The Essential Purpose and Analytical Structure of Personal Jurisdiction Law

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Introduction

In *Wonderful Life: The Burgess Shale and The Nature of History*,[1] Harvard paleontologist Stephen Jay Gould tells us that evolution has no essential direction or purpose. Indeed, if the tape of life were rewound and replayed from any earlier point, we would get a completely different set of species. Homo sapiens, with an existence spanning only a quarter of a million years—a mere geological moment when one considers that the splitting point between human and chimpanzee ancestors was six to eight million years ago—probably would not even be included in this new array of species.

To many proceduralists, the Supreme Court's opinions concerning personal jurisdiction have the same quality of purposelessness[2] as the evolutionary process described in Professor Gould's marvelous book. *Burnham v. Superior Court of California*,[3] the Supreme Court's most recent important opinion on personal jurisdiction, is often presented as Exhibit A in support of this claim.[4] *Burnham*, it is argued, adds to the lack of direction in personal jurisdiction law less because of its failure to promulgate bright line rules than because of two other reasons. First, *Burnham* breathes life into the ancient doctrine of transient jurisdiction

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1. Stephen J. Gould, Wonderful Life: The Burgess Shale and The Nature of History (1989).

2. *See generally* James S. Cochran, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 Tex. L. Rev. 1463 (1986); Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1064-74 (1992).

3. 110 S. Ct. 2105 (1990). For a full discussion of this case, *see infra* text accompanying notes 147-76.

4. *See, e.g.*, Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 Rutgers L. J. 572 (1991); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction* 22 Rutgers L. J. 597 (1991); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory after Burnham v. Superior Court*, 22 Rutgers L. J. 675 (1991).

that traces back to *Pennoyer v. Neff*.[5] Indeed, some lower courts have held that *International Shoe Co. v. Washington*[6] or *Shaffer v. Heitner*[7] invalidated transient jurisdiction.[8]

Second, a majority of the Justices in *Burnham* did not employ the *Burger King-International Shoe*[9] analytical framework in explaining or resolving the jurisdictional issue.[10] When *Burnham* was decided, the *Burger King-International Shoe* formula was the standard method of understanding and resolving questions of personal jurisdiction. This formula comes into play once it is determined that a state long-arm statute reaches the case *sub judice*. At that juncture, a court must decide whether the exercise of personal jurisdiction is constitutional under the Fourteenth Amendment Due Process Clause.[11] This constitutional determination is made by asking whether jurisdiction over the person or property comports with "fair play and substantial justice";[12] meaning whether "minimum contacts" between the defendant and the forum state exist and whether the exercise of such jurisdiction is otherwise reasonable.[13] In *Burnham*, only Justice Brennan's group used the formula,[14] and even there it could be argued that the formula was misapplied because it strains reason to assert that a nonresident served with process while only temporarily present in the forum state had established minimum contacts.[15]

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5. 95 U.S. 714 (1877). Stanley Cox, for example, criticizes Scalia's opinion in *Burnham*, arguing that "Scalia . . . rechampions discredited territoriality method for measuring the constitutionality of jurisdictional reach." Stanley E. Cox, *Would that Burnham had not Come to be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts about Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 538 (1991).

6. 326 U.S. 310 (1945).

7. 433 U.S. 186 (1977).

8. *See,e.g.*, Nehemiah v. Athletics Congress of U.S.A., 765 F.2d 42, 46-47 (3d Cir. 1985) (service of process on a person voluntarily present in the forum state does not survive *Shaffer*). *See also infra* cases cited in note 15.

9. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). *See also* Redish, *supra* note 4, at 684 (discussing modern due process analysis employed by the Court).

10. *See infra* text accompanying notes 147-76.

11. The two step analysis is illustrated in World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 289-90 (1980). For an example of state codification of the rule, see OKLA. STAT. tit. 12, § 1701.03 (a)(4)(197)(West 1981 & Supp. 1984) (jurisdiction must be tested against both statutory and constitutional standards).

12. *See* Abramson, *infra* note 22, at 444-68 (discussion of "fair play and substantial justice").

13. *See Burger King*, 471 U.S. at 471-78; *infra* text accompanying note 130. *See also* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (White, J.) (asserting that the defendant's interest is most important when assessing these factors).

14. *Burnham*, 110 S. Ct. at 2124-26. *See infra* text accompanying notes 159-63.

15. *See* Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305,

Is personal jurisdiction law as purposeless as the absence of a bright line rule, the resurrection of transient jurisdiction, and the nonapplication or misapplication of the *Burger King-International Shoe* conceptual scheme seem to suggest? Is this area of the law as random as evolution? Does it have no essential direction?

Clearly there is an element of unpredictability in personal jurisdiction law, but no more or no less than in any other area of the law. As Holmes stated:

> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man.[16]

But to say that personal jurisdiction law is uncertain—in that one cannot predict the outcome of cases—is not to say that it has no jurisprudence. I argue in this Article that all the characteristics of personal jurisdiction law mentioned above only establish the unpredictability of personal jurisdiction law; that, contrary to what other scholars are suggesting, the law of personal jurisdiction has an essential direction, a central goal, and is not as random or purposeless as evolution.

As I attempt to clarify the essential purpose of personal jurisdiction law, I shall also try to explain the contours of the Supreme Court's analytical framework designed to facilitate or vindicate this essential purpose. Clearly, the *Burger King-International Shoe* conceptual scheme did not control the Court's jurisdictional analysis in *Burnham*. That does not necessarily mean that the Court's thinking was unstructured. The Court was guided (and has always been guided) by a process of analysis more subtle and fundamental than that formulated in *Burger King-International Shoe*.

Part I of this Article states my basic thesis regarding the essential direction of personal jurisdiction law and its analytical framework, demonstrating that the goal and decisionmaking process of personal jurisdiction law are symbiotically related. Part II offers proof of the basic thesis set forth in Part I, primarily focusing on the most important Supreme Court cases on personal jurisdiction handed down since *Pennoyer v. Neff*.

I. The Thesis

Far from being a rogue case, the decision in *Burnham* is compatible with a form of jurisdictional analysis that drives personal jurisdiction

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310-14 (N.D. Ill. 1986); Bershaw v. Sarbacher, 700 P.2d 347, 349 (1985). *See generally* Cox, *supra* note 5, at 518-30 (propounding that *Burnham* was wrongly decided).

16. Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 465-66 (1897).

decisionmaking. The constitutional sufficiency test—whether it is called "fair play and substantial justice," "minimum contacts," the "power theory," or something else—functions as a balancing test.[17] The purpose of this test is to help courts decide cases in a way that is consistent with the essential direction of personal jurisdiction law.

The essential direction of such law is to determine who should travel. In other words, most personal jurisdiction cases that are litigated involve defendants who are nonresidents of the forum state.[18] In these cases, someone—either plaintiff or defendant—has to travel. The question, then, is whether it is fairer for the plaintiff or the defendant to travel.[19]

Based on the foregoing propositions, my thesis is that the essential purpose of personal jurisdiction law is to determine who should travel. Deciding whether it is fairer, within the meaning of the Due Process Clause,[20] for the plaintiff or the defendant to travel, the Court proceeds from a policy-oriented perspective whereby it identifies and balances all the relevant interests or policies inherent in the litigation.[21] These interests or policy considerations, consist mainly of the plaintiff's interests, the defendant's interests, and, to use a cumbersome term, other relevant interests in the litigation.[22] The defendant's interests include its ties to

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17. World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 289-301 (1980) (Brennan, J. dissenting) (asserting that the Court must consider the interests of the state and the other parties when determining whether the exercise of jurisdiction is constitutional).

18. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978); World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1985); Burnham v. Superior Court, 110 S. Ct. 2105 (1990); Shaffer v. Heitner, 433 U.S. 186 (1977).

19. With his usual perspicüity, Judge Learned Hand saw this as the ultimate question in personal jurisdiction. In a case involving the legal fiction of "corporate presence," he stated:

> In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no *vade mecum*.

Hutchinson v. Chase and Gilbert, 45 F.2d 139, 142 (2d Cir. 1930).

20. *See Pennoyer*, 95 U.S. at 733; *International Shoe*, 326 U.S. at 311.

21. *See* Earl M. Maltz, *Visions of Fairness-The Relationship Between Jurisdiction and Choice-of Law*, 30 ARIZ. L. REV. 751, 755 (1988) (arguing that Justice O'Connor's decisionmaking rests on policy considerations). *But see* Paul C. Wilson, *A Pedigree for Due Process? Burnham v. Superior Court of California*, 56 Mo. L. REV. 353, 381 (1991) (arguing that the Court's decisionmaking is essentially predicated on territoriality). *See infra* note 40.

22. I have reduced to three the five components of "fair play and substantial justice" laid out in Burger King v. Rudezewicz, 471 U.S. 462, 476-78 (1985), which are as follows: 1) "the burden on the defendant;" 2) "the forum State's interest in adjudicating

the forum state (what *Burger King-International Shoe* calls "minimum contacts"). Other relevant interests in the litigation may include the forum state's interests shaped by the particular facts of the case (which can be viewed as expressions of "power" in the *Pennoyer* sense[23]), and the social goals of civil procedure.[24] This jurisdictional approach can be called "interest analysis."[25]

Several observations should be made about interest analysis. First, it is flexible enough to absorb all the major expressions of the constitutional sufficiency test handed down since *Pennoyer*: the "power theory" (*Pennoyer*'s test); "minimum contacts" (*International Shoe*'s test); and "fair play and substantial justice" (*Burger King-International Shoe*'s test). Each of these tests, even the "power theory" test, merely provides a conceptual vehicle for accessing the constitutional idea of fairness, whether it is fairer for plaintiff or defendant to travel. Second, because it is nonmechanical in its approach to personal jurisdiction, interest analysis is squarely within the path or spirit of *International Shoe*, which remains the most important case on personal jurisdiction.[26] Finally, interest analysis lives in the factual pattern of particular cases. The nature of the various interests at stake or policy clashes depend entirely upon the facts of each case. Hence, the meaning of fairness changes from

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the dispute;" 3) "the plaintiff's interest in obtaining convenient and effective relief;" 4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and 5) "the shared interest of the several States in furthering fundamental substantive social policies." *See also* Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L. Q. 441 (1991).

23. The "power theory" or border test provides that a state has all power over persons or things within its borders and no power over persons or things without its borders. *See infra* text accompanying notes 30-31. State sovereignty is given great weight in *in rem* cases. *See, e.g.*, Arndt v. Griggs, 134 U.S. 316, 323, 327 (1890); Shaffer v. Heitner, 433 U.S. 186, 207-08 (1977); *See also* Hans Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 617 (1977) (maintaining that tangibles which have a continual presence within the state are integral to the social and legal life of the state).

24. *See* FED. R. CIV. P. 1: "[t]hese rules shall govern the procedure. . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action."

25. *See* Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 847, 848, 858 (1991) (the author proclaims that "the due process methodology established by the radical changes of the 1930's and 1940's is essentially an 'interest analysis' and an accommodation approach under which the Court has developed social-functional standards. . . .").

26. Personal jurisdiction should not turn on "mechanical" tests. *International Shoe*, 326 U.S. at 319.

case to case.[27] Fairness cannot be molded into a convenient, neatly packaged rule of law. This is precisely why personal jurisdiction is so unpredictable.

Part II of this Article revisits several Supreme Court cases to examine the extent to which the decision or opinion in each of these cases rests on a fair balance of relevant interests in the litigation: the plaintiff's, the defendant's, and the state's, the latter being the most recurring and important "other relevant interest."[28] I shall begin with *Pennoyer* and proceed chronologically to *Burnham*.

II. The Evidence

A. Pennoyer v. Neff.[29]

The critical facts in this case are as follows. Plaintiff Neff's property was sold to defendant Pennoyer pursuant to the execution of a default judgment entered against Neff in a prior *in personam* suit brought by one Mitchell in Oregon state court. At the time of Mitchell's suit against Neff, the latter was neither a resident of nor physically present within the forum state. Plaintiff Neff initiated the *Neff v. Pennoyer* action (which on appeal became *Pennoyer v. Neff*) in federal court to regain possession of his property. The jurisdictional issue in the federal action concerned the validity of the judgment rendered in Mitchell's *in personam* action in Oregon against the nonresident and absentee Neff. The Supreme Court held that the *in personam* judgment was invalid because Neff was not personally served with process while physically present in the forum state. Thus, a valid *in personam* judgment requires personal service on the defendant while he or she is present within the forum state. This is sometimes called "presence jurisdiction," "transient jurisdiction," or "in-state service of process."

The rationale behind the Court's holding is also the *Pennoyer* test for determining the legal sufficiency of any assertion of personal jurisdiction in state courts. It is commonly referred to as the "power theory,"

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27. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 765 (Ill. 1961) ("[w]hether the type of activity conducted within the State is adequate to satisfy the requirement depends upon the facts in the particular case. . . . The question cannot be answered by applying a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable in the circumstances.").

28. Some would argue that territoriality, or the forum state's interest, is the most important if not the only consideration on which the Court relies. *See, e.g.*, Abramson *supra* note 22, at 451; Wilson, *supra* note 21, at 381.

29. 95 U.S. 714 (1877).

or "borders test":[30] a state has exclusive power over persons or things within its borders, and no power over persons or things outside its borders.[31] The Oregon state court violated the second half of the power theory when it attempted to exercise its authority over defendant Neff who was outside the forum state at the time of service of process.

Several observations should be made about the Court's treatment of the power theory and about the fairness of its decision. First, the power theory was not a theory of constitutional law prior to *Pennoyer*. Rather, it was a common law concept of comity, borrowed from international law and conflict of laws.[32] The *Pennoyer* Court recognized, however, that questions of personal jurisdiction must thereafter be determined under the Fourteenth Amendment Due Process Clause.[33] In subsequent cases, the power theory became the edifice of analysis for assessing the constitutionality of jurisdictional assertions.[34]

Second, the power theory is not as inflexible as its statement would seem to suggest. Its approach to personal jurisdiction can be as nonmechanical as minimum contacts or fair play and substantial justice. Hence, decisions based on the power theory can be as unpredictable as those based on other expressions of constitutional sufficiency.

To understand this perspective on the power theory, one must turn to the *Pennoyer* opinion itself, which was written by Justice Field. After stating the power theory with great force and authority early in the opinion,[35] Justice Field, beginning in the very next paragraph, devotes most of the balance of the opinion to carving out exceptions and limitations to the power theory. For example, the Court notes that as to contracts made and property held by nonresidents, "the exercise of

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30. For a discussion of the "power theory" *see* Joel H. Spitz, *The "Transient Rule" of Personal Jurisdiction: A Well-Intentioned Concept that has Overstayed its Welcome*, 73 MARQ. L. REV. 181 (1989) (asserting that the transient rule that developed from *Pennoyer* is outdated and should be abolished). *See also* Cox, *supra* note 5, at 503-17 (discussing the background of the "power theory").

31. *Pennoyer*, 95 U.S. at 722.

> And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Id. Arguably, however, the concept of "transient" jurisdiction is in conflict with the constitutionally guaranteed right to travel. *See, e.g.*, Wilson, *supra* note 21, at 360; Brilmayer, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 753 (1988).

32. *Pennoyer*, 95 U.S. at 722 (citing authorities).

33. *Id.* at 733.

34. *See, e.g.*, Arndt v. Griggs, 134 U.S. 316 (1890); Harris v. Balk, 198 U.S. 215 (1905).

35. *Pennoyer*, 95 U.S. at 722.

the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it.''[36] Later, the Court discusses numerous other exceptions to or limitations on the power theory, such as nonresident corporations,[37] the Full Faith and Credit Clause,[38] and consent.[39] These exceptions or restrictions on the power theory were necessary to make the exercise of jurisdiction under the power theory fair. So the *Pennoyer* opinion itself recognized that a spirit of fairness is inherent in personal jurisdiction,[40] and that fairness must therefore be the goal of any formula employed to test the legal sufficiency, constitutional or otherwise, of jurisdictional assertions.

Pennoyer's understanding of personal jurisdiction and its vision of the primary objective of a legal sufficiency test are reiterated in the numerous opinions handed down in the years between *Pennoyer* and *International Shoe*. Further, these features of *Pennoyer* find expression in case after case decided under the modern constitutional sufficiency tests: minimum contacts, and fair play and substantial justice.[41]

A third observation about the power theory concerns the degree of deference it gives to state borders. If the power theory is as flexible as I claim, what is to be made of the strong deference to state territoriality packed into the theory's statement? This aspect of the power theory serves to remind us that territoriality is the *sine qua non* of a state's sovereignty and that state sovereignty cannot be ignored in deciding jurisdictional questions. Without at least the initial authority to exert power over persons or property within its borders, a state would simply cease to exist. And without the existence of states, the concept of personal jurisdiction at the state level would make no sense. Hence, the state's interest in the litigation must always be taken seriously when a court

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36. *Id.* at 723.

37. *Id.* at 735.

38. *Id.* at 731.

39. *Id.* at 733. One exception cited by the Court is the ability of a state to prescribe the conditions upon which a marriage relationship may be dissolved, notwithstanding the absence of one of the partners from the territory of the state. *Id.* at 734-35. *See also* Cox, *supra* note 5, 559-61 (arguing that a divorce affects the absent spouse not a fictitious *res* called the marriage).

40. *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1029 (1983). The author asserts that a concern for fairness to the defendant underlies *Pennoyer's* famous dictum that the Fourteenth Amendment serves as the basis for directly challenging personal jurisdiction. For a contrasting view, *see* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 504 (1987) (''First and most basically, the focus is not on concerns about fairness to the particular defendant, but instead is on the inherent limitations on the power of governments'').

41. *Id.* at 508.

decides whether the exercise of personal jurisdiction is legally sufficient.[42]

This admonition is easy to forget when applying the modern constitutional sufficiency test, because of the fuzzy language in which it is formulated. Indeed, the Court has made it a point to re-insert state sovereignty in the mix of factors to be considered under the rubric of minimum contacts or fair play and substantial justice. Thus, in *McGee v. International Life Ins. Co.*,[43] which was decided in the decade after the Court announced the minimum contacts theory in *International Shoe*, the Court held that the forum state's interest in the litigation is a relevant factor.[44] One year later in *Hanson v. Denckla*,[45] the Court stated that "[t]he basis of . . . [*in rem*] jurisdiction is the presence of the subject property within the *territorial* jurisdiction of the forum state."[46] *Kulko v. Superior Court*,[47] *World-Wide Volkswagen Corp. v. Woodson*,[48] and *Burger King* pointed to "the shared interest of the several States in furthering fundamental substantive social policies."[49] And *Burnham*, of course, upheld presence, or transient, jurisdiction, which falls squarely within the first prong of the power theory.[50]

In short, with all its limitations and exceptions, *Pennoyer*'s power theory may not be the best expression of a general theory of state court personal jurisdiction.[51] Minimum contacts and fair play and substantial justice, especially the latter, may provide better, more comprehensive statements. Yet *Pennoyer*'s understanding that fairness (rather than state sovereignty or some other consideration) is the core concern of personal jurisdiction and that the primary objective of any constitutional sufficiency test is to promote fairness remains the dominant force in personal jurisdiction decisionmaking even today.[52]

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42. The state's interest, or state sovereignty, is most often at stake in *in rem* cases. See *supra* cases cited in notes 15 and 34. *See also* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271-72 (1917) ("The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner").

43. 355 U.S. 220 (1957).

44. *Id.* at 223.

45. 357 U.S. 235 (1958).

46. *Id.* at 246 (emphasis supplied).

47. 436 U.S. 84 (1978).

48. 444 U.S. 286 (1980).

49. *World-Wide Volkswagen*, 444 U.S. at 292 (citing *Kulko*, 436 U.S. at 98); *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

50. *See supra* text accompanying notes 30-31. *See also* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113 (1987) (assessing interest of plaintiff and forum state, California, in determining whether minimum contacts existed).

51. For an excellent critique of *Pennoyer*, see Geoffrey Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241. *See also*, Reynolds, *supra* note 25 (describing the formalist territorial paradigm of *Pennoyer* as socially regressive and inept).

52. *See* Terry S. Kogan, *A Neo Federalist Tale of Personal Jurisdiction*, 63 S.

The final observation I shall make about *Pennoyer* relates to the fairness of its decision rather than to its statement regarding the power theory. Because the decision turned on the issue of notice, specifically whether publication is a proper method of service in an *in personam* action, one cannot assess the fairness of the decision from the standpoint of personal or bases jurisdiction, which is the focus of this article. On the issue of notice, it is obvious that the decision to invalidate the default judgment rendered in Mitchell's *in personam* action against Neff is a fair decision. Publication is the weakest form of notice in terms of its ability to apprise a party of the pendency of the action and afford her an opportunity to be heard.[53] In Mitchell's lawsuit and in the subsequent sheriff's sale, Neff stood to lose land valued at $15,000 on a mere $300 claim. Neff's interest in receiving notice of the action was paramount under these circumstances.

Although the Court's reasoning that notice in *in personam* cases must be effectuated through personal service is more formalistic than interest analysis would allow, it is difficult to believe that the Court did not think about the consequences of its decision before rendering it. Thus, fairness may be the driving force behind notice jurisdiction as well as personal jurisdiction.[54] As Holmes said: "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[55]

B. Hess v. Pawlaski[56]

In this case, a state statute subjected a nonresident motorist to limited *in personam* jurisdiction within the state by appointing, on behalf of such motorist, the registrar, or Secretary of State, as agent for service of process.[57] *In personam* jurisdiction was limited to any accident or collision growing out of the operation or the use of an automobile by

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CAL. L. REV. 257, 358-71 (1990) (setting forth three paradigms of personal jurisdiction growing out of *International Shoe*; one urges that *Pennoyer* was correct to focus on interstate sovereignty, the other two view fairness in a reciprocity sense and in a mutual inconvenience sense, respectively).

53. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (publication deemed an unreliable means of giving notice in most instances).

54. *See generally* Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane case*, 100 U. PA. L. REV. 305, 319 (1951) ("Fairness to both parties is becoming the major consideration in determining if a court has jurisdiction. . . .").

55. Holmes, *supra* note 16, at 466.

56. 274 U.S. 352 (1927).

57. In addition, the plaintiff was required to send notice of such service to the defendant via registered mail, and to attach the return receipt along with an affidavit of compliance to the writ. *Id.*

the nonresident in the forum state.[58] In a unanimous opinion, the Supreme Court upheld this statute under the Fourteenth Amendment Due Process Clause.

Hess is the cornerstone of a hodgepodge of cases that have been subsumed under the nondescriptive legal fiction of "implied consent."[59] The jurisdictional theory that ties these cases together is said to be that the nonresident has committed some act within the state, such as, driving a motor vehicle, selling securities, or selling insurance, from which a state statute secures his or her consent.[60] Indeed, the statute in *Hess* began with the following words:

> The acceptance by a nonresident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, . . . shall be deemed equivalent to an appointment by such nonresident of the registrar . . . to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved while operating a motor vehicle . . . .[61]

However, in *Olberding v. Illinois Central Railroad Co.*,[62] the Supreme Court took issue with the fiction of implied consent. Speaking for the Court, Justice Frankfurter said:

> This is a horse soon curried. . . . It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has "impliedly" consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all . . . . The defendant may protest to high heaven his unwillingness to be sued and it avails him not.[63]

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58. *Id.* at 353-54.

59. *See, e.g.*, Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (upholding Iowa's assertion of jurisdiction on a nonresident selling securities in Iowa based on a dispute generated by those sales); McGee v. International Life Ins. Co., 355 U.S. 200 (1957) (upholding California's assertion of jurisdiction on a nonresident insurance company based on a dispute arising out of a single insurance policy sold to a California resident).

60. *See, e.g.*, JOHNATHAN LANDERS AND JAMES MARTIN, CIVIL PROCEDURE 69 (1981); STEPHEN YEAZELL, JOHNATHAN LANDERS & JAMES MARTIN, CIVIL PROCEDURE 72-73 (3d ed. 1992).

61. 274 U.S. at 354. *See also id.* at 356 ("Under the statute the implied consent . . . .").

62. 346 U.S. 338 (1953).

63. *Id.* at 340-41 (jurisdiction over the defendant in *Olberding* was asserted under a non-resident motorist statute).

Justice Frankfurter's reading of *Hess* is in accord with Justice Holmes's dictum that "[t]he Constitution is not to be satisfied with a fiction."[64]

Although the Massachusetts legislature may have had an implied consent rationale in mind when it enacted the statute in *Hess*,[65] the Supreme Court sought to provide a different rationale, one that could address the fairness issue. Specifically, the Court stated that "[m]otor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property."[66] Based upon these considerations, the Court concluded that the exercise of jurisdiction was fair and, hence, constitutional.

Using interest analysis, one would ineluctably reach the same conclusion. Interest analysis focuses on the competing interests, or fairness factors, in the litigation. The most obvious, and perhaps most important, interest in *Hess* is that of the state. It is the desire of the state to augment the inducements the nonresident may or may not have to conduct her inherently dangerous or risk-creating in-state activities in compliance with the state law regulating such activities. This is a legitimate state interest. It is well within the state's police powers to induce the nonresident, who has little or no ties with the community, to do his very best to avoid injury to others (namely, residents) with whom he deals in connection with the regulated activity.[67] By bringing the nonresident within the reach of the state's judicial process, the nonresident is thereby encouraged to comply with the applicable state substantive law.

Augmenting the inducement to comply with the substantive law is not only a legitimate state interest, but it also points to a fundamental relationship between procedure and the substantive law. Hepburn reminds us that procedure is part of the adjective law, and "[a]s its name 'adjective' imports, it exists for the sake of something else—for the sake of the 'substantive' law."[68] James and Hazard strike a similar note: "The law of procedure provides a mechanism by which authority of the state, and its coercive powers, can be brought to bear on a carefully examined basis to secure compliance with the law when these inducements fail."[69]

Although augmenting compliance with the substantive law falls within the scope of the fundamental relationship between procedure and the

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64. Hyde v. United States, 225 U.S. 347, 390 (1912).

65. *See supra* text accompanying note 61.

66. *Hess*, 274 U.S. at 356.

67. Individuals have the right to "life, liberty and property," and states have authority to preserve such life, liberty, and property through the exercise of their implied powers. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 554 (1988).

68. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING 19, 20 (1897).

69. FLEMING JAMES, JR. AND GEOFFREY HAZARD, JR., CIVIL PROCEDURE 2 (3rd ed. 1985).

substantive law, it does not by itself provide a constitutionally sufficient reason for the exercise of *in personam* jurisdiction over any nonresident who happens to have dealings within the forum state. Most of the myriad of so-called implied consent cases seem to have the following common features, which suggest that the jurisdictional base that arises from these cases is quite limited.

First, the in-state activity must be of a certain quality—inherently dangerous or risk-creating. Typically, this type of activity has two features: No amount of skill or care can remove the danger inherent in the activity;[70] and the activity is "subject[] . . . to special regulation" in the sense that "neither . . . citizens nor nonresidents could freely engage" in it.[71] Driving a motor vehicle,[72] selling securities,[73] and selling insurance[74] are exceptional activities because the potential for danger (in these instances physical or financial) cannot be eliminated by skillful or careful conduct. And because of the risk-creating quality of these activities, they are subject to such heavy regulation that an owner's or operator's license is required of both residents and nonresidents.[75]

The second feature common to most of the so-called implied consent cases is that the cause of action on which the plaintiff sues must arise out of the regulated, in-state activity.[76] This, then, is a discrete jurisdictional base. The scope of suability is limited rather than plenary, sometimes called "limited jurisdiction" or "specific jurisdiction."[77]

In addition to augmenting the nonresident's inducement to comply with the substantive law—what might be called a "preventative" interest or policy—the state has another important interest inherent in the implied consent factual pattern. This interest might be called a "remedial" interest or a "day-in-court" policy. It is an interest or policy of providing residents with access to a convenient forum. As the Court said in *McGee*, an insurance case: "California [the forum state] has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[78]

The state's remedial interest can also be viewed as the plaintiff's interest. In *Olberding*, Justice Frankfurter actually claimed this interest

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70. *See supra* text accompanying note 66.

71. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627-28 (1935).

72. *Hess*, 274 U.S. at 356.

73. *Doherty*, 294 U.S. at 627 (1935).

74. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

75. *Doherty*, 294 U.S. at 627 (selling securities); *Hess*, 274 U.S. 352 (driving a motor vehicle); *McGee*, 355 U.S. 220 (selling insurance).

76. *Hess*, 274 U.S. at 356; *Doherty*, 294 U.S. at 623; *McGee*, 355 U.S. at 223.

77. "Specific jurisdiction" is to be distinguished from "general jurisdiction." *See infra* note 85 and accompanying text.

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

for the plaintiff. "The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him . . . ."[79]

In short, the state's interest in the so-called implied consent cases is manifested in two ways. First is the preventative policy of augmenting the nonresident's inducement to comply with the substantive law regulating his or her risk-creating activity. Second is the remedial policy of providing a convenient forum, a day in court, for residents injured by such risk-creating activity. Plaintiff also has a day-in-court interest at stake.

Under interest analysis, these interests must be balanced against the interest of the nonresident defendant. In this context, the nonresident defendant's interest may be stated as an interest in having an opportunity to be heard in a convenient forum, which is usually a forum in its state of residence.[80] Given the weight of the preventative and remedial policies, it is usually fairer for the nonresident to travel than for the resident. Clearly, the nonresident is inconvenienced, "but certainly nothing which amounts to a denial of due process."[81]

For Justice Frankfurter, the plaintiff's interest was paramount. It alone was sufficient to tip the scale in favor of the forum state's exercise of *in personam* jurisdiction. Underscoring the fact that fairness is the *sine qua non* of personal jurisdiction, he stated the following: "We have held that this is a fair rule of law as between a resident injured party (for whose protection these statutes are primarily intended) and a nonresident motorist, and that the requirements of due process are therefore met."[82]

C. *Tauza v. Susquehanna Coal Co.*[83]

Although not a Supreme Court case, *Tauza* is an important case on personal jurisdiction. Many judges have adopted its understanding of the "doing business," or "corporate presence," jurisdictional base because of the cogency of its opinion written by Judge Cardozo, who later replaced Justice Holmes on the Supreme Court.

In *Tauza*, the defendant was an out-of-state corporation that engaged in certain activities within the forum state. Primarily, the defendant solicited business within the forum state and shipped its product (coal) into the forum state on a continuous basis. In addition, it maintained

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79. *Olberding*, 346 U.S. at 341. *See also supra* text accompanying note 66.
80. *See Olberding*, 346 U.S. at 341; *McGee*, 355 U.S. at 224.
81. *McGee*, 355 U.S. at 224.
82. *Olberding*, 346 U.S. at 341.
83. 115 N.E. 915 (N.Y. 1917).

an office in the forum state. Judge Cardozo held that these in-state activities were sufficient to constitute "doing business" within the forum state and that as such the defendant could be sued upon a cause of action that "has no relation in its origin to the business here transacted."[84] Thus, unlike the so-called implied consent cases, the defendant in a doing business case was subject to plenary liability, sometimes called "general jurisdiction."[85]

Tauza gives content to the concept of doing business, or corporate presence, that the Supreme Court adopted in *Philadelphia and Reading Railway v. McKibbin*.[86] In *McKibbin*, Justice Brandeis, speaking for the Court, ruled that: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there."[87] Judge Cardozo held that continuous solicitation, shipments, and the maintenance of an office within the forum state were sufficient to give a foreign corporation a jurisdictional presence within the forum state.[88]

This is not, however, a universal rule. Other courts, including the Supreme Court, have found corporate presence to exist on the basis of fewer in-state activities, such as the mere continuous solicitation of orders by sales agents.[89] Judge Hand put it best. After reviewing a number of doing business cases at both the Supreme Court and lower court levels, he concluded: "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[90]

Thus, it appears that the doing business, or corporate presence, jurisdictional base is but a legal fiction. Like implied consent, it subsumes a heterogeneous mixture of factual patterns under a single rubric. And, like implied consent, future decisions are difficult to predict, requiring courts to "step from tuft to tuft across the morass."[91]

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84. *Id.* at 918.

85. *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984). *See generally* Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). Some scholars argue for a restrictive application of general jurisdiction because of its "dispute-blind" character; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988). Others are comfortable with a more liberal application of the doctrine; Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988).

86. 243 U.S. 264 (1917).

87. *Id.* at 265.

88. *Tauza*, 115 N.E. at 917-18.

89. International Harvester Co. v. Kentucky, 234 U.S. 579 (1941). *See McKibbin*, 243 U.S. 264.

90. *Hutchinson*, 45 F.2d at 142.

91. *Id.*

But the decisions are not without some essential direction. As Judge Hand recognized,[92] they can be read as an attempt to determine whether it is fairer for the plaintiff or the defendant to travel. This can be seen clearly through the prism of interest analysis.

The primary interests at stake in most of the doing business cases are the convenience interests of plaintiff and defendant.[93] Other interests, including the state's interest, usually are not relevant. Whatever the precise nature of the defendant's in-state activities in these cases, they typically have a common factual pattern. "They are made," to use Judge Cardozo's words, "not on isolated occasions, but as part of an established course of business . . . . [They are conducted] not casually and occasionally, but systematically and regularly."[94] Given this fact, it can hardly be argued that it is too inconvenient for the nonresident defendant to answer for its alleged wrongful conduct in the forum state.[95] Indeed, the defendant is more like a resident than a nonresident because, given the continuous and systematic quality of its in-state activities, it receives fire and police protection, municipal services, and other privileges and benefits from the forum state on an on-going basis. Thus, if a resident can be subjected to general jurisdiction, so can the defendant doing business in the forum state.

This point is made clearer by comparing "doing business" with "implied consent." The defendant's in-state activities under the latter jurisdictional base are perhaps part of a single transaction but, more importantly, they are inherently dangerous.[96] There is, therefore, no reason to expand the defendant's suability beyond the scope of its in-state activities. In contrast, the defendant doing business in the forum state has a greater or broader presence, more permanent in nature. It is therefore reasonable to expand the defendant's suability beyond the range of its in-state activities.[97]

D. International Shoe Co. v. State of Washington[98]

If analyzed under *Pennoyer*'s power theory, *International Shoe* would line up as a "doing business" case. The Court, instead, analyzed the

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92. *See supra* note 19.

93. *See* Kogan, *supra* note 52, at 367-71 (discussing "The Mutual Inconvenience Paradigm of Personal Jurisdiction").

94. *Tauza*, 115 N.E. at 917.

95. *Id.* at 918.

96. *See supra* text accompanying note 66.

97. *But see* COUND ET AL, CIVIL PROCEDURE 81 (5th ed. 1989) (the application of either the "consent" or "presence" doctrine by the Court was difficult because "whichever was chosen it became necessary to determine whether the foreign corporation was 'doing business' within the state, either to decide whether its 'consent' could properly be 'implied,' or to discover whether the corporation was 'present.'").

98. 326 U.S. 310 (1945).

case under a different constitutional sufficiency test—minimum contacts.[99] Yet, the result in the case would probably be the same regardless of which test was employed, because fairness dictated that the defendant, International Shoe, should have traveled.

The State of Washington brought suit against International Shoe, a foreign corporation, to recover unpaid contributions to the state unemployment compensation fund. International Shoe's in-state activities consisted of continuous solicitation of shoe orders and shipments of shoes to customers who were, for the most part, residents of the state. There was no office; the salesmen rented rooms for sample displays occasionally. The employees of International Shoe were residents of the forum state. Plaintiff's cause of action related to these in-state activities.[100]

After finding that International Shoe's in-state activities "were systematic and continuous throughout the years in question,"[101] the Court concluded that International Shoe "received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights."[102] On this basis the Court ruled that the exercise of jurisdiction satisfied the minimum contacts standard.

Significantly, the aspects of *International Shoe* that the Court found compelling were essentially the same as those in the "doing business" cases. Generally, the Court looked for systematic and continuous in-state activities and discovered them, although International Shoe's in-state activities were fewer than those of the defendant in *Tauza* (for example, International Shoe had no office within the forum state). Once the Court found this magic factual pattern, it was able to conclude that the defendant was receiving privileges and benefits from the forum state on a regular basis. Thus, the exercise of jurisdiction was consistent with the power theory, minimum contacts, and, indeed, fairness.

One comes to the same conclusion more directly using interest analysis. Although the interest of the defendant, International Shoe, argued against the exercise of jurisdiction, the interests of the plaintiff, the state in this instance, argued in favor of the exercise of jurisdiction. The defendant's interest was in avoiding inconvenient litigation. Given

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99. *See supra* text accompanying note 13.

100. 326 U.S. at 311-14.

101. *Id.* at 320.

102. *Id.* The Court applied a *quid pro quo* rationale:

> [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 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.

Id. at 319.

the fact that the defendant was in the forum state on a continuous and systematic basis, it was reasonable to conclude that litigation there would not unduly inconvenience the defendant. The defendant was already in the forum state; that fact alone vitiated its claim of inconvenience.

On the other side of the scale, the plaintiff/state's interest was valid and quite substantial. To deny the state the power to sue a nonresident employer locally for collection of the unemployment compensation tax would increase the state's cost of maintaining the unemployment compensation fund. State attorneys would have to litigate the collection question in many different jurisdictions, because other nonresident employers would follow the defendant's actions if the defendant were successful. This could result in substantial cost and could possibly lead to inconsistent judicial determinations. The increased operating cost of the fund would ultimately be passed on to the residents of the state of Washington. The plaintiff/state, then, had a strong interest in maintaining the fiscal integrity of its unemployment compensation fund, a fund whose importance was demonstrated many times during 1937-1940, as the country began to move out of the Great Depression.

The fact that the plaintiff/state's cause of action was discreet also suggested that it was fairer for the defendant to travel than for the representatives of the plaintiff/state to travel. This was not a case of general jurisdiction; rather, it was a case of specific jurisdiction, which added to the fairness of exercising jurisdiction in the forum state.[103]

E. Harris v. Balk[104] *and Shaffer v. Heitner*[105]

Harris v. Balk validates a type of *quasi-in-rem* jurisdiction in which the plaintiff seeks to determine a personal claim that is unrelated and antecedent to the attachment of property located within the forum state. The property is used both as a basis for jurisdiction and as a means of paying the claim in whole or in part. Three-quarters of a century after *Harris v. Balk*, the Supreme Court rejected this type of *quasi-in-rem* proceeding in *Shaffer v. Heitner*. *Shaffer* was decided under *International Shoe*'s minimum contacts theory.[106] However, by applying interest analysis, it is possible to understand how *Harris* was correctly decided at the time it came before the Supreme Court, and how its form of *quasi-in-rem* jurisdiction could *still* be upheld today in a manner consistent with *Shaffer* and fairness.

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103. *See supra* text accompanying notes 75-77.
104. 198 U.S. 215 (1905).
105. 433 U.S. 186 (1977).
106. *See supra* text accompanying note 13 and text accompanying notes 98-102.

In *Harris v. Balk*, a $180 debt Harris owed to Balk, both of whom were residents of North Carolina, was attached pursuant to a Maryland statute by Epstein, Balk's creditor who was a resident of Maryland, while Harris was temporarily in Maryland on business. Harris paid over the debt to Epstein and was subsequently sued by Balk in a North Carolina court for nonpayment of the $180 debt. Harris sought to plead the Maryland garnishment proceedings as a bar to Balk's recovery, but the pleading was not accepted on the ground that the Maryland judgment was void for lack of jurisdiction. The North Carolina Supreme Court agreed, and Harris appealed to the United States Supreme Court.

On appeal, the Court reversed, holding the Maryland judgment invalid. The Court had to first decide whether the situs of a debt is either at the domicile of either the creditor or debtor or is nonexistent, clinging to the debtor and following her wherever she may go. The lower courts were not in harmony on this issue; the Court itself recognized that "they cannot be reconciled."[107] Once the Court decided that the Maryland judgment should be sustained, there was no doubt as to how it would decide this threshold issue. Debts, the Court ruled, "have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere."[108]

This ruling placed the property (the debt) within Maryland, the forum state, at the time the *quasi-in-rem* action was commenced. For purposes of *quasi-in-rem* jurisdiction, the property must be deemed to be located within the forum state, but this consideration may not have been the driving force behind the ruling concerning the situs of debts.

The Court seems to have been motivated by two other considerations. First, if the Maryland judgment was not sustained, then Harris would have had to pay Balk the amount Harris paid Epstein. That would have been fundamentally unfair. As the Court said, "[i]t ought to be and it is the object of courts to prevent the payment of any debt twice over."[109] Second, because the case was litigated against the backdrop of the American industrial revolution, the Court may have been concerned with the nation's credit economy. Easy credit was essential to the nation's industrial development. If debt collection became difficult, credit could become less available or more costly. By ruling that a creditor can sue his debtor wherever the latter may be found, the Court may have been trying to make debt collection easier.

These considerations carry considerable weight within the framework of interest analysis. The first consideration, that Harris should not have

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107. *Harris*, 198 U.S. at 225.
108. *Id.* at 225 (quoting *Chicago, R.I. & P.R. Co. v. Sturm*, 174 U.S. 710 (1899)).
109. *Id.* at 226.

to pay twice, represented the plaintiff's interest. The second consideration concerned the public interest or the national interest, which was described as an "other relevant interest."[110] Both interests argued in favor of sustaining the validity of the Maryland judgment. Furthermore, there were no contraposed interests in the litigation. Balk had no real interest at stake because, as he admitted in court, "he did, at the time of the attachment proceeding, owe Epstein some $344,"[111] $180 of which was repaid through Harris. Thus, it was fairer to sustain the Maryland judgment than to overrule it.

There may, however, be cases in which the assertion of *quasi-in-rem* jurisdiction is unfair. *Shaffer v. Heitner* is one such case. In *Shaffer*, the owner of a single share of stock, a nonresident of the forum state, Delaware, sequestered stock in a corporation owned by officers and directors of the corporation, all of whom were nonresidents of the forum state. The corporation, Greyhound, had its principal place of business in Phoenix, Arizona, but its stock was deemed to be located in the forum state, its state of incorporation. The plaintiff sought to hold the defendants personally liable for a large judgment entered against the corporation in a private antitrust suit litigated in Oregon.

In holding that such *quasi-in-rem* jurisdiction was impermissible, the Court applied *International Shoe*'s minimum contacts test. Minimum contacts were lacking, the Court said, because the defendants "have simply had nothing to do with the State of Delaware."[112] There were no real ties, contacts, or relations between the defendants and the forum state. Consequently, the exercise of personal jurisdiction in this case violated constitutional due process.

Applying interest analysis, one would reach the identical conclusion. Although the plaintiff had an interest in having his claim litigated in a convenient forum, this was a weak interest in the context of the case. This plaintiff, unlike Epstein in *Harris v. Balk*, was a nonresident of the forum state and did not demonstrate that Delaware was otherwise a convenient forum. The forum state's interest in the litigation was also weak. True, Delaware may have an interest in augmenting the inducement of officers and directors of Delaware corporations to comply with the state substantive law regulating the fiduciary duties of corporate managers,[113] but the sequestration statute, which created *quasi-in-rem* jurisdiction in this case, failed to promote such a policy. The sequestration

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110. *See supra* text accompanying notes 20, 21. *See also* Abramson, *supra* note 22, at 465 (discussing "the shared interest of the several states in furthering fundamental substantive social policies.").

111. *Harris*, 198 U.S. at 228.

112. *Shaffer*, 433 U.S. at 216.

113. *See id.*

statute reached beyond corporate fiduciaries; it could be used against any nonresident who owned property, such as stock in a Delaware corporation, within the state. Jurisdiction under this statute was predicated not on a defendant's status as a corporate fiduciary, but on the mere presence of property within the state of Delaware.

Further, the lawsuit did not promote the public interest in a way similar to the *quasi-in-rem* action filed in *Harris v. Balk*. The role of *quasi-in-rem* jurisdiction as a means of preventing the evasion of debts, duties, or obligations was quite insignificant at the time of *Shaffer*. It was far easier under minimum contacts than under the power theory to obtain direct, *in personam* jurisdiction over a nonresident defendant. *International Shoe* expanded *in personam* jurisdiction.

Finally, the defendants' interest in avoiding litigation in Delaware was relatively substantial. The defendants did not purposefully direct a sufficient quantum of their activities toward the forum state such that they would have reasonably expected to litigate personal claims there. As the Court stated,

> [defendants] had no reason to expect to be haled before a Delaware court. Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State. And "[i]t strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's . . . jurisdiction on any cause of action."[114]

Thus, it was fairer to make the plaintiff travel to a more appropriate forum to litigate his claim than to litigate it in Delaware.

In approaching *Shaffer* from the perspective of interest analysis, one can readily see that *quasi-in-rem* jurisdiction is not entirely dead. Indeed, the Court stated: "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."[115] It is not difficult to imagine such a situation. No court today would invalidate the attachment of Iranian or Iraqi assets located in the United States by an American business person who seeks to satisfy an antecedent personal claim (e.g., the expropriation of plaintiff's business in Iran or Iraq) against these governments. It would simply be unconscionable to make the American travel to Iran or Iraq to litigate such a claim.

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114. *Id.* (footnotes omitted).
115. *Id.* at 211 n.37.

F. World-Wide Volkswagen Corp. v. Woodson[116]

Like *Shaffer*, the Supreme Court in *World-Wide Volkswagen* decided against the exercise of personal jurisdiction. *World-Wide Volkswagen* is, however, a more difficult case to decide on grounds of fairness.

In *World-Wide Volkswagen*, the plaintiffs, husband and wife, purchased a new Audi automobile from a retail dealer (Seaway) in New York. While traveling to their new home in Arizona the following year, the plaintiffs, who resided in New York, became involved in an accident in Oklahoma. Their Audi was struck in the rear by another automobile, causing a fire that severely burned the wife and her two children. Subsequently, the plaintiffs brought a products liability action in Oklahoma claiming that their injuries resulted from design defects in the Audi.

Named as defendants were Seaway, the regional distributor (World-Wide), the importer (Volkswagen), and the manufacturer (Audi). Only the retail dealer and the regional distributor entered special appearances to challenge the Oklahoma court's personal jurisdiction. Plaintiffs produced no evidence that either Seaway or World-Wide sold or shipped products into the forum state. "In fact, as . . . [plaintiffs'] counsel conceded at oral argument, . . . there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the exception of the vehicle involved in the present case."[117]

In ruling on the jurisdictional issue, the Court set forth the basic framework for the *Burger King-International Shoe* formula.[118] Once it is determined that the defendant has purposefully directed its activities toward the forum state such that the defendant could reasonably foresee the possibility of litigation there, the Court said, then the jurisdictional inquiry requires a balancing of various relevant interests and policies.[119] The Court ruled that neither Seaway's nor World-Wide's in-state activities were purposeful or foreseeable. Minimum contacts were lacking because the Audi was brought into the forum state by plaintiffs' voluntary act, rather than Seaway's or World-Wide's. Because the exercise of personal jurisdiction was unconstitutional for lack of minimum contacts, the Court did not have to apply the balancing test.[120]

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116. 444 U.S. 286 (1980).

117. *Id.* at 289.

118. *See supra* text accompanying notes 10-13 for a statement of this formula.

119. *See World-Wide*, 444 U.S. at 292. *See also supra* note 22, *infra* text accompanying notes 136-38.

120. *Burger King*, discussed next, is the Court's first attempt to apply the test, which it does under the rubric of "other factors" or "reasonableness." *See Burger King*, 471 U.S. at 476-78. *See also infra* text accompanying note 130.

Under interest analysis, however, *all* relevant interests are considered. Unlike the *Burger King-International Shoe* test, the plaintiff's interest and other relevant interests in the litigation must be considered when applying interest analysis even if minimum contacts or the defendant's ties to the forum state are lacking.

When analyzing *World-Wide Volkswagen* under interest analysis, consider the defendant's interest first. The absence of a deliberate affiliation with the forum state that would make litigation there foreseeable, as was arguably the situation in *World-Wide Volkswagen*,[121] may suggest that litigation within the forum state would inconvenience the nonresident defendant. However, inconvenience to the defendant does not by itself invalidate personal jurisdiction under interest analysis.

When the defendant's interest is balanced against the plaintiffs' interest and other relevant interests, the balance tips in favor of the exercise of personal jurisdiction in *World-Wide Volkswagen*. Plaintiffs' lawsuit was filed in Oklahoma while they were hospitalized in that state.[122] Thus, even though the plaintiffs did not reside in Oklahoma when the lawsuit was filed, Oklahoma was clearly the plaintiffs' most convenient forum. Given the severity of the plaintiffs' injuries, it would appear that the defendants were in the best condition to travel. To the extent one could conclude that the plaintiffs' and defendants' inconveniences were offsetting, another relevant interest—specifically the social goals of civil procedure—would seem to break the tie in plaintiffs' favor. Given that efficient litigation is a major procedural goal,[123] Oklahoma provided the best forum for efficient litigation, because the essential witnesses and critical evidence were located in Oklahoma.[124]

I disagree with Justice Brennan's argument that the state's interest is implicated in *World-Wide Volkswagen*. Justice Brennan argued that "[t]he State has a legitimate interest in enforcing its laws designed to keep its highway system safe."[125] If Justice Brennan was referring to the state's motor vehicle code, that reference was misplaced, because the defendants were not operating a motor vehicle in Oklahoma at the time of the accident. This was not a case like *Hess*.[126] If Justice Brennan had in mind Oklahoma's general tort law, the nexus between that law and Oklahoma highway safety was too unspecific or indirect to be

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121. Arguably, Seaway's and World-Wide's conscious participation in an interstate economic network establishes the foreseeability of litigation in Oklahoma. See *World-Wide Volkswagen*, 444 U.S. at 306 (Brennan, J dissenting).

122. *Id.* at 305 (Brennan, J. dissenting).

123. *See* FED. R. CIV. P. 1.

124. *World-Wide*, 444 U.S. at 305 (Brennan, J. dissenting).

125. *Id.*

126. *See supra* text accompanying notes 56-81.

meaningful. I do agree with Justice Brennan's conclusion that the exercise of personal jurisdiction in Oklahoma was fair under the totality of circumstances.

One wonders whether the Court would have reached a different result if neither the importer nor manufacturer remained as defendants in the litigation. The fact that plaintiffs could still have litigated in Oklahoma notwithstanding the Court's holding left the case somewhat immune from the charge of unfairness. Thus, as a practical matter, there was very little difference in terms of the outcome of the case and the outcome of interest analysis.[127]

G. Burger King Corporation v. Rudzewicz[128]

Burger King applied the balancing test ("other factors" or reasonableness test) broached in *World-Wide Volkswagen*.[129] The "little person" lost on the jurisdictional issue in *Burger King*, and that decision was fair.

The facts of the case are straightforward. Burger King, a Florida corporation that operates an extensive fast food franchise system, sued MacShara and Rudzewicz, residents of Michigan who opened a Burger King restaurant in Michigan, for breach of contract. Suit was brought in the Southern District of Florida on the basis of diversity subject matter jurisdiction. Personal jurisdiction was based on a provision of the Florida long-arm statute that reached causes of action arising from breach of contract. Burger King trained its franchisees and regulated their operations in detail. Regional offices supervised franchisees in their areas. The defendants' franchise contract was negotiated mainly with the district office but also with Miami headquarters. Shortly after the contract was signed, the franchise began to deteriorate. When rent payments fell behind, Burger King first negotiated and then sued. The defendants' challenge to personal jurisdiction was denied by the trial court. After trial, the district court ruled for Burger King on the merits, and the judgment was subsequently reversed by a divided appellate court on the ground that personal jurisdiction over defendant Rudzewicz (MacShara did not appeal his judgment) was improperly exercised by the Florida trial court.

In reversing the appellate court, the Supreme Court set forth the current framework for determining the constitutionality of personal jurisdiction: any assertion of personal jurisdiction must comport with traditional notions of "fair play and substantial justice." This means

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127. *See World-Wide*, 444 U.S. at 288 n.3.
128. 471 U.S. 462 (1985).
129. *See supra* note 119.

two things: (1) the defendant must purposefully establish minimum contacts with the forum state; and (2) the exercise of personal jurisdiction must be reasonable in light of other factors.[130] The Court elaborated on each test (or subtest) of the modern formula and then applied both tests to the facts of the case.

As to the minimum contacts test, the Court said: "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations'."[131] Applying the minimum contacts test to the facts of this case, the Court specifically noted that the defendants had "no physical ties to Florida," save for "a brief training course in Miami. . . . Yet this franchise dispute grew directly out of 'a contract which had a *substantial* [and continuing] connection with the State.'"[132] The defendants reached out to negotiate with a Florida corporation and agreed by long-term contract to be regulated from Florida, to make payments to Florida, and to have disputes governed by the laws of Florida.[133]

Although choice-of-law considerations are generally irrelevant to jurisdictional analysis,[134] the Court indicated that a choice-of-law provision in a contract was relevant to minimum-contacts analysis. Such a provision can help to determine "whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes."[135] But, standing alone, such a provision "would be insufficient to confer jurisdiction."[136]

Moving to the reasonableness test broached in *World-Wide Volkswagen*,[137] the Court provided the following extended analysis, which is quite important:

> Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the

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130. *Id.* at 471-78.

131. *Id.* at 471-72.

132. *Id.* at 479 (emphasis in original).

133. *Id.* at 479-81.

134. Hanson v. Denckla, 357 U.S. 235, 254 (1958).

135. *Burger King*, 471 U.S. at 481-82. Further insight into the Supreme Court's insistence on the defendant's foreseeability of being haled into the forum is found in Rush v. Savchuk, 444 U.S. 320, 329, 332 (1980) (holding that where the cause of action arose outside the forum and the defendant's only contact with the forum could not have "forewarned" him of the possibility of jurisdiction there, the forum state's interest in providing a forum for its resident is lacking).

136. 471 U.S. at 481-82.

137. *See supra* text accompanying note 119.

> assertion of personal jurisdiction would comport with "fair play and substantial justice." Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum state's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several states in furthering fundamental substantive social policies." These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another state may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.[138]

Applying the reasonableness test to the facts of the case, the Court concluded that the exercise of personal jurisdiction was reasonable and, hence, constitutional.[139] Most important, the Court stated that there was no danger that allowing a franchisor to sue its franchisees in the former's home state would "sow the seeds of default judgments against franchisees owing smaller debts."[140] Given the absence of unreasonableness, the Court ruled that the exercise of personal jurisdiction in this case was fair.

A few observations need to be made about the important passage quoted above. First, the reasonableness test is essentially a balancing test that incorporates a variety of relevant interests, including the defendant's interest. This interest could be broad enough to encompass minimum contacts, and, to that extent, it may duplicate minimum-contacts analysis. Second, the Court makes it clear that the exercise of

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138. *Id.* at 476-78 (citations omitted).
139. *Id.* at 482-86.
140. *Id.* at 485-86.

personal jurisdiction may be unconstitutional even if minimum contacts can be established.[141] This strongly suggests that the reasonableness test may be the most important or even the decisive element of the fair play and substantial justice jurisdictional formula. Indeed, Justices Stevens, White, and Blackmun in *Asahi Metal Industry Co. Ltd. v. Superior Court of California*[142] invalidated jurisdiction on grounds of unreasonableness even though they believed that minimum contacts had been established.

Interest analysis is attentive to these observations. It assumes that the reasonableness test is determinative of jurisdictional questions and that the defendant's interest under the reasonableness test is broad enough to include the factors that would ordinarily come into play under minimum contacts analysis.[143] Thus, interest analysis consolidates the minimum contacts and reasonableness tests.[144]

It is difficult to see how interest analysis could yield a different result in the case. The interests of plaintiff Burger King and defendant Rudzewicz were the only major interests at stake in the litigation. They were both convenience interests. Litigation in Michigan or Florida would not have been "so gravely difficult and inconvenient" for either party.[145] Both parties were sophisticated and experienced in the business world.[146] It was, however, the quality and nature of Rudzewicz's in-state activities, particularly his reaching out to engage in a twenty-year business relationship with a Florida-based business, that most tipped the scale in favor of exercising jurisdiction. These activities were not random, isolated, or attenuated. Through his own initiative, a substantial connection with the forum state was created. The fact that plaintiff's cause of action was limited rather than plenary was also important because it specifically related to Rudzewicz's in-state activities. These considerations suggest that on balance it was fairer for Rudzewicz to travel to Florida than for Burger King to travel to Michigan.

H. Burnham v. Superior Court of California[147]

Our final case to revisit, *Burnham* harkens back to *Pennoyer v. Neff*.[148] In *Burnham*, a New Jersey resident was served with a summons and a divorce petition while temporarily in California on business and

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141. *See* Silberman, *supra* note 4, at 576-83 (discussion of problems that might result from the additional requirement of reasonableness).

142. 480 U.S. 102 (1987).

143. *See supra* text accompanying notes 130-33.

144. *See supra* text accompanying notes 22, 23.

145. The M.S. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).

146. Rudzewicz is "the senior partner in a Detroit accounting firm." *Burger King*, 471 U.S. at 466.

147. 110 S. Ct. 2105 (1990).

148. *See supra* text accompanying notes 29-55.

to visit his children who were living with their mother, the defendant's wife. Defendant's motion to quash service was denied by the trial court and that decision was affirmed by the California Court of Appeals and the California Supreme Court.

The United States Supreme Court affirmed unanimously, but many scholars argue that its plurality opinion adds confusion to jurisdictional analysis.[149] This is because a majority of the Justices ignored the *Burger King-International Shoe* analytical framework, which had been in existence since at least *World-Wide Volkswagen*.[150] Four Justices (Chief Justice Rehnquist and Justices Scalia, the author of the opinion, White, and Kennedy) held that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"[151] Although the reference to fair play and substantial justice may make it appear that Justice Scalia's analysis is within the *Burger King-International Shoe* conceptual scheme, Justice Scalia believed that the presence, or transient, jurisdictional base need not be subjected to *International Shoe*'s minimum-contacts analysis. "*International Shoe* confined its 'minimum contacts' requirement to situations in which the defendant 'be not present within the territory of the forum. . . .'"[152]

Justice Scalia, then, believed that presence jurisdiction, being a traditional rule of jurisdiction, is *ipso facto* fair or constitutional and, hence, was exempt from the application of both *International Shoe*'s minimum contacts test and *Burger King-International Shoe*'s two-pronged minimum contacts and reasonableness test.[153] Clearly, this view of jurisdictional analysis conflicts with *Shaffer v. Heitner*'s command that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[154]

Justice White concurred in much of Justice Scalia's opinion. Significantly, however, he did not join in the view that *Shaffer*'s command or *International Shoe*'s analysis was inapplicable to presence jurisdic-

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149. *See, e.g.*, Redish, *supra* note 4; Stein, *supra* note 4.

150. *See supra* text accompanying notes 117-19.

151. *Burnham*, 110 S. Ct. at 2115.

152. *Id.* at 2116 (citing *International Shoe*, 326 U.S. at 316). In addition, Scalia specifically relies on historical validity to meet the *International Shoe* standard, stating: "[] a doctrine that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard." *Burnham* at 2116-17.

153. For an excellent discussion and critique of Scalia's opinion *see*, Cox, *supra* note 5, at 537-47.

154. 433 U.S. at 212 (emphasis added). *See also* Cox, *supra* note 5, at 539-41 (discussing specifically Scalia's opinion in reference to *Shaffer*).

tion,[155] leaving only three Justices holding to that part of Justice Scalia's opinion. Citing *Shaffer*, Justice White stated that ". . . the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid. . . ."[156] Justice White concurred in the judgment because his examination of the presence jurisdiction rule led him to conclude that the rule, either as applied in this case or as a general proposition, was not so arbitrary and lacking in common sense that it should be held to be violative of the Constitution.[157] Thus, for Justice White, presence jurisdiction was virtually impervious to constitutional challenge. Indeed, he went on to expressly state that "until . . . a showing [of general arbitrariness or unfairness] is made, which would be difficult indeed, claims in individual cases that the rule would operate unfairly as applied to the particular non-resident involved need not be entertained."[158]

Justice Stevens also concurred in the judgment. He wrote separately only to state that Justices Scalia's and Brennan's opinions were too broad to join in, and that this was "a very easy case" to decide.[159]

Justice Brennan wrote a concurring opinion in which Justices Marshall, Blackmun, and O'Connor joined. This opinion is distinguishable from the others in that it is the only opinion that attempted to apply the *Burger King-International Shoe* test.[160] Justice Brennan stated that minimum contacts existed because the transient defendant "knowingly assume[s] some risk that the State will exercise its power over my property or my person."[161] Justice Brennan also believed that the exercise of presence, or transient, jurisdiction was reasonable because the transient defendant availed herself of significant benefits, such as, police and fire protection and free travel on state roads and waterways, provided by the state.[162] In addition, the burden placed on a transient defendant was slight, because modern modes of transportation and communications have made it "much less burdensome" for a party to defend herself outside her state of residence.[163]

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155. *Burnham*, 110 S. Ct. at 2109, 2119-20.

156. *Id.* at 2119.

157. *Id.* at 2120.

158. *Id.*

159. *Id.* at 2126. *But see* Silberman, *supra* note 4, at 573 (maintaining that general jurisdiction rules are necessary and require clear, identifiable standards based on power and sovereignty rationales).

160. *See* Stein, *supra* note 4, at 604-06 ("Brennan's concurrence does attempt to apply the general conceptual framework set out in earlier personal jurisdiction cases.").

161. *Id.* at 2124.

162. *Id.* at 2124-25.

163. *Id.* at 2125.

Whether presence jurisdiction establishes sufficient contacts, ties, or relations between the defendant and the forum state to satisfy the minimum-contacts requirement is open to serious question.[164] Certainly, the jurisdictional contacts under presence jurisdiction are of a more ephemeral quality than those under other traditional jurisdictional bases.[165] Moreover, to say that the transient defendant "knowingly assume[s] some risk that the State will exercise its power over" her person[166] comes very close to establishing a new legal fiction. This language seems fictive because, in point of fact, the transient defendant in *Burnham* did not *knowingly* assume a litigation risk by merely entering the forum state. Justice Brennan's reasoning is at variance with the facts in *Burnham*.[167] Indeed, the jurisdictional status of the transient defendant in this case was strikingly similar to that of the defendant in an "implied consent" case. To borrow from Justice Frankfurter, the transient defendant "may protest to high heaven his . . . [lack of intent to assume a litigation risk] and it avails him not."[168] Lest we forget, the Court long ago rejected the use of legal fictions as a substitute for substantive jurisdictional analysis.[169] Such use of legal fictions may also be constitutionally suspect.[170]

This is not to suggest that the result in *Burnham* was wrong, or unfair. The result would be the same if interest analysis were applied, but the fairness of the decision would be brought into sharper focus.[171] Unlike Justice Brennan's application of the *Burger King-International Shoe* test, interest analysis would not focus on only one interest in the litigation. Justice Brennan's jurisdictional analysis in *Burnham* dealt primarily with the defendant's interest or ties to the forum state.[172] Interest analysis necessarily looks at all the relevant interests in the litigation.

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164. *See* Cox, *supra* note 5, at 517 (arguing that transient jurisdiction is unconstitutional).

165. *See supra* text accompanying notes 56-97.

166. Justice Brennan argued: "[t]hat the defendant has already journeyed at least once before to the forum - as evidenced by the fact that he was served with process there - is an indication that suit in the forum likely would not be prohibitively inconvenient." *Burnham* at 2125. *See also supra* text accompanying note 161.

167. *See* Stein, *supra* note 4, at 604-06.

168. *See supra* text accompanying note 63.

169. *See supra* note 26 and accompanying text. Justice Brennan himself has recognized this fact. *See Burger King*, 471 U.S. at 479 (citing *International Shoe*, 326 U.S. at 319).

170. See *supra* text accompanying notes 58-64.

171. *See* Reynolds, *supra* note 25, n.279 (stating that "[i]n *Burnham*, California had a legitimate need to exercise jurisdiction over the defendant, and the defendant had sufficient relationships to justify the exercise of jurisdiction without the invocation of the transient jurisdiction concept.").

172. *See supra* text accompanying notes 159-63.

Although the forum state may have an interest in providing a convenient forum for one of its citizens seeking a divorce, the strongest interest in favor of the exercise of jurisdiction in *Burnham* may have been that of the plaintiff. State courts have a monopoly on marriage dissolution. Thus, the plaintiff was locked into the judicial system; her problem could only be resolved by resort to the courts. Additionally, as a single mother, the plaintiff was hardly in a position to travel across country to New Jersey to sue for divorce. Such an expedition could have been quite burdensome because it might have caused major disruptions in her family and work.

In contrast, the potential burden on the defendant in this case was relatively slight. The defendant had reasons to return to the forum—children and business. In any event, he seemed less encumbered by family or work to travel than did the plaintiff. Also, shortly before the plaintiff departed for California, the defendant did in fact agree that the plaintiff would file for divorce on grounds of irreconcilable differences.[173] When plaintiff failed to file in New Jersey, the defendant should have reasonably anticipated that she would file in California, her new state of residence.[174]

The public also had an interest in the litigation. However, this interest argued against the exercise of jurisdiction in California. Knowing that she will be subject to *general* liability in a distant state, a divorced parent may be disinclined to visit her children frequently if at all. This goes against society's interest in promoting strong family values.

Two considerations may counter this concern. First, arguably a parent would not allow the threat of being sued to stand between him and his children. This, of course, depends on the seriousness of the litigation lurking in the background. Second, interest analysis would limit the jurisdictional ruling to the facts of the case. Unlike Justice Scalia's opinion in *Burnham*, an opinion based on interest analysis would reject any talismanic formulas; "the facts in each case must [always] be weighed" in determining whether the exercise of jurisdiction is fair.[175] Indeed, *International Shoe* in spirit and in words calls for such ad hoc jurisdictional decisionmaking: "Whether Due Process is satisfied must depend [not on a mechanical or quantitative analysis, but] 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."[176]

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173. *Burnham*, 110 S. Ct. at 2109.

174. *But see* Silberman, *supra* note 4, at 595 (arguing that it may be unfair for California to assert jurisdiction over this defendant considering that the wife and children are "newly arrived" and the defendant has little or no relationship with that state and its marriage/divorce regulatory rules).

175. Kulko v. California Sup. Ct., 436 U.S. 84, 92 (1978).

176. *International Shoe*, 326 U.S. at 319.

III. Conclusion

In this Article, I have examined a number of Supreme Court cases to support my thesis that, in spite of its uncertainty, personal jurisdiction law has an essential purpose and analytical structure. The basic goal of personal jurisdiction law is to determine in each case whether it is fairer for the plaintiff or the defendant to travel.[177] This determination is made through a policy-oriented approach in which courts identify and balance all the relevant interests, or policies, in the litigation. Using this conceptual scheme, the results of future cases cannot be predicted; each case must be judged individually on its own merits to achieve a fair result.

The Court does not always indicate that it is engaging in a balancing test when it decides jurisdictional questions. However, given the Court's clear and overriding desire to reach a fair result in these cases, I believe the Justices are in fact, without knowing or acknowledging it, engaging in interest analysis, or something close to it, in every case. The power theory, minimum contacts, fair play and substantial justice, and even Justice Scalia's historical evidence and consensus test necessitate some degree of balancing of contraposed interests. Certainly this is so with respect to the cases reviewed in this article.[178] Even the decision in *World-Wide Volkswagen*, which is backed by an opinion that involves less discussion of competing interests than interests analysis commands,[179] does not "sacrifice good sense to a syllogism." As a practical matter, the outcome of the case is fair because at least one and possibly two deep pockets remained in the case after dismissal.[180] It is difficult to believe that this critical fact went unnoticed when the Justices considered the case.

Scholars may wish to criticize personal jurisdiction law for its unpredictability. But let us hope that good sense will continue to triumph over ritual in the Court's jurisdictional decisionmaking, even if the outcome of future cases remains unpredictable. Unpredictability is not too high a price to pay for fairness.

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177. *See supra* note 19 and accompanying text.

178. As Oliver Wendell Holmes stated, ". . . the law is administered by able and experienced men [and women], who know too much to sacrifice good sense to a syllogism, . . . when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them. . ." Oliver W. Holmes, The Common Law 36 (1881).

179. *See supra* text accompanying notes 119-24.

180. *See World-Wide Volkswagen*, 444 U.S. at 288, n.3.