Jurisdiction to Adjudicate: A Revised Analysis

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Personal jurisdiction doctrine as articulated by the Supreme Court is in disarray. As a constitutional doctrine whose contours remain imprecise, the law of personal jurisdiction has generated confusion, unpredictability, and extensive satellite litigation over what should be an uncomplicated preliminary issue. Many commentators have long lamented these defects, making suggestions for how the doctrine could be improved. Although many of these proposals have had much to offer, they generally have failed to articulate (or adequately justify or explain) a simple and sound approach to jurisdiction that the Supreme Court can embrace. This Article revises the law of personal jurisdiction by reconceiving the proper role of due process within the doctrine—which is to ensure that defendants receive adequate notice of an action and are protected against arbitrary assertions of governmental power—and reasserting the role of state sovereignty and interstate federalism as concepts that permit jurisdiction over all disputes in which a state has a legitimate interest. The doctrines of venue and forum non conveniens are left to redress any meaningful burdens on defendants arising out of having to litigate in inconvenient fora. The result is a coherent analysis that will provide litigants and courts clear guidance regarding the scope of a court's jurisdiction to adjudicate.

> New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas.[1]

INTRODUCTION

Adjudicatory jurisdiction, which refers to the power of a court to hear a case, is the central and most basic preliminary issue faced by courts in the United States.[2] A court (state or federal) may not enter a binding judgment in resolution of a matter unless it has jurisdiction to adjudicate the dispute. Adjudicatory jurisdiction is traditionally thought to have two dimensions: first, a subject matter component that identifies the types of cases that a court may hear; and second, a personal component that refers to the ability of a court to bind a particular in-

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1 Felix Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 Harv L Rev 717, 717 (1931).

2 The term "judicial jurisdiction" has also been used to embody the concept of adjudicatory jurisdiction. See, for example, *Quill Corp v North Dakota*, 504 US 298, 307 (1992) (referring to *International Shoe Co v Washington*, 326 US 310 (1945), as a case "in the area of judicial jurisdiction"). See also Restatement (Second) of Conflict of Laws ch 3, Introductory Note (1971). Adjudicatory jurisdiction should be contrasted with legislative or regulatory jurisdiction, which refers to the authority of a state to apply its laws to certain conduct.

dividual or entity as a defendant to the judgment rendered.[3] The quest to settle upon clear principles that govern the permissible reach of courts in this latter sense (personal jurisdiction) has occupied the Supreme Court ever since its seminal case of *Pennoyer v Neff*,[4] if not before that time.

Forty years ago, Professors Arthur von Mehren and Donald Trautman attempted to impose some coherence on the doctrine of adjudicatory jurisdiction as it had been reformulated in *International Shoe Co v Washington*[5] by identifying distinct general and specific jurisdictional analyses and discarding the distinctions of in personam, in rem, and quasi in rem jurisdiction.[6] Unfortunately, the Supreme Court's subsequent jurisprudence in this area did more to confuse and complicate the doctrine than Professors von Mehren and Trautman had done to clarify it. With each decision, the Court has convulsed away from the simple notion in *International Shoe* that state sovereignty and due process permit jurisdiction over nonresidents who are minimally connected with the forum,[7] to a confused defendant-centric doctrine obsessed with defendants' intentions, expectations, and experiences of inconvenience. In so doing, the Court has created a doctrine quite removed from its theoretical foundations—for neither due process nor state sovereignty harbor any concern for these issues that now take center stage within contemporary personal jurisdiction analysis. Such a disconnect might have been forgivable if the result were a clear doctrine that achieved predictable, practical, and just results—but such is not the case. To the contrary, the law of personal jurisdiction has blossomed into an incoherent and precarious doctrine that many commentators have long vilified as being in need of reform.[8]

Notwithstanding this near-universal condemnation, the doctrine remains in place with no credible challenger appearing in the offing.

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3 The Restatement (Second) of Conflict of Laws treats the concept of judicial jurisdiction as having three elements: judicial jurisdiction of the state, notice and opportunity to be heard, and competence. Restatement (Second) of Conflict of Laws at ch 3, Introductory Note. In this Article, I use the term "adjudicatory jurisdiction" to refer to the classic notion of personal or territorial jurisdiction, which subsumes the requirement of proper notice and hearing. See Part II.B. Subject matter jurisdiction or "competence" is not a topic addressed in this Article; thus, the analysis of adjudicatory jurisdiction contained herein will not embrace that topic.

4 95 US 714 (1877) (finding no jurisdiction over a nonresident without sufficient notice).

5 326 US 310 (1945) (finding jurisdiction over a nonresident corporation with sufficient minimum contacts and notice).

6 Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv L Rev 1121, 1136–63 (1966).

7 326 US at 316.

8 In a recent article, Professor James Weinstein aptly identified the body of commentary condemning the jurisdictional doctrine of *International Shoe*. See James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 Va L Rev 169, 171–72 n 5 (2004).

Although the resilience of the doctrine over the course of the sixty-plus years since *International Shoe* would tend to inspire resignation, the fight is not worth giving up yet. The difficulties—both legal and practical—that the confused personal jurisdiction doctrine spawns are too great to permit acquiescence. The complexity and lack of fundamental soundness characteristic of contemporary doctrine has resulted in a hopeless unpredictability that fosters regular jurisdictional challenges,[9] turning what should be a "simple, threshold question" into one of the more vigorously litigated issues between parties.[10]

It is with the hope of once and for all providing a viable alternative to contemporary jurisdictional doctrine that the Court can embrace that I undertake this effort to suggest a reconception of the law of personal jurisdiction. Indeed, calls for the Court[11] to revamp its law of personal jurisdiction are not new.[12] However, it is by identifying the proper role of due process within jurisdictional doctrine and reasserting the primary relevance of state sovereignty and interstate federalism that I intend to clarify the proper basis for and limitations on a state court's exercise of jurisdiction over a civil dispute involving nonresident defendants in a manner not previously achieved.

Part I of this Article rehearses the law of personal jurisdiction as it now stands, doing so only briefly in light of the numerous efforts of

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9 See Robert H. Abrams and Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 Minn L Rev 75, 83–84 (1984) ("[T]he bases for the Court's limitations of state court jurisdiction are invariably muddled. . . . [N]o clear guidelines [have] emerge[d]. When this failure is coupled with the Court's own confusion, prediction of future due process applications becomes impossible.").

10 Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 Wake Forest L Rev 915, 917 (2000). See also Pierre Riou, *General Jurisdiction over Foreign Corporations: All That Glitters Is Not* Gold Issue Mining, 14 Rev Litig 741, 803 (1995) ("How much litigation is now devoted merely to deciding whether a defendant is amenable to personal jurisdiction? Amorphous concepts of fairness, reasonableness, convenience, purposeful availment, and balancing of interests should not be allowed to complicate the determination of this threshold issue."); Abrams and Dimond, 69 Minn L Rev at 84 (cited in note 9) ("Ultimately, this morass generates costly and wasteful threshold litigation over state court exercises of jurisdiction."); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 S Ct Rev 241, 283 ("[T]he vagueness of the minimum-contacts general principle can make jurisdictional litigation uncertain at the trial level and frequent at the appellate level.").

11 I do not disturb the status of the Court as the superintendent of personal jurisdiction doctrine, although it has been argued that Congress—if it chose—could regulate state court jurisdiction via its powers under the Full Faith and Credit Clause of the Constitution. US Const Art IV, § 1. See Abrams and Dimond, 69 Minn L Rev at 87–109 (cited in note 9), for a proposal for how Congress could legislate control over state court jurisdiction through its powers under the Full Faith and Credit Clause.

12 See, for example, Douglas D. McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 Mo L Rev 753, 754 (2003) ("The Supreme Court should again start afresh. A workable test placed between the extreme rigidity of *Pennoyer* and the extreme malleability of *International Shoe* is needed.").

previous authors who have summarized and restated that material.[13] Part II then addresses the proper role that the Due Process Clause has to play in determining a state's adjudicatory jurisdiction. It concludes that due process serves three functions in the jurisdictional realm: it creates the requirement of jurisdiction, it requires that adequate notice of the action be afforded to the defendant as a prerequisite to a proper assertion of state court jurisdiction, and it protects defendants against arbitrary assertions of jurisdiction as a matter of substantive due process. Part III addresses the relevance of state sovereign authority to adjudicatory jurisdiction. This Part finds that notions of state sovereignty and interstate federalism and the derivative principles of domestic omnipotence and extraterritorial impotence articulated in *Pennoyer* are central to determining adjudicatory jurisdiction. These notions serve as the basis for limiting a state's jurisdiction over disputes involving nonconsenting, nonresident defendants to those in which the state has a legitimate governmental interest. Part IV formulates these findings into the central proposal of this Article, that the law of personal jurisdiction be revised to permit a state court to hear and render a binding judgment in a case involving a nonconsenting, nonresident defendant not served with process within the state's borders so long as the defendant has been given proper notice of the action and the state has a legitimate interest in the dispute. Part V tests the efficacy of this approach by revisiting some of the Court's seminal personal jurisdiction cases, and is followed by a Conclusion.

I. THE CURRENT LAW OF PERSONAL JURISDICTION

The landscape of contemporary personal jurisdiction doctrine is familiar terrain. Its roots lie in *International Shoe Co*, which in turn was a revision of the doctrine of *Pennoyer*. The *Pennoyer* Court announced the requirement that in-state service was a fundamental prerequisite to a state court's jurisdiction over a nonresident defendant, suggesting that such was not only the product of the international public law limitations on state sovereignty[14] but also a requirement of the Due Process Clause of the Fourteenth Amendment.[15] Although reliance on the Due Process Clause was of dubious legitimacy given that the facts in *Pennoyer* occurred before the ratification of the Four-

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13 See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 UC Davis L Rev 19, 25–87 (1990), for a thorough review of the Supreme Court's personal jurisdiction jurisprudence.

14 95 US at 722–24.

15 Id at 733 (holding that due process of law requires that "if [a suit] involves merely a determination of the personal liability of the defendant, he must be brought within [the tribunal's] jurisdiction by service of process within the State, or his voluntary appearance").

teenth Amendment,[16] the Court subsequently endorsed the constitutional status of the decision in *Riverside and Dan River Cotton Mills v Menefee*.[17]

By 1945, the notion that the law of state court jurisdiction was a matter with which the Due Process Clause was concerned was not fairly open to challenge. When the Court addressed itself to the doctrine of personal jurisdiction in *International Shoe*, the doctrine limited the reach of state courts to defendants who were either served with process within state borders, who had consented either explicitly or implicitly to jurisdiction,[18] or to those deemed to be "present" within the state by virtue of "doing business" there.[19] In light of the strain personal jurisdiction doctrine had endured over the sixty-seven years since the decision in *Pennoyer*—specifically, the challenge that the rise of the corporation posed for a doctrine based on in-state presence,[20] and the imprecision of the concept of "doing business"—the Court

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16 Mitchell obtained his judgment in February 1866. See id at 719. The Fourteenth Amendment was proposed by Congress on June 13, 1866, and was ratified on July 28, 1868. USCA Const Amend XIV, Historical Notes.

17 237 US 189 (1915). The majority concluded:

> Equally well settled is it that the courts of one State cannot without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another State when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in *Pennoyer* . . . and has been without deviation upheld by a long line of cases.

Id at 193.

18 See *Hess v Pawloski*, 274 US 352, 356–57 (1927) (describing the use of a state's highways as "implied consent" to the county registrar acting as the out-of-state driver's agent for service of process).

19 See *Philadelphia and Reading Railway Co v McKibbin*, 243 US 264, 265 (1917) ("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."). And also, four years earlier:

> [T]his case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. . . . In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process.

St. Louis Southwestern Railway Co of Texas v Alexander, 227 US 218, 227 (1913).

20 The *International Shoe* Court addressed the issue thus:

> Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its "presence" without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.

326 US at 316 (internal citation omitted). See also *Hutchinson v Chase & Gilbert*, 45 F2d 139, 140 (2d Cir 1930) ("The service of a capias subjects him de facto to such commands as its courts may utter, though in its stead a notice will usually serve. Such a theory is not really apposite to a corporation, however conceived, and it is only by analogy that it can be used.").

felt compelled to revise the doctrine substantially. The Court's revision supplanted the requirement of in-state service or presence with a requirement of "minimum contacts" that were to serve as surrogates of presence.[21] Contacts would qualify as "minimum contacts" that could support jurisdiction depending on their "nature and quality" and their relationship, if any, to the underlying cause of action.[22] Systematic and continuous contacts that were substantial could support jurisdiction over a defendant regardless of the connection between the contacts and the claim.[23] However, single and isolated contacts would support jurisdiction only where they were related to the action.[24] These assertions of jurisdiction would come to be known as general and specific jurisdiction, respectively.[25]

Over time, the Court has adhered to the view that the Due Process Clause of the Fourteenth Amendment lies at the core of personal jurisdiction doctrine[26] but has refined the details regarding what the clause requires. The current view is that due process requires *purposeful availment*, which means that minimum contacts must be something that the defendant purposefully establishes with the forum state.[27] Due process also requires, under the current view, that assertions of jurisdiction be *reasonable*, which means that jurisdiction may not "offend 'traditional notions of fair play and substantial justice.'"[28] This reasonableness requirement is given substance by a five-factor test applied in

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21 *International Shoe*, 326 US at 316 ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam* . . . he have certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

22 Id at 318.

23 Id at 317–18.

24 Id at 317 (noting that "single or isolated items of activities in a state . . . are not enough to subject it to suit on causes of action unconnected with the activities there").

25 See *Helicopteros Nacionales de Colombia SA v Hall*, 466 US 408, 414–15 (1984) (outlining the criteria for general and specific jurisdiction); von Mehren and Trautman, 79 Harv L Rev at 1136 (cited in note 6) (same).

26 *Insurance Corp of Ireland, Ltd v Compagnie des Bauxites de Guinee*, 456 US 694, 702–03 n 10 (1982) ("[The Due Process] Clause is the only source of the personal jurisdiction requirement.").

27 *Burger King Corp v Rudzewicz*, 471 US 462, 474 (1985).

28 *Asahi Metal Industry Co v Superior Court*, 480 US 102, 113 (1987), quoting *International Shoe*, 326 US at 316. Though originally articulated as a unitary test whereby establishing the requisite minimum contacts would satisfy due process and permit the assertion of jurisdiction, the test has evolved into a bifurcated analysis treating minimum contacts and "fair play and substantial justice" as distinct inquiries. See *Burger King*, 471 US at 476 ("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 assertion of personal jurisdiction would comport with 'fair play and substantial justice.'").

Asahi Metal Industries Co v Superior Court[29] that considers "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief,"[30] as well as "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."[31] The burden on defendants is typically given the most weight, with the plaintiffs' interests and state interests receiving a fair degree of consideration as well. Unfortunately, neither the purposeful availment requirement nor all of the five factors articulated by the Court are true derivatives of the Due Process Clause. Rather, they are largely contrivances that the Court has developed as it has attempted to rationalize results under the doctrine from one decision to the next.[32] The essential jurisdictional requisites of due process are explored in Part II below.

Regarding the relationship between state sovereignty, interstate federalism, and personal jurisdiction doctrine, the Court has vacillated between endorsement and rejection of the relevance of these two concepts, giving varying degrees of weight[33] or no weight[34] to sovereignty and federalism as legitimate underpinnings of the law of personal jurisdiction. The most recent major jurisdictional decision of the Court seems to treat due process as the exclusive source of limitations on state

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29 480 US 102 (1987) (finding insufficient minimum contacts to support jurisdiction, and fracturing on whether introducing products into the stream of commerce is "purposeful availment" sufficient to subject a corporation to jurisdiction).

30 Id at 113.

31 Id (internal quotation marks omitted). Although the Court has not quite resolved how the minimum contacts and reasonableness prongs of the doctrine should interact, the general practice is to require defendants to make a showing of unreasonableness in the event that the plaintiff establishes the existence of minimum contacts. See *Burger King*, 471 US at 477 ("[W]here a defendant . . . seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.").

32 Professor Kevin McMunigal describes the succession of the Court's personal jurisdiction decisions and resultant doctrinal development as a process of accumulation rather than evolution or refinement, arguing that the Court in each decision has simply "added new factors without admitting that it was doing so, justifying the additions, relating them to any underlying purpose, or attempting to assimilate the new factors with those found in *International Shoe*." Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 Yale L J 189, 197 (1998). Professor Geoffrey Hazard was less charitable when he described the jurisdictional decisions following *Pennoyer* as "the palliation of *Pennoyer*'s worst defects by improvisation." Hazard, 1965 S Ct Rev at 241–42 (cited in note 10).

33 See *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 293 (1980) ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

34 See *Burger King*, 471 US at 472 n 13 (1985) ("Although this protection operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'"), quoting *Insurance Corp of Ireland*, 456 US at 703 n 10.

court jurisdiction.[35] However, as discussed below,[36] state sovereign authority plays a vital role in limiting the scope of a state's adjudicatory jurisdiction. Indeed, it is the Court's contemporary failure to embrace fully the relevance of state sovereign authority to personal jurisdiction that has enabled the Court to stray toward the current doctrine almost exclusively focused on the interests, intentions, and actions of defendants.

Before proceeding, it is worth noting that personal jurisdiction doctrine is almost exclusively concerned with the limits on *state court* jurisdiction. It has long been understood that the personal jurisdiction of federal courts is not limited in the same manner as is the jurisdiction of state courts; Congress is free to provide federal courts with nationwide jurisdiction over all parties served with process anywhere within the United States[37] and has so provided in several circumstances.[38] Indeed, a much simpler system would be one that simply permitted jurisdiction based on nationwide service of process, leaving the federal venue statute to sort out the proper judicial district in which a case should be brought.[39] However, Congress has determined that the general rule is that the personal jurisdiction of federal courts is limited to that of courts of the states in which the federal courts are located.[40] Thus, so long as that continues to be the case, the issue of the jurisdic-

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35 See *Burnham v Superior Court*, 495 US 604, 609 (1990) (noting that after adoption of the Fourteenth Amendment, the Court held that "the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment").

36 See Part III.

37 *Mississippi Publishing Corp v Murphree*, 326 US 438, 442 (1946); *Robertson v Railroad Labor Board*, 268 US 619, 622 (1925). One commentator has suggested that Congress has the authority to authorize state courts to exercise nationwide jurisdiction in certain cases. See Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 Tex L Rev 1589, 1619 (1992) (suggesting that Congress can constitutionally authorize state courts to exercise personal jurisdiction through nationwide service and national contacts).

38 See, for example, Clayton Act, 15 USC § 25 (2000) (providing for nationwide jurisdiction of restraining violations); Employee Retirement Income Security Act of 1974, 29 USC § 1132(e)(2) (2000) (providing that process may be served in any district where the defendant resides or may be found); Securities and Exchange Act of 1934, 15 USC § 78aa (2000) (providing that process may be served where the defendant resides or may be found).

39 A similar suggestion was forwarded by Professor Hazard long ago:

> [I]t could have been provided that diversity would be deemed to exist if any of the parties was diverse in citizenship from another party; that venue be sited in the federal district court in which the action could most conveniently be tried; and that federal process reach the parties to be joined wherever they might be.

Geoffrey C. Hazard, Jr., *Interstate Venue*, 74 Nw U L Rev 711, 712–13 (1979). See also Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 Vand L Rev 608, 635 (1954) ("[W]ith nation-wide service of process, [the plaintiff] will be able to get personal jurisdiction of all parties in any district where venue is proper.").

40 FRCP 4(k)(1)(A). This limitation on the reach of federal courts was originally reflected in the Process Act. See Process Act of 1789, ch 21 § 2, 1 Stat 93 (1789).

tional reach of state courts will remain the central concern of courts and scholars.

II. DUE PROCESS AND JURISDICTION

Although the Due Process Clause of the Fourteenth Amendment has much to do with a state court's adjudicatory jurisdiction, the current requirements that the Court has developed and imposed in the name of the clause generally go beyond what due process truly requires. That is, the requirements of purposeful minimum contacts and reasonableness measured by the *Asahi* factors are not the inevitable mandates of due process. Rather, they are a patchwork of ideas created and cobbled together by the Court over time as it has sought either to explain or to clarify its previous statements about the doctrine. However, by closely analyzing the roots of personal jurisdiction doctrine in due process and state sovereign authority, we can derive the essential requisites of a state's proper assertion of jurisdiction. This Part explores the meaning of due process to discover what it requires in the jurisdictional realm. Part III considers the relationship between state sovereign authority and adjudicatory jurisdiction.

A. Due Process and the Requirement of Jurisdiction

Beginning with the most basic contribution of due process to adjudicatory jurisdiction, the guarantee contained within the Due Process Clause—that no state may deprive any person of life, liberty, or property without due process of law—ensures that a court must have proper jurisdiction before it may render a binding and enforceable judgment. As the Court put it in *Pennoyer*: "[P]roceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[41] Indeed, it is only those judgments rendered by state courts having jurisdiction that will be entitled to recognition in other states under the Full Faith and Credit Clause of the Constitution[42] and its implementing statute:[43] "[T]he act [is] applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter."[44] This right of individuals to be protected against exer-

41 95 US at 733. See also *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 291 (1980) ("Due process requires that the defendant . . . be subject to the personal jurisdiction of the court."); *Kulko v Superior Court*, 436 US 84, 91 (1978) ("It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant.").

42 US Const Art IV, § 1.

43 28 USC § 1738 (2000).

44 *Pennoyer*, 95 US at 729, citing *M'Elmoyle v Cohen*, 38 (13 Pet) US 312 (1839).

cises of power in the absence of jurisdiction is a *substantive due process* right. Thus, substantive due process requires adjudicatory jurisdiction and, since ratification of the Fourteenth Amendment, the Due Process Clause provides persons with a guarantee that this requirement will not be ignored by states.[45] This role of the Due Process Clause should be beyond dispute.

B. Due Process and the Right to Notice and Hearing

Another uncontroversial role that due process plays in determining adjudicatory jurisdiction is requiring that state courts provide defendants with proper notice before jurisdiction will obtain: "The existence of personal jurisdiction . . . depends upon the presence of reasonable notice to the defendant that an action has been brought."[46] Relatedly, the opportunity to be heard has also been deemed to be a critical due process right that must be respected for a court's judgment to be treated as valid and binding on a defendant.[47] However, it is notice that is viewed as a jurisdictional requisite, with the opportunity to be heard serving more as a procedural guarantee that must be afforded by a court once it asserts jurisdiction. But the two rights are inextricably intertwined: "The fundamental requisite of due process of law is the opportunity to be heard. . . . And it is to this end, of course, that summons or equivalent notice is employed."[48]

The ratification of the Fourteenth Amendment brought about an express constitutional guarantee of due process upon which the Court could base the requirements of notice and the opportunity to be heard. These requirements were long understood as the basic elements of due process that, prior to the Fourteenth Amendment, derived from natural law.[49] Since the ratification of that amendment, the Court has looked to the Due Process Clause rather than common law understandings as the source of authority for enforcing this require-

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45 See Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 Wash L Rev 479, 503 (1987) ("[Substantive due process] rights were not created by the fourteenth amendment. Rather, the fourteenth amendment provided the mechanism for protecting these rights from intrusions by the states."), citing *Powell v Pennsylvania*, 127 US 678, 690 (1888) (Field dissenting).

46 *Kulko*, 436 US at 91.

47 *Mathews v Eldridge*, 424 US 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'").

48 *Grannis v Ordean*, 234 US 385, 394 (1914). See also *D'Arcy v Ketchum*, 52 US (11 How) 165, 174 (1850) ("That countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court, is the familiar rule; national comity is never thus extended.").

49 See, for example, *Lafayette Insurance Co v French*, 59 US (18 How) 404, 407 (1855) (referring to "that principle of natural justice which forbids condemnation without opportunity for defence").

ment, still presumably deriving the content of the requirement (notice and the opportunity to be heard) from the original, preconstitutional natural law source.[50] In the words of the Court in *Mullane v Central Hanover Bank and Trust Co*,[51] "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing."[52] Thus, it cannot be gainsaid that due process has long required that defendants be given proper notice, sufficient to permit the opportunity to be heard, before a court's assertion of jurisdiction over the matter will be recognized.

C. Due Process and Convenience

The minimum imperatives of due process just discussed—that a court must have jurisdiction to render a binding and enforceable judgment and that in order to have jurisdiction the defendant must first be given proper notice of the pendency of the action—are not controversial. The debate lies, however, with the question of whether due process imposes any additional limits on adjudicatory jurisdiction. One prime candidate for due process protection within jurisdictional doctrine is the notion of convenience to the defendant, given the prominent place accorded this issue within the contemporary law of personal jurisdiction. However, the constitutionalization of convenience turns out to be one of the greatest flaws of personal jurisdiction doctrine as currently conceived.

The Court has clearly made inconvenience to defendants a central concern of the Due Process Clause within the doctrine of personal jurisdiction. One of the "two related, but distinguishable functions" that the minimum contacts requirement performs, according to the Court, is that "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum."[53] First among the *Asahi* reasonableness factors is consideration of "the burden on the defendant."[54] The Court has explained the degree of burden that causes concern by stating, "[J]urisdictional rules may not be employed in such a way as to

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50 I have borrowed the terms "source of authority" and "source of content" from Professor James Weinstein. Weinstein, 90 Va L Rev at 182 (cited in note 8).

51 339 US 306 (1950) (finding notice by publication insufficient to support jurisdiction where the defendant's whereabouts are known).

52 Id at 313.

53 *World-Wide Volkswagen*, 444 US at 291–92. See also id at 292 ("The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'").

54 480 US at 113.

make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent."[55]

Commentators have endorsed this view as well. Professor Martin Redish has labeled this type of burden "litigation inconvenience," a concept that includes "the imposition of significant burdens and expense, resulting from the need to travel to the forum in question and to transport evidence and witnesses long distances."[56] Professors von Mehren and Trautman long ago indicated their view that "very strong considerations of convenience" should be considered when evaluating the reasonableness and fairness of an assertion of jurisdiction.[57] Other commentators have also suggested that the Due Process Clause is relevant as a measure protecting defendants against inconvenient or burdensome litigation.[58]

Notwithstanding the Court's longstanding adherence to a belief that inconvenience to the defendant is relevant to a due process analysis of personal jurisdiction, or commentators' infatuation with the link between fairness and convenience, there is no basis for asserting the existence of any procedural or substantive due process protection against litigation inconvenience save for the *ipse dixit* of its proponents. The argument in favor of a connection seems to be that if the Due Process Clause protects defendants against "injustice," and if "litigation inconvenience" and "the imposition of significant burdens and expense" on defendants constitute injustice, then burden and inconvenience is something defendants may not be subjected to per the

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55 *Burger King*, 471 US at 478 (internal citations omitted).

56 Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw U L Rev 1112, 1133 (1981). Indeed, Professor Redish would revise the doctrine by making litigation inconvenience the primary concern of the due process clause, finding an assertion of jurisdiction to be unconstitutional where "meaningful inconvenience"—determined with reference to the factors used to evaluate the propriety of a forum non conveniens dismissal—to the defendant is present and outweighs the interests of the plaintiff and the forum state. Id at 1137–38.

57 Von Mehren and Trautman, 79 Harv L Rev at 1167 (cited in note 6).

58 See, for example, Peter Hay, *Judicial Jurisdiction over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 Or L Rev 431, 431–33 (1984) (positing that the avoidance of extreme inconvenience is the most important consideration within personal jurisdiction doctrine); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 Or L Rev 485, 527–28 (1984) (suggesting that minimum contacts and notions of federalism in jurisdictional doctrine should be relegated to "the dustbin of history," replaced by a focus on the burden on defendants); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 Creighton L Rev 735, 846 (1981):

> The primary "territorial" rule that the Court should follow . . . is that a court has jurisdiction to adjudicate an action against any defendant, unless the defendant demonstrates that the relative burdens imposed by suit in the particular court are so great that the defendant is, as a practical matter, unable to defend there adequately.

Due Process Clause.[59] The problem with this syllogism—that all injustice is prohibited by due process; burden and inconvenience are unjust; therefore, due process prohibits burden and inconvenience—is that its minor premise is false.

Inconvenience and burden are not unjust, at least not in the sense contemplated by due process. The concept of due process embodies the substantive and procedural protections traditionally thought to be requisites of a fair and just exercise of state authority that works a deprivation of life, liberty, or property.[60] Two of those requisites, as previously discussed, include the requirement that a court have jurisdiction before it may be permitted to render a binding judgment and that the party to be bound be given sufficient notice of, and right to present a defense in, the action.[61] And, as will be discussed in Part II.D, due process also protects defendants against arbitrary governmental action, which serves as an additional due process limitation on state assertions of jurisdiction. Other requirements of due process beyond the jurisdictional level are those that protect fundamental fairness,[62] such as the right to a hearing before an impartial decisionmaker[63] and the right to have a judgment rendered only on the basis of information presented to that decisionmaker.[64] Judgments that are the product of a process that complies with the substantive and procedural due process requirements just mentioned have given the defendant all process that is due; any burden or inconvenience ordinarily will be simply a consequence of litigation that one who is sued unfortunately

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59 See Redish, 75 Nw U L Rev at 1133 (cited in note 56).

60 The Court has explained the purpose of the due process requirement as follows:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Fuentes v Shevin, 407 US 67, 80–81 (1972).

61 See id at 80 ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"), quoting *Baldwin v Hale*, 68 US (1 Wall) 223, 233 (1863).

62 *Quill Corp v North Dakota*, 504 US 298, 312 (1992).

63 *Weiss v United States*, 510 US 163, 178 (1994).

64 *Goldberg v Kelly*, 397 US 254, 271 (1970) ("[T]he decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing.").

must endure,[65] not a concern that undermines the constitutionality of the entire enterprise.

Inconvenience to defendants does not find itself among this list of traditional concerns of the Due Process Clause because the experience of litigation inconvenience does not in itself deprive a defendant of the fundamental requisites of a fair deprivation of property or undermine our faith in its soundness; rather, inconvenience simply makes the deprivation a potentially more troublesome affair.[66] Furthermore, there is simply no historical concern over convenience as an additional component of due process, other than the Court's unprecedented infusion of such concerns into the doctrine in *International Shoe*, where the Court simply passed along the unsupported formulation regarding convenience written by Judge Learned Hand in an earlier Second Circuit case.[67] Justice Black was right to take issue with this portion of the *International Shoe* opinion when he wrote, "Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more 'convenient' for the corporation to be sued somewhere else."[68] So too was Chief Justice Warren correct to note that the jurisdictional restrictions on state courts were not simply a guarantee against litigation inconvenience but were rather "a consequence of territorial limitations on the power of the respective States."[69] Given the lack of a historical basis for a convenience-guarding conception of due process and the absence of a connection between convenience and the fundamental requisites of a fair governmental deprivation, it is difficult to understand the basis of the Court's posi-

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65 One commentator aptly stated: "It is appropriate to presume, at least *in limine*, that plaintiff is the wronged party and defendant the wrongdoer. If one must bear the inconvenience of a foreign forum, therefore, it should be the defendant." David E. Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 Geo Wash L Rev 82, 85 (1968).

66 Consider *Yakus v United States*, 321 US 414, 437 n 5 (1944) (stating that inconvenience to petitioners with grievances against the wartime Price Administrator resulting from requiring them to make their objection in Washington, D.C., was not a violation of due process because the petitioner's physical presence was not needed unless there was a hearing, and in that event, the Administrator could lay venue for the hearing anywhere in the country).

67 The *International Shoe* Court wrote:

> Th[e] demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection.

International Shoe, 326 US at 317, quoting *Hutchinson v Chase & Gilbert*, 45 F2d 139, 141 (2d Cir 1930).

68 *International Shoe*, 326 US at 325 (Black concurring).

69 *Hanson v Denckla*, 357 US 235, 251 (1958).

tion that the Due Process Clause "protects the defendant against the burdens of litigating in a distant or inconvenient forum."[70]

Theoretically, the burdens caused by the assertion of jurisdiction might be so oppressive as to threaten the defendant's ability to obtain a fair trial, but in such a situation, the potential threat would be to the defendant's right to a meaningful opportunity to be heard, not to some right to be protected against burden and inconvenience.[71] More important, however, such a degree of burden is hard to perceive beyond the realm of the imagination. Indeed, the lack of constitutional significance for the notion of inconvenience and burden to defendants is made clear by the fact that burden and inconvenience are concepts that are increasingly meaningless in modern times. The Supreme Court acknowledged long ago in *McGee v International Life Insurance Co*[72] the decreasing burdens associated with litigation when it wrote, "[M]odern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[73] This statement is even truer nearly fifty years later. A defendant forced to defend itself in a distant state may easily employ local counsel to appear on its behalf and manage the pretrial aspects of the case without any appearance on the part of the defendant. Modern communications technology, including email, the Internet, mobile phones, and fax machines, enable defendants and their counsel to communicate at any time across great distances to discuss and advance their cases. In the rare event that a trial actually occurs[74] and a defendant desires or is required to appear personally, modern aviation provides a rapid and affordable means of moving from one's home state to distant others. Professor (now Dean) Patrick Borchers summed up these points well when he wrote:

> The "inconvenience" rationale depends upon the elaborate metaphor of a civil party temporarily relocating to the forum

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70 *World-Wide Volkswagen*, 444 US at 292. See also id ("The protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness.'").

71 See Heiser, 35 Wake Forest L Rev at 935 (cited in note 10) ("[T]he Due Process Clause should preclude jurisdiction where the defendant can show that trial in the chosen forum will be so manifestly and gravely inconvenient that the defendant will be effectively deprived of a meaningful day in court."); Abrams and Dimond, 69 Minn L Rev at 76–77 (cited in note 9) ("State court assertions of extraterritorial jurisdiction violate these [due process] guarantees when the inconvenience and expense of responding to the suits prevent defendants from being heard and from participating in fundamentally fair proceedings.").

72 355 US 220 (1957) (finding that an insurance contract with a domiciliary created sufficient minimum contacts with the state to sustain jurisdiction over the corporation).

73 Id at 223.

74 See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J Empirical Legal Stud 459, 462–63 (2004) (reporting that trials accounted for only 1.8 percent of dispositions in all cases in 2002, down from 11.5 percent in 1962).

> state to defend or pursue the case. In reality, civil litigation does not operate in this manner at all. Depositions and other discovery devices take place anywhere the parties designate, and are not tied to the forum. The only events tied to the forum are those requiring judicial supervision, such as pretrial motions. Motions require the presence of counsel, but a party is free to hire a lawyer close to the courthouse. The only time a party is likely to travel is in the improbable event that the case goes to trial.[75]

Certainly today—well beyond 1957 when the Court spoke in *McGee*, and deep into the age of the jet engine, the fax machine, and the Internet—it is hard to imagine any remaining vitality to notions of inconvenience and burden to travel within the United States that can rise to levels of constitutional concern. This is particularly so for corporate defendants accustomed to operating on a national if not an international level. A construct of burden and inconvenience that has more substance in the realm of theory and imagination than in reality cannot plausibly claim any legitimate position as a central component of jurisdictional doctrine.

Does the lack of any constitutional protection against litigation inconvenience mean that convenience bears no relationship to jurisdictional analysis? In a word, yes. Adjudicatory jurisdiction does not depend on convenience to the defendant. Jurisdiction is delimited by due process and, as we shall see in the next Part, a state's sovereign authority. Thus, if defendant convenience is not safeguarded by due process, then the only remaining possible source of protection would be some inherent limitation on state sovereign authority. But there is no such limitation; the only limits on a state's sovereign authority are those imposed by the Constitution and those principles of public international law that are of continuing validity in the wake of the adoption of the Constitution. Neither the Constitution nor public international law recognize convenience to defendants as a constraint on the scope of a state's sovereign authority. Thus, in the absence of any constitutional protection against inconvenience and burden, there is no proper place for such concerns within the doctrine of personal jurisdiction.

To the extent that a state's exercise of jurisdiction results in inconvenience and burden to the defendant, the doctrines of venue and forum non conveniens have long been in place to address such concerns at a subconstitutional, nonjurisdictional level.[76] That is, although

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75 Borchers, 24 UC Davis L Rev at 95 (cited in note 13).

76 A similar observation has been made by Professor Douglas McFarland. See McFarland, 68 Mo L Rev at 798 (cited in note 12).

inconvenience and burden will not suffice to deprive a state of the authority to exercise jurisdiction over a given matter, such factors may be considered as the basis for transferring the case to a more convenient forum where such a transfer is possible, or dismissing the case altogether where another more convenient forum exists outside of the current forum's judicial system.[77] Indeed, the Court has endorsed the notion that a defendant's concerns regarding the burden associated with defending in a particular forum generally may be addressed by recourse to doctrines besides personal jurisdiction. As stated in *Burger King Corp v Rudzewicz*:[78] "Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. . . . [A] defendant claiming substantial inconvenience may seek a change of venue."[79] The rejection of convenience as a concern of the Due Process Clause thus does not mean that defendants must be subjected to litigating in unduly burdensome venues. Rather, it simply means that defendants will not be able to cite inconvenience as a basis for denying the jurisdictional authority of a forum but instead may use inconvenience only as a means to move the case to a preferred venue, where appropriate.

In sum, although convenience of the parties may be a valid concern that courts should seek to accommodate, there is nothing within due process that entitles defendants to convenience. Thus, there is no place for considerations of convenience and burden within a proper analysis of adjudicatory jurisdiction.

D. Due Process and Arbitrary Governmental Action

Is there more to substantive due process as it relates to the question of adjudicatory jurisdiction beyond the mere requirement of jurisdiction? Current jurisdictional doctrine has created a formidable substantive due process right, namely the right to be subjected to jurisdiction in states only with which one has minimum contacts such that the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.[80] Other scholars have aptly and ably articulated the clear proposition that the current role ascribed to the Due Process

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77 One commentator has noted:

> The fact that adjudication of the defendant's rights in the forum is not so outrageous as to be unconstitutional does not mean it is wise. The defendant may be able to show that suit in another available forum will be more convenient for the parties and witnesses and will avoid placing unnecessary burdens and expenses on local courts.

Weintraub, 63 Or L Rev at 523 (cited in note 58).

78 471 US 462 (1985).

79 Id at 477.

80 *International Shoe*, 326 US at 316.

Clause within the law of personal jurisdiction is flatly inappropriate and unsupportable.[81] Although I generally agree with those commentators who question the soundness of the asserted linkage between the contemporary minimum contacts requirement and due process, I do not go so far as to repudiate any further jurisdictional role for the Due Process Clause beyond requiring personal jurisdiction and notice that protects the opportunity to be heard. Rather, it is my view the Court's imposition of a requirement of purposeful minimum contacts was inspired by what is indeed a proper due process limitation on jurisdiction: state assertions of jurisdiction may not be arbitrary.

The protection against arbitrary state action lies at the heart of the Court's original formulation in *International Shoe* that a state must have some relationship with a defendant such that the assertion of jurisdiction comports with traditional notions of fairness. This is difficult to discern, however, because the sources from which the Court crafted its standard in *International Shoe* were not concerned with protecting defendants against arbitrary governmental action but rather emphasized the status of notice and the opportunity to be heard as requisites to the exercise of judicial jurisdiction. In *International Shoe* the Court wrote, "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within [the forum], he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[82] For this proposition, the Court cited *Milliken v Meyer*[83] and *McDonald v Mabee*.[84] But both of these cases concerned themselves only with the sufficiency of service, specifically whether the method of service employed satisfied the requirement of the Due Process Clause that the defendant be given proper notice of the action. In *McDonald*, Justice Holmes wrote, "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if *substantial justice* is to be done."[85] In *Milliken* the Court built upon this endorsement of substituted service "most likely to reach the defendant" by stating:

> [Substituted service's] adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for [in] such cases and employed is reasonably

81 See, for example, Borchers, 24 UC Davis L Rev at 87–105 (cited in note 13) (advocating that the Court should no longer regard personal jurisdiction as an issue of constitutional law).

82 326 US at 316.

83 311 US 457 (1940).

84 243 US 90 (1917).

85 Id at 92 (emphasis added).

> calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard. If it is, the *traditional notions of fair play and substantial justice* . . . implicit in due process are satisfied.[86]

How the *International Shoe* Court leapt from these statements regarding a linkage between due process and adequate notice to its statement that the jurisdiction of a court to render an in personam judgment against a defendant requires minimum contacts equaling fair play and substantial justice is unclear.[87]

Nevertheless, the Court was on to something. The Court's instincts were correct in declaring that there must be a connection between the state and the defendant in order for our traditional conception of "substantial justice" not to be offended. That is because substantive due process also protects defendants against deprivations of life, liberty, or property that are arbitrary: "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"[88] What does that mean for jurisdiction? Jurisdictional power must be limited to disputes involving matters of proper local concern,[89] which in turn means that a state at a minimum must have some rational connection with a dispute such that some legitimate interest is implicated before its jurisdiction over that dispute can be recognized. This formulation bears much resemblance to the due process standard the Court has crafted in the choice-of-law context: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[90] The resemblance is not coincidental.[91] With inconvenience to defendants proven

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86 311 US at 463 (emphasis added).

87 See McFarland, 68 Mo L Rev at 757–61 (cited in note 12), for a more thorough review of the precedential origins of the central minimum contacts formulation of *International Shoe*.

88 *Zinermon v Burch*, 494 US 113, 125 (1990), quoting *Daniels v Williams*, 474 US 327, 331 (1986). See also *Daniels*, 474 US at 331 ("[T]he Due Process Clause, like its forebear in the Magna Carta . . . was intended to secure the individual from the arbitrary exercise of the powers of government.") (internal quotation marks omitted); *Fuentes*, 407 US at 80–81 (highlighting the connection between the right to a fair hearing and the protection against arbitrary governmental deprivations).

89 The phrase "matters of proper local concern" is borrowed from Professor Hazard, who used these words to describe one of the central problems that *Pennoyer* addressed: the need "to restrict the judicial remedial power of the respective states to matters of proper local concern." Hazard, 1965 S Ct Rev at 245 (cited in note 10).

90 *Allstate Insurance Co v Hague*, 449 US 302, 312–13 (1981).

91 Although the state interest analysis proposed herein is not identical to that of choice-of-law doctrine, it is quite similar. See Part IV.B. Other commentators have suggested that the stan-

to be a subconstitutional concern,[92] defendants' only complaint against the assertion of jurisdiction by a state that has given proper notice and the opportunity to be heard can be that the state's assertion of jurisdiction is arbitrary. If a state has a legitimate interest in the dispute, however, no claim of arbitrariness can be made. Correspondingly, the absence of a legitimate governmental interest on the part of the state in a dispute will bar a state from exercising jurisdiction, per the Due Process Clause.

Whether a state has a sufficient interest in a dispute is a question of the extent of its sovereign authority, not of due process. That is, although due process requires that a state have an interest in the dispute in order to prevent its assertion of jurisdiction from being arbitrary, due process does not help us identify whether a state's legitimate interests are implicated.[93] Part III will consider the role that state sovereign authority plays in giving substance to the state interest concept within the context of jurisdictional doctrine. However, before moving to the next Part it will be helpful to briefly recapitulate what we have established thus far. Due process ultimately serves three functions relevant to adjudicatory jurisdiction: (1) it creates the requirement that a court have jurisdiction before a binding judgment may be entered against a defendant; (2) it provides that jurisdiction will be valid only where proper notice preserving the opportunity to be heard has been afforded; and (3) it protects defendants against arbitrary assertions of state jurisdiction, which minimally requires that a state have an interest in the dispute. Let us turn now to the substance of the state interest requirement, which is wholly a matter of state sovereign authority.

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dards should be one and the same. See, for example, Heiser, 35 Wake Forest L Rev at 955 (cited in note 10) (offering a proposal under which "the constitutional limitation on state court assertions of personal jurisdiction would be the same as for choice-of-law determinations"); Courtland H. Peterson, *Proposals of Marriage between Jurisdiction and Choice of Law*, 14 UC Davis L Rev 869, 882–83 (1981) (proposing the need for a symbiosis of judicial jurisdiction and choice-of-law determinations).

92 See Part II.C.

93 It has been argued that a similar interplay between due process as providing protection against illegitimate exercises of jurisdiction and state sovereign authority as the basis for determining legitimacy was present in *Pennoyer*:

> The role of the due process clause was passive; it bestowed on the defendant a right to resist unjustified assertions of jurisdiction. The fourteenth amendment, however, did not state when jurisdiction in fact was unjustified. It therefore became essential for the Court to articulate a jurisdictional justification. Drawing on principles of natural and international law, as well as the federalism element of the full faith and credit clause, the Court constructed the "territorialist" justification: jurisdiction is justified when a state acts on persons or things within its borders.

Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex L Rev 689, 693 (1987) (internal citations omitted).

III. STATE SOVEREIGN AUTHORITY AND JURISDICTION

Having established the proper role of due process in jurisdictional analysis and the absence of a role for considerations of defendant inconvenience and burden in such an analysis, it remains to be determined whether the concepts of state sovereignty or interstate federalism are of any relevance to jurisdiction. Before exploring the relevance of these concepts, they must first be defined. State sovereignty simply refers to the status of states as independent sovereigns and the power that such sovereigns retain within the federal system established by the Constitution.[94] Interstate federalism refers to the relationship between states within our federal system, their status as coequal sovereigns, and the limits on state power that derive from that status.[95] These two concepts go hand-in-hand: state sovereignty refers to the power of states, and interstate federalism imposes limits on that power.[96] I shall use the term *state sovereign authority* to refer jointly to the concepts of state sovereignty and interstate federalism; that is, the term state sovereign authority as I intend to use it will refer to the sovereign power of states as limited by the existence of equally empowered comembers of our national federation.

After initially giving a prominent role to state sovereign authority in *Pennoyer*, the Court has vacillated between giving it a central place

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94 See US Const Amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Coyle v Smith*, 221 US 559, 567 (1911) ("[E]ach [state is] competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."); *Pennoyer*, 95 US at 722 ("The several States of the Union are not, it is true, in every respect independent . . . . But, except as restrained and limited by [the Constitution], they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them."). See also Laurence H. Tribe, *American Constitutional Law* 907 (Foundation 3d ed 2000) ("It is clear, however, that the Constitution does indeed presuppose the existence of the states as entities independent of the national government—not simply as a matter of historical reality, but as a matter of constitutional text and structure.").

95 *Pennoyer* states:

> [A State's] direct exertion of authority upon [persons], in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

95 US at 723.

96 See *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 293 (1980) ("[T]he Framers also intended that the States retain many essential attributes of sovereignty . . . . The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."). Consistent with other commentators, I reject the Court's assertion that the Fourteenth Amendment speaks to the concepts of sovereignty and federalism, but endorse the Court's view stated here that the original scheme of the Constitution is what gives these concepts meaning.

within the doctrine,[97] and its current view that due process serves as the sole basis of jurisdictional doctrine.[98] Scholars too have wrestled with the question of whether state sovereign authority is relevant to personal jurisdiction,[99] often concluding that the infusion of such concerns into a law of personal jurisdiction based on the Due Process Clause is inappropriate.[100] The Court and commentators have struggled with this question because the modern law of personal jurisdiction is rooted in the Due Process Clause, which protects individual rights and has nothing to do with state sovereignty or interstate federalism.[101]

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97 See id at 291–92 ("The concept of minimum contacts . . . acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."); *Hanson v Denckla*, 357 US 235, 251 (1958) ("[R]estrictions on the personal jurisdiction of state courts . . . are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.").

98 See *Insurance Corp of Ireland, Ltd v Compagnie des Bauxites de Guinee*, 456 US 694, 703 n 10 (1982) ("[The Due Process] Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns."); *Shaffer v Heitner*, 433 US 186, 204 (1977) ("Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."). Professor Borchers has made a similar observation. See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 Am J Comp L 121, 126 (1992) (suggesting that the Court has vacillated between dismissing and reviving a "sovereignty" factor in personal jurisdiction cases).

99 See, for example, Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again*, 54 Cath U L Rev 53, 147–48 (2004) ("[T]he problem of whether courts are entitled to take institutional and systemic interests, including sovereignty interests, into account in resolving jurisdictional disputes has never been adequately resolved. . . . [T]he Court definitely will take such interests into account, but a serious question remains as to the legitimacy of doing so."); McFarland, 68 Mo L Rev at 790 (cited in note 12) ("[D]o state boundaries have continuing legal significance for the jurisdictional reach of state courts?"); Perdue, 62 Wash L Rev at 479 (cited in note 45) ("The Court continues to treat geographic boundaries as central to the interests protected by personal jurisdiction, but has never satisfactorily explained why they are so central.").

100 See, for example, Abrams and Dimond, 69 Minn L Rev at 75 (cited in note 9) ("This Article contends that the due process clause is wholly inapposite to these interstate federalism concerns."); Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 Syracuse L Rev 533, 548 (1982) ("The language of the fourteenth amendment is directed toward the relationship between states and persons, and not the relationship between, or among, states. To extract from that clause the principle that a state's judicial authority should be limited by anything other than fairness to the defendant is difficult.").

101 See *Insurance Corp of Ireland*, 456 US at 703 n 10:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.

See also Redish, 75 Nw U L Rev at 1114 (cited in note 56) ("[S]uch notions of federalism as limitations on the reach of personal jurisdiction are found nowhere in the body of the Constitution, much less in the terms of the due process clause.").

That is, if jurisdiction is all about due process, and due process has nothing to do with sovereignty or federalism, then sovereignty and federalism have no place within jurisdictional doctrine.[102] But again we encounter a syllogism with a flawed foundation. Jurisdiction is not all about due process, with sovereignty and federalism only derivatively relevant thereto, if at all. Rather, jurisdiction is about due process *and* state sovereign authority, with sovereignty and interstate federalism being relevant on their own terms, owing nothing to due process in the matter.

How is it that state sovereign authority (that is, state power as limited by the sovereignty of other states) is relevant per se to jurisdiction without help from the Due Process Clause? As previously discussed,[103] although the Due Process Clause protects defendants against illegitimate, arbitrary assertions of jurisdiction, whether a state's assertion of jurisdiction is legitimate and nonarbitrary is an issue of state sovereign authority.[104] This is what the Court meant by its statement in *International Shoe* that the connection between the defendant and the state must be such as to make it "reasonable, *in the context of our federal system of government*, to require the corporation to defend the particular suit which is brought there."[105] Or, as Chief Justice Warren more clearly stated it, "[R]estrictions on the personal jurisdiction of state courts . . . are a consequence of territorial limitations on the power of the respective States."[106] The connection, then, between state sovereign authority and adjudicatory jurisdiction is that sovereign authority is the very basis of a state's jurisdictional power and its legitimacy; individuals have a right to challenge jurisdictional assertions they believe to be arbitrary under the Due Process Clause.[107] The failure to understand the nature of this link explains the Court's[108] and

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102 See, for example, Redish, 75 Nw U L Rev at 1114 (cited in note 56) ("Nothing in the concept of a federated system logically dictates any limitations on the reach of a state's authority to assert personal jurisdiction over private parties.").

103 See Part II.D.

104 See Weinstein, 90 Va L Rev at 215 (cited in note 8) ("[L]imitations on state court jurisdiction were consistently understood to be a logical consequence of territorial limits on state authority."); Stein, 65 Tex L Rev at 711 (cited in note 93) ("Due process protects the sovereign interests of other states, but only incidentally, through its protection of the individual from illegitimate assertions of state authority. Legitimacy, though, is defined by reference to the state's allocated authority within the federal system.").

105 *International Shoe*, 326 US at 317 (emphasis added).

106 *Hanson*, 357 US at 251.

107 Professors Robert Abrams and Paul Dimond offered a similar analysis of the connection between state sovereignty and due process in discussing *Pennoyer*'s treatment of the issue when they wrote: "Territorial restraints relate to due process only to the extent that they are proxies for fairness." Abrams and Dimond, 69 Minn L Rev at 78–79 n 18 (cited in note 9).

108 *Insurance Corp of Ireland*, 456 US at 703 n 10:

commentators'[109] befuddlement with the seeming ability of individuals either to assert or waive state sovereign interests when challenging or acquiescing to jurisdiction: defendants are not directly asserting or waiving sovereign rights of a state, but rather are raising (or waiving) due process rights personal to them that protect them against arbitrary governmental encroachments.

The real question then is how state sovereign authority shapes and constrains a state's legitimate assertion of jurisdiction over *disputes* involving nonresident defendants. I pose the question in this fashion because thinking about jurisdiction over disputes (rather than over defendants) highlights the distinction between the issue of personal rights—which is the province of due process—and the issue of state power—which is a matter of state sovereignty and interstate federalism.[110] State sovereignty and interstate federalism determine a state's authority to adjudicate a dispute, while due process protects an individual defendant involved in a dispute from assertions of jurisdiction that violate protected rights. Turning attention to a court's authority to hear a dispute rather than the court's authority over a particular defendant makes it more appropriate to speak of "adjudicatory" jurisdiction rather than "personal" jurisdiction because the latter term connotes concern with power over individuals while the former suggests power over disputes.[111] Focusing on a state's jurisdiction over a dispute

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> [I]f the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

109 See, for example, McMunigal, 108 Yale L J at 212 (cited in note 32) ("[F]ederalism is inconsistent with the notion that an individual can waive the protections afforded by the minimum contacts test."); Abrams and Dimond, 69 Minn L Rev at 84 (cited in note 9) ("[F]ederalism does not justify allowing an individual to assert the state's supposed interest as a personal due process right when the state could, if it wished, intervene in the suit or otherwise indicate that it perceives extraterritorial jurisdiction as an affront to its state sovereignty.").

110 The Court in *Pennoyer* focused on a state's authority to assert jurisdiction over defendants, namely, those nonresidents who had not been served with process within the state. 95 US at 733 ("[I]f [proceedings] involve[ ] merely a determination of the personal liability of *the defendant*, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.") (emphasis added). The *International Shoe* Court framed the issue similarly: how to "subject *a defendant* to a judgment *in personam*." 326 US at 316 (emphasis added).

111 Using the term "adjudicatory jurisdiction" rather than "personal jurisdiction" in the manner suggested would appear to ignore the fact that the issues of subject matter jurisdiction and personal jurisdiction are both components of the larger concept of adjudicatory jurisdiction. My suggestion is that the concept of subject matter jurisdiction be regarded as a separate concern from adjudicatory jurisdiction, serving to identify the *topical* limits of a court's competency. "Adjudicatory jurisdiction," then, would remain exclusively concerned with the matter of which disputes among those that fall within a court's topical (subject matter) jurisdiction also fall within its ambit of authority such that the decisions it renders will be considered valid and binding. That is the question that this conception of adjudicatory jurisdiction purports to address.

thus permits resolution of the pertinent issue at the heart of adjudicatory jurisdiction: whether a state's assertion of jurisdiction over a dispute is a legitimate exercise of that state's sovereign authority.

To resolve this question, we need look no further than the basic principles that the Court announced in *Pennoyer* as derivative of the concepts of state sovereignty and interstate federalism: states are powerless beyond their borders[112]—a concept that derives from interstate federalism and to which I will refer as *extraterritorial impotence*—but states are all-powerful within their borders,[113] to the extent not limited by the federal constitution—a state sovereignty–based concept I will label *domestic omnipotence*. *Pennoyer* interpreted these concepts as limiting the reach of states to those persons served with process within their boundaries (and those who were state citizens or who consented to jurisdiction),[114] while the Court sixty-seven years later in *International Shoe* believed that defendants who had simply established certain minimum contacts within a state's borders manifested sufficient in-state "presence" to be subject to the domestic sovereignty and thus jurisdiction of that state.[115]

Although no longer demanding *Pennoyer*'s rigid requirement of in-state service, state citizenship, or consent, the principles of domestic omnipotence and extraterritorial impotence remain relevant as the basis from which we may deduce the proper scope of a state's jurisdictional authority. A state's domestic omnipotence gives it authority, as an extension of its police power,[116] to exercise jurisdiction over disputes involving nonconsenting, nonresident defendants where the action implicates the legitimate governmental interests of the state within its borders. Correspondingly, by virtue of its extraterritorial impotence, a state may not coercively assert jurisdiction over disputes

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112 *Pennoyer*, 95 US at 722 ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory. . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.").

113 Id ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

114 Id at 732–34.

115 326 US at 316–18.

116 See *United States v Morrison*, 529 US 598, 618 n 8 (2000) ("[T]he Constitution reserves the general police power to the States."). See also *Kovacs v Cooper*, 336 US 77, 83 (1949) ("The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."). The Supreme Court has explained the purpose of the police power as follows:

> The police power of a State . . . springs from the obligation of the State to protect its citizens and provide for the safety and good order of society. . . . It is the governmental power of self protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.

Panhandle Eastern Pipe Line Co v State Highway Commission, 294 US 613, 622 (1935).

that are wholly foreign in nature, meaning those disputes that have no connection with the state or in which the state has no interest. Just as a state's legislative or regulatory jurisdiction extends only to those matters in which the state has an interest,[117] so too is a state's adjudicatory jurisdiction limited to those disputes in which it has an interest. *State interest analysis*, then, must become the core inquiry for determining whether state sovereignty and interstate federalism permit the exercise of jurisdiction over disputes involving nonresident defendants.[118]

The Court has already indicated that the interest of the forum state in resolving the dispute is a consideration in jurisdictional analysis under the reasonableness prong of the *International Shoe* test.[119] But prior to the advent of the modern bifurcated version of the *International Shoe* test[120] in which state interest is subordinated to considerations of burden on the defendant, the Court treated the interest of the forum state as central to the determination of whether courts have jurisdiction to adjudicate a dispute. In *Travelers Health Association v Virginia*[121] the Court, acknowledging that "a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the 'state action may have repercussions beyond state lines,'"[122] upheld jurisdiction based on the connection between the defendant insurer and forum resident insureds, and the state's interest in protecting those residents.[123] Similarly, in *McGee* the Court upheld jurisdiction based on the connection between the defendant insurer and a resident insured, and on the forum state's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[124] It is worth noting here that not only did the Court reject the purported inconvenience to

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117 *Allstate Insurance Co v Hague*, 449 US 302, 308 ("[T]he Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.").

118 The term "state interest analysis" used here should be distinguished from the term "interest analysis" used by Professor Roy Brooks to describe his understanding of current doctrine, which in his view looks primarily at the parties' interests in having the case tried in a particular forum. See Roy L. Brooks, *The Essential Purpose and Analytical Structure of Personal Jurisdiction Law*, 27 Ind L Rev 361, 365 (1993).

119 See *Asahi*, 480 US at 113 (recognizing "the interests of the forum State" as one of the five "reasonableness" factors).

120 See *Burger King*, 471 US at 476 ("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 assertion of personal jurisdiction would comport with 'fair play and substantial justice.'").

121 339 US 643 (1950).

122 Id at 647, quoting *Osborn v Ozlin*, 310 US 53, 62 (1940).

123 339 US at 648.

124 355 US at 223. See also Condlin, 54 Cath U L Rev at 62 (cited in note 99) ("Ultimately, *McGee* is probably best explained as a 'sovereignty' or 'state interest' case.").

the defendant in *McGee* as insufficient to count as a denial of due process,[125] but the Court also suggested that the absence of any contention that the state failed to supply adequate notice or the opportunity to be heard meant that no further impediment to the state's jurisdiction remained.[126]

More recently in *Mullane*, the Court provided one of the most striking examples of the role that state interest has in empowering a state with adjudicatory jurisdiction. In upholding the jurisdiction of a state court to enter a judgment that would bind nonresident trust beneficiaries, the Court wrote:

> [T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[127]

Note the centrality of state interest analysis, the check on state authority provided by the rights to notice and hearing, and the complete absence of any concern with litigant convenience. The Court made these points even more clearly when it wrote:

> [T]he vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. . . .
>
> Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "[t]he fundamental requisite of due process of law is the opportunity to be heard." . . . This right to be heard has little reality or worth unless one is informed that the matter is pending.[128]

Again, state interests are balanced against procedural due process rights, which are defined as the right to notice and the opportunity to be heard, and not as the right not to be subjected to inconvenient litigation. Thus *Mullane* presents a clear instance of the Court using

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125 355 US at 224.

126 Id (concluding its jurisdictional analysis by noting, "[t]here is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear" and "respondent was given a reasonable time to appear and defend on the merits after being notified of the suit").

127 *Mullane*, 339 US at 313.

128 Id at 313–14.

state interest analysis to conclude that the state has authority to exercise adjudicatory jurisdiction, limited only by the issue of whether proper notice and the opportunity to be heard have been given.

State interests played a critical role in conferring jurisdiction on the forum state in *Calder v Jones*[129] as well. Faced with Florida defendants who were alleged to have intentionally defamed a California resident, the *Calder* Court stated, "Jurisdiction over [the defendants] is therefore proper in California based on the 'effects' of their Florida conduct in California."[130] In support of this conclusion, the Court cited the Restatement (Second) of Conflict of Laws § 37, which explains, "A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere."[131] In *Calder*, California had a clear interest in opening its courts to a state resident who allegedly had been intentionally injured by outsiders.[132] With notice not challenged and the state's interest clear and strong, the state's adjudicatory jurisdiction was proper, without any reference to the potential inconvenience of litigation for the defendants.[133]

Keeton v Hustler Magazine, Inc[134] provides yet another example of the centrality that state interest analysis should play in jurisdictional determinations. After stating that the relevant inquiry was the "the relationship among the defendant, the forum, and the litigation," then–Associate Justice Rehnquist, writing for the Court, indicated that the relationship must be such that jurisdiction would be "fair," and that "the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities."[135] Justice Rehnquist then proceeded to engage in a thorough analysis of New Hampshire's interests, finding that "New Hampshire has clearly expressed its interest in protecting such persons [nonresidents] from libel, as well as in safeguarding its populace from falsehoods" and that "New Hampshire also has a substantial interest in cooperating with

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129 465 US 783 (1984).

130 Id at 789, citing *World-Wide Volkswagen*, 444 US at 297–98 and Restatement (Second) of Conflict of Laws § 37.

131 Restatement (Second) of Conflict of Laws § 37, comment a. See also id § 36, comment c ("A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory.").

132 See 465 US at 790 ("An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.").

133 See id ("[P]etitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.").

134 465 US 770 (1984).

135 Id at 775–76.

other States, through the 'single publication rule,' to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding."[136] On the strength of these state interests and without regard to convenience to the defendant, the Court held that jurisdiction was proper in New Hampshire.[137]

As *Calder* and *Keeton* demonstrate most clearly, and the other cases mentioned earlier confirm, the concept of minimum contacts was originally intended to protect the notion that valid adjudicatory jurisdiction is limited to those cases in which the defendant's contacts have implicated legitimate interests of the state. That is, the minimum connection that must exist between a nonresident defendant and the forum is one where the alleged actions of the defendant have implicated the legitimate interests of the forum state, creating a link that makes it fair and nonarbitrary for that state to exercise adjudicatory authority over the case against that defendant. Where a nonresident defendant acts in such a way so as to adversely affect affairs within a state, disputes arising therefrom are something that a state has a clear interest in resolving;[138] such an interest justifies jurisdiction unless there is a real injury to any of the constitutionally protected due process interests identified above.[139]

It is through this analysis that we can reconceive the idea of minimum contacts into an idea focused on the implication of state interests. That is, rather than analyzing whether a defendant has established minimum contacts with a state, the question becomes whether the defendant acted in a way that implicates a state's interests such that it may adjudicate any resultant dispute. Purposefulness recedes from the scene under this formulation, as the intentionality of the defendant in so implicating a state's interest is not relevant to a state interest analysis. That is because sovereign power, where it properly exists to protect legitimate state interests, operates by command, not

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136 Id at 777.

137 Id at 781 ("There is no unfairness in calling [defendant] to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.").

138 See *Burger King*, 471 US at 473 ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."), quoting *McGee*, 355 US at 223; *Keeton*, 465 US at 776 ("And it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State.").

139 See *World-Wide Volkswagen*, 444 US at 312 (Brennan dissenting) (emphasis added):

> If a plaintiff can show that his chosen forum State has a sufficient interest in the litigation (*or* sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest . . . should have no constitutional excuse not to appear.

permission.[140] It is thus the mere implication of the state's interest, not the defendant's intent or lack of intent to implicate that interest, which places a dispute within the authority of a state to resolve.

What of the "critical" right to "reasonably anticipate being haled into court" in the forum?[141] If jurisdictional analysis abandons any requirement that defendants purposefully make a connection with a state, it can be argued that they will lack notice of where their actions will and will not subject them to suit, and, as a result, the matter of jurisdiction will become hopelessly unpredictable. Such an argument has long been considered a red herring whose circularity has been recognized by all but the Court itself.[142] The argument has been rejected as circular because defendants will anticipate being "haled into court" wherever the law says they are subject to suit; thus, defining the law of jurisdiction with reference to the expectations of defendants makes no sense. To illustrate the point, if the law in the federal courts tomorrow were changed to give those courts nationwide personal jurisdiction—which is well within Congress's authority to confer[143]—defendants would thenceforth be on notice that their conduct within the United States will submit them to personal jurisdiction in any of its federal district courts.[144] So too would defendants be able to anticipate the fora in which they could be haled into court if the law of jurisdiction were altered to subject defendants to jurisdiction in those states where their conduct implicates legitimate state interests. In any event, the law of personal jurisdiction in its current form hardly provides the level of predictability that would give defendants the ability to anticipate where they will be subject to jurisdiction. A doctrine rooted primarily in state interest analysis is far more likely to yield less confusion regarding one's amenability to jurisdiction.

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140 See Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 Wash U L Q 377, 402 (1985) ("The state does not simply invite defendants to participate in a civil suit; it orders them to do so.").

141 See *World-Wide Volkswagen*, 444 US at 297.

142 Justice Brennan made this point in his dissent to *World-Wide Volkswagen*. See id at 311 n 18 (Brennan dissenting) ("A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is."). Professor Borchers stated the point best when he wrote, "[T]he 'jurisdictional surprise' argument is circular. Any expectation that a defendant has of avoiding an out-of-state court is a function of the jurisdictional rules themselves. Thus the 'jurisdictional surprise' argument cannot justify the contents of jurisdictional rules, it simply describes a consequence of having such rules." Borchers, 24 UC Davis L Rev at 94 (cited in note 13).

143 See, for example, Charles Alan Wright and Arthur R. Miller, 4B *Federal Practice and Procedure* § 1125 (West 3d ed 2002) (recognizing the "continuing force" of congressional statutes to provide for extraterritorial or national service).

144 Of course, the federal venue statutes would limit the districts that could properly hear the case—a subconstitutional, nonjurisdictional way of siting an action and addressing concerns regarding convenience.

IV. ADJUDICATORY JURISDICTION RIGHTLY CONCEIVED: STATE INTEREST ANALYSIS

A. A Restatement of the Law of Adjudicatory Jurisdiction

1. The proposal.

Having excised concerns about litigation inconvenience from due process, the underbrush has been sufficiently cleared to perceive the true contributions of due process to a jurisdictional inquiry and to restore the forsaken concepts of state sovereignty and interstate federalism to their rightful place of centrality within the doctrine. Based on the proper understandings of due process and state sovereign authority discussed above, the law of adjudicatory jurisdiction can be restated as follows: a state court may exercise jurisdiction over a dispute involving a nonconsenting, nonresident defendant not served with process within the state's borders provided: (1) the defendant has received proper notice of the suit such as will afford an opportunity to present its defense, and (2) the state has a legitimate governmental interest in the dispute. Where assertions of jurisdiction are thought to be inconvenient or unduly burdensome, those concerns may be addressed through the doctrines of venue or forum non conveniens. There would no longer be a bifurcated analysis of contacts and reasonableness; the proposed revision entails a unified inquiry into the presence of a legitimate state interest, which in and of itself justifies jurisdiction and renders jurisdiction "reasonable," in the sense comprehended by the Due Process Clause in that it is nonarbitrary.

Note that this proposal applies only to cases where the defendant has not consented to jurisdiction. The proposal is so limited because in consent situations the defendant has voluntarily submitted to the authority of the state's courts and has thus waived any jurisdictional due process rights he or she might have asserted.[145] The jurisdictional analysis proposed is only necessary where the state attempts a *coercive* exercise of jurisdiction, which is one involving a defendant who has not voluntarily submitted to the state's authority.

It should also be noted that the revised analysis concerns itself only with cases where the defendant is not served with process within the forum state. That states have jurisdiction over those served with process within their borders is a longstanding principle of American

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[145] Voluntary submission to the jurisdiction of a court can occur in any number of ways, including via contractual consent, as a result of a statutory obligation to consent in exchange for the right to obtain a license to do business within a state, or through a voluntary appearance. Also included in this group would be nonresident plaintiffs, who have consented to a court's jurisdiction by selecting it as the forum for their suit.

law. As Justice Scalia stated the point in *Burnham v Superior Court*,[146] "Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State."[147] Limiting the proposed analysis to cases where there is no in-state service is a result of the domestic omnipotence principle, which renders any person or property located within a state's borders subject to an exercise of authority by the state if found and served or seized therein. Further, due process restricts only arbitrary assertions of state court jurisdiction. There is nothing arbitrary about a state's assertion of jurisdiction over a person found within its borders because such jurisdiction is the foundation of state jurisdictional authority by which all other assertions of jurisdiction have come to be measured.[148] Certainly, "tag" jurisdiction—as jurisdiction based on in-state service has come to be known—could be viewed a priori as random or arbitrary, were it presented for the first time today as a basis of jurisdiction.[149] However, because in-state service was an acceptable basis for jurisdiction during the period in which the constitutional protections of due process were crafted,[150] it is not possible—absent an evolutionary view of constitutional understandings—to hold that the conception of due process espoused by the progenitors of these protections did not embrace the allowance of in-state service as a legitimate means of founding adjudicatory jurisdiction.

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146 495 US 604 (1990).

147 Id at 610.

148 The *Burnham* Court stated:

> [J]urisdiction 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." That standard was developed by *analogy* to "physical presence," and it would be perverse to say it could now be turned against that touchstone of jurisdiction.

Id at 619.

149 See, for example, Paul D. Carrington and James A. Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich L Rev 227, 227 (1967) ("Committed as we are to the idea that judicial power should be exercised in a manner that is responsive to the common welfare, we could not suffer the limits of power to be determined irrationally by the random success of process servers."); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L J 289, 290 (1956) ("The rule [of transient jurisdiction] may result in trying the suit in a State in which no part of the operative facts occurred and in which neither of the parties lives.") (internal quotation marks omitted).

150 See *Burnham*, 495 US at 610–11 ("The view developed early that each State had the power to hale before its courts any individual . . . within its borders, . . . by properly serving him with process, . . . no matter how fleeting his visit."), citing *Potter v Allin*, 2 Root 63, 67 (Conn 1793), and *Barrell v Benjamin*, 15 Mass 354 (1819). But see Ehrenzweig, 65 Yale L J at 293–96 (cited in note 149) (questioning the existence of solid early common law authority in support of a longstanding rule of transient jurisdiction).

Contrary to the concerns motivating other commentators' proposals for reform, it is not out of any sense that jurisdictional doctrine is no longer capable of resolving jurisdictional questions in modern times that I offer this revised analysis.[151] As I have argued elsewhere, the doctrine in its current state is perfectly capable of being applied to disputes arising out of contacts mediated through the Internet.[152] So, it is not that the doctrine has aged poorly and is in need of a modern successor; rather, the problem is that the law of personal jurisdiction—as concerned primarily with defendant intentions, expectations, and experiences of inconvenience—is fundamentally flawed. The confusion and unpredictability it has sown is not a product of societal or technological progress but rather flows from its misperceived foundations and the resultant doctrinal incoherence.[153]

2. State interest defined.

How would state interest analysis work? Under the proposed analysis, states would be solely responsible for articulating the circumstances under which their interests would be sufficiently implicated to support an assertion of jurisdiction. This would be done through the states' long-arm statutes, many of which currently set forth in detail the situations warranting state court jurisdiction.[154] Common among long-arm statutes are assertions of jurisdiction where liability arises from any of the following situations:

a) Domicile or residency. The defendant is a natural person domiciled within the state, a domestic business entity, or a person or entity engaged in substantial activities within the state.

b) Transacting business. The cause of action arises out of the defendant's transaction of business in the state.

c) Contracts. The cause of action arises out of the defendant's contracting to supply goods or services within the state.

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151 See, for example, Condlin, 54 Cath U L Rev at 130–31 (cited in note 99) ("Internet-based forum contacts (through websites, chat rooms, newsgroups, and the like) do[] not fit easily into the doctrinal categories inherited from the *International Shoe-Burger King* line of decisions, and provide[ ] the Court with both a reason and an opportunity to reconstitute the 'minimum contacts' standard.").

152 See generally A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U Ill L Rev 71.

153 See Borchers, 40 Am J Comp L at 122 (cited in note 98) ("The Supreme Court has evinced great uncertainty as to, and a great preoccupation with, the theoretical underpinnings of its doctrine, while steering an erratic course that confuses courts, counsel, academicians, and often the Justices as well.").

154 Many states do not bother enumerating the circumstances under which their courts may exercise jurisdiction; rather, they simply indicate that jurisdiction may be exercised to the limit permitted by the U.S. Constitution. See, for example, Ala St R Civ P 4.2(b) (2004); Cal Civ Proc Code § 410.10 (2004); RI Gen Laws § 9-5-33 (2004); Wyo Stat § 5-1-107 (2005).

d) Torts. The cause of action arises out of the defendant's causing of tortious injury within the state by an act or omission within the state; or the cause of action arises out of the defendant's causing of tortious injury within the state by an act or omission within the state where the defendant regularly does business or solicits business within the state.

e) Property ownership. The cause of action arises out of the defendant's having an interest in, using or possessing real property within the state.

f) Marriage and parentage. The cause of action arises out of the defendant's enjoyment of a marital or parent-child relationship within the state, provided a party to the relationship still resides within the state.[155]

The circumstances described above can fairly be said to reflect situations in which a state would have a sufficient interest in a dispute to authorize it to exercise jurisdiction. However, it is not my purpose here to enumerate a definitive list of such circumstances. The point is that states, through their long-arm statutes, have demonstrated the capacity to articulate their interests in a manner that comports with the limitations on their sovereign authority and could continue to do so under the revised analysis herein proposed.

It is possible that states may imagine other situations in which their interests would be implicated. For example, a state might feel it has an interest in the subject matter of a dispute when one of its residents is the plaintiff.[156] Or, it is possible that a state may feel that it has an interest whenever a defendant is alleged to have caused tortious injury within the state from without, regardless of whether the defendant regularly does business within the state. The measuring rod for determining whether such claims of state interest would be legitimate would be the limits of the state's police power, given that the basis for a state's authority to adjudicate is derivative of the police power that it enjoys domestically. That is, when faced with a given assertion of a state's interest, one should ask whether the interest the state is seeking to protect is properly viewed as falling within that state's domestic

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155 For statutes that list all of these factors in some form, see, for example, Colo Rev Stat Ann § 13-1-124 (West 2005); DC Code § 13-423 (2003); Fla Stat Ann § 48.193 (West 2003); 42 Pa Cons Stat Ann § 5322 (2004); Wis Stat § 801.05 (2005).

156 This is the jurisdictional rule in force within France:

> A foreigner, even if not residing in France, may be cited before French courts for the execution of obligations contracted by him in France with a Frenchman; he may be brought before the courts of France for obligations by him contracted in foreign countries towards Frenchmen.

Code Civile art 14 (1977).

police power. A state's police power allows it to provide protection and regulation in the areas of community health, morals, safety, security, and public welfare, and also allows a state to provide for general tranquility and order within the community it controls.[157]

Applying this standard to the example of a state asserting an interest in any case where one of its residents is a plaintiff, that fact alone would be insufficient to fall within the police power of a state. If a citizen of Virginia travels to California and is assaulted by a Californian there, Virginia has no legitimate interest in resolving the dispute because the alleged assault did not violate the sphere of domestic protection that Virginia has a right to provide within its borders.[158] A state's police power exists only within its borders; just as Virginia has no ability to create tort law that persons in California must respect,[159] it has no authority to force Californians who violate California tort law in California to submit to the jurisdiction of Virginia simply because they have assaulted a Virginian. Virginia cannot protect Virginians beyond its borders;[160] travelers leaving the state must rely on the protection of the states they visit, or that of the federal government. Thus, those not alleged to have acted, in some way, to violate the tranquility and order provided by a state *domestically* cannot be said to fall within that state's sphere of authority. On the other hand, where

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157 See *Kovacs v Cooper*, 336 US 77, 83 (1949) ("The police power . . . comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."); *Panhandle Eastern Pipe Line Co v State Highway Commission*, 294 US 613, 622 (1935) ("The police power of a State . . . is the governmental power of self protection, and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury.") (internal citation omitted).

158 See, for example, *Bigelow v Virginia*, 421 US 809, 824 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.").

159 See *Huntington v Attrill*, 146 US 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them.").

160 Interest analysis in the context of choice-of-law determinations has not proven to be as limited. There are cases holding that a state does have a sufficient interest in a dispute to justify applying its law on the basis of the plaintiff's status as a citizen of that state. See, for example, *Phillips v General Motors*, 995 P2d 1002, 1014–15 (Mont 2000) (applying Montana law on the basis of interest analysis principles embodied in § 6 of the Restatement (Second) of Conflict of Laws to a negligence and strict liability claim brought by Montana citizens against a Michigan defendant based on an accident occurring in Kansas). The difference is warranted because states' interest in having actions tried in their courts is different than their interest in having their laws apply. States enact laws to further particular substantive policies, which in turn are furthered when those laws are applied to disputes where those policy interests are implicated. However, a state's interest in providing a forum for adjudicating a dispute is not as closely connected with the furtherance of substantive state policies because that is ultimately achieved more directly via the application of its laws (which will not necessarily correspond to the state's exercise of jurisdiction). Given the relatively weaker interest a state has in adjudicating a case versus supplying the applicable law, a state's interest in adjudicating a case solely based upon the plaintiff's status as a citizen of that state is correspondingly diminished.

wrongdoing is visited by nonresidents from without, directly against state citizens reposed within the state, the domestic tranquility and order established by that state has been breached and it may rightly call the alleged wrongdoers to account in its courts. In sum, although Virginia in our example may feel it has an interest in this dispute because the victim is a Virginian, its interest is not *legitimate* because the California encounter falls outside its domestic sphere of authority.

3. The role of venue and forum non conveniens.

Although inconvenience is banished from jurisdictional doctrine and demoted to a subconstitutional, nonjurisdictional concern under my revised analysis, it is not banished from the analysis altogether. Rather, as earlier discussed, after proper jurisdiction is established in a forum based on notice, hearing, and the presence of a legitimate state interest, the defendant may then challenge the propriety of the forum under the venue rules of that system. The federal venue statute provides that venue is proper in the district where any defendant resides if all parties reside in the same state, where a substantial portion of the act or omission giving rise to the action occurred, or provided neither of those tests supply a proper venue, where any defendant may be found or subjected to personal jurisdiction.[161] The venue provisions of most states similarly provide for venue where one of the defendants resides or where the claim arose.[162] Of course, on the state level, a defendant who finds it inconvenient to defend in a particular state at all will find little solace in being able to select a particular venue within that state. Nevertheless, if venue is proper under the relevant venue statute applicable in the forum court, then the defendant's convenience concerns have been fully addressed, provided there are no good arguments for a transfer of venue or a forum non conveniens dismissal.

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161 28 USC § 1391 (2000).

162 See, for example, Ala Code § 6-3-2 to -11 (1993 & Supp 2004); Cal Civ Proc Code §§ 392–395.5 (West 2004 & Supp 2005); Fla Stat Ann § 47.011–47.081 (West 1994 & Supp 2005); 735 ILCS Ann 5/2-101 to -103 (West 1992 & Supp 1992); La Code Civ Proc Ann art 42-86 (West 1999 & Supp 2005); Mich Comp Laws Ann § 600.1605–600.1641 (West 1996 & Supp 2005); Neb Rev Stat § 25-401 to -417 (Reissue 1995); NY Civ Prac L and Rules §§ 503–09 (McKinney 1976 & Supp 2005); RI Gen Laws § 9-4-2 to -5 (1997); Tex Civ Prac and Remedies Code Ann § 15.002 (West 2002); Va Code Ann § 8.01-261 to -262 (Michie 2000 & Supp 2005); Wash Rev Code Ann § 4.12.010–4.12.025 (West 2005). Attribution is due to Professor Mary Garvey Algero who compiled these state venue provisions in her article, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 Neb L Rev 79, 83 n 12 (1999). A nice review of state venue provisions also may be found in Gregory B. Westfall, *The Nature of this Debate: A Look at the Texas Foreign Corporation Venue Rule and a Method for Analyzing the Premises and Promises of Tort Reform*, 26 Tex Tech L Rev 903, 913–21 (1995) (dividing state venue provisions into "broad," "restrictive," and "open for court interpretation" categories).

In the federal system, venue transfers are appropriate where "the convenience of the parties and witnesses, in the interest of justice" suggests that an alternative venue would be a better place to hear the case, and that venue is another district within the federal system.[163] Forum non conveniens dismissals are appropriate where the more appropriate venue lies beyond the forum's judicial system. The Supreme Court identified the key considerations for determining whether such dismissals are appropriate in *Gulf Oil Corp v Gilbert*:[164]

> Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the [enforceability] of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
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> Factors of public interest also have [a] place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only.[165]

If a defendant finds himself in a dramatically inconvenient forum that asserts an interest in the dispute, the defendant may, if the facts warrant, argue that a court of another state would be more appropriate because, for example, all of the witnesses and evidence are located there. A good example of this approach is found in the recent case of

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163 28 USC § 1404(a) (2000). A venue transfer is also appropriate if the case is brought in an improper venue and the court deems it to be "in the interest of justice" to transfer the case to another district "in which it could have been brought" rather than dismiss it. 28 USC § 1406(a) (2000).

164 330 US 501 (1947) (upholding a forum non conveniens dismissal).

165 Id at 508–09.

Zeta-Jones v Spice House,[166] where the defendant sought and was granted a venue transfer from California federal court to federal court in his home state of Nevada because of his medical condition and the associated inconvenience of traveling to California, and because most of the evidence and witnesses were found to be located in Nevada.[167] Thus, if litigating in the plaintiff's selected forum is truly burdensome for a defendant, to a degree that the defendant is severely burdened in presenting his defense, then the ability to transfer a case to another venue, where appropriate, should yield relief. As should the proper application of the principles of forum non conveniens, as articulated by the Court in *Gulf Oil*.[168]

4. In rem and quasi in rem jurisdiction.

As suggested above, a state has a clear interest in resolving disputes involving real property located within its borders, regardless of the residency status of the property owner. In rem jurisdiction, as currently understood, would thus not be upset. Quasi in rem jurisdiction, however, would suffer the fate already given it in *Shaffer v Heitner*.[169] That is, the *Shaffer* Court indicated that assertions of quasi in rem jurisdiction would have to be evaluated with reference to the same principles of *International Shoe* that were used to evaluate other assertions of personal jurisdiction.[170] Under the proposed state interest analysis, the same would be true: jurisdiction over a dispute involving a nonresident defendant based on unrelated in-state property would have to be evaluated with reference to whether the interests of the forum state were implicated. Generally speaking, the actions of a nonresident unrelated to in-state property and having no domestic impact are unlikely to implicate the interests of the state where the property is located. Only where the dispute somehow concerns the property—either directly or indirectly—will the state be able to assert an interest

166 372 F Supp 2d 568 (CD Cal 2005).

167 Id at 576 (noting also the ease with which the plaintiff could travel to Nevada).

168 Professors Abrams and Dimond suggest that "Congress could require states to grant motions for forum non conveniens dismissals when certain convenience standards are not satisfied or are better satisfied by other available forums." Abrams and Dimond, 69 Minn L Rev at 102 (cited in note 9). Although not opposed to congressionally imposed standards, the revised analysis proposed in this Article does not require congressional intervention in this area but rather leaves defendants to the various versions of the forum non conveniens doctrine found within the several states.

169 433 US 186, 209 (1978) ("Thus, although the presence of the defendant's property in a State might suggest the existence of other ties . . . the presence of property alone would not support the State's jurisdiction.").

170 *Shaffer*, 433 US at 212 ("[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.").

in the dispute on the basis of the property. Where the property is not relevant to the dispute but serves as the only basis for jurisdiction, quasi in rem jurisdiction in that sense will not be recognized given the patent lack of state interest in the matter.

5. General and specific jurisdiction.

State interest analysis does not upset the distinction between general and specific jurisdiction first highlighted by Professors von Mehren and Trautman and subsequently embraced by the Court. However, under the proposed analysis, general jurisdiction is limited to cases involving defendants that reside within the state. Such a limitation is appropriate because a state can only exercise complete sovereignty over those properly classed as members of that state's political community;[171] nonresidents, as nonmembers of the community, are only fairly reachable through their actions that touch and concern the state so as to implicate legitimate state interests. Even if a nonresident is extremely active within a state, that state has no interest in a dispute involving that nonresident based on activity occurring beyond the state's boundaries unless it is alleged that those external acts had harmful consequences domestically. When there are only external actions and external consequences, no state can legitimately exercise sovereignty over absentee, nonconsenting, nonresident defendants no matter how active they may be within the state.

A fair question, then, is under what circumstances may a defendant be classed as a resident of the state, such that general jurisdiction will be available? This is a question to be posed of corporate defendants, for the matter of the state residency of individuals has been conclusively resolved as their state of domicile, which provides the only basis for exercising general jurisdiction over real persons beyond in-state service.[172] Corporate defendants can fairly be said to be residents—at a minimum—of those states under whose laws they are organized and those states where they have their corporate headquarters. Beyond that, it may be possible for a state to define residency with reference to the existence of extensive physical operations within the state. But that is a standard that cannot be clearly defined; how extensive would a company's physical operations have to be before a state could legitimately consider that entity to be resident within the

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171 See Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 Duke L J 1, 10 (1991) ("General jurisdiction is primarily based upon membership in the local community.").

172 See *Burnham*, 495 US at 610 n 1 ("It may be that whatever special rule exists permitting 'continuous and systematic' contacts . . . to support jurisdiction with respect to matters unrelated to activity in the forum applies *only* to corporations.") (internal citation omitted).

state? Certainly, where *all* of the entity's operations or employees are within the state—even though its headquarters and state of incorporation may be elsewhere—that entity is truly resident within the state because the state would be the entity's principal place of business. As one travels down the scale to lesser degrees of operation, however, the case for residency becomes more difficult to make. I submit that facts that depart from the archetypical case just described would not warrant a declaration of state residency because the presence of operations that fall short of full-scale corporate activities no longer reflects the level of community membership that justifies the state's jurisdiction over any and all disputes involving that defendant. In other words, once operations and corporate activities are sited elsewhere in addition to the state in question, that state no longer has a legitimate interest in disputes arising out of those external activities that have no domestic impact.

This position is consistent with Supreme Court precedent regarding general jurisdiction, which reveals only a single case where general jurisdiction has been deemed appropriate: *Perkins v Benguet Consolidated Mining Co*.[173] As the Court later explained regarding *Perkins*:

> [T]he president and general manager of a Philippine mining corporation [Benguet] maintained an office in Ohio from which he conducted activities on behalf of the company. He kept company files and held directors' meetings in the office, carried on correspondence relating to the business, distributed salary checks drawn on two active Ohio bank accounts, engaged an Ohio bank to act as transfer agent, and supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines. In short, the foreign corporation, through its president, "ha[d] been carrying on in Ohio a continuous and systematic, but limited, part of its general business," and the exercise of general jurisdiction over the Philippine corporation by an Ohio court was "reasonable and just."[174]

The only other opportunity for the Court to consider the propriety of general jurisdiction came in *Helicopteros Nacionales de Colombia, SA v Hall*,[175] which revealed a Court unwilling to extend the notion of general jurisdiction beyond the circumstances recognized as

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173 342 US 437, 447–48 (1952) (finding general jurisdiction over a Philippine mining company with significant operations in Ohio).

174 *Helicopteros Nacionales de Colombia, SA v Hall*, 466 US 408, 415 (1984).

175 466 US 408 (1984).

appropriate in *Perkins*.[176] Under the proposed state interest analysis the view is the same: only state residency or its corporate equivalent—being organized under the laws of the state or having its corporate headquarters or principal place of business within the state—gives states the authority to exercise jurisdiction over all disputes involving such defendants because state sovereignty over these defendants flows from the state's domestic omnipotence. Disputes involving nonresidents will need a connection with valid state interests to fall within the ambit of the state's domestic authority, a limitation that currently characterizes specific jurisdiction.

6. Internet jurisdiction.

As is the case with personal jurisdiction doctrine in its current form, there will be no need for a distinct analysis to address assertions of jurisdiction in disputes involving activity mediated through the Internet if the revised analysis is adopted.[177] Whether a state has a legitimate interest in a dispute is a question that transcends the medium through which the challenged conduct occurs. For example, out-of-state defamation of a state resident within that state implicates a state's interest in protecting its citizens whether the publication of the defamation occurs via conventional media[178] or via the Internet.[179] This is not to say that the current approach to Internet jurisdiction—based largely upon *Zippo Manufacturing Co v Zippo Dot Com, Inc*[180]—will not be altered. To the contrary, the revised analysis proposed herein will result in a substantial alteration of the current approach to Internet jurisdiction, which focuses on the interactivity of websites and the targeting of Internet activity while giving less weight to state interests.[181] It will thus often be the case that the proposed state interest analysis

176 See id at 415–16 ("We thus must explore the nature of Helicol's contacts with the State of Texas to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*. We hold that they do not.").

177 See Spencer, 2006 U Ill L Rev at 75 (cited in note 152) (arguing that traditional jurisdictional principles may readily be applied to analyze Internet jurisdiction fact patterns).

178 See, for example, *Calder*, 465 US 783 (finding jurisdiction over a national printed tabloid).

179 See, for example, *Young v New Haven Advocate*, 315 F3d 256 (4th Cir 2002) (finding no jurisdiction over a local newspaper that made its articles available on the Internet).

180 952 F Supp 1119 (WD Pa 1997) (holding that a California company was subject to personal jurisdiction in a Pennsylvania forum when it intended to engage in business in the state by its use of the Internet and succeeded in obtaining Pennsylvania resident subscribers). See, for example, *ALS Scan, Inc v Digital Service Consultants, Inc*, 293 F3d 707, 714 (4th Cir 2002) (indicating that the court was "adopting and adapting the *Zippo* model").

181 See, for example, *ALS Scan*, 293 F3d at 714 ("[S]pecific jurisdiction in the Internet context may be based only on an out-of-state person's Internet activity directed at [a state] and causing injury that gives rise to a potential claim cognizable in [the state].").

will yield results that diverge from those yielded by the current *Zippo*-inspired approaches.[182]

B. The Relationship with Choice-of-Law Analysis

The affinity between personal jurisdiction analysis and choice-of-law analysis—which gives great consideration to a state's interest in having its laws applied to a dispute—is one that the Supreme Court unfortunately has never endorsed.[183] The Court has addressed the relationship between choice-of-law analysis and jurisdictional analysis in the past but has always emphasized the distinct nature of the two.[184] However, there has been some sentiment on the Court acknowledging a close relationship between the two inquiries. Justice Black remarked in dissent in *Hanson v Denckla*[185] that "the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations."[186] Justice Brennan went so far as to suggest as follows: "At the minimum, the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy."[187] Citing these views approvingly, Justice Brennan most recently remarked, "[T]oday there is an interaction among rules governing jurisdiction, forum non conveniens, and choice of law."[188] Thus, although state interest analysis for jurisdictional

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182 For example, state interest analysis would yield a different result in *Young*, 315 F3d 256, where the *Zippo*-inspired approach denied jurisdiction over an out-of-state newspaper alleged to have published defamatory information about a forum resident on the Internet. Under state interest analysis, the result would be no different than that in *Calder*, 465 US 783, or *Keeton*, 465 US 770.

183 See Weintraub, 63 Or L Rev at 525 (cited in note 58) ("Some of the most unfortunate statements in the jurisdictional decisions of the Supreme Court are those denying a relationship between jurisdiction and choice of law.").

184 See, for example, 436 US 84, 98 (1978) ("[T]he fact that California may be the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant.").

185 357 US 235, 251 (1958).

186 Id at 258 (Black dissenting).

187 *Shaffer*, 433 US at 225 (Brennan concurring in part and dissenting in part). See also id at 225–26:

> [W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction.

188 *Burnham*, 495 US at 634–35 n 9 (Brennan concurring in judgment) (emphasis omitted), citing *Ferens v John Deere Co*, 494 US 516, 530–31 (1990), *Shaffer*, 433 US at 224–26 (Brennan concurring in part and dissenting in part), and *Hanson*, 357 US at 256 (Black dissenting).

questions represents a departure from the Supreme Court's current position, the alignment with choice-of-law analysis does grow out of a modicum of Court sentiment supporting such a link. Such sentiment could form the foundation for a future Court move toward the doctrine herein proposed.

Although the Court has consistently rejected the relevance of choice-of-law analysis to determinations of personal jurisdiction, that position will inevitably have to be reconsidered. A closer affinity between choice-of-law analysis and the law of jurisdiction is desirable because significant differences between a state's authority to enact legislation applicable to a dispute and its authority to adjudicate that dispute make little sense.[189] For a state to be able to dictate, through its laws, the substantive outcome of a suit suggests that the state has an interest in the matter sufficient to permit its laws to govern rather than those of another state. On what basis then can a jurisdictional doctrine dictate that this same state is not empowered to adjudicate the very dispute to which its law applies? Given the subconstitutional status of convenience concerns, provided the defendant's due process right to notice is respected, no other due process protections will prevent a state from exercising its sovereign authority to provide a forum for resolving disputes that implicate its interests. Thus, where the state is sufficiently interested in a dispute to have its law govern, so too will it typically have an interest sufficient to support jurisdiction.

However, such will not always be the case. It is possible that a state may have an interest in an isolated issue among many, such that its law will apply only to that issue. But when the dispute is viewed as a whole, the state's interest may become diminutive and insufficient to prevent an assertion of jurisdiction from being arbitrary. The point here is that it is too facile to simply suggest that personal jurisdiction analysis should become choice-of-law analysis and the results of one will coincide with those of the other. To the contrary, the analyses, although similar, must remain distinct so that proper results can be de-

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[189] One commentator argued:

> From the defendant's perspective, the differing treatment of contacts in the jurisdiction and choice-of-law cases turns things on their head. . . .
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> . . . Thus from the defendant's perspective, it seems irrational to say that due process requires minimum contacts . . . merely to hale him into the forum's court while allowing more tenuous contacts to upset the very outcome of the case.

James Martin, *Personal Jurisdiction and Choice of Law*, 78 Mich L Rev 872, 879–80 (1980). See Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 NYU L Rev 33, 88 (1978) ("To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether.").

rived from each. Thus, although under the revised analysis the forum whose law will apply to issues within the dispute will generally also be a forum sufficiently interested in the dispute to assert jurisdiction, the state providing the applicable law need not inevitably be the forum of appropriate jurisdiction.

C. Federal Supervision of State Court Jurisdiction

Would the Supreme Court have jurisdiction to review a state's determination that its own interest in a dispute was sufficient to grant it adjudicatory jurisdiction? The requirement that a state have a legitimate governmental interest in the dispute before it may assert jurisdiction derives not only from limitations on state sovereignty, but also from due process—both constitutional concerns. The exercise of jurisdiction by a state with no interest in a dispute involving a nonconsenting, nonresident defendant would be a violation of the defendant's due process rights because a judgment rendered by a disinterested and unrelated sovereign would constitute arbitrary state action. Thus, as states continue to define the scope of their interests in adjudicating cases via long-arm statutes, under the proposed analysis the Supreme Court would review assertions of jurisdiction primarily to evaluate whether the purported state interests are legitimate enough to ground a nonarbitrary assertion of state power, without weighing the significance of the interest itself. Similarly, the Supreme Court's authority to evaluate the legitimacy of state interests vis-à-vis state sovereignty would also derive from its authority as the ultimate interpreter of the Constitution, given that the extent of state sovereign authority is a matter of constitutional interpretation. In other words, whether a state action falls within that state's authority is determined by how the Constitution is viewed to have diminished state sovereignty from its preconstitutional levels—an interpretive question the Supreme Court is empowered to resolve.

How would the Court evaluate the legitimacy of the asserted interest? As already mentioned, legitimacy is judged by reference to the scope of states' domestic police power; claims of interest in areas where the domestic police power does not extend could not be judged to be legitimate assertions of state authority. There already exists a rich and extensive body of jurisprudence regarding legitimate state interests and the scope of state police power.[190] The Court could draw

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[190] See, for example, *Granholm v Heald*, 125 S Ct 1885, 1899 (2005) (regulation of liquor); *Engine Manufacturers Association v South Coast Air Quality Management District*, 541 US 246, 249 (2004) (air quality); *Virginia v Maryland*, 540 US 56, 63, 76–77 (2003) (use of navigable waters); *City of Columbus v Ours Garage and Wrecker Service, Inc*, 536 US 424, 439–40 (2002)

upon this resource for guidance in applying the proposed state interest analysis to assertions of jurisdiction.

In addition to policing state declarations of interest based on the Due Process Clause and principles of state sovereign authority, the Court could refer to the Commerce Clause[191] as a check on state overreaching. For example, the Court has held that if a state attempts by statute to subject foreign corporations to general jurisdiction based solely on the presence of an in-state registered agent appointed as a condition of conducting business, jurisdiction over disputes unrelated to the business conducted by the corporation within the state "imposes upon interstate commerce a serious and unreasonable burden which renders the statute obnoxious to the commerce clause."[192] Although implicating the Commerce Clause, such assertions of jurisdiction more fundamentally appear to violate the proper limits of a state's sovereign authority, because a state has no legitimate interest in a dispute between nonresidents over injury inflicted and sustained elsewhere, unless they have consented to jurisdiction in the state. Thus, although Commerce Clause considerations could inform the Court in its effort to constrain unwarranted assertions of state interest, it seems that it should often be the case that reference to the proper limits of a state's sovereign authority alone will permit a determination of the legitimacy of a particular assertion of jurisdiction.

Beyond the influence the Court's oversight would have in chastening outrageous claims of state interests to support jurisdiction, there are several additional constraints against such overreaching that would exist. First, although state legislatures will be responsible for determining, through their long-arm statutes, the range of disputes in which they think state interests will be implicated, state courts will be responsible for interpreting those statutes. These courts may, in a given case, decide that a particular assertion of jurisdiction is improper because the state does not actually have a sufficient legitimate interest in the dispute. Second, because state judgments may require recognition

(safety on municipal streets and roads); *Watchtower Bible and Tract Society of New York, Inc v Village of Stratton*, 536 US 150, 164–65 (2002) (prevention of fraud, protection of the privacy of residents, and the prevention of crime); *Lorillard Tobacco Co v Reilly*, 533 US 525, 541–42, (2001) (advertising; preventing underage tobacco use); id at 591 (Stevens concurring in part, concurring in the judgment in part, and dissenting in part) (health and safety of minors); *Egelhoff v Egelhoff*, 532 US 141, 147–50 (2001) (family law); *City of Erie v Pap's A.M.*, 529 US 277, 296–99 (2000) (public health and safety); *New Jersey v New York*, 523 US 767, 771–80 (1998) (historic preservation, land use, and zoning); *Medtronic, Inc v Lohr*, 518 US 470, 475 (1996) ("protection of lives, limbs, health, comfort, and quiet of all persons"); *Holt Civic Club v City of Tuscaloosa*, 439 US 60, 85 (1978) (businesses).

191 US Const Art I, § 8, cl 3.

192 *Davis v Farmers Co-operative Equity Co*, 262 US 312, 315 (1923).

in other states,[193] states rendering the judgments are likely to develop statements of their own interest that are more likely to be recognized by other states,[194] given the ability of states to scrutinize the jurisdictional foundation of foreign default judgments before giving them full faith and credit.[195] In so doing, the state will be creating more reasonable rules that will also have application for judgments not requiring enforcement elsewhere, thus giving defendants in all cases the benefit of more reasonable, chastened long-arm statutes. Finally, if the possibility of being denied foreign recognition is insufficient to lead a state to develop reasonable rules concerning when their interests are implicated, then the state's unreasonable jurisdictional regime will quickly render it terra non grata to the rest of the world. That is, as businesses and individuals learn that the state does not restrain itself from entering and enforcing judgments against nonresidents in circumstances where it lacks a legitimate interest, they will decide that it is not worth having property, offices, or other assets located in that state.[196] Such a result would not be good for the state's economy, and thus it would behoove the state to maintain reasonable jurisdictional rules that conform with consensus views regarding state interests.

V. REVISITING THE COURT'S SEMINAL PERSONAL JURISDICTION CASES

Under state interest analysis, many of the Court's seminal personal jurisdiction cases would be decided differently. Justice Black provides us with some guidance for how *Hanson* would be resolved under state interest analysis. Eschewing concern over the defendant's

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193 See von Mehren and Trautman, 79 Harv L Rev at 1127 (cited in note 6) ("[A]djudicatory action of one jurisdiction, if it is to be fully effective, will often require the cooperation of other jurisdictions.").

194 As von Mehren and Trautman stated the point,

> [A] judgment can, as a practical matter, often be made fully, or at least partially, effective without relying upon its recognition elsewhere. Nonetheless, in establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate, and convenient. To a degree it must take into account the views of other communities concerned. Conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal, and economic reprisals.

Id at 1126–27.

195 See *Underwriters Natl Assurance Co v N Carolina Life & Accident & Health Ins Guar Assn*, 455 US 691, 705 (1982) ("[B]efore a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree. If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given."), citing *Nevada v Hall*, 440 US 410, 421 (1979).

196 This is an unlikely scenario, because truly outrageous assertions of state interest would be checked by Supreme Court oversight.

contacts with the state, he focused instead in the interests of the state in the subject matter of the dispute:

> It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice." . . . So far as the nonresident defendants here are concerned I can see nothing which approaches that degree of unfairness.
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> . . .
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> [W]e are dealing with litigation arising from a transaction that had an abundance of close and substantial connections with the State of Florida.[197]

Although reflective of the Court's inappropriate regard of convenience as a constitutional concern, Justice Black's core analysis of the nature of the relationship between the state and the subject matter of the dispute—the decedent's (Mrs. Donner) power to appoint beneficiaries of the remainder interest in the trust she established—reflects the key analysis that should have determined the outcome in this case. Mrs. Donner was a Florida resident, as were the principal potential beneficiaries of the trust, and the appointment at issue was made in Florida.[198] Florida thus had a clear interest in resolving whether the appointment was valid; this interest was legitimate because the final disposition of a Florida decedent's estate falls within Florida's domestic sphere of protection comprehended by its police power. The Court thus should have recognized that Florida's state sovereign authority authorized it to exercise jurisdiction over the dispute.[199]

Shaffer, which involved a shareholder derivative suit against corporate officers and directors, also would be resolved differently under a state interest analysis. A state has a clear interest in regulating the conduct of officers and directors of corporations organized under its

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197 *Hanson*, 357 US at 258–59, 260 (Black dissenting).

198 See id at 259 (Black dissenting).

199 Although Delaware would also have clear interests in resolving a dispute concerning appointments made under a trust established in Delaware, Florida's prior assertion of jurisdiction, once recognized as proper, could enable the Florida court to enjoin parties from initiating an identical action in Delaware. If such an injunction were not upheld, and two concurrent actions arose, the first action to result in a judgment would have a res judicata binding effect on the remaining proceeding. Alternatively, the Delaware court might opt to abstain from hearing the case or continue the action pending its resolution in the Florida court.

laws. This interest is legitimate because domestic corporations and their principals have not only agreed to be subject to the applicable state laws in exchange for the privilege of incorporation, but corporate malfeasance by principals of a Delaware corporation injures a Delaware resident, the corporation. Thus, in this suit by a shareholder against the officers and directors of a Delaware corporation for violation of fiduciary duties owed to that corporation under Delaware law, Delaware's interests in enforcing these duties are clear. Having a clear interest in a dispute over the conduct of officers and directors of a Delaware corporation, the defendants would have been in no position to challenge the assertion of jurisdiction over them as arbitrary; jurisdiction would thus be upheld under state interest analysis.

The outcome of *Kulko v Superior Court*,[200] decided shortly after *Shaffer*, also changes once state interest analysis is applied. In that case, the divorced mother of two children brought an action in California—where the mother and children resided—against the children's father—who resided in New York—for full custody of the children and an increase in child support.[201] The custodial fate of children who are California residents, as well as the sufficiency of their support, are clearly things with which the State of California is concerned. California has a substantial interest in protecting the welfare of its children, which relates both to who would be the best caretaker for the children and what level of resources are needed to provide for them. Inadequate provision for the children could potentially place the burden of caring for them upon the state, through one of its public assistance programs. Thus, the state's interest in the child custody and support action was strong. The legitimacy of these interests derives from the fact that the nonresident father's support obligations extend to California citizens residing therein; California can legitimately act to enforce the obligations of outsiders to its citizens residing within the state because the breach of those obligations violates the domestic protection that California extends to its residents. Similarly, California may legitimately act to resolve the custody issue by virtue of its domestic authority (indeed responsibility) to provide for the welfare of children residing in the state. Given that California's assertion of jurisdiction under such circumstances could hardly be deemed arbitrary, and given that adequate notice of the action was provided, the New York father's due process rights were fully respected. Because inconvenience has been shown to be a subconstitutional concern, and because the interests of justice or efficiency do not necessarily militate in

200 436 US 84 (1978).

201 Id at 87–88.

favor of having the trial in New York, the right of the California court to hear the case under state interest analysis seems clear.

In *World-Wide Volkswagen Corp v Woodson*,[202] the outcome under a state interest analysis would also be different than the result reached by the Court. The plaintiffs in that case, the Robinson family, purchased a car in New York and were driving it through Oklahoma when they were struck in the rear by another car, which caused a fire that resulted in serious injuries to the plaintiffs.[203] The question in the products liability suit, filed in Oklahoma, was whether jurisdiction was proper over the dealer that sold the plaintiffs the car, Seaway, and the regional distributor, World-Wide Volkswagen, in light of the fact that neither entity did any business in Oklahoma. The Court found that Oklahoma did not have jurisdiction over these defendants because they had not purposefully initiated contacts with Oklahoma: the connection was the result of the "unilateral activity" of the plaintiffs.[204] Under state interest analysis, given that notice was not an issue in this case, the only question would be whether Oklahoma had a legitimate interest in the dispute. Professor Daan Braveman has already aptly analyzed the state interests of Oklahoma in the dispute between the plaintiffs and the New York area defendants as follows:

> Oklahoma undoubtedly had a significant interest in the adjudication of the dispute that resulted from an accident on its highways. Oklahoma had a legitimate interest both in promoting safety on its highways and in protecting the local medical creditors who treated the plaintiffs. Additionally, Oklahoma had an interest in protecting its taxpayers from the burden of providing welfare assistance for the Robinsons, who were "pauperized" by the accident.[205]

Thus, it is clear that the alleged wrong committed by the New York defendants—distributing and selling a dangerously defective product—implicated several strong interests of Oklahoma.[206]

Oklahoma's sovereign authority permitted it legitimately to exercise jurisdiction over this dispute to vindicate these interests because

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202 444 US 286 (1980).

203 Id at 288.

204 Id at 298–99.

205 Braveman, 33 Syracuse L Rev at 537–38 (cited in note 100) (internal citations omitted).

206 As two commentators once observed generically regarding the propriety of state jurisdiction over a products liability dispute involving in-state harm, "[T]he supplier of potentially harmful goods may be viewed as undertaking a special responsibility for the welfare of the consumers which makes it peculiarly inappropriate for him to resist the moral claim of the state when it seeks to assert power over him." Carrington and Martin, 66 Mich L Rev at 232 (cited at note 149).

the alleged wrong breached the order and highway safety provided by Oklahoma and endangered persons traveling on Oklahoma roads. Given these legitimate interests, there would be nothing arbitrary about Oklahoma's exercise of jurisdiction, and thus the defendants' due process rights would not be violated. The only remaining concern of defendants could be that litigation in Oklahoma would be inconvenient; however, such concerns would be unavailing here. First, the New York defendants could not plausibly claim any degree of inconvenience that would warrant depriving Oklahoma of jurisdiction where its interests have been implicated, given the ease with which the defendants could employ local counsel and travel, if necessary, to Oklahoma to participate in the trial. Second and more important, the considerations of convenience that comprise the forum non conveniens analysis weigh in favor of the plaintiffs, not the defendants. With all of the evidence and witnesses surrounding the accident being in Oklahoma, and the evidence regarding alleged design defects not necessarily being located in New York, there is no good argument that the case would be more appropriately tried in New York. In sum, state interest analysis would permit Oklahoma to exercise jurisdiction under the facts of *World-Wide Volkswagen*.

Asahi would be a closer call. Recall that the plaintiff in *Asahi* was the driver of a motorcycle involved in an accident in California who claimed that the accident was caused by a defective tire tube manufactured by Cheng Shen Rubber Industrial Co., Ltd., a Taiwanese company.[207] Cheng Shen filed a cross-complaint against Asahi Metal Industry Co., Ltd., the manufacturer of the tube's valve assembly.[208] The plaintiff settled with Cheng Shen, leaving only Cheng Shen's indemnity action against Asahi Metal.[209] Applying state interest analysis to these facts, on balance, the interest of California in an indemnification dispute between two foreign non-U.S. companies is slight. Although like Oklahoma in *World-Wide Volkswagen*, California had a clear interest in resolving the cause of a fatal accident occurring on roads within its borders, that interest had already been vindicated because the victim of the accident had already been compensated via the settlement agreement. The remaining dispute no longer sought to resolve the cause of the harm visited upon California and those traveling its highways, but rather it sought reimbursement for damages that Cheng Shen paid to the victim based on a prior foreign contractual arrangement. Whether Cheng Shen was entitled to reimbursement had no

207 480 US at 105–06.
208 Id at 106.
209 Id.

bearing on the interest of California in ensuring the safety of vehicles on its roads or on its interest in ensuring that victims are adequately compensated if wronged.[210] Because of the settlement, California's interest in the dispute no longer existed and any assertion of jurisdiction on its part would have been truly arbitrary, violating the due process rights of the foreign defendant, Asahi.

Other seminal personal jurisdiction cases in which state interest analysis would not alter the outcome include *Pennoyer*, *International Shoe*, *Travelers Health*, *Perkins*, *McGee*, *Keeton*, *Calder*, *Burger King*, *Helicopteros Nacionales*, and *Burnham*. In *Pennoyer*, Mitchell sued Neff for $300 in unpaid legal fees, providing notice by publication in the newspaper of the Oregon county where Neff owned land.[211] When Neff failed to appear, Mitchell obtained a default judgment and executed the judgment on the land.[212] Pennoyer subsequently purchased the land in a sheriff's sale, whereupon Neff appeared to challenge the ownership rights of Pennoyer.[213] The result in *Pennoyer* would not change under state interest analysis because the nature of notice given in the original suit by Mitchell against Neff was completely inadequate. As the Court recognized, constructive notice by publication would have been appropriate for an action either preceded by attachment of Neff's land or in an action involving the land itself, an action in rem.[214] However, because Neff's land was not attached and the suit concerned personal rights and obligations rather than the land, the notice given was insufficient.[215]

Had Neff received adequate notice of the action for unpaid legal fees, however, state interest analysis would indicate that Oregon would indeed have had a right to hear Mitchell's case against him. Given that

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210 California's interest in seeing to it that vehicles on its roads are safe and that victims are properly compensated arises out of the fact that the failure to ensure vehicle safety would leave California citizens vulnerable to accidents caused by defective parts in vehicles they purchase in the state, which would not only cost injuries and perhaps lives, but could also tax California's medical response and care resources. California has every right to protect its citizens from exposure to dangerously defective products, and it also has a right to minimize dangerous conditions in order to prevent the needless burdening of its emergency response services.

211 95 US at 717, 719–20.

212 Id at 720.

213 Id at 715–16.

214 The Court explained the reasoning behind this rule as follows:

> The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.

Id at 727.

215 Id ("But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose.").

Neff contracted for services with an Oregon resident—Mitchell—and then allegedly breached that contract, Oregon had an interest in hearing a dispute involving a nonresident alleged to owe a debt to a resident. Oregon has an interest in seeing to it that those who come into the state and make agreements with its citizens uphold those agreements.[216] Thus, Oregon's assertion of jurisdiction to enforce the obligations of a contract between an Oregonian and an outsider could not fairly be classed as arbitrary and would be upheld, assuming proper notice.

This analysis would also obtain for the facts of *Burger King*, which involved a nonresident defendant who had entered into a contract with a Florida corporation and was subsequently being sued in Florida for an alleged breach. Florida had a strong interest—which it had articulated in its long-arm statute[217]—in enforcing contracts between nonresidents and residents and in protecting their residents against alleged breaches by outsiders. Thus, the Court's holding that jurisdiction was appropriate in that case would not be disturbed under the proposed state interest analysis.

The remaining jurisdictional cases mentioned above would be similarly decided under state interest analysis because the Court in each of these cases upheld jurisdiction where significant state interests can be said to have been present, or, in the case of *Helicopteros Nacionales*, denied jurisdiction after correctly determining that the state had an insufficient interest to support general jurisdiction.[218] The state of Washington's clear interest in enforcing the tax obligations of a company operating within its borders would certainly permit that state to exercise jurisdiction in *International Shoe*. In *Perkins*, Ohio had a strong interest in adjudicating all disputes involving Benguet Consolidated because that company had taken up residence within the state, with all of its management activities occurring therein.[219] There would be nothing arbitrary about Ohio's exercise of jurisdiction over this resident corporation because Ohio rightly has sovereign authority over all state residents, both individual and corporate. The pro-

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216 See, for example, Or Rule Civ Pro 4(E) (2003) (indicating that Oregon courts have personal jurisdiction over the defendant in any proceeding that "[a]rises out of a promise, made anywhere to the plaintiff . . . to pay for services to be performed in this state by the plaintiff").

217 *Burger King*, 471 US at 463–64 (noting that "Florida's long-arm statute extends jurisdiction to '[a]ny person, whether or not a citizen or resident of this state,' who, *inter alia*, '[b]reach[es] a contract in this state by failing to perform acts required by the contract to be performed in this state,' so long as the cause of action arises from the alleged contractual breach"), quoting Fla Stat § 48.193(1)(g) (Supp 1984).

218 See Part IV.A.5 for a discussion of general jurisdiction in the context of the proposed state interest analysis.

219 342 US at 445–46.

priety of the results reached in *Travelers Health*,[220] *McGee*,[221] *Keeton*,[222] and *Calder*[223] under state interest analysis have already been explained and need not be repeated here.[224] Finally, the transient jurisdiction upheld in *Burnham* would fare no differently under the proposed analysis because, as explained above,[225] the domestic omnipotence that states continue to enjoy gives them sovereign authority over all persons found within their borders.

From the above review it becomes clear that the Court's current approach to jurisdiction is not yielding the proper result in all cases. To the contrary, the Court has too often rejected assertions of jurisdiction that state interest analysis would have sustained. In each of the cases rejecting jurisdiction, the main culprit was an undue concern either for the convenience of the defendant or for the expectations of the defendant and its intention to subject itself to the authority of the forum. But convenience has no proper place within jurisdictional analysis and, as has been shown, can be dealt with through the doctrines of venue and forum non conveniens. Neither do the expectations of the defendant or its intent to submit to a state's authority bear on jurisdictional analysis because the former concern is wholly a product of whatever law the Court pronounces,[226] and the latter is a remnant of bygone efforts to impute fictive consent relationships between states and defendants to justify assertions of jurisdiction. Although one may voluntarily consent to a state's authority, state sovereign authority does not depend on consent but rather is solely a function of the power of the state. As this brief review shows, once concern with the intentions, expectations, and experiences of inconvenience of the defendants are removed from jurisdictional analysis, the proper considerations of state sovereign authority and protection against arbitrary, illegitimate assertions of jurisdiction result in an expansion of the ju-

220 339 US at 647–48 (upholding jurisdiction based on the fact that "a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the 'state action may have repercussions beyond state lines'").

221 355 US at 223 (noting the forum state's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims").

222 465 US at 777 (finding that "New Hampshire has clearly expressed its interest in protecting such persons [nonresidents] from libel, as well as in safeguarding its populace from falsehoods" and "New Hampshire also has a substantial interest in cooperating with other States, through the 'single publication rule,' to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding").

223 465 US at 789 (citing, as support for its jurisdictional holding, the Restatement (Second) of Conflict of Laws § 37, comment a, which explains, "A state has a natural interest in the effects of an act within its territory even though the act itself was done elsewhere").

224 See text accompanying notes 121–23 (*Travelers Health*), 124–26 (*McGee*), 129–33 (*Calder*), and 134–37 (*Keeton*).

225 See text accompanying notes 147–50.

226 See text accompanying notes 142–44.

risdictional reach of states beyond what the Court currently embraces, but in line with the authority that states actually enjoy under our Constitution.

CONCLUSION

There is indeed a way out of the labyrinth the Court has created through its law of personal jurisdiction, if the Court is willing to take it. By stepping away from the contemporary jurisdictional doctrine of purposefulness and convenience to explore the relevant meanings of due process and state sovereignty, it becomes apparent that due process as convenience, and state sovereignty as contingent on some degree of assent, are mistaken notions that should be discarded. In their stead, due process as notice and as a guard against arbitrariness, and state sovereign authority as omnipotence over all disputes implicating the sovereign interest, create a doctrine substantially more faithful to traditional understandings of those concepts.

Further, adoption of the revised analysis would improve predictability: beyond notice, the sole issue for consideration would be the presence and legitimacy of a state's interest in a dispute. Because the nature and scope of legitimate state interests is a more generic and settled issue than whether, under the facts of a given case, a defendant has manifested the requisite degree of purposefulness, or whether the burden on a defendant would be too great to bear, jurisdictional litigation would likely be less frequently and vigorously pursued under the revised analysis. Indeed, as the Court would, over time, speak to the range of legitimate state interests in the jurisdictional context, there would be vastly greater resolution and guidance for future litigants than current jurisdictional precedent has been able to provide, given the fact-specific nature of the existing analysis. As a result, once certain battles were fought and resolved, jurisdictional litigation would likely subside to a much lower level of activity than is prevalent today.

Moving the doctrine toward state interest analysis is imminently possible[227] because the Court need not expressly overrule its jurisdictional precedents to embrace the proposed revision to personal jurisdiction analysis.[228] Rather, the Court could simply clarify that its previ-

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227 Consider Abrams and Dimond, 69 Minn L Rev at 109 (cited in note 9) ("A proposal for a new constitutional structure for evaluating state court assertions of extraterritorial jurisdiction presents only an intriguing intellectual exercise if it offers no promise of adoption.").

228 In promoting doctrinal reform without dramatic fundamental precedential upheaval, it is my hope to offer a proposal that stands some chance of being embraced by members of the Court, in contrast to proposals that call for a wholesale abandonment of the basic *International Shoe* doctrine. See, for example, McFarland, 68 Mo L Rev at 789–90 (cited in note 12) ("While everyone realizes the Supreme Court is reluctant to cast aside even one of its decisions, let alone

ous decisions were concerned both with due process and federalism/state sovereignty issues because the former comprehend limitations that are given substance by the latter. That is, the right to be free from arbitrary assertions of state power—a due process right—is evaluated with reference to whether a given assertion of power is legitimate in view of the limits on a state's sovereign authority. Once the Court articulates this view, it could then simply further clarify that its original insistence on a minimal connection between a defendant's actions and the forum state in *International Shoe* reflected the fact that the limits of state sovereign authority could permit jurisdiction over only those disputes in which the state could claim a legitimate interest. Indeed, such a restatement would be more in line with the original unitary test created by the *International Shoe* Court. The original test was not the bifurcated analysis of whether there are minimum contacts followed by a determination of the reasonableness of jurisdiction that we have today; rather, the test was a unified analysis that simply required minimum contacts "such that" the assertion of jurisdiction was fair and just.[229] Under state interest analysis, after assuring itself of the sufficiency of notice, a court would engage in a similar, unified inquiry, asking whether the state has a legitimate interest in the dispute such that the assertion of jurisdiction is not arbitrary and is thus consistent with the due process rights of the defendant. Reassigning convenience considerations to venue and forum non conveniens analyses would require a repudiation of language in earlier opinions that constitutionalizes convenience, unless the Court prefers to gloss the issue by maintaining that inconvenience extreme enough to undermine the meaningful right to be heard is the essence of

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a whole area of law, in favor of beginning anew, sometimes that is exactly what is needed. . . . The Supreme Court should drop the *Shoe*."). But see Abrams and Dimond, 69 Minn L Rev at 80 (cited in note 9):

> From another perspective, the proposed law should be palatable to the Court because in many ways it is not truly starting afresh. The intentional transactional entry test is crafted in large part from Court precedents. The test can in part be seen as a restatement of the Court's requirement that a defendant must "purposefully avail" itself of the benefits and protections of the laws of the forum state.

[229] As McFarland observed:

> [T]he original, unpolished *International Shoe* test is clearly a one-step, unitary test. A court is not required to find "minimum contacts" *and* "fair play and substantial justice." Neither is a court required to find "minimum contacts" *or* "fair play and substantial justice." The opinion requires a court find "minimum contacts with [the state] *such that* the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The connective words "such that" meld the test into a single, unitary whole.

McFarland, 68 Mo L Rev at 763–64 (cited in note 12).

the constitutional convenience concern.[230] With these moves, the Court could realign the doctrine in the way herein proposed without giving too much offense (or too much obedience) to stare decisis.

In the end, what must be recognized is that the Constitution reserves to states the power to hear cases in their courts so long as no federal constitutional provisions are transgressed.[231] It is this power, then, that must serve as the germinating source for developing an understanding of the reach of a state's courts. Only after that picture of state power develops must it then be cabined to conform to the requirements of the national Constitution. In the jurisdictional context, we have seen what this means: the authority of states to assert jurisdiction in all disputes where their *legitimate* interests are implicated is limited only by the need to provide adequate notice of the proceedings. The presence of legitimate state interests thus becomes the touchstone of the analysis, as it properly should be. For states have too long had to endure the emasculation of their authority via the divestment of jurisdiction that has flowed from doctrinal obeisance to the demonstrably subconstitutional prerogatives of defendants. So too have plaintiffs languished under a doctrine that closed courthouse doors that more properly should have been open. Only by purging the doctrine of its tenets of purposefulness and convenience, and rooting the analysis in notice and legitimate sovereign authority, can the Court finally arrive at a sound approach that will yield just and predictable jurisdictional results.

230 Such an approach would be almost entirely a face-saving measure of no real import because, as discussed above, see text accompanying notes 71–75, it is difficult to imagine circumstances that would work the requisite degree of inconvenience in modern times.

231 *World-Wide Volkswagen*, 444 US at 293 ("[T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.").