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## A General Look at General Jurisdiction

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# A General Look at General Jurisdiction

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*In reviewing the constitutionality of state assertions of personal jurisdiction, the Supreme Court has recognized two types of jurisdiction—general and specific. Contacts between the defendant and the state that are not necessarily related to the suit form the basis of general jurisdiction, while specific jurisdiction rests on contacts that are either the direct cause of the action or at least related to the suit. The vast bulk of recent scholarly and judicial attention has focused solely on the issue of specific jurisdiction, leaving general jurisdiction a powerful yet largely unexplored theory.*

*Professor Brilmayer and her co-authors examine the theory of general jurisdiction, its meaning and its rationales. They first discuss the traditional bases for general jurisdiction: domicile and place of incorporation or principal place of business, defendant's forum activities, transient presence, consent, and property in the forum. As they evaluate the rationales underlying each basis, they highlight recurrent themes and analyze forum contacts that support general jurisdiction. Finally, they explore the contacts supporting general adjudicative jurisdiction that also justify legislative jurisdiction permitting the court to apply the forum's substantive law to the dispute.*

## I. Introduction

Earl Cowan died on January 18, 1976, as a result of his injury in a pickup truck accident in Cherokee County, Texas. Five years later, after the two-year Texas statute of limitations had run, his widow filed suit against Ford Motor Company and served its resident agent in Mississippi, where the limitations period is six years. Mrs. Cowan was a resident of Texas, as her husband had been. Ford is incorporated in Delaware and maintains its principal place of business in Michigan. Ford neither manufactured nor sold the truck in Mississippi. After it received service of process, Ford filed a motion to dismiss for want of jurisdiction.[1]

Although these circumstances suggest the kind of tortuous hypothetical that first-year law students confront on civil procedure exams, they actually represent a typical scenario in litigation.[2] In this scenario,

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1. Cowan v. Ford Motor Co., 694 F.2d 104, 105 (5th Cir. 1982), *question certified on reh'g*, 713 F.2d 100 (5th Cir.), *district court rev'd & action remanded*, 719 F.2d 785 (5th Cir. 1983). For a general discussion of *Cowan*'s effects on Mississippi's exercise of personal jurisdiction over nonresidents, see Recent Decisions, 53 MISS. L.J. 369 (1983).

2. *See, e.g.*, Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979) (suit by a Kansas plaintiff under Mississippi law against a defendant incorporated in Delaware and headquartered in Wisconsin); Ratliff v. Cooper Laboratories, Inc., 444 F.2d 745 (4th Cir.) (suit between residents of Indiana and Florida and corporations headquartered in Connecticut and New York), *cert. denied*,

a plaintiff seeks jurisdiction in a forum court over a claim unrelated to activities in the forum. Such jurisdiction usually is called general jurisdiction, in contrast to specific jurisdiction, under which the claim is related to activities in the forum state.[3] The Supreme Court voiced its approval of general jurisdiction in *Perkins v. Benguet Consolidated Mining Co.*[4] Finding that the defendant's forum activities were "continuous and systematic,"[5] the Court held that Ohio could assert jurisdiction over a claim unrelated to those activities and brought by a nonresident plaintiff.[6] The phrase "continuous and systematic" thereafter became the test used by lower courts to evaluate assertions of general jurisdiction.[7] In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Supreme Court renewed its theoretical recognition of general jurisdiction, but held that on the facts of the case an inadequate nexus existed to support jurisdiction.[8]

These are the only two Supreme Court cases addressing the issue of general jurisdiction since 1952. Although they provide some guidance, the exact status and boundaries of general jurisdiction remain uncertain. Lower courts, unable to agree on the criteria establishing an adequate basis for general jurisdiction, often reach discordant results.[9] Commentators have failed to clarify the issue; apparently, until quite recently, no one had devoted an article exclusively to general jurisdiction.[10]

404 U.S. 948 (1971). For a list of case citations, see R. CASAD, JURISDICTION IN CIVIL ACTIONS ¶ 3.02[2][a], at 3-65 n.274 (1983).

3. This terminology originated in von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-45 (1966).

4. 342 U.S. 437 (1952).

5. *Id.* at 438. During the Japanese occupation of the Philippines, the defendant, a Philippine corporation, carried on its entire wartime activity in Ohio, including directors' meetings, business correspondence, banking, stock transfers, payments of salaries, and purchasing of machinery. *See id.* at 447-48.

6. *Id.* at 448.

7. *See, e.g.*, Olsen *ex rel.* Sheldon v. Government of Mex., 729 F.2d 641, 648 (9th Cir. 1984); Bucks County Playhouse v. Bradshaw, 577 F. Supp. 1203, 1207 (E.D. Pa. 1983).

8. 466 U.S. 408, 418 (1984). The *Helicopteros* suit arose out of a helicopter crash in Peru that killed four United States citizens, none of them Texas residents. The victims were employees of a Peruvian consortium composed of two Texas corporations and a Delaware corporation. The defendant, a Peruvian corporation, had contracted with the consortium to provide transportation. The defendant's contacts with Texas included negotiating the contract in Houston, Texas, purchasing most of its helicopters and parts in Texas, accepting as payment checks from Texas banks, leasing a helicopter through a Texas bank, and training and keeping some employees in Texas on a regular basis. *Id.* at 409-12.

9. *See* R. CASAD, *supra* note 2, ¶ 3.02[2][a], at 3-65 & n.274.

10. Discussions of general jurisdiction, however, do appear in articles addressing a broad range of jurisdictional issues. *See, e.g., id.* ¶ 1.01-.08 (outlining fundamental concepts of jurisdiction); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80-82 [hereinafter Brilmayer, *How Contacts Count*] (explaining bases for general jurisdiction); von Mehren & Trautman, *supra* note 3, at 1136-44 (discussing jurisdiction in claims unrelated to forum activities in the context of "directly affiliating circumstances"). For an excellent recent article exclusively addressed to general jurisdiction, see Twitchell, *The Myth of General Jurisdiction*,

One reason for this lack of attention may be that general jurisdiction is now of less practical importance than it once was. Historically, courts commonly predicated jurisdiction upon the defendant's general affiliation with the forum, and not the defendant's activities in the forum that were related to the litigation.[11] Thus, presence in the forum, doing business in the forum, and domicile in the forum were the important bases for jurisdiction.[12] In *International Shoe Co. v. Washington*,[13] however, the Supreme Court fundamentally changed the constitutional approach to personal jurisdiction. The Court's holding enabled a state to reach outside its boundaries and compel an absent defendant to defend a claim that arose in the forum.[14] After *International Shoe*, plaintiffs no longer must chase defendants to their home states to obtain jurisdiction over them.[15]

Nonetheless, general jurisdiction is not on its way to extinction. Often, plaintiffs prefer to chase defendants to their home states. As our initial example *Cowan v. Ford Motor Co.*[16] illustrates, a plaintiff may seek the application of a distant forum's law because it is more favorable than the law of the state where the cause of action arose.[17] Such forum shopping is a persistent problem in general jurisdiction cases,[18] given current minimal restraints on a state's choice of law.[19]

101 HARV. L. REV. 610 (1988). For a response to Professor Twitchell's arguments, see Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988).

11. *See* Milliken v. Meyer, 311 U.S. 457, 462 (1940); Harris v. Balk, 198 U.S. 215, 222 (1905); *see also* Kurland, *The Supreme Court, the Due Process Clauses and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958) (relating historical accounts of jurisdiction).

12. *See* Kurland, *supra* note 11, at 569-74 (analyzing the various early bases for jurisdiction).

13. 326 U.S. 310 (1945).

14. *See id.* at 321.

15. *See* von Mehren & Trautman, *supra* note 3, at 1128.

16. 694 F.2d 104 (5th Cir. 1982) *question certified on reh'g*, 713 F.2d 100 (5th Cir.), *district court rev'd & action remanded*, 719 F.2d 785 (5th Cir. 1983).

17. Other factors also may cause a plaintiff to seek general jurisdiction over a defendant in a state other than where the claim arose. For example, a plaintiff might prefer to litigate in the defendant's home state when it is also the plaintiff's home state or when no other forum is available. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

18. *See, e.g.*, Schreiber v. Allis-Chalmers Corp., 611 F.2d 790, 792 (10th Cir. 1979) (plaintiff taking advantage of the forum's longer statute of limitations); Goldman v. Pre-Fab Transit Co., 520 S.W.2d 597, 598 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ) (same); *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773 (1984) (stating, in a specific jurisdiction case, that the place where the plaintiff filed suit "was the only state where [plaintiff's] suit would not have been time-barred when it was filed").

19. A decision to apply a particular state's substantive law will be unconstitutional only if the choice of that state's law is arbitrary or fundamentally unfair, based on an assessment of the aggregation of contacts between the parties, the occurrence, and the state. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981). The *Hague* decision indicates that a state's choice of law decision will receive only minimal constitutional scrutiny. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 9.2A, at 525-27 (3d ed. 1986). The application of constitutional limits on choice of law in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799 (1985), however, may indicate the beginning of greater scrutiny. Several commentators have discussed the constitutional limits on choice of law.

We will explore two questions tied to the forum-shopping problem. First, what should be the appropriate standard for determining whether general jurisdiction exists? This question breaks down into a series of subissues. When must a court rely on general rather than specific jurisdiction? In other words, when is the controversy unrelated to the forum? Are the types of contacts that are relevant to general jurisdiction different from the types that are relevant to specific jurisdiction? If so, then how do the two contacts inquiries differ?

The second question relates to choice of law. How are general and specific jurisdiction different for choice-of-law purposes? This question also generates more narrow questions. Why is forum shopping more of a problem when the plaintiff relies on unrelated contacts to establish general legislative jurisdiction—the power of the forum to apply its own substantive law? Under what circumstances will a finding of general adjudicative jurisdiction also satisfy the constitutional tests for legislative jurisdiction?

We examine first the meaning of general jurisdiction and the ways in which it may be established. We then address the choice-of-law implications of general jurisdiction. With such a general look at the subject, we can do little more than raise interesting questions, highlighting and redefining the central issues. Definitive resolution of these issues is nearly impossible, given the incomplete state of current doctrine. Nevertheless, we will suggest theoretical limitations on the reach of general jurisdiction.

These theoretical limitations result from basic premises of political philosophy. Adjudicative jurisdiction is one way in which the state asserts coercive power over individuals. Consequently, the legitimacy of a particular assertion of state power is always an issue. Of the various justifications for the exercise of state power, two, in particular, are relevant to the question of adjudicative jurisdiction. The first is the notion that a state's special relationship with those that have a right to influence state decision making justifies the assertion of state power over those individuals or entities. The second is the idea that a state may exercise authority over activities occurring within its territory. The former justification

*See, e.g.*, Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907, 916 (1981); Reese, *The* Hague *Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 201 (1982); Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 74 (1982); von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on* Hague, 10 HOFSTRA L. REV. 35, 37, 39 (1982); Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 34 (1982). In a recent article, Professor Kogan argues that fairness to litigants should be the primary constitutional limitation. *See* Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651, 689-700 (1987).

supports general jurisdiction while the latter buttresses specific jurisdiction. We argue that the contours of these two justifications establish the outer limits of general and specific jurisdiction.

## II. The Nature and Existence of General Jurisdiction

What difference does it make whether we characterize assertion of state judicial power as specific or general? Differentiating between the two is crucial for one important reason: fewer contacts—perhaps only one—will support specific jurisdiction.[20] In contrast, the Supreme Court's opinions in *Perkins*[21] and *Helicopteros*[22] suggest that assertions of general jurisdiction require a larger number of contacts. Plaintiffs usually benefit from arguing that the cause of action arises out of or is related to the defendant's contacts because the jurisdictional threshold is lower. Because in many cases there will only be contacts that are not continuous and substantial, whether jurisdiction exists at all will depend on the type of jurisdiction the plaintiff asserts.

Von Mehren and Trautman offer the following observations in distinguishing the two types of jurisdiction:

> [A]ffiliations between the forum and the underlying controversy normally support only the power to adjudicate . . . issues deriving from, or connected with, the very controversy that establishes jurisdiction . . . . This we call specific jurisdiction. On the other hand, American practice for the most part is to exercise power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum and the person or persons whose legal rights are to be affected. This we call general jurisdiction.[23]

General jurisdiction rests upon a direct relationship between the defendant and the forum and does not differentiate between the various causes of action that the plaintiff may assert against the defendant. Once shown, general jurisdiction establishes forum adjudicative power over any controversy involving that defendant. Specific jurisdiction, in contrast, depends on a connection between the defendant, the forum, and the particular litigation.[24]

While their distinction is enormously helpful, von Mehren and Trautman do not specify which contacts might support general jurisdic-

20. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (finding jurisdiction based on insurance contract made by mail with a forum resident, defendant's sole contact with the forum).

21. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952).

22. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984).

23. von Mehren & Trautman, *supra* note 3, at 1136.

24. *See* Brilmayer, *How Contacts Count*, *supra* note 10, at 80-81.

tion and which might establish specific jurisdiction. Their distinction rests more on intuition than analysis. Spelling out the difference more precisely, however, is no easy matter. An examination of the paradigms of general jurisdiction's bases—domicile, place of incorporation, and principal place of business—will illuminate the underlying rationales for each type of jurisdiction we discuss. We characterize these paradigms as unique affiliations—those that the defendant has with only one state.

### *A. Unique Affiliations*

*1. Domicile.*—Domicile is the place with which a person has a settled connection for certain legal purposes, either because the person's home is there or because the law assigns this significance to that place.[25] Many legal functions—taxation, probate, divorce, and adoption—require factual findings of domicile for an exercise of jurisdiction over the party.[26] "Every person has a domicile at all times, and at least for the same purpose, no person has more than one domicile at a time."[27] A state has a special relationship[28] with its domiciliaries that justifies the

25. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1969). Holmes defined domicile as "the one technically pre-eminent headquarters, which . . . every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined." Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 157, 51 N.E. 531, 532 (1898).

Domicile is not merely residence, although courts and legislatures often confuse the two concepts or use them interchangeably. *See, e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302, 313-17 (1981) (discussing party's residence, but not domicile, in determining contacts with state); Carrington v. Rash, 380 U.S. 89, 96 (1965) (stating that "the fact that one is a soldier or sailor does not deprive him of the right to change his residence or domicile"). Although courts recognize that the concepts differ, *see* Note, Martinez v. Bynum *and Residency Requirements for Free Public Education*, 26 ARIZ. L. REV. 729, 730 (1984), one must examine closely the factors a court discusses to determine whether the court is describing residency or domicile.

26. *See, e.g.*, CAL. PROB. CODE § 362 (West 1972) (providing that a foreign will is valid according to the law of the place where the testator was domiciled at the time of death); N.Y. CIV. PRAC. L. & R. 302(b) (Consol. 1983) (matrimonial long-arm statute allowing jurisdiction over nonresident defendant, provided that New York was the matrimonial domicile before separation); TEX. PROB. CODE ANN. § 100 (Vernon 1986) (providing specific grounds for contesting a foreign will based on the existence of domiciliary or nondomiciliary jurisdiction).

27. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1969).

28. This relationship is demonstrated in the Supreme Court decisions in suits over durational residency requirements. The Court repeatedly has held that when a state grants benefits to or extracts duties from its domiciliaries, it must do so without regard to length of residence, although the state may impose a reasonable waiting period for administrative purposes before extending these benefits. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) (holding a durational residency requirement to be an improper basis for denying indigents nonemergency medical care); Vlandis v. Kline, 412 U.S. 441, 452-53 (1973) (holding unconstitutional a durational residency requirement that prohibited out-of-state students from becoming residents for tuition purposes while they attended the state university); Dunn v. Blumstein, 405 U.S. 330, 352 (1972) (stating that a durational residency requirement is permissible only to prevent voter fraud, not to keep new residents from voting); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (holding a durational residency requirement to be an improper basis for denying welfare benefits); *see also* Chimento v. Stark, 353 F.

state's exercise of judicial and regulatory authority over these residents.[29] Indeed, most courts treat as self-evident the state's right to subject domiciliaries to the jurisdiction of its courts.[30]

A person legally acquires this unique relationship with the domiciliary state by operation of law[31] or by choice.[32] Because most adults choose their domicile, domicile of choice is the most important type. A person establishes a domicile of choice through physical presence in a new location and an intent to make the place home, at least for the time.[33] The presence requirement, although it seems to be of only evidentiary value, "may have originated in a felt need for the individual to be within the physical power of the state before subjecting him to its legislative or judicial jurisdiction."[34] Thus, the remaining element of domicile of choice—subjective intent to make the state a legal home—becomes the essential determination for domicile.[35] Of course, if a finding of domicile depends solely on state of mind, we might expect litigants to profess an intent compatible with the particular benefit or burden that accompanies such a finding. For example, one predictably would express a different domiciliary intent when seeking in-state tuition at a state university than when seeking to escape a state's jurisdiction. Consequently, courts review actions that manifest the requisite domiciliary intent rather than relying on a person's self-interested profession.[36]

Although a test focusing on objective facts may establish domicile on a common-sense level, domicile remains an ambiguous legal doctrine. Thus, courts determine domicile in different ways[37] and consider a variety of factors when deciding whether a party's conduct demonstrates the degree of intent necessary to establish a new domicile.[38]

Supp. 1211, 1215 (D.N.H.) (considering durational residency requirement to be appropriate for candidates seeking public office), *aff'd*, 414 U.S. 802 (1973).

29. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 463-64 (1940); Lawrence v. State Tax Comm'n, 286 U.S. 276, 279 (1932); Maguire v. Trefrey, 253 U.S. 12, 15 (1920).

30. *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (concluding summarily that a state may exercise authority over its own citizens).

31. The law assigns a domicile to certain classes of persons regarded as incapable of choosing a domicile. Children receive the domicile of their parents, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 (1969), as do incompetent persons, *id.* § 23.

32. *See id.* § 15.

33. *See* Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974); Lea v. Lea, 18 N.J. 1, 11, 112 A.2d 540, 545 (1955); White v. Tennant, 31 W. Va. 790, 791-92, 8 S.E. 596, 597 (1888); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 15-16, 18 (1969).

34. Note, *Domicil of Refugees*, 42 COLUM. L. REV. 640, 643 n.19 (1942).

35. *See generally* R. WEINTRAUB, *supra* note 19, §§ 2.4-.11 (discussing various issues that arise from inquiries into domiciliary intent).

36. *See, e.g.*, *Mas*, 489 F.2d at 1400; *Lea*, 18 N.J. at 11, 112 A.2d. at 545; *White*, 31 W. Va. at 791-92, 8 S.E. at 597.

37. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 27-30 (1969).

38. For example, a court might consider

Domicile is traditionally the strongest basis supporting general jurisdiction over a party. Domicile provides such a strong foundation for the imposition of general personal jurisdiction because it typically satisfies four of the major theoretical justifications for the assertion of jurisdiction: convenience for the defendant, convenience for the plaintiff, power, and reciprocal benefits.

*(a) Convenience for the defendant.*—Presumably, the domiciles of the parties to a suit would provide forums convenient to them. Defendants, especially, would seem to benefit from a rule basing jurisdiction upon domicile.[39] Of course, this generalization is not always true; a defendant might be away from home for a long period of time or might move to another state after commencement of a suit.[40] Furthermore, as the Supreme Court emphasized in *World-Wide Volkswagen Corp. v. Woodson*, jurisdiction may be inappropriate even when a defendant suffers relatively little inconvenience.[41] We must seek, therefore, additional explanations for the use of domicile as a basis of general jurisdiction.

*(b) Convenience for the plaintiff.*—For the convenience of plaintiffs, general jurisdiction should exist somewhere in order "to preserve some place where the defendant can be sued on any cause of action."[42] In light of this policy, von Mehren and Trautman conclude that general jurisdiction should be narrowly available and tied closely to domicile.[43] The domicile test theoretically enhances convenience to the plaintiff by providing one sure forum in which to sue the defendant. But domicile is not always mechanically ascertainable. In our increasingly mobile society, people not only relocate more often and for a broader array of reasons, but frequently do so with less certainty that they will

> the paying of taxes and statements on tax returns; the ownership of property; where the person's children attend school; the address at which one receives mail; statements as to residency contained in contracts or other documents; statements on licenses or governmental documents; where furniture and other personal belongings are kept; which jurisdiction's banks are utilized; membership in professional, fraternal, religious or social organizations; where one's regular physicians and dentists are located; where one maintains charge accounts; and any other facts revealing contact with one or the other jurisdiction.

Bainum v. Kalen, 272 Md. 490, 499, 325 A.2d 392, 397 (1974).

39. *See* R. WEINTRAUB, *supra* note 19, § 4.33, at 213; *cf.* Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026, 1034 (1987) (denying jurisdiction in part because of the burden a Japanese defendant faces in litigating in California).

40. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 459 (1940) (absent defendant was sued at his domicile while he was residing in a different state); Blackmer v. United States, 284 U.S. 421, 433 (1932) (defendant, while living in France, was sued at his domicile).

41. 444 U.S. 286, 294 (1980).

42. von Mehren & Trautman, *supra* note 3, at 1179.

43. *Id.*

remain in a new home.[44] Such uncertainty for an intention-based domicile test thwarts the effort to provide a plaintiff with a simple, reliable place to sue.

Even if we overcome the definitional problems with a domicile standard, assigning jurisdiction based on the coincidence of domicile presents implementation problems. Assume Smith is domiciled in New York when she runs over Jones, domiciled in Connecticut. Smith then moves to Califoruia and establishes her domicile there. Where should Jones file suit? One might assume that Jones should file in the state where Smith was domiciled when the cause of action arose because this would not subject Jones to the vagaries of Smith's later change in domicile. But from a practical view, Smith is now a domiciliary of California, and a suit filed in Connecticut would not serve Smith's convenience. Clearly, the concept of domicile does not serve the convenience-to-the-plaintiff purpose of jurisdiction to the extent that it arbitrarily adopts time limits on determining domicile.

*(c) Power.*—In essence, the power rationale for an assertion of general jurisdiction relies on practical considerations. For the forum state meaningfully to adjudicate the rights of any party, the state must be able to compel the appearance of defendants in its courts and exercise power over them sufficient to enforce its judgments.[45] States may obtain jurisdiction over defendants as long as they are subject to the state's physical power. A state derives its physical power from its status as an independent sovereign, which possesses and imposes authority over persons and property within its borders.[46] Because a state's authority over a particular person is commensurate with its general territorial limitations, the state may subject persons that occupy its land to its physical power. Domiciliaries, therefore, are particularly amenable to the state's jurisdiction.[47] The Supreme Court in *International Shoe Co. v. Washington* rec-

44. *Cf.* Holmes v. Sopuch, 639 F.2d 431, 434 (8th Cir. 1981) (holding that a Missouri citizen studying at Ohio State University and intending to stay in Ohio only while his studies required it did not acquire an Ohio domicile); Elwert v. Elwert 196 Or. 256, 265, 248 P.2d 847, 851 (1952) (holding that an Idaho divorce was null and void because the husband, who lived in Idaho for 10 months, was not an Idaho resident when he filed for divorce).

45. *Cf.* Blackmer v. United States, 284 U.S. 421, 439-40 (1932) (stating that the necessity of a state to compel an appearance of the defendant justifies contempt finding when the defendant residing abroad fails to answer a subpoena).

46. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

47. Plaintiffs, in comparison, submit to the laws and authority of a state by choosing to bring suit in its courts. *See, e.g.*, Adam v. Saenger, 303 U.S. 59, 67-68 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.").

ognized physical power as the traditional basis for jurisdiction.[48]

The power rationale presents several problems. First, its worth as a measure of constitutional due process has given way to an approach centered on fairness to the defendant.[49] Second, other jurisdictional bases, such as the presence of defendants or their property, are more likely than domicile to confer power over the defendant. Finally, the state's power over a domiciliary may depend upon whether sister states will enforce its judgment;[50] if the state of domicile renders judgment against a domiciliary absent from the state, a sister state will enforce that judgment only if the rendering state had constitutional jurisdiction over the defendant.[51] The power rationale, therefore, results in unavoidable circularity: a state has power and thus jurisdiction over an absent defendant domiciliary only if sister states will enforce the judgment, which sister states will do only if the first state had jurisdiction.

*(d) Reciprocal benefits and burdens.*—Domicile creates a unique relationship between the domiciliary and the forum state, a relationship composed of the benefits provided to the domiciliary and the burdens imposed by the state in consideration for those benefits. If a state finds that Smith is a domiciliary, that state determines the validity of Smith's marriage, divorce, will, and custody rights. It has administrative authority over her estate, can impose inheritance and income taxes, and can subject her to the state's judicial processes and rules for any claims against her. The state, on the other hand, must extend certain benefits to her, including the right to vote, education (when other locals are granted such benefits), and in-state tuition. She is eligible to run for office, and the state cannot deny her general welfare and medical assistance. The state can extract these special responsibilities from its domiciliaries even when they are absent from the state; for example, in *Milliken v. Meyer*,[52] the Court held that a state of domicile has general jurisdiction over an absent domiciliary if the domiciliary has received notice of the

48. 326 U.S. 310, 316 (1945); *see also* McDonald v. Mabee, 243 U.S. 90, 91 (1917) (referring to physical power as the "foundation of jurisdiction").

49. *See International Shoe*, 326 U.S. at 319; *see also* R. WEINTRAUB, *supra* note 19, § 4.8, at 118 (stating that *International Shoe* established a "jurisdictional standard of fairness to the defendant").

50. The full faith and credit clause, U.S. CONST. art. IV, § 1, requires states to give to the judgments of sister states the same effect that such judgments have in the state of rendition. Morris v. Jones, 329 U.S. 545, 551 (1947); *see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 comment b (1969); *see also* 28 U.S.C. § 1738 (1982) (requiring federal courts to give full faith and credit to state court jndgments).

51. *See* R. WEINTRAUB, *supra* note 19, § 4.3, at 94.

52. 311 U.S. 457 (1940).

suit[53] adequate to conform with "traditional notions of fair play and substantial justice . . . implicit in due process."[54] The Court's discussion of the relationship between notice and fairness later provided the basis for *International Shoe*'s introduction of a minimum contacts approach to jurisdiction.[55] Although the Court recognized a state's physical power as the historical basis for general jurisdiction, its new approach signaled an important theoretical shift in explaining how a state obtains jurisdiction over persons.

One benefit that states regularly confer is the right to vote. The right to vote gives domiciliaries the chance to influence local political processes. When a state applies its long-arm statute to attain jurisdiction over a domiciliary, it simply requires the domiciliary to adhere to a local law that theoretically the party had a chance to influence. For this reason, domicile is different from other bases for general jurisdiction, all of which raise the question of the state's right to regulate outsiders that have not had the opportunity to influence the legislative process. On balance, the reciprocal benefits and burdens rationale provides the most satisfactory basis for the state's exercise of coercive power.

*2. Place of Incorporation and Principal Place of Business.*—The law treats corporations like legal persons, and the place of incorporation and the principal place of business are both analogous to domicile. In some respects, the decision to incorporate in a particular state provides a more powerful basis for adjudicatory jurisdiction than does domicile. First, the corporation intentionally chooses to create a relationship with the state of incorporation, presumably to obtain the benefits of that state's substantive and procedural laws.[56] Such a choice creates a unique relationship that justifies general jurisdiction over the corporation.[57] Second, the corporation, unlike an individual, cannot ever be absent from the state of incorporation. Third, even if a corporation neither does business nor maintains an office in the incorporating state, the incorporation

53. *See id.* at 462.

54. *Id.* at 463.

55. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (finding that constitutional due process for jurisdiction requires that the defendant 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' " (quoting *Milliken*, 311 U.S. at 463)).

56. *Cf.* Macey & Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEXAS L. REV. 469, 477 (1987) (suggesting that one school of thought, the corporate federalists, would hold that corporations will incorporate in the "state providing the most efficient menu of legal rules"). Empirical evidence has shown that companies are particularly sensitive to differences among states' laws when deciding where to reincorporate. *See* Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORGANIZATION 225, 265 (1985).

57. *See* Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878); R. WEINTRAUB, *supra* note 19, § 4.21.

process itself provides notice of the potential for judicial jurisdiction. Finally, the corporation is likely to be familiar with that state's law, arguably more familiar than an individual domiciliary would be, because the corporation presumably based its incorporation decision in part on the state's substantive law.[58]

Place of incorporation, however, is not the only affiliation that supports general jurisdiction; a corporation may do sufficient business within a state to give the state general jurisdiction over it. *Perkins v. Benguet Consolidated Mining Co.*[59] suggests two standards with which to evaluate a corporation's doing business in a state. First, as discussed below,[60] an absolute quantum of activity in a forum may give rise to jurisdiction. Second, if the state is the corporation's principal place of business, then a smaller quantum of activity may establish jurisdiction. In *Perkins*, for example, the defendant had relocated its corporate headquarters to the forum, and its activities in the forum constituted its entire wartime business.[61] The principal place of business standard may rest on conceptual grounds similar to those supporting the state of incorporation as a jurisdictional basis. This standard, however, incurs definitional and functional problems of application similar to those occurring with the domicile test.[62] States may define the term "principal" differently[63] or

58. The major theories on selection of a state of incorporation rest on the premise that corporate managers base their decisions upon the states' various laws. The race-to-the-bottom theory contends that corporate managers primarily look to a state with laws favorable to them and not to shareholders. *See* Macey & Miller, *supra* note 56, at 474. The competing theory, proffered by the law and economics movement, contends that corporate management searches for states with efficient rules. *See id.* at 472. In particular, corporate management prefers Delaware's legal environment both for the present structure of its rules and for its reliable promise that rules adopted in the future will continue to be highly favorable. *See id.* at 471-72.

59. 342 U.S. 437, 444 (1952).

60. *See infra* subpart II(B).

61. *See* 342 U.S. at 447-48.

62. The defendant's activities may be spread over several states, making it difficult to determine which state is its principal place of business. *Cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485 n.28 (1985) (suggesting that the nature of a franchise agreement is such that no single corporate headquarters is a principal place of business).

63. Some courts have held that the location of business supervision is sufficient to establish the principal place of business. *See, e.g.*, Tolchester Lines v. Dowd, 253 F. Supp. 643, 648 (S.D.N.Y. 1966) (stating that principal place is where the corporate officers spend the "great bulk of their time"); Meyers v. Lux, 76 S.D. 182, 189, 75 N.W.2d 533, 537 (1956) (stating that the principal place of business is where supervision occurs and books and records are kept). *But see In re* Evans, 12 F. Supp. 953, 954 (W.D.N.Y. 1935) (stating that the " 'principal place of business' is not necessarily determined by the volume of business carried on"). Other courts have held that the corporate charter identifies the principal place of business. *See, e.g.*, Kane v. Universal Film Exchs., 32 Cal. App. 2d 365, 367, 89 P.2d 693, 694 (1939) (stating that the principal place of business cannot be established unless the correctly filed corporate charter identifies it). *But see In re* Charmichael Enters., 334 F. Supp. 94, 102 (N.D. Ga. 1971) (stating that the principal place of business would be in a county other than the one specified in charter if business functions so indicated).

may determine that they provide benefits which are relatively more important to a particular corporation than those provided by other states.

*3. Conclusion.*—Domicile, place of incorporation, and principal place of business are paradigms of bases for general jurisdiction. Unlike other bases for general jurisdiction discussed below,[64] these bases typically are unique. A corporation usually has one state of incorporation and one principal place of business, and individuals have a single domicile. In contrast, other bases, such as activities, presence, property, and consent, may exist in any number of states for a single defendant.[65] Thus, we refer to domicile, place of incorporation, and principal place of business as *unique affiliations*, indicating that one state alone has that relationship to the party. That these affiliations are unique may account for the special constitutional status they historically have enjoyed; indeed, courts have taken their sufficiency as jurisdictional bases more or less for granted.[66] We will discuss below[67] a considerably more controversial point, namely the significance of unique contacts for choice-of-law purposes. First, we must discuss other nonunique bases for general jurisdiction: activities in the state, presence, consent, and ownership of property. Although many courts properly have relied on these for general jurisdiction, they are not paradigm bases of general jurisdiction because each also establishes specific jurisdiction in certain circumstances.

## *B. Activities*

A defendant's activities in the forum can be the basis for either general or specific jurisdiction.[68] One important practical implication follows from this fact: one must first determine whether the plaintiff alleges these nonunique contacts in support of general or specific jurisdiction in order to decide how many must be shown. The type of jurisdiction being asserted sets the quantum of contacts required; a single activity may suffice to establish specific jurisdiction,[69] whereas general jurisdiction re-

64. *See infra* subparts II(B)-(E).

65. For example, state long-arm statutes typically provide some basis of jurisdiction over a defendant that contracts with state residents, *see, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (Vernon 1986); thus a basis for jurisdiction over a party conceivably exists in every state in which the party contracts with a resident.

66. Twitchell, *supra* note 10, at 633 & n.111.

67. *See infra* Part III.

68. For example, in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 444 (1952), general jurisdiction was based on activities; in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), specific jurisdiction was based on activities.

69. *See, e.g.*, *International Shoe*, 326 U.S. at 318 (finding that defendant's lone activity in the state—using salesmen to solicit orders—supported jurisdiction over a claim related to that activity).

quires proof of continuous and systematic activities.[70] Determining whether an activity invokes specific or general jurisdiction turns on the difficult question of whether the activity is related to the controversy.[71] This inquiry is unnecessary when the contact alleged in support of jurisdiction is either domicile or incorporation. Once the plaintiff has established such a unique affiliation, the type of jurisdiction sought does not matter because the affiliation clearly has shown the requisite level of contact.

*1. Substantive Relevance and Related Activities.*—When defendants have engaged in forum activities that are related to the controversy or out of which the controversy arises,[72] plaintiffs usually seek specific jurisdiction. In contrast, when plaintiffs seek general jurisdiction, they may allege as a basis for jurisdiction activities unrelated to the dispute. For instance, one standard basis for general jurisdiction has been the defendant's doing business in the fornm;[73] the Supreme Court in *Perkins v. Benguet Consolidated Mining Co.,* for example, predicated jurisdiction upon the defendant's business activities in the forum.[74]

According to von Mehren and Trautman, specific jurisdiction is "the power to adjudicate with respect to issues deriving from, or connected with, the very controversy that establishes jurisdiction to adjudicate."[75] A plaintiff can show specific jurisdiction with a small number of contacts if they are related to the controversy, or if the controversy arises out of the contacts. Given that general jurisdiction requires a larger number of contacts, determining whether activities are related or connected in the appropriate sense becomes crucial. Resolution of the relatedness issue thus should precede an assessment of the contacts' quantity. The vast bulk of commentary on jurisdictional due process, however, is strangely silent on this issue.[76]

The Supreme Court likewise has been relatively unhelpful. While it

70. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416-17 (1984) (holding that continuous and systematic activities between the defendant and the forum were necessary to establish jurisdiction over a claim unrelated to those activities).

71. *See* L. BRILMAYER AND OTHERS, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 22 (1986) [hereinafter L. BRILMAYER].

72. *See, e.g.*, McGee v. Interuational Life Ins. Co., 355 U.S. 220, 223 (1957); *International Shoe*, 326 U.S. at 319.

73. *See, e.g.*, Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 626, 626, 208 N.E.2d 439, 439, 255 N.Y.S.2d 671, 671 (1965). *See generally* Kurland, *supra* note 11, at 584 (analyzing the doing business doctrine).

74. *See* 342 U.S. 437, 445-47 (1952).

75. von Mehren & Trautman, *supra* note 3, at 1136.

76. *But see* Richman, *Part I—Casad's Jurisdiction in Civil Actions, Part II—A Sliding Scale To Supplement the Distinction Between General and Specific Jurisdiction* (Review Essay), 72 CALIF. L. REV. 1328, 1336-46 (1984) (discussing the distinction between general and specific jurisdiction and

has acknowledged the importance of the relation of the claim to the forum,[77] the Court's opinions fail to describe exactly what type of relatedness between the claim and the forum is necessary in order to establish specific jurisdiction.[78] Must the claim have arisen out of the defendant's forum activities in a substantive law sense? Or is it sufficient if the forum contacts are in some other way related or similar to the activities that constitute the cause of action?[79] Purportedly because the parties did not argue the issue, the *Helicopteros* majority did not reach the question of whether "a forum's exercise of personal jurisdiction in a situation where the cause of action 'relates to,' but does not 'arise out of,' the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction."[80]

Some courts have embraced the position that specific jurisdiction is justified when the forum contacts are in some way related to or connected with a claim, even though the cause of action did not arise out of the defendant's forum activities.[81] For example, although the California Supreme Court in *Cornelison v. Chaney* stated that the defendant's forum contacts were insufficient to establish general jurisdiction over a tort claim, it nonetheless found "a substantial nexus between plaintiff's cause of action and defendant's activities in California."[82] The accident occurred while the defendant, a trucker, was en route to California, and he

arguing that more attention be paid to the relatedness of the defendant's contacts to the cause of action).

77. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

78. *Cf.* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 420 (1984) (Brennan, J., dissenting) (arguing that the Court fails to distinguish controversies that relate to defendant's contacts with the forum from disputes that arise out of such contacts).

79. For example, one approach uses a sliding scale between specific and general jurisdiction. As related contacts become more attenuated, the level of the defendant's total forum contacts must rise concomitantly. This type of jurisdiction, midway between specific and general jurisdiction, requires contacts sufficient in their combined relatedness (although not related enough to establish specific jurisdiction) and amount (although not enough to establish general jurisdiction) to create an adequate nexus. *See* K. CLERMONT, CIVIL PROCEDURE 147 (1982); Richman, *supra* note 76, at 1336-45. Justice Brennan proposed such a sliding scale in his dissent in *Helicopteros*. *See* 466 U.S. at 425 (Brennan, J., dissenting).

80. 466 U.S. at 415 n.10. *But cf. id.* at 425 (Brennan, J., dissenting) (contending that although the claim did not arise out of forum activities, it was related to such activities and therefore the activities should support specific jurisdiction).

81. *See, e.g.*, Cubbage v. Merchent, 744 F.2d 665, 668 (9th Cir. 1984) (finding that a malpractice "claim arose out of or resulted from appellant's forum-related activities," which amounted to minimal advertising and obtaining from the state a "Medi-Cal" number that enabled them to collect fees); Southwire Co. v. Trans-World Metals & Co., 735 F.2d 440, 442 (11th Cir. 1984) (construing "transacting business" requirement in a state long-arm statute liberally to include jurisdiction over actions arising directly or indirectly out of transactions).

82. 16 Cal. 3d 143, 149, 545 P.2d 264, 268, 127 Cal. Rptr. 352, 356 (1976); *see also* Comment, *The* Cornelison *Doctrine: A New Jurisdictional Approach*, 14 SAN DIEGO L. REV. 458, 460-69 (1977) (discussing *Cornelison*'s structure and application).

carried on some other unrelated trucking activities there.[83]

Just what courts mean when they speak of this amorphous concept of relatedness, however, is simply unclear. Practically any contact might appear to be related to the cause of action and thus support specific jurisdiction. In short, such a vague term offers a state an apparently boundless jurisdictional reach—a result out of step with our notions of due process. In *Cornelison*, would it have been enough that the defendant once carried on trucking activities in the forum, or that it now carried on a small bus charter operation? What if the driver had been planning to drive to Califoruia three months hence? In what sense are the actual contacts in *Cornelison* any more "related"?

A test of substantive relevance provides a different approach in discerning the boundary between specific and general jurisdiction.[84] Substantive relevance finds that "[a] contact is related to the controversy if it is the geographical qualification of a fact relevant to the merits. A forum occurrence which would ordinarily be alleged as part of a comparable domestic complaint is a related contact."[85] Some have criticized this approach as relegating the boundaries of jurisdiction to the vagaries of state substantive law.[86] Yet these boundaries arguably should vary with state law just as a particular cause of action will vary from state to state, and whose variances are a well-accepted aspect of federalism.[87] Indeed, the Supreme Court in both *Rush v. Savchuk*[88] and *Shaffer v. Heitner*,[89] while

83. *See* 16 Cal. 3d at 146-47, 545 P.2d at 266, 127 Cal. Rptr. at 354. As one jurisdiction aficionado described the connection in *Cornelison*, "a funny thing happened on the way to the forum." Conversation with Mark Gergen, Assistant Professor of Law, The University of Texas School of Law (summer 1980).

84. *See* Brilmayer, *How Contacts Count*, *supra* note 10, at 82.

85. *Id*; *see also* Standard Life & Accident Ins. Co. v. Western Fin., Inc., 436 F. Supp. 843, 846 (W.D. Okla. 1977) ("The acts alleged to give rise to the cause of action must be the same acts which provide the basis for the Oklahoma court's exercise of jurisdiction over the nonresident defendant.").

86. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting).

87. For arguments that federalism should assume a larger role in determining limits on personal jurisdiction, see Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEXAS L. REV. 689 (1987).

88. 444 U.S. 320, 330-31 (1980) (observing that a direct action statute would make a defendant amenable to suit while jurisdiction founded on the garnishment of an insurer's obligation to defend a suit against its insured would not).

89. 433 U.S. 186, 214 (1977) (disallowing quasi in rem jurisdiction over corporate directors' stock holdings "present" in Delaware, but suggesting that personal jurisdiction over the directors, granted by a long-arm statute, would be constitutional). After *Shaffer*, Delaware enacted a long-arm statute affording jurisdiction over directors of Delaware corporations, *see* DEL. CODE ANN. tit. 10, § 3114 (Supp. 1986); the Delaware Supreme Court later upheld the statute as constitutional, Armstrong v. Pomerance, 423 A.2d 174, 179 (Del. 1980). *Shaffer* is probably wrong to the extent that it allows a state to alter the due process calculus simply by tinkering with its long-arm statute. *See* Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1323 (1981). *Rush*, in contrast, requires a state to change its substantive law. *Id.*

disallowing jurisdiction, left open the door for each state to enact legislation that would create an adequate basis for jurisdiction—an even more expansive route to a similar end. Moreover, *Rush* contains language supporting a test of substantive relevance.[90]

Any analysis of what activities, or contacts, should count towards specific jurisdiction—and in effect weigh more heavily than those only counting towards general jurisdiction—must rest on some underlying notion of why relatedness should matter. For unique affiliations, the strongest justification for a state's jurisdiction is the reciprocal benefits and burdens that arise from the affiliation.[91] When a defendant has no such affiliation with a forum, however, some other rationale for requiring obedience to a state's coercive authority is needed.

One possibility lies in the state's authority to regulate occurrences within its territory. Surely the state may condition entry into the state upon willinguess to comply with its laws. When an individual enters a state and engages in tortious activities there, the state has an interest in adjudicating the legality of the conduct.[92] Assertion of jurisdiction is a rational means to that legitiinate end. Whether the conduct is a criminal or a civil wrong, the state reasonably may require the individual to defend a suit in the state and satisfy any judgment arising out of such a transgression. For example, in *International Shoe Co. v. Washington*,[93] assertion of jurisdiction was a means toward collecting a tax that the state arguably had a right to impose because the activities taxed were local. The forum had a substantive interest to assert, and achieving this interest was the goal of the litigation.[94]

On the other hand, allowing a state to use innocent conduct within the state as a pretextual basis for asserting power over conduct occurring outside the state would not be reasonable. The state's interest in regulating activities in the state cannot justify predicating jurisdiction upon lo-

90. In *Rush*, the Court faced the question whether an insurer's obligation under its insurance policy was related to the suit's cause of action, which arose out of an automobile accident. The Court held that the policy was not related, noting that it was not part of the "operative facts of the negligence action." 444 U.S. at 329. An amorphous test for relatedness probably would have found the policy related. Indeed, prior to *Rush* several commentators had argued that an insurance policy should be deemed related property. *See* Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031, 1038 (1978); Note, *The Constitutionality of* Seider v. Roth *after* Shaffer v. Heitner, 78 COLUM. L. REV. 409, 426-33 (1978).

91. We have contended that the paradigm cases of general jurisdiction involve defendants that are insiders who are entitled to all the benefits of membership in the forum, such as voting, educational benefits, and welfare. In such cases, it is reasonable to require defendants to comply with laws that they theoretically have participated in making. *See supra* subsection II(A)(1)(d).

92. *Cf.* R. WEINTRAUB, *supra* note 19, § 6.10 (discussing the interests of the state where the tort occurred in applying its law to the case).

93. 326 U.S. 310 (1945).

94. *See id.* at 311-12.

cal conduct that is not legally wrongful. The facts of *Cornelison v. Chaney*[95] well illustrate this point. California could not explain its assertion of jurisdiction in terms of its interest in regulating local conduct because the litigation was not an adjudication concerning the defendant's local conduct.[96]

A test of substantive relevance helps to identify those situations in which the state is using the litigation to regulate local activity.[97] Conduct that has no *legal* relevance is unlikely to give rise to any plausible state interest in regulation. Consequently, if such legally irrelevant conduct is the only local contact, then a state cannot predicate jurisdiction upon any purported desire to regulate local activities. Moreover, this perspective not surprisingly explains why the contours of local substantive law might influence an assessment of the constitutionality of jurisdiction. Clearly, if one factor in the constitutional equation is the state's interest in adjudication,[98] then asking whether the state has manifested such an interest in its substantive law is both reasonable and desirable.

Perhaps we should emphasize what may already be obvious: the inquiry into substantive relevance is not talismanic, but instead is a means to a particular end—to determine whether entertaining the litigation would further the state's legitimate interests in local regulation. In some unusual circumstances, a fact may be formally relevant to the substantive dispute but still not support a state interest. In others, it might not be formally relevant, yet may establish an interest. Nevertheless, substantive relevance is an important starting point for inquiring into a state's interest. Acknowledging that an interest does exist, moreover, will not ensure satisfaction of the due process clause; in some circum-

95. 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

96. The cause of action in *Cornelison* involved a vehicle collision in Nevada between a defendant from Nebraska and a plaintiff from California. *Id.* at 152-53, 545 P.2d at 269, 127 Cal. Rptr. at 357.

97. L. BRILMAYER, *supra* note 71, at 38 n.98.

98. In McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), the Court found that the forum state's interest in providing effective means of redress to its residents when their insurers fail to pay claims supported jurisdiction over a nonresident insurer. Similarly, the Court has recognized that a state has a special interest in exercising judicial jurisdiction over those who commit torts within its territory. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984) (finding, in a libel suit, jurisdiction based on circulation of a national magazine within the forum state). A state's interest in protecting its residents does not always justify the exercise of jurisdiction. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84, 98 (1978) (stating that the state's interest in protecting its minor residents may favor application of that state's law, but it does not grant personal jurisdiction over the defendant). A state's interest in adjudication nonetheless continues to be a consideration in determining whether a state may exercise jurisdiction. For example, in Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987), the Court observed that California had little interest in asserting jurisdiction to protect its resident because the resident had dropped out of the suit. The court found that California had minimal legitimate interests, and it could not justify its assertion of jurisdiction in a suit involving two foreign parties. *See id.* at 1034.

stances asserting that interest against a particular defendant may still be unfair or unreasonable.[99]

Ascertaining the distinction between related and unrelated contacts, therefore, cannot answer all issues of jurisdictional due process. The distinction is only part of a threshold question to determine whether a small number of contacts may suffice, as is the case in specific jurisdiction, or whether the continuous and systematic contacts required for general jurisdiction are necessary. Even once we establish, by whatever test for relatedness we choose, that the contacts in a particular case are unrelated, there remain important issues of how many and what kind of activities would make assertion of general jurisdiction fair.

*2. Fairness and Unrelated Activities.*—If, in a particular case, local activities are unrelated to the litigation, and as a result, regulation of in-state activities will not provide a basis for jurisdiction, then why should the activities be relevant at all? Why and when should activities suffice as a basis for general jurisdiction? We address this question by first recalling our paradigm bases of general jurisdiction: domicile, place of incorporation, and principal place of business. Under what circumstances would unrelated activities present as good a justification for the assertion of state power as would local domicile or incorporation? The answer turns on the reasons given for finding domicile and incorporation to be adequate bases in the first place.

Previously, we demonstrated that domicile, place of incorporation, and principal place of business satisfy the theoretical justifications for general jurisdiction.[100] A substantial quantity of unrelated activities also may satisfy these rationales: convenience to both the plaintiff and defendant, power, and reciprocal benefits and burdens. To the extent that defending in one's domicile is convenient, litigating where one carries on continuous and systematic activities is also likely to be convenient. Similarly, allowing suit where the defendant is so engaged serves the plaintiff's convenience by providing a more definite forum; indeed, a test that focuses on continuous and systematic activities eliminates the uncertainty of proving which of several places is the defendant's principal place of business. Most importantly, the reciprocal benefits rationale obtains when the defendant carries out substantial activities, which implicate the police powers and public facilities of the state.

99. *See, e.g., Kulko*, 436 U.S. at 96-98 (finding unreasonable the exercise of jurisdiction over a nonresident father whose former spouse moved their children into the state, despite the state's interest in the welfare of minor residents).

100. *See supra* subpart II(A).

The only difference between a defendant with substantial local activities and one with a local principal place of business may be that the former defendant has a more substantial connection with another state than the latter. The absolute amount of each defendant's activity may be identical, or the former defendant actually may have a larger absolute quantity of local contact. We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states; with one possible qualification, noted immediately below, the amount of activity elsewhere seems virtually irrelevant to any of the convenience or fairness policies underlying the imposition of general jurisdiction over a defendant. Thus, the due process clause should permit general jurisdiction on the basis of activities when the defendant reaches the quantum of local activity in which a purely local company typically would engage.

A defendant's greater affiliation with a different state is, in one circumstance, of great significance. This circumstance occurs when the defendant has the right to vote in a different state. Only domicile, not substantial activity in a state, earns the right to vote. Because political fairness results from an opportunity to participate in political processes, domicile indeed provides a stronger basis for general jurisdiction than carrying on substantial unrelated activities in a state, even when the absolute amount of activity for each is the same. This qualification, however, is likely to have little practical importance. Natural persons usually do not perform substantial or continuous unrelated activities in a state where they are not eligible to vote. And, of course, a corporate defendant cannot exert political influence by the right to vote. Instead, they may lobby, advertise, make campaign contributions, and exert other types of political pressure where they have a substantial enough stake in the political process to justify such activity. This decision to exert political influence, however, does not depend on whether the corporation has its greatest attachment to that state, but rather on whether the level of attachment in that state exceeds the threshold beyond which exerting political influence is profitable.

The nonunique relationship of continuous and systematic activities, therefore, satisfies the reciprocal benefits and burdens rationale as well as do unique affiliations, with the sole exception that domicile remains superior to nonunique activities as a jurisdictional basis for natural persons who have no right to vote in the state in which they carry on these activities. The basic inquiry must be whether the defendant's level of activity rises to the level of activity of an insider, so that relegating the defendant to the political processes is fair. Such a quantum of activity is a prerequi-

site to asserting a state's coercive power when the state cannot justify such power by its authority to regulate in-state activities. Significantly, for purposes of general jurisdiction, the relevant issue is the absolute amount of activity, not the amount of activity relative to what the defendant does outside the state.

*3. Interstate and Intrastate Activities.*—We have discussed thus far only the *quantity* of local contacts necessary to establish general jurisdiction and have left aside issues of *quality.* Inquiry into the type of activities might seem unnecessary because the determination of substantive relevance exhausts qualitative issues. But not all contacts unrelated to a suit are alike, and the reason for the differences bears on the qualitative distinction underlying the test for general jurisdiction. Predicating jurisdiction on certain contacts will likely cause disincentives for conduct that gives rise to such contacts.[101] Indeed, the relatedness test recognizes that the availability of jurisdiction aids the state in discouraging or regulating actionable conduct within the state. Discouraging some sorts of conduct by the imposition of jurisdiction, however, may be constitutionally problematic.

Again, we can analyze activities as a basis of general jurisdiction by comparing activities to the paradigm bases, domicile, incorporation, or principal place of business. One difference between the in-state actions of locals and the in-state actions of outsiders is that the latter are more likely than the former to involve interstate transactions. An outsider's activities in the state may stem entirely from interstate activity, a fact made relevant by the Constitution.[102] Because predicating jurisdiction upon interstate conduct provides disincentives to engage in it, such jurisdiction may be unconstitutional under the commerce clause.[103] Disincentives to interstate commerce are particularly problematic in general jurisdiction cases because they affect innocent conduct, not conduct that gives rise to the litigation and that the state legitimately may seek to discourage. To illustrate how interstate activity may deny the exercise of general jurisdiction despite a large quantity of innocent, intrastate activ-

101. *Cf.* Carrington & Martin, *Substantive Interests and Jurisdiction of State Courts,* 66 MICH. L. REV. 227, 234 (1967) (asserting that liberal long-arm statutes can stifle commerce in states quite distant from the forum).

102. *See* U.S. CONST. art. I, § 8, cl. 3. The Constitution does not explicitly limit state interference with interstate commerce. Early on, however, the Supreme Court found that the negative implications of the commerce clause limit the scope of state power even in the absence of explicit congressional regulation under the clause. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9 (1824).

103. *See, e.g.,* Davis v. Farmer's Co-op. Equity Co., 262 U.S. 312, 315 (1923) (holding that the state's imposition of general jurisdiction over every railroad that maintained a soliciting agent in that state was unconstitutional under the commerce clause). *See generally* R. WEINTRAUB, *supra* note 19, § 4.30 (discussing the commerce clause as a limit on state court jurisdiction).

ity, we turn to *Helicopteros Nacionales de Colombia, S.A. v. Hall.*[104]

In ruling that Texas could not exercise general jurisdiction, the Court in *Helicopteros* gave short shrift to the defendant's contacts with Texas, which included large-scale purchases of helicopters manufactured there.[105] Relying on *Rosenberg Bros. v. Curtis Brown Co.*[106] for the proposition that mere purchases in the forum by a defendant do not justify personal jurisdiction,[107] the Court dismissed as insignificant the defendant's negotiations in Texas, withdrawal of money from a Texas bank, the purchase of ninety percent of its helicopter fleet in Texas over a seven-year period, and sending of numerous pilots and management personnel to Texas for training.[108] The Court concluded that these activities were not "the *kind* of continuous and systematic general business contacts" required by due process to uphold general jurisdiction over a foreign corporation.[109] Although the *Helicopteros* Court clearly suggested that some contacts count for general jurisdiction while others do not, the opinion itself offers no explicit guidance for distinguishing between them.

One approach would be to distinguish between intrastate and interstate activities. A defendant's intrastate activity should count more heavily towards general jurisdiction than its purely interstate activity—that in-state activity which engages the defendant from across the state's borders. An example of interstate activity would be the solicitation of orders from out of state, whereas intrastate activity would include local manufacturing or management. This distinction helps to explain the different results of *Helicopteros* and *Perkins*. In *Perkins*, the Court permitted Ohio to exercise general jurisdiction over a Philippine corporation whose forum contacts consisted of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, and the general management of the corporation's wartime activities by its Ohio-based president.[110] Unlike those in *Perkins*, the contacts in *Helicopteros* were not primarily the result of intrastate transactions.[111] This distinction be-

104. 466 U.S. 408 (1984).

105. *See id.* at 423-24 (Brennan, J., dissenting).

106. 260 U.S. 516 (1923).

107. *See Helicopteros*, 466 U.S. at 418.

108. *See id.* at 423-24 (Brennan, J., dissenting).

109. *Id.* at 416 (emphasis added); *see also* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (stating that the "quality and nature of the activity in relation to the fair and orderly administration of the laws" is an important concern in considering whether the court has general jurisdiction).

110. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952).

111. *See Helicopteros*, 466 U.S. at 410. Technically, the contacts in *Helicopteros* were international rather than interstate: the defendant was a Colombian corporation that performed all its services, helicopter transportation, in South America. *See id.* at 409-10. This fact should not affect, however, the analysis under the dormant commerce clause. The clause expressly applies to "Commerce with foreign Nations" as well as commerce "among the several States." U.S. CONST. art. I,

tween interstate and intrastate contacts also explains the otherwise peculiar suggestion, in other cases, that mere solicitation does not constitute doing business and cannot in itself establish jurisdiction.[112]

The justification for an interstate-intrastate distinction appears in dormant commerce clause doctrine.[113] Two strands of theory underlie this doctrine:[114] one focuses on the protection of free trade between the states,[115] and the other concentrates on preventing state discrimination against interstate trade.[116] Courts reviewing state action under the free trade strand generally assess the extent of the burden imposed on interstate commerce and then balance state and national interests against that burden.[117] If both the burden and the national interest favoring unrestricted commerce are large, the state action will be struck down as an undue burden on interstate commerce, unless a countervailing state interest prevails.[118]

Arguably this free trade strand of the dormant commerce clause doctrine supports the distinction between interstate and intrastate activity in general jurisdiction analysis. Imposing general jurisdiction over a foreign corporation engaged only in interstate activity may constitute a burden on interstate commerce. Such jurisdiction raises the cost of en-

§ 8, cl. 1. Apparently, most dormant commerce clause cases address state restrictions on interstate commerce. Nonetheless, there is no reason for differentiating between international and interstate activity in this context. Consequently, we will treat situations involving international contacts as raising the same dormant commerce clause issues as interstate contacts and will use interstate to refer to both types of contacts.

112. *See, e.g.*, People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 87 (1918) (stating that acts of agents without authority beyond solicitation are not sufficient to constitute doing business for purposes of jurisdiction); Barcelona Hotel, Ltd. v. Mahoney Hadlow & Adams, 82 A.D.2d 790, 791, 440 N.Y.S.2d 660, 661 (1981) (finding that a law firm whose only contact was mail and telephone transactions did not have a "continuous, systematic and regular" presence).

113. The dormant power to regulate interstate commerce lies exclusively in Congress. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 9 (1824). The Supreme Court first referred to "the power to regulate commerce in its dormant state" in Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2 (2d ed. 1988) (discussing "implied rather than expressed" constitutional limitations on states under the commerce clause).

114. For a general discussion of the two strands of theory that underlie the dormant commerce clause, see Eule, *Laying the Dormant Commerce Clause To Rest*, 91 YALE L.J. 425, 439-41 (1982); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 130-31.

115. *See, e.g.*, Bibb v. Navajo Freight Lines, 359 U.S. 520, 527-29 (1959) (invalidating Illinois statute because it placed "a great burden of delay and inconvenience" on interstate truck lines by making equipment illegal that was legal in 45 other states and requiring installation of innovative equipment).

116. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 336-38 (1979) (articulating a three-part test that includes determining whether the challenged statute "discriminates against interstate commerce either on its face or in practical effect").

117. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761, 779 (1945) (finding that a "slight and dubious" safety advantage of a state law limiting the number of railroad cars in a train does not counterbalance the harm to interstate commerce).

118. *See id.*

gaging in interstate business by requiring the corporate defendant to litigate claims unrelated to its forum activities in distant and perhaps unpredictable forums, where it possibly will be subject to local law. Indeed, in several older cases, courts invalidated assertions of jurisdiction on commerce clause grounds.[119]

In contrast, if a corporation engages only in a large amount of intrastate activity, general jurisdiction over it may impose little burden on interstate commerce. Suit in a "home" forum not only will be predictable, but also should not overly tax the resources of the foreign corporation, which presumably will be familiar with local law and can retain local counsel more easily. Moreover, allowing jurisdiction will not threaten the national interest in free trade because any burden derives from intrastate activities, which are not constitutionally protected.[120]

The discrimination strand of the dormant commerce clause doctrine also offers support for distinguishing interstate and intrastate contacts. Discriminatory state treatment of interstate commerce is invalid because "legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."[121] This standard will invalidate state action that has the discriminatory effect of favoring insiders at the expense of outsiders, even when the burden on free trade is minimal.[122]

Of course, imposing general jurisdiction on the basis of continuous and systematic activities is not discriminatory on its face; both outsiders

119. *See, e.g.*, Michigan Cent. Ry. v. Mix, 278 U.S. 492, 495 (1929); Atchison, Topeka & Santa Fe Ry. v. Wells, 265 U.S. 101, 103 (1924); Davis v. Farmers Co-op. Equity Co., 262 U.S. 312, 315 (1923).

120. *See* J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 303 (1978) (defining interstate commerce). The Court has drawn on the interstate-intrastate distinction in passing on the constitutionality of state door-closing statutes, which bar foreign corporations that have not qualified to conduct intrastate business from litigating in local courts. In Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 31-34 (1974), the Court held that the commerce clause does not allow a state to deny access to its courts if the plaintiff is litigating an interstate claim. In Eli Lilly & Co. v. Sav-On-Drugs, Inc., 366 U.S. 276, 283-84 (1961), however, the Court permitted such a bar when the foreign corporation's claim was intrastate in nature. *See also* Note, *A Proposed Minimum Threshold Analysis for the Imposition of State Door-Closing Statutes*, 51 FORDHAM L. REV. 1360, 1365-73 (1983) (proposing a uniform minimum threshold of contacts to permit an unqualified corporate plaintiff to sue in a state court on an interstate claim).

121. South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938). *But see* CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1648-49 (1987) (finding that the the mere fact that some of the burden of state regulation falls on some interstate companies does not establish discrimination).

122. *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978). The Supreme Court has given various meanings to the term "discrimination." *See* G. GUNTHER, CONSTITUTIONAL LAW 276 (11th ed. 1985). For example, whereas *City of Philadelphia* concerned a state law that was discriminatory on its face, presumptively enacted for an illegitimate purpose, 437 U.S. at 627, the Court in Dean Milk Co. v. Madison, 340 U.S. 349 (1951), invalidated an ordinance that was discriminatory only in its effect, although it noted the law's legitimate purpose, *see id.* at 354-56.

and insiders are subject to it. In application, however, the burden of expansive general jurisdiction falls entirely on the shoulders of the outsider. Assume, for example, that state *A* counts interstate activity in its minimum contacts analysis for general jurisdiction. Insider Corporation is not concerned with *A*'s aggressiveness because it will be subject to general jurisdiction in *A* even under the most conservative jurisdictional standards. But Outsider Corporation now must answer not only to unrelated claims in states where it is a true insider, but also to unrelated claims in *A*, where it is an outsider. Assuming that their businesses are equal in size and distribution throughout the country, Outsider Corporation is subject to one more forum of general jurisdiction than Insider Corporation solely because *A* counts interstate contacts.[123] Not only is Outsider Corporation less politically able than insiders to change this situation, but the local government will have incentive to continue this practice because it will give insider businesses a competitive edge over outsiders that exclusively bear the costs of the extra forum of general jurisdiction. Furthermore, the practice provides a boon to the local bar, a group that is hardly without influence in local politics.[124]

Thus, courts should weigh a defendant's intrastate contacts more heavily and should discount purely interstate activity in determining whether to exercise general jurisdiction. The *Perkins* Court upheld general jurisdiction over a defendant engaging in extensive intrastate activity that amounted to the management of the company in the forum.[125] In *Helicopteros*, on the other hand, the Court denied the state's exercise of general jurisdiction over a defendant whose intrastate activity—negotiations and pilot and management training—was far from substantial and could not be counted with the defendant's large-scale interstate and international activity—purchases of helicopters.[126] At least one court has refused to exercise general jurisdiction over a defendant whose forum contacts were wholly interstate. In *Lumber Mart, Inc. v. Haas International Sales & Service, Inc.*, the North Dakota Supreme Court denied the exercise of jurisdiction because the unrelated forum contacts included only interstate commerce activity, namely, registering with a regulatory department and obtaining a trip permit.[127] But another court has ex-

123. *Cf.* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 256 (1938) (prohibiting the taxation of interstate commerce when it subjects such commerce to "cumulative burdens not imposed on local commerce").

124. *Cf.* Macey & Miller, *supra* note 56, at 506-09 (describing the power of the Delaware bar as a political interest group influencing Delaware corporate law).

125. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 448 (1952).

126. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984).

127. 269 N.W.2d 83, 89 (N.D. 1978); *see also* Glater v. Eli Lilly & Co., 744 F.2d 213, 217 (1st

tended general jurisdiction over foreign corporations whose forum contacts were interstate in nature. In *Quaker Oats Co. v. Chelsea Industries, Inc.*, the district court exerted general jurisdiction over defendants whose only contacts were periodic sales of food products to Illinois companies over a three-year period.[128] Exercising such jurisdiction ignores the discriminatory and burdensome impact on interstate trade that results when interstate contacts are the sole basis for general jurisdiction.

### C. *Transient Jurisdiction*

Transient jurisdiction[129] presents an unresolved question of due process: Does an individual's mere presence in the state for service of process constitute sufficient contact to confer on the state power to adjudicate? The issue predominantly arises in the context of individual rather than corporate defendants because a corporation does not have a tangible existence and thus is unable to move about. Yet the presence of a corporate employee acting as agent in the forum arguably constitutes the presence of the corporation. A corporate employee's mere presence in the forum, however, does not necessarily indicate the representation of the corporation, and at least two lower courts have held that transient presence may be an inappropriate basis for jurisdiction over corporate defendants.[130]

For individuals, however, the Supreme Court in *Pennoyer v. Neff* enshrined the principle that a state has the power to assert jurisdiction over individuals solely because they were served while in the state.[131] *Pennoyer*'s rationale was simple: a state has complete authority over per-

Cir. 1984) (stating that interstate sales to wholesale distributors and employment of sales representatives to solicit business in forum were insufficient to establish general jurisdiction).

128. *See* 496 F. Supp. 85, 88 (N.D. Ill. 1980); *see also* Huffman v. Inland Oil & Transp. Co., 98 Ill. App. 3d 1010, 1017, 424 N.E.2d 1209, 1215 (1981) (finding that a "regular pattern of commerce and transportation by [the defendant] throughout the waterways of the State" was an adequate nexus for general jurisdiction).

129. The term "transient jurisdiction" refers to jurisdiction over persons temporarily present in the forum. *See* R. WEINTRAUB, *supra* note 19, § 4.10.

130. *See, e.g.*, Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 271 (5th Cir. 1985) (remarking that the case was not one in which the defendant employee had visited the forum in a purely personal capacity); Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305, 312 (N.D. Ill. 1986) (stating that "mere service of process upon a defendant transiently present in the jurisdiction does not vest a state with personal jurisdiction over the defendant"); *see also* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067, at 251-53 (2d ed. 1987) (stating that courts gradually have recognized that the casual presence of a corporate agent in a state is insufficient to subject a corporation to suit there on claims unconnected to the corporation's activities there). *But see* Aluminal Indus. v. Newtown Commercial Assoc., 89 F.R.D. 326, 328 (S.D.N.Y. 1980) (finding sufficient evidence to support jurisdiction over the defendant's managing partner while in transit at the airport).

131. 95 U.S. 714, 722 (1878).

sons and things within its borders.[132] The more modern focus on defendants' rights, however, casts doubt upon the propriety of such naked territorial assertions of jurisdiction.[133] Increasingly, the Supreme Court has emphasized that assertions of jurisdiction must be fair[134] and that defendants must be able to predict when their behavior might result in their being subject to suit in a particular forum.[135] Indeed, the *Pennoyer* notion that state power extends to all defendants physically within the forum may have perished in *Shaffer v. Heitner*, in which the Supreme Court held that all assertions of state jurisdiction must satisfy the standard of fairness based on minimum contacts set forth in *International Shoe*.[136] We begin our analysis by examining the past of transient jurisdiction. Then, we assess its current legal vitality and conclude by evaluating the current justifications for the doctrine.

*1. The Past of Transient Jurisdiction.*—Before the advent of modern transportation, when traveling was difficult and ties between jurisdictions were attenuated, courts justifiably were concerned that defendants could evade suit by avoiding forums in which potential plaintiffs resided. Early American jurisdictional theory developed at least in part as a response to this problem. An early Massachusetts opinion concludes:

> A debtor coming here merely for the purpose of embarking may be detained several months before he procures a passage; he may have all his effects about him; and he may never return to the place where he transacted his business. If the creditor cannot take him here, he may lose his chance of securing his debt.[137]

Theoretical notions of sovereignty exacerbated the practical problems associated with obtaining jurisdiction against someone outside a forum. Nations had absolute authority over persons and things within their borders but none over persons and things outside their territory.[138] The American federal system incorporated a theory of state sovereignty that paralleled Locke's theory of sovereignty of independent nations. Locke concluded that an individual's very presence "within the territories of [a] government" obligated that person to obey the government.[139]

132. *See id.*

133. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (focusing on whether the corporate defendant has minimum contacts with the forum so that maintenance of the suit is fair and just).

134. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

135. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).

136. *See Shaffer*, 433 U.S. at 212.

137. Barrell v. Benjamin, 15 Mass. 354, 358 (1819).

138. *See* Pennoyer v. Neff, 95 U.S. 714, 726-27 (1878).

139. J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 119, at 181-82 (T. Cook ed. 1947).

The Supreme Court in *Pennoyer* accepted the view that the American states "exercise the authority of independent States," and concluded that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[140]

The development of transient jurisdiction after *Pennoyer* revealed the conflation of notice to the defendant with power to adjudicate.[141] Initially, the rule in *Pennoyer* sought to protect defendants from suits brought in states where they were unlikely to hear of their potential liability.[142] Concern with due process requirements led the *Pennoyer* Court to invalidate Oregon's practice of providing constructive notice to nonresident defendants who owned property in Oregon.[143] Transient jurisdiction worked a nice balance between notions of state sovereignty and individual rights, because it ensured that a defendant had received notice of the suit, and at the same time it allowed the state to exercise its traditional authority over those present within its borders. Hence, after *Pennoyer*,[144] courts regularly upheld a forum's power over individuals on the sole basis of the person's presence in the forum when served.[145]

*2. Transient Jurisdiction's Current Status.*—The key to the current legal status of transient jurisdiction rests with the holdings of *International Shoe Co. v. Washington*[146] and *Shaffer v. Heitner*.[147] In *Interna-*

140. 95 U.S. at 722.

141. Courts have read *Pennoyer* as evaluating state power to adjudicate in terms of the reliability of notice to defendant. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 463 (1940) (expanding the bases of jurisdiction acceptable under *Pennoyer* in light of more efficient means of providing constructive notice).

142. This protection derived from *Pennoyer*'s requirement of presence within the territorial jurisdiction of the court. *See* 95 U.S. at 733. The *Pennoyer* rule also sought to prevent "encroachment upon the independence of the state" to exercise its sovereignty over the defendant, when the defendant or his property was present within the state's borders. *See id.* at 723.

143. *See id.* at 726.

144. Commentators disagree on the extent to which *Pennoyer* created transient jurisdiction in America. *Compare* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956) (finding little support for the doctrine in the common law before *Pennoyer*) *with* Werner, *Dropping the Other Shoe:* Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 572 (1979) (claiming that state courts adopted the English concept of presence-oriented jurisdiction early in the nineteenth century).

145. *See, e.g.*, Donald Manter Co. v. Davis, 543 F.2d 419, 420 (1st Cir. 1976) (upholding jurisdiction over defendant served while in forum on unrelated business); Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (upholding jurisdiction over defendant served while flying over forum); Fitzhugh v. Reid, 252 F. 234, 237 (E.D. Ark. 1918) (upholding jurisdiction over defendant served while in forum for medical treatment); Lee v. Baird, 139 Ala. 526, 528, 36 So. 720, 720 (1903) (upholding jurisdiction over defendant served while traveling through forum); Fisher, Brown & Co. v. Fielding, 67 Conn. 91, 104, 34 A. 714, 715 (1895) (upholding jurisdiction over defendant served while in forum on business unrelated to cause of action); Nielsen v. Braland, 264 Minn. 481, 484, 119 N.W.2d 737, 739 (1963) (same).

146. 326 U.S. 310 (1945).

147. 433 U.S. 186 (1977).

*tional Shoe*, the Supreme Court imposed a minimum contacts test for in personam jurisdiction.[148] It also suggested, however, that presence remained an alternate basis for jurisdiction:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam, if he be not present within the territory of the forum*, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[149]

The phrasing suggests that notwithstanding the new minimum contacts approach, the *International Shoe* Court approved transient jurisdiction.[150]

Some years later, the Court appeared to reassert both transient jurisdiction and the state's absolute power over persons served within its borders in *New York v. O'Neill*.[151] Obeying an interstate agreement, Florida authorities transported O'Neill, a nonresident, to New York to appear as a witness in a criminal proceeding taking place there.[152] O'Neill objected and the Florida Supreme Court agreed that the state lacked power to order a nonresident to perform acts outside Florida. The United States Supreme Court, without a single citation, reversed: "[T]he Florida courts had immediate personal jurisdiction over respondent by virtue of his presence within that State."[153] O'Neill's presence "gave the Florida Courts constitutional jurisdiction to order an act even though that act is to be performed outside of the State."[154]

*Shaffer v. Heitner*, like *International Shoe*, emphasized fundamental fairness as the core of jurisdictional due process.[155] Commentators were quick to interpret *Shaffer*'s extension of minimum contacts to all bases of jurisdiction as the death knell of transient jurisdiction. Representative of the general trend is the view of Professor Werner:

> [Transient jurisdiction] can find no support, however, in the post-*Shaffer* world of jurisdiction. . . . In my opinion, the 'catch as catch can' theory of in personam jurisdiction, based upon the unrelated physical presence of a defendant within the forum state, is, and should be, entombed along with the attachment basis of

148. 326 U.S. at 316.

149. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (emphasis added).

150. According to one recent decision, this exception in *International Shoe* "foreclosed judicial reconsideration" of transient jurisdiction until *Shaffer*. Nehemiah v. Athletics Congress of U.S.A., 765 F.2d 42, 47 (3d Cir. 1985).

151. 359 U.S. 1 (1959).

152. Florida invoked its Uniform Statute To Secure the Attendance of Witnesses from Within or Without the State in Criminal Proceedings to justify transporting O'Neill to New York. O'Neill, a nonresident of Florida, was there for a convention. *See id.* at 3.

153. *Id.* at 8-9.

154. *Id.* at 9.

155. *See* 433 U.S. 186, 212 (1977).

jurisdiction.[156]

The proposed revisions to the *Restatement (Second) of Conflict of Laws* likewise cast doubt on the sufficiency of mere presence.[157]

The relevance of *Shaffer* to transient jurisdiction, however, is not at all clear, given *O'Neill*'s indication that transient presence remained a valid basis of jurisdiction after *International Shoe*. *Shaffer* arguably only extended in personam standards to jurisdiction based on property. Justice Stevens, concurring in *Shaffer*, suggested that transient presence in a forum may satisfy *International Shoe*'s minimum contacts standard. Basing his analysis on notice to the defendant, Stevens's definition of notice included more than mere notification of the filing of a particular suit; notice meant that an individual could foresee that certain conduct might subject one to jurisdiction.[158] At least one current Justice, then, seems willing to accept transient jurisdiction on the grounds that it meets *International Shoe*'s notice-based analysis of due process. Various lower courts have found the notice reasoning persuasive.[159]

*3. Current Justifications for Transient Jurisdiction.*—Against this backdrop of uncertain and contradictory case law, a return to first principles is in order. Transient jurisdiction is comparable to other forms of general jurisdiction in several ways. First, the state cannot justify this assertion of adjudicatory authority in terms of its power to effectuate local substantive interests. Like most general jurisdiction cases, the cause of action in a transient jurisdiction case is not related to forum activities; therefore, the litigation is not a means of regulating local conduct. Innocent transit through the state is not an activity to which the state reasonably can object.

156. Werner, *supra* note 144, at 589; *see also* 4 C. WRIGHT & A. MILLER, *supra* note 130, § 1064, at 232 n.15 (suggesting that *Shaffer* may undercut transient jurisdiction, at least for in rem and quasi in rem cases); Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 61 (1979) (asserting that in light of *Shaffer* "there is little need for the 'catch-as-catch-can' attitude which justifies the transient rule"). *But see* Glen, *An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607, 611 (1979) (contending that transient jurisdiction is appropriate if an individual entered a forum purposefully).

157. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 16, 17, 28 (Proposed Revisions 1986).

158. Stevens described his idea of notice as follows:

> The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another State . . . I knowingly assume some risk that the State will exercise its power over . . . my person while there. My contact with the State, though minimal, gives rise to predictable risks.

433 U.S. at 218 (Stevens, J., concurring).

159. *See, e.g.*, Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 270 (5th Cir. 1985) (stating that notice of suit is sufficient for due process); Leab v. Streit, 584 F. Supp. 748, 756 (S.D.N.Y. 1984) (emphasizing that defendant received notice adequate for due process requirements).

The constitutional protection afforded innocent transit[160] casts further doubt on the validity of transient jurisdiction. A state may not discourage nonresidents from exercising their simple right to travel into the state,[161] particularly when the state can point to no cognizable substantive interest justifying imposition of the burden. In addition, many states have recognized that under certain circumstances imposition of jurisdiction on nonresidents is burdensome and may deter the conduct upon which it is predicated. For instance, courts typically grant immunity from process for nonresident witnesses, so as not to discourage them from appearing voluntarily to testify.[162] Admittedly, the state voluntarily grants this immunity; the due process clause does not require special treatment for those appearing as witnesses.[163]

Other justifications for transient jurisdiction are equally problematic. The argument that service within the state assures notice of suit appears to justify transient jurisdiction, but notice alone cannot establish jurisdiction.[164] Furthermore, mere entry into a state should not establish notice that defendants may be served with process. The forum could as easily determine that ownership of real property in the state alerts defendants that they may be subject to suit on unrelated claims, yet *Shaffer v. Heitner* prohibits such assertions of jurisdiction.[165]

Moreover, if notice of the suit is the goal, other means can accomplish this end; service of process need not coincide with the defendant's presence in the state. Suppose, for example, a state adopts a long-arm

160. The right to travel is a fundamental constitutional right. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

161. *See, e.g.*, Edwards v. California, 314 U.S. 160, 177 (1941) (striking down a California law that made bringing a known nonresident indigent into the state a misdemeanor); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867) (invalidating a Nevada tax imposed on persons entering or leaving the state).

162. *See, e.g.*, Stewart v. Ramsay, 242 U.S. 128, 129 (1916) (discussing the immunity of parties when process is served on them while in attendance at court and in transit thereto); Diamond v. Earle, 217 Mass. 499, 500-01, 105 N.E. 363, 363 (1914) (describing witnesses' immunity from service); Crusco v. Strunk Steel Co., 365 Pa. 326, 327-28, 74 A.2d 142, 143 (1950) (explaining immunity from service granted to a nonresident defendant present in the state for criminal proceeding). *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE §§ 2.26-2.31, at 98-101 (1985) (summarizing rules relating to immunity from service).

163. *See, e.g.*, Wangler v. Harvey, 41 N.J. 277, 286, 196 A.2d 513, 522 (1963) (stating that a court may retain jurisdiction over a witness unless such jurisdiction would violate the *International Shoe* standards of fairness); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 83 comment b (1969) (stating that only the needs of judicial administration support granting witnesses and attorneys immunity); *see also* Keeffe & Roscia, *Immunity and Sentimentality*, 32 CORNELL L.Q. 471, 489 (1947) (arguing that sentimentality for the defendant has led to the expansion of circumstances in which a witness receives immunity from service).

164. Many of the Supreme Court's jurisdictional decisions resulted from cases in which defendants received actual notice and appeared to urge the constitutional defense of due process. *See, e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978).

165. *See* 433 U.S. 186, 212 (1977).

statute predicating jurisdiction upon the defendant's prior presence in the state at any time and directing notice by registered mail. This statute probably would violate due process, but its underlying notice rationale differs little from that for transient jurisdiction.[166]

This hypothetical statute also illustrates why the consent justification for transient jurisdiction is unconvincing. If we assume that every person entering a state effectively agrees to state-imposed conditions, then the state should be able to extract consent to suit from the defendant's ever having entered the forum. Perhaps entering the state does signal consent to obey state law while there, and the state has a clear legitimate interest in the obedience of visitors.[167] But this interest justifies only specific jurisdiction to regulate local activities and not transient jurisdiction over unrelated claims.

Furthermore, the state's rationale for compelling attendance after a defendant has received service but left the state is far from clear, because the power to regulate seems to dissolve upon departure. Consent adds nothing to the analysis; the state simply cannot presume tacit consent to state jurisdiction for any unrelated matter. Interests of individual rights and comity among the states preclude such an unreasonable presumption. A sovereign nation may have the right to forbid entry, and thus it may condition entry upon assent to jurisdiction. The American states, however, neither can forbid nor impose unreasonable conditions upon interstate travel.[168]

Notwithstanding these criticisms, lower courts have not been quick to consign transient jurisdiction to the dustbin of history. Some courts have upheld it in the belief that forum non conveniens or venue transfer will prevent abuses.[169] But because a court may condition forum non conveniens dismissals upon waiving certain defenses in the new forum,[170] and because venue transfers preserve the plaintiff's choice of law,[171] these devices do little to curb abusive forum shopping. Other courts simply have noted that the Supreme Court has not yet declared transient

166. One could argue that transient presence at least protects the defendant's repose; the person that leaves the state without being served has completely escaped transient jurisdiction. Our hypothetical long-arm statute would not allow such an escape.

167. *Cf.* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 773-74 (1984) (concluding that publication's regular circulation in the forum was sufficient to support assertion of jurisdiction in a libel action based on contents of the publication); R. WEINTRAUB, *supra* note 19, § 6.10 (stating that states have an interest in shaping their tort rules to influence the conduct of those that come within their borders).

168. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

169. *See, e.g.*, Amusement Equip., Inc. v. Mordelt, 779 F.2d 264, 270-71 (5th Cir. 1985); Aluminal Indus. v. Newtown Commercial Assoc., 89 F.R.D. 326, 329-30 (S.D.N.Y. 1980).

170. *See, e.g.*, Opert v. Schmid, 535 F. Supp. 591, 594-95 (S.D.N.Y. 1982).

171. *See* Van Dusen v. Barrack, 376 U.S. 612, 624 (1964).

jurisdiction invalid under minimum contacts analysis.[172] Still others have required that at least one of the parties have some connection with the forum.[173]

Certainly the rule's most favorable aspect is its straightforward application, a rare and welcome characteristic in due process litigation. The rule allows a state court to bypass complicated weighings of unrelated contacts under the continuous and systematic test. Furthermore, extreme abuses, cases in which transient presence is the sole basis for jurisdiction, may be rare because plaintiffs typically locate defendants by their more substantial forum activities.

We must choose between a clear, simple—though overly broad—rule, or the more difficult tests for general jurisdiction that are used when the defendant is served in another state. On balance, transient jurisdiction has outlived its theoretical justifications. Originally, the doctrine sought to ensnre that defendants received notice of pending lawsuits. In the day of *Pennoyer*, notice seemed a sufficient protection of defendants' rights.[174] The Supreme Court now recognizes, however, that notice alone does not confer power to adjudicate.[175] We are uncertain whether allowing suits against defendants whose only connection to the forum is transient presence serves any legitimate state interests.

### *D. Consent to Jurisdiction*

Consent traditionally has been a basis for exercising personal jurisdiction because, unlike for subject matter jurisdiction, the parties may waive personal jurisdiction.[176] A party expressly may submit to a court's jurisdiction by contractual consent in advance of the dispute[177] or may submit inadvertently by making a general appearance.[178] The Supreme Court recognized consent as a basis for jurisdiction in *National Equipment Rental, Ltd. v. Szukhent.*[179] The out-of-state defendants in that

172. *See, e.g., Amusement Equip.*, 779 F.2d at 268 & n.8 (noting that the Supreme Court's approach has precluded clear-cut jurisdictional rules); Humphrey v. Langford, 246 Ga. 732, 734, 273 S.E.2d 22, 23-24 (1980) (stating that the Supreme Court has "yet to reach the issue" whether persons without minimum contacts can be subject to personal jurisdiction solely because they were served while transient in the state).

173. *See* Waite v. Waite, 367 N.W.2d 679, 681 (Minn. 1985).

174. *See supra* section II(C)(1).

175. *See supra* notes 164-65 and accompanying text.

176. *See* Sosna v. Iowa, 419 U.S. 393, 398 (1975); Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 699-700 (6th Cir. 1978); *see also* C. WRIGHT, THE LAW OF FEDERAL COURTS § 7, at 23, 25 (4th ed. 1983) (contending that parties cannot waive lack of subject matter jurisdiction, but may waive in personam jurisdiction).

177. *See* National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964).

178. *See* Cuellar v. Cuellar, 406 S.W.2d 510, 512 (Tex. Civ. App.—Fort Worth 1966, no writ).

179. 375 U.S. 311 (1964).

case had agreed in a leasing contract to designate a third party as agent for service of process within the state of New York. Recognizing the parties' ability to consent to jurisdiction by contract, the Court upheld the agreement.[180]

The *Szukhent* defendants consented to specific jurisdiction,[181] but parties conceivably might provide for jurisdiction that is general in all respects. In other words, they might agree to jurisdiction for suits that bear no relationship to the instrument in which they express consent and that have no relationship to the chosen forum.[182] Parties could draft an agreement that subjects a defendant to the forum's general jurisdiction, which would permit any individual, even one not a party to the agreement, to sue on any subject matter, eveu one with no connection to the forum. This kind of consent clause would rarely appear in a private contract because one party would have little reason to extract such consent from another. Analogous consent does exist, however, when a foreign corporation appoints an agent for service of process.[183]

Contractual consent to jurisdiction is subject to standard contract law doctrine and may be unenforceable when the consent results from adhesion, overreaching, or unequal bargaining positions.[184] But these limits are imposed by state law, not necessarily by the Constitution.[185] The constitutional limitations on assertion of judicial jurisdiction based on general consent are unclear; the due process clause possibly would intervene if a state dispatched with such limits or interpreted contractual consent clauses very broadly. For example, in *Szukhent*, the due process clause might have come into play if the New York courts had interpreted

180. *Id.* at 315-16.

181. The agreement apparently encompassed only amenability to suit arising out of the contract, and not to suit on unrelated claims. Consent to jurisdiction given in a private contract ordinarily does not constitute consent to a jurisdiction over any cause of action whatsoever. The Court in *Szukhent* did not specifically discuss this issue. The contract designated Weinberg as agent "for service of process," and the Court only discussed jurisdiction over that particular dispute. *See id.* at 313. Further, because New York was the location of the offices of the plaintiffs, the forum had some connection with the controversy. The opinion states that the corporation's principal place of business was New York. *See id.*

182. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-9 (1972) (upholding contract clause that required parties to bring suit in English forum even though that forum was unrelated to towage contract).

183. Currently, all fifty states require the appointment of a local agent as a condition for transacting certain kinds of business in the state. *See, e.g.*, CAL. CIV. PROC. CODE § 1018 (West 1986); MASS. GEN. L. ch. 181, § 4 (1986); TEX. AGRIC. CODE ANN. § 63.032 (Vernon Supp. 1988). *See generally* R. CASAD, *supra* note 2, ¶ 3.02[2][a] (discussing state requirements that corporations consent to jurisdiction in order to operate in the state); Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C.L. REV. 1, 20 (1968) (discussing state requirements that corporations appoint local agents for service of process).

184. *See* F. JAMES & G. HAZARD, *supra* note 162, § 2.23, at 93.

185. *But see Szukhent*, 375 U.S. at 324-25 (Black, J., dissenting) (suggesting that some constitutional protection against adhesion contracts may exist).

the contract to mean that the designation of an agent for service of process made the Szukhent's amenable to suit in New York on any cause of action, whether or not it related to the contract or to New York. States, however, have not pressed the constitutional limits of contractual clauses through expansive readings of private contracts.

The most formidable constitutional issue surrounding general jurisdiction by consent arises when consent derives from a statutorily required appointment[186] rather than from contract. If states with such statutes allow general jurisdiction when the defendant's forum contacts arguably neither relate to the controversy nor are "continuous and systematic,"[187] they render the due process credentials of statutory appointment doubtful. To avoid this issue, some courts explicitly require a minimum contacts analysis in addition to a showing that the defendant's statutory agent received service of process. In *Springle v. Cottrell Engineering Corp.*,[188] a Maryland appellate court held that service on a foreign corporation's agent subjects the corporation to state jurisdiction if "the corporation has sufficient contact with the State to make it constitutionally subject to suit here."[189] Under this view, the mere appointment of a resident agent does not reduce the amount of actual forum contacts required for jurisdiction.[190]

Other courts, however, have almost eliminated minimum contacts analysis for defendants that have appointed agents. The court in *Cowan v. Ford Motor Co.*[191] summarily concluded that "[b]y appointing a resident agent and conducting substantial business in Mississippi, [the defendant] has consented to Mississippi's exercise of personal jurisdiction."[192] The opinion fails to reveal what those substantial con-

186. Of course, the agent frequently provides an additional basis for asserting jurisdiction that already exists for other reasons. For example, when the cause of action arises in the forum, the state probably has jurisdiction anyway, so the agent becomes simply the method for serving process. Likewise, contacts may be sufficiently continuous and systematic that general jurisdiction would exist independent of the in-state agent. In Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952), the court held that Ohio could assert general jurisdiction over the defendant even though it had not appointed a statutory agent for service of process.

187. In some states, statutory consent only applies to suits arising from the defendant's forum activity. *See* Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 43, 49 (9th Cir.), *cert. denied*, 385 U.S. 831 (1966); Williams v. Williams, 621 S.W.2d 567, 569-70 (Tenn. Ct. App. 1981).

188. 40 Md. App. 267, 391 A.2d 456 (1978).

189. *Id.* at 288, 391 A.2d at 469; *see also* Nelson v. World Wide Lease, Inc., 110 Idaho 369, 373, 716 P.2d 513, 517 (Ct. App. 1986) (stating that although valid service on resident agent establishes jurisdiction over nonresident corporation, it is proper to determine the reasonableness of the exercise of jurisdiction by considering the corporation's contacts with the state).

190. *See* R. CASAD, *supra* note 2, ¶ 3.02[2][a][ii], at 3-67 to -69 (questioning the reasoning of Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979)).

191. 694 F.2d 104 (5th Cir. 1982), *question certified on reh'g*, 713 F.2d 100 (5th Cir.), *district court rev'd & action remanded*, 719 F.2d 785 (5th Cir. 1983).

192. *Id.* at 107; *see also* Recent Decisions, *supra* note 1 (discussing the *Cowan* case).

tacts were, preferring simply to state in a footnote that "sufficient contacts indisputably are present."[193]

Even conclusory assertions of connections to the forum are lacking from some opinions that have based general jurisdiction wholly on the defendant's statutory appointment of an agent. In a brief opinion, the court in *Goldman v. Pre-Fab Transit Co.* held that Texas courts could entertain a suit against a foreign corporation for property damages suffered in a truck crash in Louisiana.[194] Noting service on the defendant's resident agent, the court explained that "[t]he rationale behind the theory of consent is that in return for the privilege of doing business in the state, and enjoying the same rights and privileges as a domestic corporation, the foreign corporation has consented to amenability to jurisdiction for purposes of *all* lawsuits within the state."[195] The court in *Junction Bit & Tool Co. v. Institution Mortgage Co.*[196] went so far as to say that "minimum contacts would seem *patently established*" when a "foreign corporation has actually qualified under Florida law to transact business in th[e] state and has appointed a resident agent for service of process" as the Florida statute required.[197]

These holdings are consistent with some early Supreme Court precedent. In the first part of this century the Court held that the designation of an agent could constitutionally confer unlimited general jurisdiction.[198] In *Pennsylvania Fire Insurance v. Gold Issue Mining & Milling Co.*, Justice Holmes wrote that Missouri could constitutionally exercise general jurisdiction even though the defendant's only apparent contact with the forum was its designation of the Missouri Commissioner of Insurance as its local agent.[199]

But none of these cases or their underlying theories seems viable under today's due process standards.[200] Although the rigid territoriality

193. 694 F.2d at 107 n.8.

194. 520 S.W.2d 597 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ).

195. *Id.* at 598 (citation omitted) (emphasis added).

196. 240 So. 2d 879 (Fla. Dist. Ct. App. 1970).

197. *Id.* at 882 (emphasis added); *see also* Anderson v. United States, 220 F. Supp. 769, 770-71 (E.D. Pa. 1963) (holding that statutory consent is a sufficient basis for jurisdiction, even without contact between the defendant and the forum).

198. *See* Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917) (Holmes, J.); *see also* Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (L. Hand, J.) (holding that when a corporation designates an agent in a state, it is as if the corporation consented to jurisdiction in that state's courts); Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N.Y. 432, 438, 11 N.E. 1075, 1077 (1916) (Cardozo, J.) (holding that the presence of a designated agent within the state brings the corporation within the jurisdiction of the state courts). For a discussion of these cases and consent theory, see Kurland, *supra* note 11, at 578-82; Walker, *Foreign Corporation Laws: A Current Account*, 47 N.C.L. REV. 733, 734-36 (1969).

199. 243 U.S. at 95.

200. Professor Walker adopts this view and argues that

of *Pennoyer v. Neff* once required in-state service of process to support in personam jurisdiction,[201] the minimum contacts approach of *International Shoe Co. v. Washington*[202] led to long-arm jurisdiction. Furthermore, the old notion that a state could entirely exclude corporations or condition their entry upon consent to jurisdiction because corporations were state-created legal entities that could not operate beyond a sovereign's borders[203] eroded long ago.[204]

The New Jersey statute at issue in *G.D. Searle & Co. v. Cohn*[205] illustrates the difficulties inherent in continuing to recognize general jurisdiction based solely upon consent. Foreign corporations that operate in New Jersey without having appointed an agent for service of process face an automatic tolling against them of the state's statute of limitations during the time that the agent is not residing within the state.[206] Searle argued that the statute violated due process by requiring the company to assent to general jurisdiction in order to receive the benefits of the statute of limitations.[207] The Court declined to address this issue,[208] but it upheld the statute against Searle's argument that this rule violated the equal protection clause. Searle had argued that the state rationally could not

> the original reason for foreign corporation laws is lost, and their conceptual foundation is today largely discredited. State qualification statutes were adopted to solve problems created by a nineteenth century constitutional requirement that original legal process be served within the boundaries of forum states. The operating principle of the laws was also the product of an unusual nineteenth century development—the proposition that states can admit out-of-state corporations upon condition because, it was said, they could exclude them entirely. Subsequent Supreme Court decisions have eliminated the service of process requirement and modern judicial thinking has cut deeply into the acceptability of the principle of conditional entry.

Walker, *supra* note 198, at 733; *see also* Walker, *supra* note 183, at 24-30 (contending that the original purposes underlying the requirement of service within forums are no longer tenable).

201. 95 U.S. 714, 722 (1878). This requirement of in-state service of process necessitated fictions whereby out-of-state residents "consented" to jurisdiction. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 355 (1927) (sustaining jurisdiction over nonresident motorist under a Massachusetts statute that made using state highways equivalent to appointing the State Registrar as agent for service of process).

202. 326 U.S. 310 (1945).

203. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587 (1839).

204. *See, e.g.*, Pensacola Tel. Co. v. Westeru Union Tel. Co., 96 U.S. 1, 10-12 (1877) (stating that a state may not prevent a foreign corporation from carrying on interstate commerce within its borders).

205. 455 U.S. 404 (1981).

206. N.J. STAT. ANN. § 2A:14-22 (West 1987).

207. 455 U.S. at 412 n.7. In making the argument,

> [Searle] notes that it can obtain the benefit of the statute of limitations by appointing an agent to accept service. Fearing that appointment of an agent might subject it to suit in New Jersey when there otherwise would not be the minimum contacts required for suit in that State under the Due Process Clause, petitioner insists that New Jersey law violates due process by conditioning the benefit of the limitation period upon the appointment of a New Jersey agent.

*Id.*

208. *See id.*

toll the statute simply because a corporation had not named an agent for receipt of service.[209] Statutes such as that in *G.D. Searle*, which in effect require consent to jurisdiction, circumvent all due process notions of fairness underlying minimum contacts analysis and expose the fiction of consent as a basis for jurisdiction. Other lower courts have heeded similar due process constitutional arguments.[210]

### *E. Property*

*1. Jurisdiction Based on Property Unrelated to Suit.*—For about a century, jurisdiction in American courts was governed by *Pennoyer v. Neff*,[211] which established that the due process clause limited a state's judicial jurisdiction to persons or property present in its territory. In personam jurisdiction rested on state power over a defendant's person, and in rem jurisdiction resulted from state authority over property located within its borders.

Under in rem jurisdiction, the property itself is the subject of the cause of action[212] and judgment affects the interests of all persons in the property.[213] Quasi in rem jurisdiction arose in part from the difficulty of satisfying judgments against nonresident defendants.[214] Before long-arm statutes and before widespread recognition of sister states' judgments under the full faith and credit clause,[215] plaintiffs had little assurance of getting a nonresident defendant into the forum court or of enforcing a judgment against an absent defendant. To redress this situation, states allowed plaintiffs to request that the court sequester or garnish defendants' property in the state. Judicial attachment of property either would

209. *Id.* at 408.

210. For example, the district court in *In re Mid-Atlantic Toyota Antitrust Litigation* ruled that a defendant's designation of an agent could not alone make it amenable to suit for an unrelated claim in West Virginia, when the defendant had maintained no contact with the state for years. 525 F. Supp. 1265, 1287-88 (D. Md. 1981). The Court explained:

> Consent by itself is meaningless—it is significant only as a manifestation of the corporation's recognition that it has availed itself of "the benefits and protections of the laws" of the forum by virtue of conducting business activities there. If the corporation conducts no business in the forum, it has not availed itself of "benefits and protections of the laws" of the forum and there is no bargain between the corporation and the forum state and there is no meaning to the corporation's consent to jurisdiction. In such a situation, it would not be "reasonable and just, according to our traditional conception of fair play and substantial justice" to subject the corporation to jurisdiction in that forum. In short, a consent statute such as [West Virginia's] necessarily incorporates the Due Process "minimum contacts" requirement.

*Id.* at 1278 (citations omitted).

211. 95 U.S. 714 (1878).

212. *See* L. BRILMAYER, *supra* note 71, at 21.

213. *See* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958).

214. *See* Freeman v. Alderson, 119 U.S. 185, 187 (1886).

215. U.S. CONST. art. IV, § 1.

force appearance by the defendant or would satisfy default judgment.[216] The idea that an action in rem or quasi in rem proceeded only against property and affected the property owner only indirectly was therefore a convenient fiction which enabled plaintiffs to bypass the in personam jurisdiction requirement that the defendant be within the forum.[217]

No significant constitutional problems, beyond determining relatedness, arise when a court bases jurisdiction on property of the defendant that relates to the cause of action. The Supreme Court has recognized:

> When claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.[218]

For example, actions to quiet title or to resolve a contract dispute after the forum court attaches the disputed goods are clearly within the jurisdiction of the state where the property is located.[219] We will not focus on such relatively uncomplicated and straightforward applications of quasi in rem and in rem jurisdiction. Instead, we will examine jurisdiction based on property unrelated to the dispute and focus on the relevance of unrelated property to in personam jurisdiction.

By extending the minimum contacts requirement to property-based jurisdiction, *Shaffer v. Heitner*[220] corrected the anomalous treatment of a defendant's unrelated property under quasi in rem jurisdiction. In *Shaffer*, the defendants' only purported contact with the forum was their shares of stock, stock options, and other rights statutorily deemed present within the state.[221] The lower court sequestered this property to obtain jurisdiction over the defendants in plaintiff's stockholder derivative suit.[222] The Supreme Court found the contacts between the forum and the defendants insufficient to justify jurisdiction;[223] sequestration alone could not correct such a defect because

> the only role played by the property is to provide the basis for

216. For an example of the operation of these procedures, see Harris v. Balk, 198 U.S. 215, 222 (1905).

217. *See* Pennoyer v. Neff, 95 U.S. 714, 720-22 (1878).

218. Shaffer v. Heitner, 433 U.S. 186, 207-08 (1977).

219. *See, e.g.*, Canterbury v. Monroe Lange Hardware Imports Corp., 48 N.C. App. 90, 93-94, 268 S.E.2d 868, 870-71 (1980) (finding minimum contacts for quasi in rem jurisdiction by attaching defendant's lumber, which was the subject of the contract dispute and which the defendant had instructed the plaintiff to ship to the forum state).

220. 433 U.S. 186, 212 (1977).

221. *Id.* at 214.

222. *Id.*

223. *Id.* at 216-17.

> bringing the defendant into court. Indeed, the express purpose of the Delaware sequestration procedure is to compel the defendant to enter a personal appearance. In such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible.[224]

Three years later, *Rush v. Savchuk*[225] elaborated on *Shaffer*'s holding by declaring unconstitutional the practice of judicial attachment of an insurer's contractual obligation to defend and indemnify a defendant[226] as a means of obtaining jurisdiction over that defendant. In *Rush*, a Minnesota court had attempted to assert jurisdiction over an Indiana resident whose sole contact with the forum was that his insurer was licensed to do business in Minnesota. The Supreme Court held that the insurer's contractual obligation to defend and indemnify the defendant in a tort suit arising from an automobile accident in Indiana did not satisfy the minimum contacts test.[227]

*Shaffer* and *Rush* do not fully resolve property's status as a contact for the purposes of quasi in rem and in personam jurisdiction. Although the *Shaffer* opinion clearly states that unrelated property is not always a sufficient contact by itself for quasi in rem jurisdiction,[228] it does not determine whether a defendant's ownership of unrelated property in the forum might sometimes constitute a countable contact, or even a sufficient contact by itself, for general in personam jurisdiction.

*2. Unrelated Property as a Contact.*—Some courts have read *Shaffer* to exclude entirely the use of unrelated property both as a countable contact for in personam jurisdiction and as the sole means of obtaining jurisdiction over a defendant. No longer a special jurisdictional contact uniquely exempted from applications of the minimum contacts test, property is instead an outcast from the ranks of countable contacts. If these courts are correct, *Shaffer* has not rescued property from its unique role in jurisdictional theory, but merely has changed the explanation for this uniqueness. Such an interpretation is unreasonably constricting and ignores a defendant's relevant ties to a potential forum. *Gutierrez v. Raymond International, Inc.*[229] demonstrates the unreasonableness of this view of *Shaffer*. A federal district court in Texas had to decide whether

224. *Id.* at 209.
225. 444 U.S. 319 (1980).
226. This practice has been dubbed *Seider*-type jurisdiction, after the first case to employ it. *See* Seider v. Roth, 17 N.Y.2d 111, 114, 216 N.E.2d 312, 315, 269 N.Y.S.2d 99, 102 (1966).
227. *See Rush*, 444 U.S. at 329-30.
228. *See* 433 U.S. at 207.
229. 484 F. Supp. 241 (S.D. Tex. 1979).

the defendant's extensive ownership of land in Texas was an act that constituted doing business under the state long-arm statute.[230] Even though Texas law interprets its statute "as broadly as the federal constitutional requirements of due process will permit,"[231] the court held that "under the single standard for determining judicial jurisdiction, it would be improper to allow those contacts to support an action brought in personam."[232] But property ownership was not this defendant's only contact with the forum. The defendant corporation also owned several Texas subsidiaries and transferred funds used by a nonresident subsidiary through the Houston offices of another resident subsidiary.[233]

The court in *Nelepovitz v. Boatwright*[234] decided just months after *Shaffer* that neither the defendant husband's interest in a South Carolina limited partnership[235] nor the defendant wife's ownership of mortgaged real estate in the state provided sufficient contacts between the defendants and the South Carolina forum.[236] Admittedly, such property interests might not be very significant; however, the court rejected them not because they were insignificant but simply because they were property interests.[237]

These courts are wrong. For one thing, they treat property ownership as though it exists in a vacuum and creates no other possible rights, expectations, or obligations between the defendant and the forum. Moreover, even if the Supreme Court in *Shaffer* had unwittingly suggested relegating unrelated property to the uncountable, lower courts should recognize that the suggestive language is only dictum and should not be followed.

We begin our analysis with the facts and wording of *Shaffer* and *Rush*, which leave open the possibility of counting unrelated property as a contact. The *Shaffer* Court did not declare that property's presence in a forum was irrelevant,[238] but clearly authorized reliance on related property.[239] Furthermore, the Court did not say that the presence of

230. *Id.* at 247-48.
231. *Id.* at 247 (citing U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977)).
232. *Id.* at 248.
233. *Id.* at 253.
234. 442 F. Supp. 1336 (D.S.C. 1977). The underlying cause of action was a claim for injuries and loss of consortium due to the alleged negligence of the defendants in allowing their dog to trip one of the plaintiffs, causing her to fall down a flight of stairs in the defendants' Missouri home. *See id.* at 1338.
235. "A partnership interest is personal property." S.C. CODE ANN. § 33-42-1210 (Law. Co-op. 1987).
236. *See* 442 F. Supp at 1338.
237. *See id.* at 1340.
238. *See* Brilmayer, *How Contacts Count*, *supra* note 10, at 97.
239. *See* Shaffer v. Heitner, 433 U.S. 186, 208 (1977).

unrelated property could never support jurisdiction; rather, the Court said that the presence of unrelated property alone could not *always* justify jurisdiction.[240] The *Shaffer* Court acknowledged that "the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation."[241] Although *Shaffer* gives as examples suits arising from property ownership and torts arising from an absentee owner's negligent care of his property, these do not compose an exhaustive list of possible jurisdictional bases. The Court does not exclude the possibility of unrelated property providing contacts.

In *Rush v. Savchuk*, the Court stated outright that "ownership of property in the State is *a* contact between the defendant and the forum, and it may suggest the presence of other ties."[242] *Rush* thus does not preclude the possibility that courts could include the contact of property ownership with others to establish jurisdiction under *International Shoe*'s standard.

Consequently, not all judges narrowly construe *Shaffer*. Courts frequently have included as a component of the doing business test a nonresident's ownership of property[243] in the forum. Property ownership may affect the test directly, as a counted activity, or indirectly,[244] as an outgrowth of other activities that constitute doing business. Courts also have viewed a defendant's unrelated property as a countable contact for

240. Brilmayer, *How Contacts Count*, *supra* note 10, at 97.

241. 433 U.S. at 207.

242. 444 U.S. 320, 328 (1980).

243. Property's role is sometimes unclear because the importance of a corporate defendant's ownership of unrelated property in a forum state often will be overshadowed by activities that would be sufficient in themselves, such as incorporation in the forum or maintaining a principal place of business there.

244. *See, e.g.*, Rollins v. Proctor & Schwartz, 478 F. Supp. 1136, 1140 (D.S.C. 1979) (listing among contacts of nonresident corporation in-state ownership of two filing cabinets), *rev'd on other grounds*, 634 F.2d 738 (4th Cir. 1980); Horton v. Richards, 594 P.2d 891, 893 (Utah 1979) (listing among contacts in-state ownership of a bank account and office records); Schroeder v. Raich, 89 Wis. 2d 588, 596, 278 N.W.2d 871, 875 (1979) (inferring substantial contacts from the defendant's membership in one in-state partnership and ownership of three parcels of land).

The *Schroeder* court, relying on Wisconsin's statute that requires "substantial and not isolated activities within [the] state," WIS. STAT. ANN. § 801.05(1)(d) (1977), found:

> The trier of fact can infer from Raich's membership in at least one partnership and his ownership of three parcels of real estate, including two stores, that at a minimum, Raich was involved in the payment of property taxes and income taxes in Wisconsin, in obtaining insurance coverage on Wisconsin property, and in the rental, maintenance, or other management operations of the properties . . . . "[W]ith three properties in Wisconsin, I don't think there is any question about it that he is here for not just isolated activities. He has substantial activities."

89 Wis. 2d at 596, 278 N.W.2d at 875.

One of the three parcels of property was related to the cause of action, in that the promissory note was given in partial payment for it. The court, however, does not appear to distinguish this contact from the unrelated property contacts.

in personam jurisdiction outside of the doing business context.[245] Moreover, although few cases list property ownership as one of a defendant's countable contacts with a forum, some courts have implied that the absence of property owned by the defendant was relevant to a finding of no jurisdiction.[246] Perhaps most noteworthy is the Supreme Court's contact-counting in *Helicopteros Nacionales de Colombia, S.A. v. Hall*; the Court listed the defendant's lack of property ownership alongside such weighty, single-factor contacts as domicile, doing business, and consent to service, which also were missing in that case.[247]

245. In Beechem v. C.M. Pippin, 686 S.W.2d 356, 363 (Tex. App.—Austin 1985, no writ), a Texas Court of Appeals found sufficient contacts between the forum and a nonresident defendant corporation and its representative to justify jurisdiction. The court went on to note, however, that "another particularly significant reason why it seems 'fair' or 'substantially just' to assert jurisdiction" over the nonresident representative was his admission to "owning both real and personal property in Texas and to having previously conducted sales in Texas." *Id.* The court explained:

> While the possession of property in the forum state does not alone necessarily constitute sufficient contact to justify the exercise of in personam jurisdiction, *Shaffer v. Heitner*, it undoubtedly is important, along with the other activities, to a determination of whether the defendant has so enjoyed the benefits, protections and privileges of the forum state as to render the exercise of jurisdiction over his person consistent with "fundamental fairness," *International Shoe Co. v. Washington*, even, we think, when those contacts are unrelated to the controversy.

*Id.* at 363 (citations omitted).

Yet another case involving jurisdiction based in part on unrelated property is Hann v. Hann, 175 N.J. Super. 608, 421 A.2d 607 (Ch. Div. 1980), in which a woman sued her husband for separate maintenance. The New Jersey Chancery Court based in personam jurisdiction over the nonresident husband on several contacts, including the husband and wife's joint ownership of rental property in New Jersey. The court was careful to distinguish property not related to the cause of action from marital property that would be related to the cause of action and therefore might confer specific jurisdiction. Because the plaintiff sought an equitable remedy—she asked the court to restrain her husband from harassing her—rather than a divorce action dividing their assets, the property was unrelated to the cause of action. Well aware of *Shaffer v. Heitner*, the court nevertheless counted the property contact. *Id.* at 612, 421 A.2d at 609.

In Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483 (D. Kan. 1978), the court counted a form of personal property, the wholly-owned subsidiary. Distinguishing the corporate law issues from the jurisdictional issue of a relationship between a corporation and its subsidiary, the court declared:

> Quite clearly, the ownership of an affiliated corporation within the forum is a "contact, tie or relation" of that non-resident with the forum . . . . Like the ownership of property in the state, the existence in a forum of an affiliated corporation with which the non-resident has some relationship implicates a flow of control and benefits to and from the forum as a consequence of that ownership. It is thus one indication of the non-resident's nexus with the forum and therefore has some weight in the overall evaluation of the fairness or reasonableness of the exercise of jurisdiction.

*Id.* at 507.

Thus, the court apparently believed that a wholly-owned subsidiary was one kind of property that entailed sufficient ties between a defendant and a forum, regardless of the relatedness of the subsidiary to the cause of action.

246. *See, e.g.*, Saraceno v. S.C. Johnson & Son, Inc., 492 F. Supp. 979, 987 (S.D.N.Y. 1980) ("[Defendant] has no offices or employees in New York, owns no property in New York, pays no taxes in New York, and does no banking in New York.").

247. 466 U.S. 408, 411 (1985).

*3. Property Contacts and Fairness.*—Counting property contacts and even treating certain types of property, under certain circumstances, as the decisive or sole countable contact between a defendant and a forum is undoubtedly reasonable. Ironically, refusing to count unrelated property as a contact perpetuates the unjustified treatment property has long received.[248] As an uncountable contact, property ownership occupies a role that is less significant than other dubiously important relationships a defendant may have with a forum, such as maintaining a telephone directory listing or visiting the state for wholly unrelated reasons. Singling out quasi in rem jurisdiction for discredit creates distinctions between it and other single-factor bases that are difficult to justify. Why should unrelated visits to the state or unrelated business transactions have so much more jurisdictional significance than a defendant's property ownership? Why should transient presence in the forum, an artifact of the *Pennoyer v. Neff* power theory of general jurisdiction[249] and usually unrelated to the cause of action, continue to be jurisdictionally significant if courts have rejected unrelated property ownership?[250]

Using property as a jurisdictional contact is reasonable because such an approach can provide a fair place to defend a suit. Fairness, not simply foreseeability of suit or state interest, is the most important consideration for general jurisdiction.[251] For example, we previously argued that jurisdiction based on unrelated activities would be fair if they indicate that the defendant is sufficiently involved in the activities of the state to be an insider whom the state may safely relegate to its political processes.[252] Some forms of property ownership could entail similarly close ties and thus justify the exercise of general jurisdiction.

*4. Assessing the Sufficiency of Unrelated Property Contacts.*—Assuming that unrelated property should count as a jurisdictionally significant contact, how should we evaluate the due process sufficiency of a particular property contact? Evaluating minimum contacts is never an easy task, and no one test can be applied inflexibly. Particularly with regard to property contacts, however, no adequate test presently exists.

248. Before *Shaffer v. Heitner*, property was automatically sufficient to support jurisdiction under the rule in Harris v. Balk, 198 U.S. 215, 222 (1905), under which an attachment of defendant's property within the forum granted the forum court jurisdiction to render a judgment up to the value of the property.

249. *See supra* notes 140-45 and accompanying text.

250. *See* Brilmayer, *How Contacts Count*, *supra* note 10, at 81.

251. *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (making "traditional notions of fair play and substantial justice" the cornerstones of the constitutional test for jurisdiction); R. WEINTRAUB, *supra* note 19, § 4.8, at 117-18 (stating that *International Shoe* created "a jurisdictional standard of fairness to the defendant").

252. *See supra* section II(B)(2).

*(a) The "continuous and systematic" test.*—Courts currently measure the sufficiency of unrelated business contacts between the forum state and the defendant with the continuous and systematic test: the defendant's activities in the forum state must be continuous and systematic to support jurisdiction.[253] Applying this test to a property contact, however, distorts the meaning of the words and produces an unsatisfactory result. The continuousness of a property contact obtains meaning only by joint reference to the property's presence in the forum and the duration of the defendant's ownership of it. Even a trivial item of property could satisfy a continuousness test based solely on the length of the property's presence in the state. Admittedly, an individual or corporate defendant might engage in continuous and systematic activities in the forum as part of overseeing or managing its property; however, such activities are themselves likely to be countable contacts independent of the property. Thus, continuousness is not helpful as an attribute of mere ownership. The continuousness test might help to distinguish tangible from intangible property according to whether the property had a continuous existence.[254] The relevant jurisdictional question, however, depends on the continuousness of the contact with the forum, not the continuousness of the property's existence in general.

A continuousness test cannot encompass the full range of property attributes that merit jurisdictional attention. What is needed is a new set of criteria for assessing property contacts, accompanied by a greater will-

253. The Supreme Court first articulated this test in *International Shoe*, 326 U.S. at 317, further explained it in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445-46 (1952), and has consistently applied it since then, *see* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1985). Courts sometimes rephrase the test. *See, e.g.*, Gehling v. St. George's School of Medicine, Ltd., 773 F.2d 539, 541 (3d Cir. 1985) (articulating a test of "continuous and substantial forum affiliations"); Reed v. American Airlines, Inc., 197 Mont. 34, 39, 640 P.2d 912, 915 (1982) (applying a test of "substantial, continuous, and systematic" activities).

The *International Shoe* opinion itself does not appear to distinguish between systematic and substantial activities. *Compare* 326 U.S. at 320 (characterizing the defendant's forum activities as continuous and systematic) *with id.* at 318 (explaining that sometimes "continuous corporate operations within a state were thought so substantial" that they justified general jurisdiction).

254. Real property generally will satisfy a minimum contacts continuous and systematic test. Barring a shift in state boundaries, the presence of real estate in a forum is permanent and therefore continuous. It cannot be moved or, except in extreme circumstances, destroyed. Tangible personal property, on the other hand, can be moved out of the forum. Possibly, the length of time that movable property was in the forum could be relevant to the contact's continuousness; even then, other factors such as how the property entered the forum would affect any determination of continuousness. Intangible property such as paper securities, debts, certificates of stock, bonds, promissory notes, and franchises can have several fictional situses, which render it worthless as a jurisdictional contact. In addition, the parties may dispute the duration of intangible property's existence. For example, renegotiation of a debt often presents the question whether a promissory note has been renewed or replaced with a new note. For a discussion of some of the problems regarding situs for intangible property, see Note, *Jurisdictional Limits on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts*, 60 IND. L.J. 389, 394-95 (1985).

ingness to consider property ownership as evidence that a corporate defendant is doing business in a forum. A new test for property's sufficiency as a contact cannot be "simply mechanical or quantitative"; it should depend on the quality and nature of the property.[255] Such a requirement would consider the property's physical attributes: situs (real or fictional), mobility, tangibility, and substantiality (*i.e.*, quantity or value).

*(b) Tangibility and mobility.*—The jurisdictional significance of an item of property is linked closely to the determinability of its situs, which varies with both its tangibility and mobility. Justice Powell alludes to the importance of situs in his *Shaffer* concurrence. While agreeing that the statutorily deemed presence of appellants' stock in Delaware could not sustain jurisdiction, Justice Powell "would explicitly reserve judgment . . . on whether the ownership of some forms of property whose situs is indisputably and permanently located within a State may, without more, provide the contacts necessary to subject a defendant to jurisdiction within the State . . . ."[256]

A definite and ascertainable situs supports the inference that a defendant's property link with a forum is conscious and involves more than mere ownership, while the fictional presence of intangible property provides weak evidence of a defendant's connection with the forum. Thus, the property that presumably justified quasi in rem jurisdiction in *Shaffer*, shares of stock whose presence in the state was but a fiction, conferred no jurisdiction over the nonresident stock owners; these owners "simply had nothing to do with the state of Delaware."[257] A person who buys stock in a Delaware corporation might even be unaware of the fictitious link between the property and the forum. In contrast, owners of tangible property are aware of where they are using the property as soon as they use it.

In *Rush v. Savchuk*, the Supreme Court highlights the distinction between tangible and intangible property:

> [T]he fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is *any* contact in the *International Shoe* sense between Minnesota and the insured. To say that "a debt follows the debtor" is simply to say that intangible property has no actual situs, and a debt may be sued on wherever there is jurisdiction over the debtor. State Farm is "found," in the sense of doing business, in all 50 States and the

255. *International Shoe*, 326 U.S. at 319.
256. Shaffer v. Heitner, 433 U.S. 186, 217 (1977) (Powell, J., concurring).
257. *Id.* at 216.

> District of Columbia. Under appellee's theory, the "debt" owed to Rush would be "present" in each of those jurisdictions simultaneously. It is apparent that such a "contact" can have no jurisdictional significance.[258]

Not all kinds of intangible property are equally prone to this objection. The situs of some kinds of intangible property is more determinable than others. For example, the situs of a defendant's business reputation is likely to follow the defendant's location. Many locatable property rights have little significance for minimum contacts analysis, however, because they are likely to be incidental to some other general jurisdictional basis, such as the defendant's principal place of business or domicile.

In contrast, tangible property, real or personal, has an objective situs. This fact has two relevant consequences. First, because only one situs exists, only one forum can base jurisdiction on the property. Second, the property's one location enables a defendant to foresee the possibility of suit in that forum.

The ability to localize a situs also depends on mobility. Real property is a fixed, easily established tie between a defendant and the forum. But the jurisdictional link between a defendant's movable tangible property and the forum is contingent upon several factors.

Counting movable property as a contact would require courts to designate a time when the property's presence in the forum acquires jurisdictional significance. The relevant issue for property related to the controversy should be the location of the property when the events giving rise to the cause of action took place. For unrelated property, the issue may differ. Courts might count certain unrelated contacts at the time the litigation is before the court instead of the time the cause of action arose. For example, the court could look to a defendant's current domicile instead of a prior domicile. Transient presence similarly is a jurisdictional contact obtained at a point in time after the cause of action arises. If the contact itself admittedly is unrelated to the cause of action, its presence in the forum need not necessarily coincide with the time that the cause of action arose.

Nevertheless, at a minimum courts should limit the time at which they count movable property as a jurisdictional contact to either the time when the events giving rise to suit occurred or the time when the court must decide whether to exercise jurisdiction. Courts should not count property removed from the forum before the cause of action arose be-

258. 444 U.S. 320, 329-30 (1980).

cause its removal by the owner implies a conscious decision to sever that tie with the forum.

In addition, fairness would dictate that movable property purposefully placed in the forum should have more jurisdictional significance than property present in the forum without its owner's knowledge. As the Supreme Court noted in *Helicopteros*, "[U]nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction."[259] Applied to movable property, this language indicates that either the defendant or his agent must have taken or sent the movable property into the forum. Limiting jurisdiction to situations in which the defendant is responsible for the property's presence in the forum also would be consistent with *Shaffer*. In overruling *Harris v. Balk*,[260] the *Shaffer* Court indicated that a third party's fortuitous act of bringing a defendant's property into the forum without the defendant's knowledge or consent would no longer confer jurisdiction.[261]

*(c) Quantity and substantiality.*—The substantiality of a defendant's property contacts also has jurisdictional significance. Although overshadowed by the continuous and systematic activity requirement, substantiality nevertheless was a due process requirement in *Perkins v. Benguet Consolidated Mining Co.*[262]

A substantiality criterion has commonsensical appeal: a defendant who has entrusted huge sums of capital to a forum's banks or purchased a ranch the size of Rhode Island within Texas would seem to have a more significant contact with the state than someone who bought one week per year of a time-share resort condominium or left a few filing cabinets in the offices of a successor company. Of course, we should avoid mechanical guidelines for jurisdictional sufficiency based solely on monetary value or acreage, but most forms of property are more easily quantified, in units of size or worth in dollars, than other sorts of contacts. These quantifications could reveal at least partially the signifi-

259. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984).
260. 198 U.S. 215 (1905).
261. *See* Shaffer v. Heitner, 433 U.S. 186, 208-09 (1977).
262. 342 U.S. 437, 447 (1952). The Court noted:

> It remains only to consider . . . the issue of whether, as a matter of federal due process, the business done in Ohio by the respondent mining company was *sufficiently substantial* and of such a nature as to permit Ohio to entertain a cause of action against a foreign corporation, where the cause of action arose from activities entirely distinct from its activities in Ohio.

*Id.* (emphasis added).

cance attached to the property by either the defendant or the forum. For example, a court could consider how much of their own worth defendants have invested in a state and what proportion the property bears to that worth. Courts making this inquiry will equalize treatment among defendants. For some defendants with few resources, a relatively small amount of property might seem more important. The size of the investment from a defendant's point of view would also bear on fairness because the investment's relative size could indicate whether the defendant was aware of the property ownership, or whether such acquisitions routinely were made by an accountant, trustee, or employee.

### *F. A General Theme*

Several basic threads run through these different aspects of general jurisdiction. By hypothesis, general jurisdiction involves the adjudication of a controversy that is centered outside the forum. For such controversies, only a direct relationship between the forum and the defendant justifies the imposition of the state's coercive power. That relationship does not rest upon the state's right to regulate the outside activities, but on its power over the individual directly. The defendant's local activities, therefore, must be substantial enough to justify such power; they cannot be sporadic or occasional, even though sporadic activities themselves might be subject to local regulation when they are the source of the dispute.

For instance, persons who travel into the forum are properly subject to forum regulation of activities in which they engage during that sojourn.[263] Travel into the state, however, does not give the state the right to regulate the travelers' activities elsewhere. Regulation of activities in the forum invokes specific jurisdiction. Regulation of activities outside the forum requires general jurisdiction, which in turn requires far more extensive contacts between the forum and the individual than does specific jurisdiction. For instance, a state in effect may require an individual's consent to specific jurisdiction as a condition of driving or doing business within the state. But a state may not reasonably require this individual, as a condition for mere entry or occasional business, to consent to general jurisdiction over litigation arising outside of the state.

Considering adjudicative jurisdiction in terms of the state's right to regulate highlights a related choice-of-law problem: Under what circum-

263. *See, e.g.*, South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 (1938); Morris v. Duby, 274 U.S. 135, 143 (1927). *But see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298-99 (1980) (holding that mere capacity to travel into a state is an insufficient basis for jurisdiction if business contacts are lacking).

stances does an affiliation that justifies general adjudicative jurisdiction also justify the application of forum law? Although this question presupposes that general jurisdiction in a given case is appropriate, the answer actually affects the determination whether adjudicative jurisdiction is appropriate. If the forum has the right to apply its law, then local adjudication presumably may be a reasonable method towards that end. To address this question, we next examine whether a direct affiliation sufficient to support general adjudication also will support the application of forum legislation.

## III. The Choice-of-Law Implications of General Jurisdiction

Substantial affiliations that support general adjudicative power, such as engaging in continuous and systematic business, may also in certain circumstances support the application of local law. In such cases, we can explain general adjudicative power, just as we explain specific adjudicative power, in terms of implementing the right to regulate. Because those substantial affiliations justify the state's regulation of the defendant's activities elsewhere, the state may assert adjudicative jurisdiction. This direct-affiliation justification for adjudicative jurisdiction then collapses into the activities-regulation justification because both justifications ultimately depend on contacts that give the state a right to regulate. By definition, the contacts supporting general adjudicative jurisdiction are unrelated to the subject matter of the litigation. Under what circumstances will these same contacts justify the application of forum law?

*Adjudicative jurisdiction* refers to a forum court's power to consider a case, while a forum court's power to apply forum law is termed *legislative* or *choice-of-law jurisdiction*.[264] When litigation concerns activities within the borders of the forum and the court has specific adjudicative jurisdiction, we will call the forum court's ability to apply forum law *specific legislative jurisdiction*. Conversely, when litigation concerns activities outside the borders of the forum, and when the forum only has unrelated contacts with the litigating parties, we will call the ability of forum courts to apply forum law *general legislative jurisdiction*.

We argue that general legislative jurisdiction should exist only when the forum bears an appropriate unique affiliation[265] with the individual

264. *See* Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (1969) (describing limitations on a court's choice of law); R. LEFLAR, AMERICAN CONFLICTS LAW §§ 3, 56-64 (1968) (discussing legislative jurisdiction and choice of law); R. WEINTRAUB, *supra* note 19, § 9.2A, at 526-39 (describing due process limitation on a state's choice of law and arguing that choice-of-law experimentation is limited by restrictions on the judicial jurisdiction of state courts).

265. *See supra* subpart II(A).

defendant. Four unique contacts—citizenship or domicile,[266] primary place of residence, place of incorporation, and principal place of business—create forum rights that justify general legislative jurisdiction. Nonunique contacts, on the other hand, should not give rise to general legislative jurisdiction. The contacts that will support general adjudicative jurisdiction, therefore, will support general legislative jurisdiction in some cases but not others.

### *A. Legislative Jurisdiction To Apply Procedural Law*

In cases involving conflict of state laws, the Supreme Court has emphasized that adjudicative and legislative jurisdiction must be distinguished, implying that separate constitutional standards exist for evaluating each type of jurisdiction. The Court has held that the assumption of adjudicative jurisdiction alone is insufficient to justify the application of forum law.[267] Similarly, a mere demonstration that a state should have legislative jurisdiction is insufficient to justify state adjudicative jurisdiction over a defendant.[268]

Adjudicative jurisdiction, however, automatically gives rise to legislative jurisdiction over the procedural rules for activities within the courts. Courts normally may apply their own rules of procedure, and this practice makes sense if we characterize application of procedural rules as specific legislative jurisdiction. Once a state becomes the forum, it has direct contacts with all courtroom activity.[269]

Although the precise test for substance versus procedure is problematic,[270] a distinction does exist, at least in general terms. Substantive law is law that governs actual rights and remedies. It creates the legal implications of conduct outside the courtroom. Conversely, procedural law governs the structure of litigation; it dictates the rules within the courtroom.[271] At the very least, the forum's specific contacts with the conduct of the litigation allow it to apply purely procedural rules, rules that indisputably have no substantive impact. Rules about the size of paper on which motions must be filed or the hours during which the court will hear cases presumably fall well within the pure procedure category. By

266. In the international context, the appropriate term would be "citizenship" or "nationality," while in the interstate context, the appropriate term would be "domicile."

267. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985) (forbidding state from using its "assumption of [adjudicative] jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law").

268. *See* Kulko v. Superior Court, 436 U.S. 84, 98 (1978).

269. *See generally* L. BRILMAYER, *supra* note 71, at 249-65 (explaining the difference between substance and procedure and why the forum has the right to apply its own procedural rules).

270. *See id.* at 250-52.

271. *See id.*

virtue of its specific contacts with the process of litigation, however, the forum also normally can apply rules with a clear procedural purpose, even if they have some substantive impact.[272]

### *B. Legislative Jurisdiction To Apply Substantive Law*

Courts may apply the procedural law of the forum because adjudicative jurisdiction creates specific forum contacts with the litigation process in its courts. General adjudicative jurisdiction, however, presupposes that the forum has no direct contacts with the subject matter of the litigation. Thus, courts cannot justify the application of the forum's substantive law on the ground that general legislative jurisdiction derives from the forum's right to regulate the conduct that spawns the dispute. Rather, general legislative jurisdiction must emanate from some other state right to regulate the behavior of the parties to the litigation.

Contrasting two Supreme Court choice-of-law cases may afford a better understanding of the implications of general adjudicative jurisdiction for choice of law. In *Phillips Petroleum Co. v. Shutts*,[273] the defendant was clearly subject to personal jurisdiction in the forum because it carried on substantial business there. But, the majority of the plaintiff class members had no relationship to the forum.[274] The Court held that the forum could not apply its law automatically to all the claims, but must first perform a choice-of-law analysis to determine the applicable law.[275] *Shutts* presents an obvious case in which general adjudicative jurisdiction did not confer general legislative jurisdiction.

272. The power of federal courts to apply their procedural rules is particularly well established. The Rules Enabling Act, 28 U.S.C. § 2072 (1982), gives the Supreme Court power to establish general rules for the forms of process, writs, pleadings, and motions, and the practice and procedure of the federal courts. This authority is subject to the restriction that such rules shall not "abridge, enlarge or modify any substantive right." *Id.* Virtually every procedural rule has some substantive impact; thus, the Court has held that the Act's prohibition was not intended to restrict "incidental effects which necessarily attend the adoption of new rules of procedure." Hanna v. Plumer, 380 U.S. 460, 465 (1965). The *Hanna* Court held that federal rules of procedure apply in diversity unless the rule violates either the Rules Enabling Act or the Constitution. *See id.* at 471. No rule yet has been found to violate either of these restrictions, and courts have upheld applications of procedural rules with substantive impact. *See, e.g.*, Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977) (holding that federal law bars plaintiff from appealing a remittitur order that he has accepted); *Hanna*, 380 U.S. at 473-74 (applying federal rule 4 instead of state process rule despite its acknowledged impact upon the defendant's substantive right to repose under state statute of limitations); Davis v. Piper Aircraft Corp., 615 F.2d 606, 611-12 (4th Cir.) (enforcing federal rule 15(c) and permitting relation back of an amendment to a complaint in a diversity suit, which cured plaintiff's lack of capacity even though state law would not have done so), *cert. dismissed*, 448 U.S. 911 (1980); *see also* R. WEINTRAUB, *supra* note 19, § 10.3, at 586-87 & n.84 (stating that after *Hanna*, all federal rules of civil procedure probably will triumph over conflicting state rules).

273. 472 U.S. 797 (1985).

274. *See id.* at 815.

275. *See id.* at 821-22.

In other cases, the facts that confer general adjudicative jurisdiction also justify application of forum law. In *Skiriotes v. Florida*,[276] the Supreme Court held that Florida could apply its regulations on the removal of sponges from the sea to a resident who conducted his activities outside the territorial waters of the state. The Court recognized Florida's right to regulate the activities of its own resident even when those activities occurred out of the state, a right derived solely from the state's powers in relation to its citizens.[277] The Court stressed that Florida's exclusive relationship to the parties conferred unrestricted power to apply its law.[278] The *Skiriotes* Court specifically distinguished Florida's relationship with its citizens from the relationship of Massachusetts to the parties in *Manchester v. Massachusetts*,[279] in which the Court had denied Massachusetts the right to enforce its regulations against Rhode Island citizens in waters that were outside Massachusetts' territorial limits.[280]

*1. The Costs of Legislative Jurisdiction.*—At the outset, one may wonder why the standards for general adjudicative jurisdiction ought to be different from the standards for legislative jurisdiction. Both raise issues of political fairness, and both involve a state's right to assert coercive power over a protesting party. Adjudicative jurisdiction implicates the state's right to compel an individual to defend litigation in its courts and to comply with its procedures for resolving disputes. Legislative jurisdiction involves state regulation of an individual's out-of-court activities. One might think that once the state's coercive power is established, it would carry with it both the right to adjudicate and the right to apply its own law. State power, however, is not so unitary. Adjudicative and legislative power differ in their implications and therefore require different justifications.

The assertion of adjudicative jurisdiction only determines where a case will be heard and what procedures will govern the litigation. The assertion of legislative jurisdiction, on the other hand, determines the cost of judgment or settlement for the parties. The differences between the two are substantial. First, less is at stake with adjudicative jurisdiction. The minimum contacts standards for adjudicative jurisdiction usually ensure that a party has some physical presence in the forum state.

276. 313 U.S. 69 (1941).

277. *See id.* at 77.

278. The Court explained that "[n]o question as to the authority of the United States over these waters, or over the sponge fishery, is here involved. No right of a citizen of any other state is here asserted. The question is solely between appellant and his own state." *Id.* at 76.

279. 139 U.S. 240 (1893).

280. *See Skiriotes*, 313 U.S. at 77.

Even when a defendant is not actually present in the forum at the time of litigation, modern transportation and communications resources make participation in foreign litigation possible. Moreover, litigation is normally expensive in *any* state. Admittedly, a forum's exercise of adjudicative jurisdiction may burden a defendant with extra costs of litigating in a more distant, a more inconvenient, and a less familiar forum. Yet these additional costs will be relatively small compared to the overall costs of litigation. Where choice of law is not an issue, the doctrine of forum non conveniens helps to prevent litigation where location is prejudicially inconvenient to one of the parties.[281]

Much more is at stake with legislative jurisdiction. A party's cost for application of state law can vary greatly from state to state. A forum's application of its own substantive law may result in a judgment against the defendant that the law of another forum would not have imposed.[282] Rarely will the unique costs that attend litigation in a particular forum exceed the costs that attend the possibility of full judgment against a party. The costs imposed by legislative jurisdiction include both the cost of an actual judgment and the costs of an increase in the opposing party's leverage in settlement negotiations. Although the threat of forum location possibly may give a plaintiff some leverage in settlement negotiations, the degree of leverage, absent some choice-of-law

281. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 n. 23 (1981) (stating that dismissal is proper if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947) (stating that plaintiffs may not choose an inconvenient forum to inflict on defendants "expense or trouble not necessary to [the] right to pursue [the] remedy"). To guide trial court discretion in deciding forum non conveniens questions, the Supreme Court has set forth a list of "private interest factors" affecting the convenience of litigants, *see id.* at 508, and a list of "public interest factors" affecting the convenience of the forum, *see id.* at 508-09. Private interests of the litigants include practical considerations that may make trial easier, more expeditious, and less expensive. Public interests include even distribution of administrative burdens among courts, local interest in deciding local controversies, and the appropriateness of holding the trial in a forum that is accustomed to the state law that must govern the case.

In Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987), the Court considered many of these factors in resolving a personal jurisdiction challenge. The Court considered the burden upon the Japanese defendant both in terms of distance and the difficulty it would encounter defending itself in a foreign legal system. *See id.* at 1034. The Court held that California had minimal interest in resolving the matter and its courts were not suited to apply Japanese or Taiwanese law to the dispute. *See id.* Thus, the Court arguably has incorporated many of the considerations underlying forum non conveniens into the constitutional standard of jurisdiction.

282. Indeed, the classic choice-of-law cases present situations in which the application of the forum's law results in a judgment exactly opposite to the one that would obtain under another state's law. For example, the forum's substantive law may bar suits by wives against their husbands while the substantive law of the marital domicile may allow such suits. Thus, if the wife can prove liability and damages against the husband, the choice of one state's law over the other completely determines whether the wife wins or is denied a day in court. An example of such a case is Sesito v. Knop, 297 F.2d 33 (7th Cir. 1961).

consequences attendant to the choice of forum, will be minimal compared to the leverage caused by the threat of maximum judgment.

Our argument is not limited to the claim that adjudicative burdens in foreign states are de minimis. More importantly, legislative jurisdiction creates a zero-sum allocation of costs that generally is absent in adjudicative jurisdiction. A plaintiff normally will not gain from adjudicative jurisdiction whatever a defendant loses when the litigation takes place in a particular forum. While a plaintiff may prefer a forum that the defendant dislikes, and while that forum may save a plaintiff money and cost a defendant more, the plaintiff's benefits and the defendant's costs rarely, if ever, will be proportionate because the defendant's loss in cases of adjudicative jurisdiction does not determine the plaintiff's gain. The most expensive forum for the plaintiff also may be the most expensive forum for the defendant. Similarly, the benefits that a plaintiff gains by selecting a place to litigate normally do not correlate to the losses that a defendant incurs because of that selection.

In contrast, choice of law is zero sum; the plaintiff's gain is the defendant's loss, and vice versa. Applying a law that benefits a plaintiff will necessarily harm a defendant in exact proportion to that benefit. Presumably, plaintiffs will always choose the forum with law most advantageous to them, and given the zero-sum nature of the choice-of-law process, the defendant will bear the costs of this opportunity. While the parties' common interest in avoiding mutually inconvenient forums allows them to rule out such forums for adjudicative jurisdiction, the defendant cannot rely on any common interest with the plaintiff to rule out a truly irrational choice of law.

The plaintiff is likely to have only a few convenient forums. Setting aside choice-of-law considerations, increasing the number of possibilities beyond these few is unlikely to change the plaintiff's preferences or present additional problems for defendants. Being subject to adjudicative jurisdiction in a large number of forums does not harm the defendant. Assuming the plaintiff chooses a forum solely for convenience, multiplying possible forums does not necessarily pose a threat to the defendant's interests. The plaintiff will share with the defendant an interest in avoiding the majority of potential forums that would be mutually inconvenient. In contrast, increasing the plaintiff's options as to legislative jurisdiction necessarily imposes costs on defendants because of the zero-sum nature of choice of law. The plaintiff has an incentive to choose the law that is least advantageous to the defendant. Recent cases illustrate that only when plaintiffs are able to forum shop for applicable law and not just for forum location do they choose ridiculously inconvenient or

disinterested forums.[283]

In this way, legislative jurisdiction creates a cumulative burden that adjudicative jurisdiction does not create. This cumulative burden arises in two important but distinct ways. First, given the larger costs imposed by the assertion of legislative jurisdiction, the potential costs to be borne by the defendant increase every time a state's law becomes available. This result cumulates the potentially large costs of legislative jurisdiction. Adjudicative jurisdiction lacks these costs because the total cumulative effect of having more states with adjudicative jurisdiction is limited by the relatively small difference between the most expensive and least expensive states in which the plaintiff might force the defendant to litigate. The degree of benefit to the plaintiff and loss to the defendant resulting from multiple forum choices is far less than the benefits and losses resulting from multiple substantive law choices.

The second cumulative burden caused by legislative jurisdiction is the increased likelihood of different outcomes caused by the accumulation of states with legislative jurisdiction. Even when the costs of litigation in different states vary for a defendant, having several states available as potential forums itself adds no real burden because the possibility of different litigation outcomes resulting from the choice of forums will be negligible. Yet the varying approaches of different states to both substantive law and choice-of-law rules increase the likelihood that the plaintiff will shop for the forum with the substantive law most harmful to the defendant, and consequently that the defendant will incur the maximum possible liability for the particular claim. Moreover, the ability of a greater number of states to apply their own substantive law increases the likelihood of conflict between these substantive laws; this concern is wholly absent when several states have adjudicative but not legislative jurisdiction.

283. For example, in *Piper Aircraft*, the plaintiff, as representative of the estates of several citizens and residents of Scotland who were killed in an airplane crash in Scotland, brought a wrongful death suit in a California state court against defendant manufacturers. The plaintiff sought to recover under a negligence or strict liability theory, neither of which were recognized by Scottish law. Plaintiff admitted that she filed the action in the United States because its laws of liability, capacity to sue, and damages were more favorable to her position than those of Scotland. 454 U.S. at 240; *see also* Holzsager v. Valley Hosp., 646 F.2d 792, 798 (2d Cir. 1981) (stating that although the "logical place" for plaintiff to have brought her wrongful death action was New Jersey—where the defendant was located and where the plaintiff and her husband resided at the time of his death—she was not precluded from forum shopping in an effort to find a more advantageous jurisdiction); *cf.* Ameritech Mobile Communications, Inc. v. Cellular Communications Corp., 664 F. Supp. 1175, 1182 (N.D. Ill. 1987) (noting that plaintiffs can choose any proper forum and that courts should not disturb the choice if a transfer merely shifts rather than eliminates inconvenience to the parties); Heller Fin., Inc. v. Nutra Food, Inc., 655 F. Supp. 1432, 1434-35 (N.D. Ill. 1987) (asserting that the plaintiff's choice of forum will not be disturbed absent a clear showing of inconvenience to the defendant).

Thus, subjection to the legislative jurisdiction of a greater number of states imposes burdens on parties that subjection to the adjudicative jurisdiction of those states does not. Given these burdens, the contacts justifying general legislative jurisdiction should be greater than those contacts that support general adjudicative jurisdiction. In cases of specific jurisdiction, the forum may justifiably apply its laws because an activity has occurred within its borders. Generally, no other state can show a greater right to apply its law, and the application of forum law is not unfair to the parties who acted within the forum. In cases of general jurisdiction, however, the relationship between the forum and the parties must justify some state right to apply forum law to an extraterritorial occurrence.

*2. Unique Affiliations.*—General legislative jurisdiction, therefore, should derive only from a unique affiliation between a state and a party, which gives that state a right to regulate all the party's activities regardless of where they might occur. Unique affiliations, because they are few, do not pose the same threat of cumulative subjection to authority as do nonunique affiliations. Only four relationships between a state and a party meet the uniqueness test required for general legislative jurisdiction: citizenship or domicile, primary place of residence, incorporation, and principal place of business.

The first of these unique affiliations, citizenship, vests an individual with the rights and privileges of political participation and state protection. These rights and privileges in turn justify individual duties of allegiance to the government and obedience to state law. A state can regulate the activities of its citizens at home or abroad to protect and benefit the interests both of the state and the citizens. As Justice McKenna explained,

> [T]he government, by its very nature, benefits the citizen and his property wherever found and, therefore, has the power to make the benefit complete. . . . [T]he basis of the power to tax was not and cannot be made dependent upon the situs of the property . . . but upon [the defendant's] relation as citizen to the United States and the relation of the latter to him as a citizen.[284]

Similarly, in *Blackmer v. United States*,[285] the Supreme Court upheld an act of Congress that required a citizen of the United States residing in France to return in order to give testimony at trial. The Court explained that "[h]e continued to owe allegiance to the United States. By virtue of

284. Cook v. Tait, 265 U.S. 47, 56 (1924).
285. 284 U.S. 421 (1932).

the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country."[286]

The state rights present in the citizenship relationship also exist in the relationship between a state and a company incorporated in the state. Perhaps the greatest source of state rights in this relationship is the state's creation of the corporation.[287] By allowing incorporation, the state confers the privilege of limited immunity to shareholders and directors[288] along with other tax and institutional benefits that vary from state to state.[289] By accepting these privileges, a corporation willingly submits to the state's regulation of its behavior.[290] Like citizens, a corporation can enjoy the pleasures of its relationship to the state only if it accepts the burdens the state imposes. Without a doubt, corporations rely on the relative benefits and burdens of state corporation laws when deciding where to incorporate.[291]

Two other unique relationships, principal place of business and primary place of residence, also justify general legislative jurisdiction. Because principal place of business and primary place of residence are by definition exclusive relationships, they will grant only one state an interest in regulating corporate or individual activities beyond the state's borders. Only the unique contacts of primary place of business or primary place of residence will justify *general* legislative jurisdiction arising from business activities or residence. The state of the principal place of business will be the state offering the greatest privileges and benefits to the business.[292] Likewise, the state of primary residence will be the state

286. *Id.* at 436. The Court determined that "one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." *Id.* at 438 (citing Blair v. United States, 250 U.S. 273, 281 (1919)).

287. *Cf.* REVISED MODEL BUSINESS CORP. ACT § 3.01(b) (1984) ("A corporation engaging in a business that is subject to regulation under another statute of this state may incorporate under this Act only if permitted by, and subject to all limitations of, the other statute.").

288. Unless otherwise provided in the articles of incorporation, shareholders are not personally liable for the acts or debts of the corporation except by reason of their own acts or conduct. *See id.* § 6.22(b). Directors are not liable for their official actions if they perform their duties in good faith and with the care of an ordinary prudent person under similar circumstances. *See id.* § 8.30(d).

289. *See generally* N. LATTIN, LATTIN ON CORPORATIONS 65 (2d ed. 1971) (noting the practical advantages of the corporation's legal personality).

290. *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(b) (1983) (providing that incorporation is available for the conduct or promotion of lawful business). Federal law frequently treats place of incorporation as the place of citizenship. For example, in defining diversity jurisdiction, the United States Judicial Code deems a corporation "a citizen of any state by which it has been incorporated and of the state where it has its principal place of business." 28 U.S.C. § 1332 (1982).

291. *See supra* note 58.

292. Professor Wright suggests that the rule for locating principal place of business "looks to the place where the bulk of the corporate activity takes place, if there is any one state in which this is true, while resorting to the location of the home office only if the corporation's activities are dis-

from which an individual receives the greatest privileges and benefits of residency; undoubtedly, the amount of time spent at a particular residence will be the critical element for determining this state.

Of course, a party's principal place of business may be in a state other than the state of incorporation, or a party may be a citizen of one state and have a primary place of residence in another state. Nonetheless, the four unique affiliations, citizenship, place of incorporation, primary place of residence, and principal place of business, at least can minimize the chance that conflicts will arise by limiting the number of states that could assert general jurisdiction.

Nonunique relationships should not support general legislative jurisdiction because of the costs this would impose on defendants. These relationships, such as a vacation residence or doing business, do not confer the types of privileges and benefits on a party that unique affiliations confer. Moreover, many states will have nonunique affiliations with a particular person or legal entity; using such affiliations to support general legislative jurisdiction would create the risk of cumulative or inconsistent overlapping regulation. Making such relationships the basis of general legislative jurisdiction also would encourage forum shopping and subject parties to unpredictable and unfairly increased burdens from their activities. Many companies do business in all fifty states. Constitutional limitations on choice of law[293] would be rendered meaningless if any of the fifty states could apply its law to all the activities of a company. Indeed, the Supreme Court in *Phillips Petroleum Co. v. Shutts* indicated that a company does not acquiesce in application of forum law to all its activities across the nation simply because it engages in unrelated business activities in the forum.[294]

Our argument that unique affiliations confer legislative jurisdiction finds noteworthy support in a recent Supreme Court case dealing with the proper reach of state law under the commerce clause. In *CTS Corp. v. Dynamics Corp. of America*,[295] the Court upheld an Indiana law[296] regulating tender offers for stock in Indiana corporations against a commerce clause challenge. The commerce clause argument relied upon a plurality opinion in *Edgar v. MITE Corp.*, which invalidated a similar Illinois statute for corporations that did a threshold amount of business

persed among several states and no one state clearly predominates." C. WRIGHT, *supra* note 176, § 27, at 153.

293. *See supra* note 19.

294. *See* 472 U.S. 797, 818-19 (1985).

295. 107 S. Ct. 1637 (1987).

296. IND. CODE ANN. § 23-1-42-1 (West Supp. 1987).

within the state.[297] The *CTS* Court distinguished *MITE* on the grounds that the Indiana law applied only to local corporations, and remarked, "So long as each State regulates voting rights only in the corporation it has created, each corporation will be subject to the law of only one state."[298]

*CTS* and *MITE* both involved statutes asserting general legislative jurisdiction. Both laws regulated activities going on outside of the state—the tender of stock—when the regulated party had the proper statutory affiliation with the state. The only difference between the two cases was that *MITE* rested on a nonunique affiliation, comparable to the doing business test for adjudicative jurisdiction, while the *CTS* law involved a unique affiliation, the place of incorporation. By affecting only a unique affiliation, the law in *CTS* minimized or even eliminated the possibility of cumulative or inconsistent regulation.

## IV. Conclusion

We saw at the outset that domicile, place of incorporation, and principal place of business were the paradigm bases for general adjudicative jurisdiction. The reasons should now be clearer. These are relationships so direct that they make fair the assertion of state adjudicative power or legislative authority. They are unique affiliations that an individual or legal entity normally will have with only one state.

These bases provide the standard for evaluating other bases for general jurisdiction. Is an affiliation closely enough analogous to these unique relationships that it justifies assertion of state power? Indeed, several nonunique affiliations are similar enough to support general adjudicative jurisdiction. These nonunique affiliations, however, are inadequate to support state legislative power. Legislative power creates greater cumulative burdens on a defendant than does adjudicative power. These cumulative burdens make the central difference between unique and nonunique affiliations—that a party may have many nonunique affiliations but will usually have only one of a particular unique affiliation—crucial in the legislative jurisdiction context.

Both legislative and adjudicative jurisdiction must derive from the fair exercise of state coercive power. General jurisdiction, of both sorts, depends upon a particular sort of fairness. Unlike specific jurisdiction, which derives from a state's right to regulate local activities, general jurisdiction depends on the fairness of regulating the activities of insiders,

297. *See* 457 U.S. 624, 641-43 (1982).
298. 107 S. Ct. at 1649.

regardless of where the activities occur. Although fairness in a given case depends upon whether the state is only instructing the defendant to appear in court or instead is imposing its rules upon the defendant's primary conduct, the basic principles underlying the exercise of both types of general jurisdiction, adjudicative and legislative, remain the same. This general view of general jurisdiction is boru of a perspective founded on a theory of the legitimate exercise of power by sovereign states.