from Shaffer's major theme would be unwise. For present purposes, it is enough to highlight a few of the most basic aspects of the new jurisdictional structure which has been created.

1. Property Ownership as a "Contact"

In eliminating the "power over property" half of the Pennoyer framework, the Court limited the importance which might be attached to property ownership in the jurisdictional inquiry. The limitation is a significant one, but it should not be confused with an absolute ban. Property ownership will no longer automatically confer jurisdiction of any type. Ownership of property within a state is, however, a contact with that state which should be considered when a court is deciding whether or not it would be fair to exercise jurisdiction over the owner.

The significance of property ownership as a contact will vary from case to case. The Shaffer Court made this clear by drawing a sharp contrast between two categories of cases.106 "[W]hen claims to the property itself are the source of

102 433 U.S. at 207.
103 This thought had also been expressed by Mr. Justice Powell in his concurring opinion in North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 610 n.1 (1975).
104 The Court notes this expansion in 433 U.S. at 204.
105 See the Court's discussion in 433 U.S. at 210.
106 The Court also made reference to a third type of case, which fits somewhere between the other two. In this third type of case, jurisdiction might exist, even though title to the seized property was not in issue, because of the close relationship between the seized property and the underlying disputes. "The presence of property may also favor jurisdiction in cases, such
the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction.\textsuperscript{107} With respect to in rem actions,\textsuperscript{108} therefore, the theoretical change brought about by \textit{Shaffer} is unlikely to lead to a different practical result. The right to exercise jurisdiction existed in the past, and it continues to exist today. With respect to quasi in rem actions,\textsuperscript{109} in which the property seized to create jurisdiction is completely unrelated to the underlying claim, however, the change in theory also leads to a "significant change" in practical result.\textsuperscript{110} In such cases, "the presence of the property alone would not support the State's jurisdiction."\textsuperscript{111} In the absence of other ties "among the defendant, the State, and the litigation" the case cannot proceed.\textsuperscript{112}

The Court justified this difference in treatment, in part, by noting the forum state's strong interest in providing a procedure by which disputes concerning the right to possess property located in the state could be peacefully resolved\textsuperscript{113} and by noting that litigation convenience would probably also be served by permitting the action to proceed there.\textsuperscript{114} Focusing more specifically on the defendant's minimum contacts, the test of \textit{International Shoe}, the Court stated that in an in rem action, "the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest."\textsuperscript{115} This statement, though undoubtedly true, does not set forth a particularly persuasive reason for differentiating between in rem and quasi in rem actions. Presumably the defendant in a quasi in rem action also expects to benefit from the state's protection of his interest in the property located in the state.

The crucial difference between an in rem action and a quasi in rem action is not a difference in the quality or nature of the defendant's tie to the state. Absent other contacts, the tie is identical—ownership of property. The key difference is, instead, a difference in the nature of the obligation being extracted from the defendant as a result of that tie. In an in rem action, the property owner, who has benefited from the state's protection of his interest in the property,
is being asked to participate in litigation directly related to that property. In a quasi in rem action, on the other hand, though the protection is the same, the obligation is much broader. The defendant must respond in the forum state to claims totally unrelated to the property even though his only tie to the state is ownership of that property and his only benefit from the state is protection of that property.

For the Court to approve the former and reject the latter seems fair, and fairness is the key under International Shoe. It is also totally consistent with developments in the law of in personam jurisdiction after International Shoe. Under International Shoe jurisdiction may properly be exercised in two basic situations. One is where the defendant's ties to the forum state are so extensive that he can be required to defend in that state against any claim that might be asserted against him, whether or not it is related to his ties to the state. The single contact that exists as a result of property ownership would not be enough to trigger this kind of "general jurisdiction." The other is where the defendant's ties to the forum state are more limited, but the claim being asserted relates directly to those ties. In such a case, the court may possess the "limited jurisdiction" necessary to consider the claim arising from the defendant's contacts with the forum state.

The extension of these principles to cases traditionally grounded in "power over property" leads to obvious results. A court considering what has been known in the past as an in rem action possesses the limited jurisdiction over a defendant claiming an interest in local property to resolve disputes relating to that interest in property. A court considering what has been known in the past as a quasi in rem action does not possess the general jurisdiction over a defendant claiming an interest in local property to resolve disputes wholly unrelated to that interest in property.  

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116 See 326 U.S. at 317-18 and the text accompanying note 130 infra.
117 Id.
118 Drawing the line between in rem and quasi in rem will not always be easy. This is particularly true when a court is confronted with a case fitting within the third category referred to by the Court. That category includes cases where the underlying dispute somehow relates to the property seized, but does not involve conflicting claims of title to the property. See note 106 supra. In such cases, according to the Court, the single contact of property ownership might be sufficient to sustain the exercise of jurisdiction.

Since the Court's decision in Shaffer, there has been considerable speculation concerning the continued validity of New York's "Seider-Simpson" doctrine, which is discussed at note 51 supra. See, e.g., Williams, supra note 90. The most significant judicial decisions to date have all upheld this "sui generis" method of obtaining jurisdiction.

The continued validity of Seider was upheld by the Second Circuit Court of Appeals in O'Connor v. Lee-Hy Paving, 579 F.2d 194 (2d Cir. 1978). The defendant's petition for certiorari was denied by the Supreme Court over the strong dissent of Justices Powell and Blackmun, who concluded that "the rationale of our recent decision in Shaffer v. Heitner, 433 U.S. 186 (1977), is at odds with the decision of the Court of Appeals here," 47 U.S.L.W. 3387 (Dec. 5, 1978). Seider was also upheld by the Minnesota Supreme Court in Savchuk v. Rush, 47 U.S.L.W. 2290 (Oct. 20, 1978) and by the New York Court of Appeals in Baden v. Staples, 47 U.S.L.W. 2291 (Oct. 24, 1978). The Savchuk decision presents particularly interesting possibilities for review since the Supreme Court, on the day that Shaffer was decided, vacated an earlier judgment in that case which upheld the Seider doctrine and remanded the case for further consideration in light of Shaffer. 433 U.S. at 902. Certiorari has been granted. 47 U.S.L.W. 3543 (Feb. 20, 1979)
2. The Traditional Bases for In Personam Jurisdiction

The Court’s mandate that “all assertions of state court jurisdiction” be tested against the standards of *International Shoe* would seem to have implications that extend beyond jurisdiction based upon “power over property.” As was discussed earlier,¹¹⁹ *International Shoe* and its minimum contacts test supplemented, but did not replace, already existing bases for the exercise of jurisdiction. The traditional bases for the exercise of in personam jurisdiction in this country have been: defendant’s presence, defendant’s domicile, and defendant’s consent.¹²⁰ Jurisdiction based upon either presence or consent becomes problematical when measured against *International Shoe*.

Jurisdiction based upon presence includes what has come to be known as “transient jurisdiction.” One side of the *Pennoyer* rule for in personam jurisdiction was its requirement that the defendant be served with process while present in the forum state.¹²¹ The flip side of this rule was the recognition that if the defendant has been served with process while present in the forum state the exercise of in personam jurisdiction would always be proper. “Transient jurisdiction” refers to the use of this “other side” of *Pennoyer* to procure jurisdiction over a defendant who may be only fleetingly present in the forum state.

The application of transient jurisdiction has led to particularly bizarre jurisdictional results.¹²² Certainly the exercise of jurisdiction over the defendant solely because he is served with process while passing through the state is no more fair than the exercise of jurisdiction over the defendant solely because he owns property in the state. After *Shaffer*, the analysis utilized should be very similar to that described for cases where there is property ownership: presence in the state may be one contact to be considered but it should not be viewed as conclusively establishing jurisdiction.¹²³

Jurisdiction based upon consent is not as blatantly repugnant to the standards of fairness, but it can present serious problems nonetheless. A decision to voluntarily submit to jurisdiction after the action has been commenced would seem to create no real difficulties. The concept of an implied consent prior to the commencement of the action has, on the other hand, been used in the past in a way which masked consideration of the real issues in much the same way that the concept of “corporate presence” did. The *International Shoe* Court specifically questioned the value of consent as a jurisdictional test.

True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent

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¹¹⁹ See the text accompanying notes 35-37 supra.
¹²⁰ See note 27 supra.
¹²¹ See the text accompanying note 20 supra.
¹²³ Mr. Justice Stevens, in his concurring opinion, indicated that, in contrast to jurisdiction based upon the seizure of a stock obligation, “If I visit another State, . . . I knowingly assume some risk that the State will exercise its power over . . . my person while there. My contact with the State, though minimal, gives rise to predictable risks.” 433 U.S. at 218. Whether this means that Mr. Justice Stevens would not find “transient jurisdiction” unfair is unclear.
to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.\textsuperscript{124}

The principles of \textit{Shaffer} would seem to require that this message from \textit{International Shoe} be heeded. There is, however, language in \textit{Shaffer} suggesting the continued validity of implied consent as a basis for jurisdiction.\textsuperscript{125}

3. "Exceptional" Cases

Finally, the Court also recognized that, despite the breadth of its language, there are certain types of cases in which the application of the \textit{International Shoe} standards would not be totally satisfactory. The Court made specific reference to jurisdiction based upon status,\textsuperscript{126} as is common in the family law area, and to "jurisdiction by necessity"\textsuperscript{127} as possible exceptions. All rules have their exceptions. That \textit{Shaffer} should also have exceptions is not surprising.

Even with these limitations, the \textit{Shaffer} decision marks the true arrival of the "Age of \textit{International Shoe}.” The \textit{Shaffer} decision converts “minimum contacts” from a theory of special application into a theory of general application.\textsuperscript{128} That theory then supplants what was left of \textit{Pennoyer}. With few exceptions, \textit{International Shoe} represents the standard by which future exercises of state court jurisdiction must be measured.

IV. The Minimum Contacts Standard

A. The Nature of the Problem: McGee v. Hanson

To herald the complete arrival of the "Age of \textit{International Shoe}” is not to proclaim the end of difficulties in the jurisdictional area, however. The extension by \textit{Shaffer} of the test of \textit{International Shoe} to the traditional categories of in rem and quasi in rem jurisdiction is clearly progress. It is important, nonetheless, to keep the nature of that progress in mind.

With respect to the evolution of in rem and quasi in rem jurisdiction, we are no longer buried in mechanical, and perhaps meaningless, inquiries. We are, in short, to the point of asking the right question: Are traditional notions of fair play and substantial justice offended by the exercise of jurisdiction by this court over this defendant in this case? The sobering reality is that the point of asking the correct question—this same question—was reached with respect to in personam jurisdiction over thirty years ago, but basic problems have remained.

The \textit{International Shoe} Court itself seemed sensitive to one major difficulty when describing the minimum contacts test.

\begin{itemize}
\item \textsuperscript{124} 326 U.S. at 318 (citations omitted).
\item \textsuperscript{125} The Court, in deciding that jurisdiction could not properly be exercised over the defendants, specifically referred to the fact that Delaware "has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." 433 U.S. at 216.
\item \textsuperscript{126} 433 U.S. at 208 n.30.
\item \textsuperscript{127} 433 U.S. at 211 n.37.
\item \textsuperscript{128} The limited scope of the minimum contacts theory created by \textit{International Shoe} has been noted. See the text accompanying notes 35-37 supra. "A general theory such as \textit{Pennoyer}'s is not displaced by one of merely special application." Hazard, supra note 8, at 242.
\end{itemize}
It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agent in another state, is a little more or a little less. 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.\textsuperscript{120}

The problem alluded to is the not uncommon problem of dealing with legal standards that can fairly be characterized as vague. It is not an insurmountable problem and is a problem for which certain basic guidelines emerge from the \textit{International Shoe} opinion itself.

Fundamental fairness to the defendant is the key under the fourteenth amendment, and fundamental fairness is to be measured in terms of the defendant's contacts with the forum state. The defendant's contacts are chosen as the standard of measurement because of a "give-and-take" concept of fairness. If the defendant "exercises the privilege of conducting activities within a state," the defendant extracts certain benefits from the state, and, to the extent that the defendant has beneficial ties to a state it may not be unjust to ask him to account for his civil sins there.\textsuperscript{130} Simply examining the defendant's ties to the forum state is not, by itself, enough, however. Some consideration must also be given to the relationship between those contacts and the claim which is being sued upon.

By taking these two factors and applying them to earlier cases, the Supreme Court in \textit{International Shoe} was able to describe four basic categories of cases and to give some indication of where cases of each type would fit along the minimum contacts continuum. Where the defendant's activities within the forum state "have not only been continuous and systematic, but also give rise to the liabilities sued upon," for example, the exercise of jurisdiction will be proper. On the other hand, "single or isolated items of activity in a state" by the defendant "are not enough to subject it to suit on causes of action unconnected with the activities there." Jurisdiction may or may not exist, depending upon the particular facts, where there are either continuous and systematic contacts coupled with a cause of action which is entirely distinct from those activities or where there are single or occasional acts combined with a related claim.\textsuperscript{131}

\textsuperscript{129} 326 U.S. at 319 (citations omitted).

\textsuperscript{130} See the language of the Court quoted in the text accompanying notes 27-31 \textit{supra}. One commentator has expressed the belief that the use of the two terms "fundamental fairness" and "minimum contacts" has split courts into two different camps, each applying \textit{International Shoe} in a different way. One camp emphasizes fairness, while the other emphasizes the "minimum contacts" language and searches primarily for physical contacts of the defendant with the forum state. \textit{See} Casad, Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?, 26 \textit{Kan. L. Rev.} 61 (1977).

The language of the Court, however, seems clearly to indicate that while fundamental fairness is the key under the fourteenth amendment, minimum contacts are the test by which such fairness will be measured. The two terms work together rather than being at odds. There is also nothing in the opinion dictating that the minimum contacts referred to must be physical contacts.

\textsuperscript{131} See the Court's discussion in 326 U.S. at 317-19.
A framework for decision thus begins to emerge. That framework continues to be grounded in elusive concepts which are difficult to apply. At least the general direction for a proper inquiry has been indicated, however. Further certainty can be obtained only through "a technique of particularization," or, as Judge Learned Hand put it, "[W]e can do no more than follow the decided cases."

Those cases to which the most attention must be paid are, of course, subsequent cases decided by the United States Supreme Court itself. Between International Shoe and Shaffer the two most important Supreme Court opinions dealing with problems of state court jurisdiction were McGee v. International Life Insurance Co. and Hanson v. Denckla. Unfortunately, those cases did little other than to further muddy already murky waters. In fact, the irreconcilable nature of these two opinions suggests a conflict more fundamental than a simple disagreement over how minimum contacts should be measured, as important as that might be.

In McGee the Court seemed intent upon taking the law of jurisdiction even further down the road which had been opened in International Shoe. The McGee opinion articulates very clearly an expansive philosophy of state court jurisdiction.

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern 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.

This language quoted is not inconsistent with International Shoe. Certainly the International Shoe Court recognized the trend toward expanding the scope of state court jurisdiction over non-resident defendants and understood the pressures which had fueled this expansion.

Even the result in McGee could be described as a rather straightforward holding that the minimum contacts test can be satisfied by contacts which are very minimal indeed. Such a holding was not required by the Court's decision

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132 This term is used in Hazard, supra note 8, at 283.
133 Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930). See note 32 supra.
136 The clash between McGee and Hanson is not primarily a clash between "results." Factual distinctions can be drawn between the two cases, and the minimum contacts test is vague enough to permit arguments that the results of the cases are consistent. The true clash between the cases arises from their conflicting descriptions of the test to be applied and the conflicting views of the constitutional limitations in state court jurisdiction which those descriptions reflect.
137 355 U.S. at 222-23.
138 In McGee the Supreme Court upheld the exercise of jurisdiction by a California state court over a non-California corporation with its principal place of business in Texas. The plaintiff sought a recovery under a policy of insurance issued by the defendant on the life of plaintiff's son. Defendant refused to pay, claiming that death had resulted from suicide.

Both the plaintiff and her deceased son were apparently residents of California. Defendant had no offices or agents in California and was not shown to have ever solicited or
in *International Shoe* because of the rather substantial ties between the defendant corporation and the State of Washington.\(^{139}\) The exercise of jurisdiction in *International Shoe* would presumably have been upheld under the jurisdictional theories which preceded the minimum contacts test.\(^{140}\) The same cannot be said about *McGee*. At the very least, then, *McGee* reveals another key characteristic of the minimum contacts test. The first was that it "puts the real question."\(^{141}\) The second is that it possesses the potential for expanding state court jurisdiction by requiring less in terms of contact between the defendant and the forum state. "Corporate presence" and "doing business," the very words used as labels to describe earlier tests, conjure up images of activities more extensive than those which might accurately be referred to as "minimum contacts." The *McGee* result underscores the significance of this change in terminology.

There are, however, certain aspects of *McGee* which could be read as providing the foundation for an even more basic retooling of *International Shoe* and the minimum contacts test. The shift in focus away from concerns with state sovereignty is stressed in the language of *McGee*. State lines apparently retain any significance only as a means of generally measuring the inconvenience caused the defendant by the conduct of the litigation away from his home. Inconvenience to the defendant, which the Supreme Court in *International Shoe* had recognized as being "relevant" to the application of the minimum contacts test\(^{142}\) appears to become the very justification for the existence of that test in *McGee*. And since modern transportation and communication have largely blunted defendant's claims of inconvenience, the continued vitality of the minimum contacts test itself is called into question. The defendant's ties to the forum state may no longer be crucial, or even very important, in ascertaining whether or not the fourteenth amendment's test of fairness has been met.

The *McGee* opinion does much to suggest that this is the case. In what is a very short opinion to begin with, the Court spends relatively little time discussing the relationship between the defendant and the forum state. Given such limited contacts,\(^{143}\) the absence of more extended discussion is not only understandable but was unavoidable. Forced to look elsewhere, the Court relied upon the limited nature of the defendant's inconvenience, the fact that the defendant was provided with notice and an opportunity to be heard, and other "compelling" factors not related to the defendant's ties with the state in upholding the exercise of jurisdiction.\(^{144}\)

The most telling sentence in the opinion is the Court's declaration that "[i]t is sufficient for purposes of due process that the suit was based on a contract which

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\(^{139}\) See note 30 supra.

\(^{140}\) See notes 25 and 30 supra.

\(^{141}\) See notes 32 and 33 supra.

\(^{142}\) See 326 U.S. at 317.

\(^{143}\) See note 135 supra.

\(^{144}\) See 355 U.S. at 223-24.
had substantial connection with that State." Note that the important tie is the tie between the contract and the state, not the tie between the defendant and the state. The two are not necessarily the same. In fact, in assessing the strength of the connection between the contract and the forum state, the Court in *McGee* emphasized the plaintiff's interest in litigating the contract questions at home, the state's interests in providing the resident plaintiff with a forum, and general considerations of trial convenience.

The most significant feature of *McGee* is that it seems to invite state courts to engage in this type of far-ranging inquiry in determining whether traditional notions of fairness would be violated by the exercise of jurisdiction in a particular case. The inquiry is one which may extend far beyond an examination of the defendant's contacts with the forum state. It is an inquiry which can, therefore, be used to generate alternative bases for the exercise of jurisdiction when significant contacts between the defendant and the forum state do not exist. It is in this sense that *McGee* most dramatically diverges from *International Shoe*.

In *Hanson*, which was decided later in the same term, however, the Court abruptly called into question the trend toward jurisdictional expansion which had been described by the opinion in *McGee* and which had been furthered by the decision in that case.

But it is a mistake to assume that this trend [the one described in *McGee*] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient 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 that are a prerequisite to its exercise of power over him.

Inconvenience to the defendant is not the sole concern. The need for a suitable relationship between the defendant and the forum state transcends the issue of convenience.

This relationship between the defendant and the state is not one, according to *Hanson*, which must be present only in those cases where no other factors exist which would justify the exercise of jurisdiction.

The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be 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.

The importance of the defendant's ties is, thus, reaffirmed, and the lack of acceptable substitutes for those ties is emphasized in another portion of the opinion when the Court said: "[A state] does not acquire that jurisdiction by being the

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145 355 U.S. at 223.
146 357 U.S. at 251 (citations omitted).
147 *Id.* at 253.
'center of gravity' of the controversy, or the most convenient location for litiga-

tion. The issue is personal jurisdiction, not choice of law. It is resolved in this
case by considering the acts of the trustee [defendant].” The Court then
proceeded to find the exercise of jurisdiction by the state court to be inappropri-
ate, even though the contacts between the transaction and the forum state were at
least arguably stronger than those present in *McGee*.

A great deal of effort has been expended in simply trying to reconcile these
two opinions. On balance, however, it seems clearly to have been the common
assumption that *McGee* was more representative of the Court's thinking on the
limits of jurisdiction and that the language of *Hanson*, suggesting that more
stringent standards were in order, could largely be dismissed either because of
*Hanson*’s unusual facts or because *Hanson* was, after all, a 5-4 decision.

Certainly, the language of *Hanson* was not taken seriously by the many state court
cases which dutifully quoted from the opinion and then proceeded to expand the
boundaries of permissible state court jurisdiction further and further.

By not only ruling that minimum contacts was the governing test in *Shaffer*
but by going a step beyond in applying the minimum contacts test to the facts of that case, the
Supreme Court created for itself the opportunity to settle once and for all the
“dispute” between *McGee* and *Hanson* and to further clarify the standards first
articulated in *International Shoe*.

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148 *Id.* at 254.

149 In *Hanson* the Court held invalid the exercise of jurisdiction by the state courts of
Florida in a case in which the validity of the exercise of a power of appointment under a trust
was called into question. Crucial to the Court's holding in the case were the assumption that
under Florida law the trustee was an indispensable party and the finding that the Florida courts
could not properly exercise jurisdiction over the trustee.

The trustee was a Delaware trust company, and the settlor of the trust was, at the time of
its creation, a resident of Pennsylvania. She subsequently moved to Florida, however, and was
a resident of that state both at the time of the exercise of the power of appointment and at
the time of her death. Throughout this period, she maintained contact with the trustee in
Delaware from her home in Florida. Despite the fact that the transaction and all of the other
litigants had substantial ties to Florida, the Court held that jurisdiction over the trustee could
not be acquired in Florida and that the action could not proceed in the trustee's absence under
Florida law.

150 The result in *Hanson* would generally be considered to be the “fair” result. That is, it
resulted in a fairly equal distribution of the decedent's assets amongst her daughters and their
families. A contrary result would have completely “cut off” one daughter.

151 Mr. Justice Black, who wrote the majority opinion in *McGee*, was one of the dissenters
in *Hanson*. This should not be surprising, since it was Mr. Justice Black who, in a separate
opinion, in *International Shoe* stated, “I believe that the Federal Constitution leaves to each
State, without any 'ifs' or 'buts,' a power to tax and to open the doors of its courts for its
citizens to sue corporations whose agents do business in those States.” 326 U.S. at 324. *See*
ote 34 *supra*.

152 *See*, e.g., Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal. 2d 893,
458 P.2d 57, 80 Cal. Rptr. 113 (1969), an action seeking damages in California from an Ohio
manufacturer. Plaintiff alleged that he had been injured as the result of an explosion in
California involving a tank manufactured by defendant in Ohio. The Court first cites *Hanson*
for the proposition that jurisdiction will not be proper unless the defendant has purposefully
availed itself of the privilege of conducting activities in the state. The court then proceeds,
however, to rule that unless defendant can show that its tank arrived in California in a
fortuitous and unforeseeable manner, purposeful availment will be assumed.

*See also* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176
N.E.2d 761 (1961); Ehlers v. United States Heating & Cooling Mfg., 267 Minn. 56, 124
N.W.2d 824 (1963); and Andersen v. National Presto Indus., 257 Iowa 911, 135 N.W.2d 639
(1965). The tendency of state courts to follow *McGee* is at least in part probably the result of
the *Hanson* Court's failure to in any way disavow the breadth of the *McGee* language.

Those who would conclude that the Shaffer Court was totally equal to this task are probably few in number. In the first three sections of the majority opinion, Mr. Justice Marshall, writing for the Court, dealt with the "power over property" problem. He described both the background of the particular case before the Court and the growth of the American law of jurisdiction generally and rendered the ruling that all exercises of state court jurisdiction must be evaluated according to the standards of International Shoe. While these sections do leave certain questions unanswered, they are generally straightforward, and they prompted no dissent. In part IV of the opinion the majority applies the standards of International Shoe to the facts of the Shaffer case. It is at this point that both the quality and tone of the majority opinion deteriorate somewhat, and it is this portion of the opinion which sparked a sharp dissent from Mr. Justice Brennan.

Even though the road becomes a bit rockier, however, the journey through part IV can be very informative. In fact, when read together, part IV of the Shaffer opinion and Mr. Justice Marshall's later efforts on behalf of the Court in Kulko v. Superior Court of California shed considerable light on a recurring and significant problem—the problem of applying the minimum contacts test of International Shoe in other cases. The light cast by Shaffer and Kulko strongly suggests a reaffirmance by the Court of jurisdictional principles that might have been thought by some to be outdated.

In certain key respects, the disagreement between the majority and the dissent in Shaffer is merely a continuation of the thirty-year-old war between McGee and Hanson. While it does not emerge unscathed, Hanson clearly emerges as

153 See the text accompanying notes 106-25 supra.
154 Mr. Justice Powell and Mr. Justice Stevens, in separate concurring opinions, did clarify their positions with respect to matters disposed of in parts I, II and III of the majority's opinion.
155 One of the key problems with part IV of the opinion, at least in the mind of the one dissenting justice, is the absence of a factual record adequate to permit the application of the standards of International Shoe to the facts of the Shaffer case. See Mr. Justice Brennan's discussion in 433 U.S. at 221-22.
156 Problems with the quality of the opinion will be discussed throughout this section. The tone for part IV of the majority's opinion seems to be set by the introductory observation that "applicant Heitner did not allege and does not now claim that appellants have ever set foot in Delaware." 433 U.S. at 213. Physically setting foot in the forum state has not, of course, been thought to be a prerequisite to the exercise of jurisdiction by that state for some time. There are some who might say that this is a regression all too typical of part IV of the opinion.
158 The Shaffer Court cites numerous authorities in support of its decision to eliminate "power over property" as a permissible basis for the exercise of jurisdiction. 433 U.S. at 205. Interestingly, many of those same authorities also express hopes or predictions for the future development of in personam jurisdiction. More often than not, however, the course chosen by the Court in part IV is not the course that was suggested by these same authorities whose advice was followed in parts I, II, and III.
159 At least one aspect of Hanson is undermined by the opinion in Shaffer. Hanson had, in some respects, seemed to maintain a hold on the notions of sovereignty which were the underpinnings of the Pennoyer framework for state court jurisdiction. Shaffer reemphasized the shift in concern from sovereignty to fairness in the law of jurisdiction and, in a footnote, declared that nothing in Hanson "is to the contrary." 433 U.S. at 204 n.20.
the winner of the *Shaffer* battle. That victory is repeated in *Kulko* and is embodied in two basic principles of personal jurisdiction which were revitalized by the Supreme Court in those cases.

1. A preference favoring the defendant remains an essential feature of the American law of jurisdiction.

The history of the American law of jurisdiction has been a history of ever-increasing choices for plaintiffs. Plaintiffs' options have been continually expanded as courts have subjected defendants to in personam jurisdiction in a wider and wider range of forums. The most visible evidence of this pattern has been the periodic creation by the Supreme Court of exceptions to the strict requirement of defendant presence laid down in *Pennoyer*. The most dramatic change of this nature came with the introduction of the minimum contacts test in *International Shoe*. Less obvious, but also important, has been the tendency of courts in recent years to apply the test of *International Shoe* in a manner which minimizes the relative significance of the ties, or lack of ties, between the defendant and the forum state.

There are those who have suggested, with force to their arguments, that the logical end point for this trend should be a system of jurisdiction in which the historical preference favoring defendants would be eliminated. Within such a system, the plaintiff could, at least in certain circumstances, force the defendant to come to him, even in the absence of any significant contact by the defendant with the forum state. The problem is, therefore, a problem which includes but goes beyond the manner of measuring the defendant's "minimum contacts."

The ultimate question is whether those contacts are necessary at all, or whether the exercise of jurisdiction can properly be justified by reliance upon other factors. Under a true "interest analysis" standard, not weighted in favor of any party, the defendant's contacts with the forum state would be only one of many factors that might be considered by the court in determining whether the forum is a proper one. Other considerations would include the interest of the plaintiff in suing at home and the interest of a state in providing a forum within which its citizen plaintiffs could sue and within which state interests could be vindicated. The fairness standard would not focus on the defendant but would be applied more generally. The strongest Supreme Court support for taking this final step and eliminating the traditional preference favoring defendants can be found in the language of *McGee*. The biggest impediment to this development has been *Hanson*.

160 Other changes to the structure had come before *International Shoe*. The traditional bases for the exercise of in personam jurisdiction included not only the presence test articulated in *Pennoyer* but also domicile and consent. See note 27 supra.

161 Two of the most influential articles dealing with problems of jurisdiction are von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966) and Hazard, supra note 8. Each of these articles contains this suggestion, though it is asserted most directly in von Mehren & Trautman, where the authors, in their own words, "recur to this theme of movement away from the bias favoring the defendant toward permitting the plaintiff to insist that the defendant come to him." 79 Harv. L. Rev. at 1128.

162 See the text accompanying notes 138-45 supra.

163 See the text accompanying notes 146-48 supra.
Mr. Justice Brennan, in his dissent in *Shaffer*, clearly cast his lot with *McGee*. In discussing the issue before the Court, he emphasized the close relationship between jurisdiction and choice-of-law and stated, “[i]n either case an important linchpin is the extent of contacts between the controversy, the parties, and the forum State.” This formulation of the jurisdictional inquiry provided him with the latitude to consider not only the defendants’ minimum contacts but the interests of the plaintiff and of the forum state as well, and consider them, he did. In fact, the bulk of his argument is directly dependent upon two contentions, neither of which relates to the defendants or their contacts.

The first is that the derivative action was brought not for the benefit of the named plaintiff, who was a virtual stranger to the forum state, but for the benefit of the corporation chartered in Delaware. The significance of a resident plaintiff’s desire to litigate in his home state was recognized in *McGee*... and has been relied upon in later cases as well. The second is that Delaware, as the state of incorporation, had an “unusually powerful interest” in providing a forum for this litigation which involved allegations of corporate mismanagement. Again, state interests were utilized to justify the approval of jurisdiction in *McGee*, as well as in other cases. Mr. Justice Brennan’s brief discussion of the defendants’ contacts with the State of Delaware appears to have been “tacked on” at the end of his opinion.

164 433 U.S. at 225 (emphasis added). At another point in his opinion, Mr. Justice Brennan asserts: “The primary teaching of Parts I-III of today’s decision is that a State, in order to assert jurisdiction over a person located outside its borders, may do so only on the basis of minimum contacts among the parties, the contested transaction, and the forum State.” 433 U.S. at 220.

165 433 U.S. at 222.

166 In justifying its decision that California could require the defendant insurer to litigate in California, the Supreme Court in *McGee* referred to the problems that might be created for plaintiffs if the local forum were not available. 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.


168 433 U.S. at 222. Justice Brennan went on to identify three interrelated public policies of Delaware which would be furthered by its exercise of jurisdiction in the case: 1) “[The] interest in providing restitution for its local corporations that allegedly have been victimized by fiduciary misconduct”; 2) “state courts have legitimately read their jurisdiction expansively when a cause of action centers in an area in which the forum State possesses a manifest regulatory interest”; and 3) “a State like Delaware has a recognized interest in affording a convenient forum for supervising and overseeing the affairs of an entity that is purely the creation of that State’s law.” See 433 U.S. at 223.

169 The *McGee* Court stated: “It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.” 355 U.S. at 223. The state’s regulatory interest in *McGee* was evidenced by a special jurisdictional statute designed to deal with out-of-state-insurers. Mr. Justice Brennan gave several further examples in which importance had been attached to such state interests. See 433 U.S. at 223-24.

170 Whether or not those contacts were of significant quality and quantity will be discussed in the second half of this section. What is important at this point is ascertaining the degree of attention these contacts received in the opinion relative to the attention afforded other factors.
The majority in Shaffer, on the other hand, adopted a much narrower approach which focused on the perceived lack of significant contact between the defendants and the forum state. The general message to be drawn from the almost exclusive attention paid by the Court to the defendants’ contacts is somewhat obscured by the Court’s unfortunate inclination, in the first instance, to either disregard or deny the existence of any other interests in the case. No mention at all of the plaintiff’s interest in a local forum is contained in the majority opinion, and, according to the Court, any argument of a compelling state interest “is undercut by the failure of the Delaware legislature to assert the state interest” in a special long arm statute.\footnote{171} To the extent that Shaffer can be viewed simply as a case in which no factors other than defendant’s contacts were considered only because no other factors existed, it is, of course, not as helpful in defining the proper scope of the jurisdictional inquiry. Despite some of the ambiguity created by the Court itself, Shaffer is not such a case,\footnote{172} however, and the clear messages which are transmitted in the majority opinion cannot prudently be disregarded.\footnote{173}

The majority consistently asserted that the central concern in the application of the minimum contacts test is “the relationship among the defendant, the forum, and the litigation. . . .”\footnote{174} Particularly when compared with Mr. Justice Brennan’s statement of the factors to be considered,\footnote{175} this formulation seems to re-emphasize the overriding importance of the defendants’ contacts and to suggest that the interests of the plaintiff are not worthy of consideration at all. Other aspects of the opinion lend support to this reading.

The Court specifically based its decision upon one of the fundamental teachings of International Shoe: “The Due Process Clause ‘does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.\footnote{176}”

171 433 U.S. at 214. It is interesting to note that the Court, despite the strong objections of Mr. Justice Brennan, proceeded to apply the minimum contacts test despite the absence of a long arm statute. In the words of Mr. Justice Brennan, the Court was, therefore, proceeding “to find that a minimum-contacts law that Delaware expressly denies having enacted also could not be constitutionally applied in this case.” In his view, “a purer example of an advisory opinion is not to be found.” 433 U.S. at 220.

The majority’s decision to proceed in this case might be taken as one indication that as the minimum contacts test has displaced more traditional bases for the exercise of jurisdiction and become more the rule than the exception this particular function of the long arm has become less important. More likely, the Court simply viewed the sequestration statute as an adequate expression of the state’s desire to act as the forum. Recent cases seem to support this latter position. See Bethany Auto Sales, Inc. v. Aptco Auto Auction, 564 F.2d 895 (9th Cir. 1977) (compliance with state long arm statute required) and Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017 (2d Cir. 1978) (combining sequestration statute and minimum contacts test).

172 The other interests identified by Mr. Justice Brennan in his dissent cannot simply be dismissed. See note 168 supra. Even the majority seems to recognize that fact. Its first tactic is to deny the existence of the other interests. It then, however, moves to a second stage of argument by asserting that even if such interests exist, they will not support the exercise of jurisdiction. See 433 U.S. at 214-16.

173 It is particularly significant to note that the Supreme Court did in this case hurdle several obstacles in getting to the minimum contacts problem and seemed eager to speak about minimum contacts generally. 433 U.S. at 204 (emphasis added). See additional references to this test in 433 U.S. at 207 and 433 U.S. at 209.

175 See the text accompanying note 164 supra.
International Shoe Co. v. Washington, 326 U.S., at 319.'

Even if other interests exist, that does not "demonstrate that Delaware is a fair forum for this litigation." The importance of a defendant's contacts is underscored by a direct quote from Hanson: "[The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for the litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants]. Hanson v. Denckla, 357 U.S. 235, 254 (1958)." This is but one of numerous references by the Shaffer majority to Hanson. It is interesting, and helpful, to note that there is, in contrast, not a single cite to McGee in the majority opinion. This focus on the Hanson concern for defendant's contacts continued in Kulko, although in that opinion there were at least passing references to McGee.

The roots of the Kulko lawsuit are directly traceable to an earlier divorce. In 1972, after thirteen years of married life and the birth of two children, Ezra Kulko and Sharon Kulko decided to separate. They had been domiciled in New York throughout their married lives. At the time of the separation, Mrs. Kulko left for California. She returned to New York to sign a separation agreement and then went to Haiti to obtain a divorce. After getting the divorce, she made California her home, was remarried, and took the name Horn.

Under the terms of the separation agreement, Kulko was given custody of both children during the school year. They were, however, to spend Christmas, Easter, and summer vacations with their mother in California. She was to receive $3000 in annual child support to cover these vacation periods, but was to receive no alimony or other support for herself.

In December of 1973 the Kulkos' eleven-year-old daughter, who was about to leave for her Christmas vacation in California, advised her father that she would prefer to stay in California after the vacation period. She desired, in effect, to reverse the arrangement agreed to by her parents by living in California during the school year and spending her vacations in New York. Her father acceded to her wishes and bought her a one-way ticket to California. Three years later the Kulkos' fifteen-year-old son decided to make the same kind of change. Rather than speaking with his father, however, he telephoned his mother, and she sent him a plane ticket to California. He began living with his mother there in January of 1976.

Less than one month after his arrival, Sharon Kulko Horn commenced an
action against Ezra Kulko in state court in California seeking to establish the
Haitian divorce decree as a California judgment, seeking to modify that judgment
to award her full custody of the children, and seeking to increase Ezra Kulko's
child support obligations. Kulko appeared specially and moved to dismiss on the
ground that the California court could not constitutionally exercise personal jurisdic-
tion over him. He contested only the power of the court to act with respect to
the claim for increased child support.182

His challenge was unsuccessful not only at the state trial court level but in
the California Court of Appeals183 and in the California Supreme Court184 as
well. Kulko had better luck with the United States Supreme Court. It reversed.
In dealing with the issues before it, the United States Supreme Court in Kulko
again demonstrated both a particular sensitivity to the need for defendant's
contacts with the forum state and a substantial fidelity to the teachings of Hanson.

This was not a case in which the strong interests that both the plaintiff and
the state had in obtaining approval of a local forum could easily be denied. As
a result, the Court's view as to the appropriate consideration to be given both
defendant's contacts and other factors emerges more clearly than it had in
Shaffer.185 Although the Court, as it had done in Shaffer, alluded to the fact that
the state's regulatory interest had not been asserted in a special jurisdictional
statute,186 it conceded that "It cannot be disputed that California has substantial
interests in protecting resident children and in facilitating child support actions
on behalf of those children."187 The existence of those interests did not prove to
be enough, however.

In the first place, according to the Court, these interests could be effectively
vindicated without subjecting the defendant to the jurisdiction of the California
courts.188 In an interesting turnabout from McGee the Court relied upon modern
developments, in this case legislation, to undermine arguments that the interests
of the plaintiff and the state required a local forum. Up to this point such modern

182 "Appellant did not contest the court's jurisdiction for purposes of the custody determina-
tion. . . ." 436 U.S. at 88. Custody matters have, of course, traditionally been viewed as
"status" matters for purposes of jurisdiction, not requiring an application of the minimum
contacts test. The impact of Shaffer on this classification is not yet clear. See the text ac-
companying notes 126-27 supra.
183 Kulko v. Superior Court of San Francisco, 63 Cal. App. 3d 417, 133 Cal. Rptr. 627
(1976).
184 Kulko v. Superior Court of San Francisco, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal.
Rptr. 586 (1977).
185 In discussing part IV of the majority's opinion in Shaffer, one commentator has stated:
"In all fairness, it would not be possible to characterize the majority opinion in this area as
better than muddled." Leathers, Substantive Due Process Controls of Quasi in Rem Jurisdic-
tion, 66 KENT. L.J. 1, 20 (1977). The comment is hauntingly similar to one made a dozen
years earlier about the majority's opinion in Hanson. "In a 5 to 4 decision, Mr. Chief Justice
Warren reached the fair result, in favor of the executrix daughter, but by a line of analysis that
in all charity and after mature reflection is impossible to follow, no less to relate." Hazard, supra
note 8, at 244. The Court's communications problems in both opinions are substantial. None-
thless, when these two opinions are now read together, and when they are read in connection
with Kulko, basic messages can be extracted.
186 See 436 U.S. at 97-99.
187 Id. at 100.
188 "California's legitimate interest in ensuring the support of children resident in Cali-
fornia without unduly disrupting the children's lives, moreover, is already being served by the
State's participation in the Uniform Reciprocal Enforcement of Support Act of 1968." Id. at
97-99.
developments had been utilized by courts almost exclusively to undermine defendants' claims of a need to defend at home. Even more important, the Court, after citing Shaffer, asserted that the existence of other interests simply did not make California a fair forum. The language employed in Kulko to define the proper scope of the jurisdictional inquiry is not as rigid as the language of Shaffer. The message is, nonetheless, clear, and the heart of the Court's discussion of jurisdictional doctrine is helpful enough to justify extensive quotation.

The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of non-resident defendants. See Shaffer v. Heitner, 433 U.S. 186, 198-200, 97 S.Ct. 2569, 55 L. Ed. 2d 683 (1977). It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. Pennoyer v. Neff, 95 U.S. 714, 732-733, 24 L. Ed. 565, 572 (1878); International Shoe Co. v. Washington, supra, 326 U.S., at 316, 66 S.Ct., at 158. The parties are in agreement that the constitutional standard for determining whether the State may enter a binding judgment against appellant here is that set forth in this Court's opinion in International Shoe Co. v. Washington, supra: that a defendant "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S., at 316, 66 S.Ct., at 158, quoting Milliken v. Meyer, supra, 311 U.S. at 463, 61 S.Ct., at 342. While the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are of course to be considered, see McGee v. International Life Insurance Co., 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L. Ed. 2d 223 (1957), an essential criterion in all cases is whether the "quality and nature" of the defendant's activity is such that it is "reasonable" and "fair" to require him to conduct his defense in that State. International Shoe Co. v. Washington, supra, 326 U.S., at 316-317, 319, 66 S.Ct. at 158, 159. Accord, Shaffer v. Heitner, supra, 433 U.S., at 207-212, 975 S.Ct., at 2581-2584; Perkins v. Benguet Mining Co., 342 U.S. 437, 445, 72 S.Ct. 413, 418, 96 L. Ed. 485 (1952).

The test described does not represent a departure from the past. It is, to the contrary, a reaffirmation of lessons that can be easily extracted from past cases.

The due process clause of the fourteenth amendment to the United States Constitution places limitations on exercises of judicial jurisdiction by state courts. This is a teaching of Pennoyer. The fourteenth amendment's limitations are imposed to protect defendants. As such, the defendant in every case must have had contact with the forum state. These are teachings of International Shoe. Other factors may be considered only as a part of the backdrop against which the defendant's contacts are to be measured. Less may be required in terms of defendant contacts with the forum state in a case involving compelling plaintiff or state interests in a local forum. These other factors cannot, however, serve as a

189 See the text accompanying notes 134 and 142 supra.
190 436 U.S. at 100.
191 Id. at 91-92.
substitute for the essential ties between the defendant and the forum state, which must be present in each case. This is a teaching which was at least implicit in International Shoe and which was explicitly expressed in Hanson.

In Kulko the Hanson brakes are applied once again to the McGee trend toward a more expansive system of state court jurisdiction. It must be conceded that neither Shaffer nor Kulko presents the strongest case for abandonment of the preference favoring defendants. Both Shaffer and Kulko are, however, unwavering in their faithfulness to the basic tenet that jurisdictional restrictions have been and are now imposed for the protection of defendants. If constitutional limitations on jurisdiction exist for the protection of defendants, it may be somewhat incongruous to even speak of a "bias" which "favors" defendants. Whatever terms are used, any movement toward a true "interest analysis," not focusing primarily on defendant contacts, seems highly unlikely in the foreseeable future.

2. If the "minimum contacts" test is to be satisfied, the contacts of the defendant with the forum state must be more than minimal contacts.

To refocus the jurisdictional inquiry on the defendant's contacts is to deal with only the first half of the problem, however. Even when a court knows that its primary responsibility is an evaluation of the defendant's contacts with the forum state, it can encounter serious difficulties in the process of evaluation. That is particularly true when the standards to be applied are as vague as the standards of International Shoe. The Supreme Court in Kulko described the dilemma facing a court saddled with the task of determining the constitutionality of an exercise of personal jurisdiction under International Shoe.

Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of International Shoe is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. Hanson v. Denckla, 357 U.S. 235, 246, 78 S.Ct. 1228, 1235, 2 L.Ed. 2d 1283 (1958). We recognize that this determination is one in which few answers will be written "in black and white. The grays are dominant and even among them the shades are innumerable." Estin v. Estin, 334 U.S. 541, 545, 68 S.Ct. 1213, 1216, 92 L.Ed. 1561 (1948).

One way to deal with a problem of this type is to avoid it, and the International Shoe test creates the opportunity to do just that. Courts being human and human nature being what it is, it is perhaps unfortunate that the Supreme Court in International Shoe chose to express its fundamental fairness test in terms of "minimum contacts." It is simply too easy to equate "minimum" with "minimal" and to approve the exercise of jurisdiction whenever there is any arguable

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192 The most complete and helpful discussion of when such an abandonment would be appropriate is contained in von Mehren & Trautman, supra note 161. As regards Shaffer and Kulko, it is sufficient to note that in neither case is a vast disparity between the parties' economic strength or the parties' involvement in multistate activities established. It is also not clear that Delaware and California would have been the most convenient forums.

193 See the text accompanying notes 33-35 and 129-35 supra.

194 436 U.S. at 92.
contact, no matter how tenuous. It would have been necessary for the U.S. Supreme Court to adopt a “minimal contacts” test to uphold the exercise of jurisdiction by the California Court in *Kulko*. The Court refused to do so.

To fully understand *Kulko*, it is first necessary to understand what contacts were thought not to be significant, even by the California courts which upheld the exercise of jurisdiction. The California courts did not base their exercise of jurisdiction upon: Kulko’s stopovers in California in 1959 and 1960 while he was in the service; his marriage to Sharon Kulko Horn in California in 1959 during one of those stopovers; or his agreement with his separated wife to permit their children to visit her in California. The temporary stopovers in California some sixteen years earlier, as well as the marriage ceremony in California, were essentially fortuitous events resulting from Kulko’s military travel schedule. The claim for relief presently being litigated was also unrelated to those earlier contacts, thus making reliance upon them even more questionable. To rely upon Kulko’s agreement that his children could visit their mother in California would have created serious “policy problems” and would have been inconsistent with the holdings of other California cases.

Instead, the California courts relied upon a California long arm statute which permits the courts of that state to exercise jurisdiction in all cases in which it would be constitutionally permissible to do so. One of the bases for jurisdiction recognized by that statute is the “causing of an effect” in the state by an act or omission which occurs elsewhere. The California Supreme Court ap-

195 The term “affiliating circumstances,” which was used in *Hanson* with respect to in personam, in rem and quasi in rem jurisdiction, does not suffer from this problem. See 357 U.S. at 245-46. The term is used by the Court in both *Shaffer* and *Kulko*, as is the term “minimum contacts.”

196 The Supreme Court does not directly assert that the marriage in California was unrelated to the action for increased child support. Such a characterization would, however, have been consistent with their holding in *Shaffer* that a director’s ownership of Greyhound stock was unrelated to a claim by Greyhound against that director for corporate mismanagement. The Court did specifically characterize the earlier stopovers as being unrelated and went on to state: “To hold such temporary visits to a State a basis for the assertion of in personam jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment.” 436 U.S. at 93.

197 It has been clear since *International Shoe* that unless the defendant’s contacts with the forum state are substantial enough to support the exercise of a “general jurisdiction” over him there, there must be a relationship between the defendant’s contacts with that state and the claim being sued upon. The importance of this relationship has been emphasized in a number of post-*Shaffer* cases. See, e.g., Toro Co. v. Ballas Liquidating Co., 572 F.2d 1267 (8th Cir. 1978) and Grevas v. M/V Olympic Pegasus, 557 F.2d 65 (4th Cir. 1977).

198 In *Titus v. Superior Court of Contra Costa*, 23 Cal.App.3d 792, 803, 100 Cal. Rptr. 477, 485 (1972), the court stated: “It is a strong policy of the law to encourage the visitation of children with their parents. Such a policy should be fostered rather than thwarted.” In *Judd v. Superior Court*, 60 Cal.App. 3d 38, 45, 131 Cal. Rptr. 246, 249-50 (1976), the court stated: “It should be a matter of strong public policy to encourage the payment of support and communication between a natural father and his children, not to discourage the same by subjecting the father to the expense and inconvenience of relitigating this matter of support in our state.” In each of these cases the California Court of Appeals found the exercise of jurisdiction to be improper. They were distinguished by the California Supreme Court in *Kulko* because Kulko sent his daughter to California knowing that she intended to stay permanently.

199 *Cal. Civ. Proc. Code* § 410.10 (West) provides: “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” The California court apparently felt that the state constitution imposed no obligations in addition to those arising under the United States Constitution.

200 In the words of the California Supreme Court, § 410.10 “includes all the recognized bases of judicial jurisdiction.” 564 P.2d at 355. The “causing an effect” basis is recognized not
parently had no problem concluding that Kulko had caused an effect in California by permitting his children to move there. That court was more troubled by its recognition that “[i]t is at once apparent that the potential scope of this basis of jurisdiction is almost unlimited since any act or omission of a defendant anywhere in the world causing an ‘effect’ in California could theoretically subject him to \textit{in personam} jurisdiction in California.”

The exercise of jurisdiction must, in short, not only fit within the applicable long arm statute but must meet the tests of the federal Constitution as well. The California Supreme Court, after alluding to \textit{International Shoe}, applied the constitutional test contained in \textit{Hanson}, a test which, in their language, requires a showing that “the nonresident ‘purposely availed himself of the privilege of conducting business in California or of the benefits and protections of California laws . . . [or] anticipated that he would derive any economic benefit as a result of his’ act outside of California.” The court concluded that this constitutional standard had been met.

Initially we observe that probably no parental act more fully invokes the benefits and protections of California law than that by which a parent permits his minor child to live in California. The parent thereby avails himself of the total panoply of the state’s laws, institutions and resources—its police and fire protection, its school system, its hospital services, its recreational facilities, its libraries and museums, to mention only a few. Therefore, we start with the premise that a nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the nonresident parent for actions concerning the support of these children.

The United States Supreme Court was not so easily persuaded. The Court first expressed its belief that the “causing an effect” basis for jurisdiction was not intended to cover a situation like the one in \textit{Kulko}. The main thrust of the Court’s opinion, however, was directed to what it felt was a misapplication of the constitutional standard of \textit{Hanson}. It was \textit{International Shoe} which justified the minimum contacts test by relating it to benefits which were extracted from the state. The extraction of benefits from the state could fairly carry with it the only by the California courts but by \textit{Restatement (Second) of Conflict of Laws} § 37 (1971) as well. That section of the Restatement provides:

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

\begin{itemize}
\item \textsuperscript{201} 564 P.2d at 356.
\item \textsuperscript{202} 564 P.2d at 356 (citations omitted). The California court's problems may have begun with its formulation of the test to be applied. The \textit{Hanson} language refers only to a “purposeful availment” and does not provide for the anticipation of economic benefit as an alternative justification for jurisdiction.
\item \textsuperscript{203} 564 P.2d at 356.
\item \textsuperscript{204} “As is apparent from the examples accompanying § 37 in the Restatement, this section was intended to reach wrongful activity outside of the State causing injury within the State, see, e.g., Comment a, p. 157 (shooting bullet from one State into another), or commercial activity affecting state residents, \textit{ibid.”} 436 U.S. at 96.
\item \textsuperscript{205} See the text accompanying notes 27-31 supra.
\end{itemize}
obligation of defending in the state.\textsuperscript{206} It was the Hanson Court that explicitly went one step further by announcing that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. ..."\textsuperscript{207}

The United States Supreme Court's decision that these standards had not been met in Kulko is straightforward. It is imperative that the defendant has purposefully availed himself of the privilege of conducting activities in the state. It is not sufficient that the defendant has acquiesced in the decision of another to conduct activities in the state. In this case the decision of the children to leave was not a purposeful availment by the defendant.\textsuperscript{208} It is imperative that the defendant has received benefits from the forum state. It is not sufficient that someone else has received benefits from that state. In this case any state law benefits received were benefits received by the children and not by their father.\textsuperscript{209} It is imperative that any benefits received by the defendant be benefits received from the forum state. It is not sufficient that general benefits with no real ties to the laws of the forum state are received. In this case the defendant's economic benefit from having lower child care costs springs not from the fact that his children now live in California but instead from the fact that they no longer live with him in New York.\textsuperscript{210}

Kulko should have been an easy case for the Supreme Court. The extent to which it was not is a tribute of sorts to McGee.\textsuperscript{211} The proper result in Shaffer v. Heitner is not as obvious. Kulko and Shaffer are, as has been noted, cases in which there was substantial agreement about the rules of law to be applied. Shaffer is, in fact, one of the principal authorities relied upon in Kulko. Kulko and Shaffer are also cases in which the same basic result—a determination that a state court could not constitutionally exercise jurisdiction—was reached. The Shaffer facts, however, present a much stronger case for permitting the exercise of jurisdiction, and the result in Shaffer is, therefore, much more susceptible to valid criticism.\textsuperscript{212} It simply seems less clear that the result in Shaffer was dictated

\begin{itemize}
\item \textsuperscript{206} See the text accompanying note 129 supra.
\item \textsuperscript{207} 357 U.S. at 253. Nothing in this language from Hanson is inconsistent with the International Shoe opinion. In fact, the language of International Shoe itself suggests that the ties between the defendant and the State to be adequate ties for purposes of jurisdiction must have been intentionally created by the defendant. The Court refers to a defendant who "exercises the privilege of conducting activities within a state," 326 U.S. at 319. The Hanson "purposeful availment" language, however, nails down the requirement that there be some volition on the part of the defendant.
\item \textsuperscript{208} In the words of the Court, "A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws." 436 U.S. at 94. With respect to the son, Kulko did not even know before the fact that a move was being contemplated.
\item \textsuperscript{209} 436 U.S. at 94 n.7.
\item \textsuperscript{210} It was the Court's view that "[a]ny diminution in appellant's household costs resulted, not from the child's presence in California, but rather from her absence from appellant's home." 436 U.S. at 95. It is interesting to apply this view to McGee since the Court in that case specifically mentioned that insurance premiums were mailed from California. Presumably any benefit to the defendant in that case, however, resulted, not from their mailing in California, but rather from their receipt in Texas.
\item \textsuperscript{211} Surprisingly, three Justices dissented in Kulko, while only Mr. Justice Brennan dissented in Shaffer.
\item \textsuperscript{212} A number of commentators have expressed misgivings about the majority's minimum contacts analysis in Shaffer, and one has gone so far as to conclude that "the Court was incorrect in its conclusion that the directors lacked minimum contacts with Delaware in regard
\end{itemize}
by the ultimate goal of ensuring that the defendant's treatment is consistent with "traditional notions of fair play and substantial justice."213

The defendant in Kulko had not sought to gain economically from any commercial dealings involving the state of California.214 The dispute in question related solely to his personal life. The defendant in Kulko had not intentionally sought to improve his personal life through any dealings involving the state of California. The defendant's own activities—at least as they related to this lawsuit—were totally intrastate.215 He was living his life in New York, sometimes in the company of his children and sometimes not. Whatever indirect benefits flowed to him from California flowed solely as the result of free exercises of choice by his ex-wife and children. Assuming that he had no power to control their activities and to restrict their choices, to subject him to jurisdiction as a result of their activities and choices would be patently unfair. Assuming that he did have the power to control their activities and to restrict their choices, to force him to utilize that power to structure their lives in a way that would insulate him from California's jurisdiction would be socially undesirable.216

A determination that the defendants in the Shaffer case should answer to the claims against them in Delaware would not give rise to the same images of basic unfairness. The defendants did, presumably voluntarily, accept positions of trust within the Greyhound Corporation, a corporation involved in multistate activities.217 It is probable that their motivation was personal economic gain in one form or another. The Greyhound Corporation is chartered under the laws of the State of Delaware. By accepting positions with that corporation,218 the defendants created ties between themselves and the State of Delaware.219 Benefits from those ties flowed to the defendants as a result of certain Delaware statutes which created benefits for the officers and directors of "local" corporations.220 It seems safe to assume that most individuals accepting positions as officers or directors are not unaware of the existence of such benefits. At least that was the

to the suit at hand." Leathers, supra note 185. While that portion of the opinion is, as has been noted, a likely target for critical comment and while at least one Justice has conceded that "[w]e are not final because we are infallible, but we are infallible only because we are final" (Jackson, J., concurring, in Brown v. Allen, 344 U.S. 443, 540 (1953)), it seems dangerous to simply dismiss this portion of the opinion as an unfortunate error.

213 Milliken v. Meyer, 311 U.S. 457, 463 (1940). This phrase was, of course, used again by the Supreme Court in International Shoe v. Washington, 326 U.S. 310, 316 (1945).

214 436 U.S. at 97. The language of the Court suggests that jurisdiction will be more often upheld when the defendant's contacts with the forum state flow from commercial transactions. 215 436 U.S. at 97-98. Those who have argued for the abandonment of the traditional bias favoring defendants in the law of jurisdiction have most often focused on the situation in which the defendant, but not the plaintiff, is engaged in interstate activity. See, e.g., von Mehren & Trautman, supra note 161.

216 See note 198 supra.

217 It is difficult to assert whether or not the plaintiff in this case was involved in multistate activities both because in this derivative action it is unclear who the plaintiff really is and because it is difficult to characterize the activity of one who, without ever leaving home, acquires an ownership interest in a national corporation engaged in multistate activities.

218 Actually, some of the defendants were officers or directors of Greyhound Lines, Inc., a California corporation. That fact was not significant, given the Court's view of the case. 433 U.S. at 213 n.41.

219 This assumes, of course, that the concept of the "state of incorporation" retains some measure of importance under the law. Presumably, for example, there is no question today but that the Greyhound Corporation itself would be suable in its "home state" of Delaware.

assumption of the State of Delaware, which enacted these statutes to induce capable individuals to accept positions with its corporations.221

In short, the majority's conclusory statement that "[a]pellants have simply had nothing to do with the State of Delaware"222 is neither grounded in reality nor supported by the meager record in this case. If the validity of the Court's determination depended upon the accuracy of that statement, the result in the case could not be rationally defended. The two are not inextricably intertwined, however. Proof that appellants did have something to do with the State of Delaware would not necessarily dictate a different result. The result in Shaffer may be explained by the fact that under the strict standard for jurisdiction being applied a great deal more than that is required.

The Court in Shaffer, again relying on Hanson, asserts that the exercise of jurisdiction is improper unless the defendants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State."223 It is not enough to show that the individual defendants have benefited indirectly from the corporation's direct ties to the forum state. It must be shown that each defendant has purposefully availed himself of the privilege of conducting activities within the forum state. The gloss which the Shaffer result puts on this rule makes it clear that the requirements will often be difficult to meet. The particular procedures followed by the Court made it virtually impossible for the plaintiff to make the necessary showing in Shaffer.

The minimum contacts test is, of course, a test which must be applied in light of the facts of a given case. No one could quarrel with Mr. Justice Brennan's characterization of the minimum contacts inquiry as one which is "highly dependent on creating a proper factual foundation."224 Such a foundation did not exist when the Supreme Court made its minimum contacts determination in Shaffer. This was, after all, a case that had begun as a quasi in rem action. Quasi in rem jurisdiction had been upheld by the state courts below. There was no real need to consider minimum contacts at that point. The Court, nonetheless, chose not to remand the case for a factual determination, and, unlike the practice evidenced in some modern cases,225 construed the gaps in the record against the plaintiff and dismissed the action. This was but one additional in-

222 433 U.S. at 216.
223 433 U.S. at 216 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
224 433 U.S. at 221.
225 Both state and federal courts have almost uniformly held that the party seeking to invoke the jurisdiction of the Court bears the burden of persuasion in establishing the existence of jurisdiction over the opposing party. See Tetco Metal Prod., Inc. v. Langham, 387 F.2d 721 (5th Cir. 1968). Therefore, once the defendant puts personal jurisdiction in issue, generally through a motion to dismiss, the burden of persuasion with respect to that issue rests with the defendant. In recent years, however, there has been a tendency on the part of at least some courts to hold, on the most minimal of showings, that the plaintiff has made a prima facie showing that jurisdiction exists and that the burden of rebutting the prima facie case rests with the defendant.

See, e.g., Buckeye Boiler Co. v. Superior Court of Los Angeles County, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969), a products liability case in which the court placed upon the nonresident defendant the burden of establishing that the product had "arrived in California in a manner so fortuitous and unforeseeable as to demonstrate that its placement here was not purposeful" and that the burden to the defendant in defending this lawsuit in California would be "significantly different in its nature and extent" than defending lawsuits which might arise out of other admittedly purposeful acts of the defendant in the state.
dication of the new "harder line" being exhibited by the Supreme Court with respect to jurisdictional questions. This "harder line" is likely to be converted into a "new caution" in the lower courts.\textsuperscript{226}

V. Conclusion

It is possible to view the \textit{Shaffer} and \textit{Kulko} opinions as the products of a somewhat schizophrenic approach to the law of state court jurisdiction. Under this view, the Court in the first three sections of the \textit{Shaffer} opinion acted in a manner consistent with the modern trend of jurisdictional development by eliminating the old "power over property" concepts and replacing them with a universal concern for "fairness to people." This was accomplished by finally breaking free from Pennoyer and by subjecting "all assertions of state-court jurisdiction" to evaluation "according to the standards set forth in \textit{International Shoe} and its progeny."\textsuperscript{227} In the last section of the \textit{Shaffer} opinion and in \textit{Kulko}, however, the Court actually retarded this modern trend by utilizing a rather restrictive approach in applying the minimum contacts test of \textit{International Shoe} to the facts of the cases before it.

Certainly the fact that the Court has expressed a restrictive view of minimum contacts cannot be denied. What might have been thought to be merely an illusion after \textit{Shaffer} has become a reality that cannot be ignored after \textit{Kulko}. In each case the Court emphasized the need for significant ties between the defendant and the forum state. In each case the Court paid tribute to the "purposeful availment" test of \textit{Hanson v. Denckla}. In each case the Court gave indications that the more "traditional" the contact the more likely that jurisdiction would be upheld.\textsuperscript{228} It is, therefore, possible to dwell on the basic "inconsistency" of the opinions. On the one hand, the Court expands the influence of \textit{International Shoe}, and, on the other, it undercuts its utility.

It is important, however, to bear in mind that every jurisdictional decision rendered in either \textit{Shaffer} or \textit{Kulko} was a restrictive one. \textit{Shaffer} initially limited plaintiffs' options by taking away quasi in rem bases for the exercise of jurisdiction which had been available at least since Pennoyer v. Neff and Harris v. Balk. In part IV of \textit{Shaffer} and in \textit{Kulko} visible limitations were placed upon the application of the minimum contacts test—a test which, particularly after \textit{McGee v. International Life Insurance Co.}, possessed great potential as the foundation upon which a more expansive system of jurisdiction might have been built. Viewed this way, the two opinions are completely consistent.

The restrictive actions of the Court—both in eliminating outmoded jurisdictional theories and in tightening the application of modern tests—suggest that

\textsuperscript{226} See, e.g., Pavlo v. James, 437 F. Supp. 125, 129 (S.D.N.Y. 1977) where the court refused to exercise jurisdiction, "especially in light of the new caution currently being portrayed in measuring the constitutionality of assertions of extraterritorial jurisdiction in general."

\textsuperscript{227} 433 U.S. at 212.

\textsuperscript{228} The first such indication comes near the beginning of part IV of the \textit{Shaffer} opinion when the Court seems to return to tests of the past in stating, "[a]ppellee Heitner did not allege and does not now claim that appellants have ever set foot in Delaware." 433 U.S. at 213. More helpful is the \textit{Kulko} opinion where the Court makes reference to causing physical injury to either property or persons in the state or engaging in commercial transactions which touch the state as the kind of contacts likely to give rise to jurisdiction. See 436 U.S. at 96-97.
a crossroads has been reached in the development of the law of state court jurisdiction. Ever since the restrictive rules of Pennoyer were announced, a major goal has been to better equip plaintiffs to deal effectively with non-resident defendants. Changes in the law have, therefore, consistently increased the permissible forums within which a plaintiff might sue. The dramatic departure from this pattern in Shaffer and Kulko is a strong indication that the pendulum has swung and that, at least in the eyes of the Supreme Court, placing effective limits on state court jurisdiction has become a new priority in this area of the law.

A shift of this sort should not have been totally unexpected. It is rare that growth of any kind continues unabated. Jurisdictional expansion has been continuous over the last century and has been most dramatic in the last thirty years. That growth has not resulted in an unlimited number of potential forums for each plaintiff in every case. It has, however, in many cases provided plaintiffs with the opportunity to choose amongst permissible forums. A next logical step in the evolutionary process might be the elimination of the plaintiff's choice. Fairness might best be served if the law did not permit the plaintiff to select any forum state which meets a “minimum contacts” test but instead required that the plaintiff sue in the forum with the “best contacts.”

The restrictive changes of Shaffer and Kulko, however, do not appear to be changes of this type. To make such a shift, greater reliance would actually have to be placed on McGee and the kind of “interest analysis” utilized by the Court in that case. “Best contacts” cannot be assessed by looking only at the defendant’s contacts, unless a return to the days when a defendant could be sued only at home is thought to be desirable. Both Shaffer and Kulko focus on the defendant’s contacts, minimize the importance of other considerations, and reject the notion that jurisdiction should be made to depend upon which forum is the “center of gravity” of the controversy.

The absence of movement toward a “best contacts” standard may be more the result of a lack of ability than it is a lack of inclination. Throughout the changes that have occurred in the law of jurisdiction, a constant point of reference has been the basic premise that the due process clause of the fourteenth amendment extends certain protections to defendants. The nature and extent of those protections have varied over time. Flexibility has been achieved by loosening the protective requirements. To suggest, however, that the fourteenth amendment would preclude a plaintiff from suing in a state because that state did not have the “best contacts” with the litigation, even though the defendant’s due process rights had been met, would be a marked departure from the past.

The only other alternative open to the Supreme Court would have been to permit the period of jurisdictional expansion to continue and to rely upon the states to impose “best contacts” limitations of their own. There is, however, little reason to believe that states, unencumbered by constitutional concerns, would launch a voluntary search for the forum conveniens. Certainly there has been little in the case law of the past thirty years to support a belief that a state court with the power to assert jurisdiction would voluntarily decline to do so.

229 An argument favoring the search for the forum conveniens is made in Ehrenzweig, supra note 37.
except under the most unusual circumstances. In using the fourteenth amendment to reassert its interest in protecting defendants from improper exercises of jurisdiction, the Court used a traditional tool in a traditional way to help ensure that future exercises of jurisdiction will at least be reasonable ones. Any drive toward the "ideal forum," however, appears to have been stalled in the process.

230 The Court's refusal to acknowledge the link between jurisdiction and choice of law may also betray a keener awareness of the close relationship between those two concepts than the literal words of the opinion would suggest. The Supreme Court has not actively asserted constitutional controls over the choice of law process for many years. The result has not been a voluntary search for the "best law" but a strong tendency on the part of state courts to apply the law of their own state.