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Restating Territorial Jurisdiction and Venue for State and Federal Courts

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RESTATING TERRITORIAL JURISDICTION AND VENUE FOR STATE AND FEDERAL COURTS

Kevin M. Clermont†

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INTRODUCTION

"Jurisdiction must become venue," concluded Professor Albert A. Ehrenzweig.¹ Perhaps it should. More certain is the proposition that comprehending jurisdiction requires mastering its relationship with venue. Such conclusions lie at some distance, however, bringing to mind that every journey must begin with a single step.

A solid first step takes me to the subject of this Symposium, the *Restatement (Second) of Judgments*. This, put simply, is a masterful work. Even while still in tentative drafts, it proved an invaluable aid to judge, practitioner, teacher, and student. Yet in a work of such scope, anyone could find grounds for differing.

At the outset the *Restatement Second* states "the requirements that must be met before a court properly may undertake [a civil] adjudication":² notice,³ subject-matter jurisdiction,⁴ and territorial jurisdiction.⁵ In particular, adopting a view popular with academics, it requires that the exercise of territorial jurisdiction be

¹ Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 ORE. L. REV. 103, 113 (1971).

² RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note to ch. 2, at 1 (Tent. Draft No. 5, 1978); *see id.*, ch. 1, at 1-2 (Tent. Draft No. 7, 1980).

³ This concern of procedural due process subsumes opportunity to be heard. *See id.* § 5(1)(a) (Tent. Draft No. 5, 1978) [§ 2(1)(a)] [Throughout this Article, the corresponding section numbers that will appear in the final *Restatement Second* are given in brackets after citation to the tentative drafts.]; RESTATEMENT OF JUDGMENTS § 6 (1942). *See also* text accompanying note 226 *infra*. This Article assumes satisfaction of these requirements.

⁴ This means "authority to adjudicate the type of controversy involved in the action." RESTATEMENT (SECOND) OF JUDGMENTS § 14 (Tent. Draft No. 5, 1978) [§ 11]; *see* RESTATEMENT OF JUDGMENTS § 7 (1942). This Article generally does not treat this requirement. *But see* text accompanying notes 179-81 & 232 *infra*.

⁵ Other names for this or similar concepts include judicial jurisdiction, adjudicatory jurisdiction, adjudicatory authority, amenability, nexus, and substantive due process. I propose "territorial authority to adjudicate" to encompass all of territorial jurisdiction and venue.

“reasonable”⁶ as well as accord with certain nonconstitutional restrictions.⁷ Herein I shall fault this approach to territorial jurisdiction and also its inadequate attention to venue.

In Part I of this Article, I shall first show that under the cases territorial jurisdiction currently has two cumulative components of constitutional stature: *power* and *reasonableness*. Then I shall note the intriguingly close ties of the reasonableness requirement to venue; exploring and defining that relationship will incidentally confirm the fruitfulness of considering self-imposed limitations on jurisdictional reach as rules of venue. Thus this Article reformulates the subject of territorial authority to adjudicate by relegating all nonconstitutional restrictions on geographic selection of forum into that third category: *venue*. I believe that this tripartite reformulation permits a clear and suggestive statement of the current law. And it induces an attractive vision of the future—the demise of power, the emergence of reasonableness as the sole constitutional test for territorial authority to adjudicate, and the intelligent use of venue to narrow the choice of forum.

Having elaborated my proposed approach, I can in Part II briefly review my differences with the *Restatement Second*. I contend that its treatment of this area neither accurately states the current law nor adequately frames the relevant concepts so as to facilitate reform.

I

PROPOSED APPROACH

A. *Evolutionary View of the Current Law*

1. *Interpretive Survey of the Cases*

Surely one could argue that “numerous law review articles reinvent the wheel” by persistently reciting the history of the subject under study, and that this practice should more often yield to shorter articles addressing “readers who are already sophisticated in a field.”⁸ Nevertheless, I must here review the leading cases on territorial jurisdiction, because my proposed approach emerges from them, initially as a means of synthesizing seemingly disparate and divergent threads in the case law. Yet in deference

⁶ RESTATEMENT (SECOND) OF JUDGMENTS §§ 8-9 (Tent. Draft No. 5, 1978) [§§ 5-6]; see *id.* §§ 10-11 [§§ 7-8].

⁷ See *id.* § 7 [§ 4].

⁸ Velvel, *Suggested Improvements in Legal Education*, 29 J. LEGAL EDUC. 194, 201 (1978).

to that radical style I shall be brief, and my survey will be interpretive rather than narrative.

a. 1878 - 1945: *From Pennoyer to International Shoe*. I break into the law's development⁹ at the classic *Pennoyer v. Neff*.¹⁰ The Court there found a lack of territorial jurisdiction and thus, in the old terminology,¹¹ held that the state judgment under collateral attack was void. In the course of so ruling, the Court established the theoretical framework within which the doctrine of territorial jurisdiction was to develop.

First, *Pennoyer* laid down its famous threefold categorization of actions: in personam, in rem, and quasi in rem.¹² In personam jurisdiction could result in a judgment imposing upon the defendant a personal liability or obligation in favor of the plaintiff. In rem jurisdiction could result in a judgment affecting the interests of all persons in a designated thing, such as a judgment registering title to land. Quasi in rem jurisdiction could result in a judgment affecting the interests of particular persons in a designated thing. Further, there were two distinct varieties of proceedings quasi in rem: in subtype-one, the plaintiff sought to establish a pre-existing interest in the thing as against the defendant's interest, an example being a suit for foreclosure of a mortgage; in subtype-two, the plaintiff sought to apply the defendant's property to the satisfaction of an unrelated claim against the defendant, an example being an action for tort begun by attachment and without personal jurisdiction.¹³

Second, *Pennoyer* established, as a matter of due process, that in any of the three categories of proceedings the adjudicating

⁹ For a discussion of the earlier roots, see Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252-62; Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147; *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 915-17 (1960). Compare Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956) ("[O]ur rules of personal jurisdiction are [not] of ancient common law origin. . . . [Prior to *Pennoyer*,] [*forum conveniens* . . . was . . . the basis of all personal jurisdiction."), and Ehrenzweig, *supra* note 1, at 105-07 (*Pennoyer* encrusted existing constitutional law—requiring only reasonable notice and opportunity to defend—with "power"), with Levy, *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 56 (1968) ("physical power was necessary for the initial obtaining of jurisdiction . . . at common law").

¹⁰ 95 U.S. 714 (1878). See generally Hazard, *supra* note 9, at 262-72.

¹¹ See generally RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note to ch. 2, at 4-8 (Tent. Draft No. 5, 1978); *id.*, Introductory Note to ch. 5, at 4-9 (Tent. Draft No. 6, 1979).

¹² 95 U.S. at 733-34.

¹³ See generally RESTATEMENT OF JUDGMENTS, Introductory Note to ch. 1, at 5-9 (1942).

state must have power over the target of the action, whether such target be a person or a thing.¹⁴ This was the Court's premise: "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."¹⁵

During subsequent years, the courts by constitutional interpretation elaborated and expanded the traditional bases of power for jurisdiction over a defendant: presence,¹⁶ domicile,¹⁷ and consent.¹⁸ Moreover, and sometimes by circuitous route, the courts added a basis of power by approving the exercise of personal jurisdiction with respect to claims arising out of certain acts done by the defendant within the state, such as transacting business,¹⁹ owning real estate,²⁰ litigating,²¹ and committing a tortious act.²²

Finally, the Supreme Court rationalized these developments in the landmark case of *International Shoe Co. v. Washington*.²³ The Court there held that the state's exercise of in personam jurisdiction over a nonresident corporation satisfied the due process clause of the fourteenth amendment. The Court noted that the "clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . . But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state"²⁴ and thus subjects itself to that state's personal jurisdiction. The courts were to locate this jurisdictional boundary line by considering the level of the defendant's in-state activity and the degree of that activity's relatedness to the asserted

¹⁴ 95 U.S. at 722.

¹⁵ *Id.* at 720; *cf.* *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("foundation of jurisdiction is physical power").

¹⁶ *See, e.g., Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 34 A. 714 (1895). *But see* note 74 and accompanying text *infra*.

¹⁷ *See, e.g., Milliken v. Meyer*, 311 U.S. 457 (1940).

¹⁸ *See, e.g., Hess v. Pawloski*, 274 U.S. 352 (1927) (approving on consent theory a state statute subjecting nonresident motorists to personal jurisdiction with respect to in-state accidents).

¹⁹ *See, e.g., Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

²⁰ *See, e.g., Dubin v. City of Philadelphia*, 34 Pa. D. & C. 61 (C.P. 1938).

²¹ *See, e.g., Adam v. Saenger*, 303 U.S. 59 (1938).

²² *Cf. Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 340-41 (1953) (recasting *Hess v. Pawloski*, 274 U.S. 352 (1927), in terms of in-state act).

²³ 326 U.S. 310 (1945). *See generally* *Casad, Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 KAN. L. REV. 61, 64-67 (1977); *Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 573-93 (1958).

²⁴ 326 U.S. at 319.

claim.²⁵ Elsewhere in its opinion, the Court stated the test differently, asking whether it was "reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state"²⁶ to exercise jurisdiction. Such an inquiry involved, among other things, an "'estimate of the inconveniences.'"²⁷ In several places, however, the Court ambiguously tied the two different formulations together. For example, the Court explained that the due process clause permitted the state to exercise personal jurisdiction if the defendant had "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁸ This ambiguity proved critical in later cases.

While the courts thus reworked *Pennoyer's* in personam category, they relatively neglected the in rem and quasi in rem branches. Presence remained the sole basis of power for such nonpersonal jurisdiction, although the courts showed some imagination in attributing location to intangibles.²⁹

b. 1945 - 1958: *The Emergence of Reasonableness*. With some indulgence, one could read *International Shoe* as reducing the power test to the status of a rough rule of thumb, with its outcome always subject to revision under the ultimate test of reasonableness. So to get to the basics, instead of asking whether the target of the action was subject to the state's power, one should ask whether jurisdiction was reasonable in view of all the interests involved. Indeed, in two leading cases the Supreme Court did so

²⁵ *Id.* at 317-19. The opinion's words in setting up the jurisdictional issue suggest that the Court envisaged a test requiring power over the defendant. *Id.* at 316 (observing, as a point of departure, that "jurisdiction of courts to render judgment in *personam* is grounded on their de facto power over the defendant's person").

²⁶ *Id.* at 320. The Court ultimately concluded that the state's exercise of jurisdiction did not constitute "an unreasonable or undue procedure." *Id.*

²⁷ *Id.* at 317 (quoting *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139, 141 (2d Cir. 1930)).

²⁸ 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); see 326 U.S. at 317 ("such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there"); *id.* at 319 ("the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure"). See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980).

²⁹ See, e.g., *Harris v. Balk*, 198 U.S. 215 (1905) (plaintiff could invoke quasi in rem subtype-two jurisdiction over debt owing to defendant, by garnishment of debt where debtor was temporarily present). But see notes 52 & 76 and accompanying text *infra*.

read *International Shoe*, and thus expanded further the states' territorial jurisdiction under the Constitution.³⁰

First, *Mullane v. Central Hanover Bank & Trust Co.*³¹ drew the logical conclusion that this shift to a reasonableness test rendered the *Pennoyer* categorization of actions obsolete and superfluous; a fluid inquiry into reasonableness would naturally take into account all the shadings in the infinite variety of proceedings. At issue in *Mullane* was New York's jurisdiction to conduct a judicial settlement of accounts by the trustee of a New York common trust fund, a statutory proceeding that would cut off all resident and nonresident beneficiaries' rights against the trustee for improper management during the period covered by the accounting. The Court found jurisdiction to be reasonable and also observed:

It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. . . . It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.³²

Second, *McGee v. International Life Insurance Co.*³³ elaborated on the meaning of the reasonableness test. At issue on collateral attack was California's jurisdiction in an action that a California resident³⁴ had brought against a Texas insurance company. The

³⁰ Cf. Kurland, *supra* note 23, at 593-606, 608-10 (treating other relevant Supreme Court cases during this period).

³¹ 339 U.S. 306 (1950). See generally Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305, 305-12, 319 (1951).

³² 339 U.S. at 312-13.

³³ 355 U.S. 220 (1957). See generally Ehrenzweig, *Pennoyer Is Dead—Long Live Pennoyer: McGee v. International Life Insurance Co. and Jurisdiction Over Individuals*, 30 ROCKY MTN. L. REV. 285 (1958).

³⁴ The court expressly noted the plaintiff's residence in *McGee v. International Life Ins. Co.*, 288 S.W.2d 579, 580 (Tex. Ct. App. 1956), *rev'd*, 355 U.S. 220 (1957).

plaintiff had sought recovery as the beneficiary of a policy on her son's life. The defendant's only contacts with California had been mailing this solitary insurance contract to the son who resided there and accepting premiums that he mailed from there. Again the Court found jurisdiction to be reasonable, but only after noting the various interests at stake. The opinion indicated that courts should decide such jurisdictional issues by balancing the interests of the public,³⁵ the plaintiff,³⁶ and the defendant.³⁷

c. 1958 - 1977: *A Fleeting Resurgence of Power*. Perhaps more fairly, one could read *International Shoe* as simply supplementing the bases of power. Under this view, the Constitution would authorize territorial jurisdiction where there was "de facto power"³⁸ over the target of the action, or where the defendant's activities justified a finding of "power" in a more metaphorical sense. The Supreme Court adopted such a reading in *Hanson v. Denckla*.³⁹

This was a hard case. Essentially at issue was Florida's jurisdiction to adjudicate the validity of a Delaware trust. *As the Court viewed the case*, Florida needed either nonpersonal jurisdiction over the trust assets or personal jurisdiction over the Delaware trustee. Nonpersonal jurisdiction did not exist, however, because Florida could not say that the trust assets were in Florida. Personal jurisdiction was also lacking, because Florida could not exercise power over a trustee who had had no contact with Florida other than remitting trust income to the trust's settlor after she had moved there and receiving her occasional instructions from there. So despite Florida's considerable contacts with the litigation as a whole, the Court held that Florida could not exercise this jurisdiction, thus braking the expansion of the states' territorial jurisdiction while shedding new light on our two basic issues.

³⁵ "California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. . . . Often the crucial witnesses . . . will be found in the insured's locality." 355 U.S. at 223. The state had a "statute which subjects foreign corporations to suit in California on insurance contracts with residents of that State." *Id.* at 221.

³⁶ "These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof." *Id.* at 223.

³⁷ The Court considered the "inconvenience to the insurer if it is held amenable to suit in California," *id.* at 224, but the insurer had engaged "in economic activity" in California, out of which activity this suit arose, *id.* at 223.

³⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

³⁹ 357 U.S. 235 (1958). See generally Kurland, *supra* note 23, at 610-23; Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959).

First, the *Hanson* Court resurrected categorization of actions.⁴⁰ Indeed, its opinion elevated “in rem” and “in personam” to the level of italicized headings.⁴¹ The best explanation for such nostalgia is that any mention of a power test necessitates categorization, because the question of power entails asking power over *what* or *whom*.

Second, the Court did in fact return to a power test. True, at least for personal jurisdiction “power” retained a metaphorical connotation, requiring only “some act by which the defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”⁴² But without doubt the opinion rings of power, not reasonableness—jurisdictional restrictions “are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.”⁴³

Hanson bucked the trend. Its peculiar facts, garbled reasoning, and seemingly obsolete approach were indeed puzzling. In the ensuing years many commentators⁴⁴ and courts⁴⁵ distinguished or effectively ignored it, while suggesting or taking a more expansive approach to jurisdiction. And there the Supreme Court let things lie for two decades.⁴⁶

d. 1977 - 1980: *Synthesis*. The Supreme Court recently revisited territorial jurisdiction, compensating for its long silence by deciding a flurry of four major cases in less than three years. These cases at last wove the threads of reasonableness and power into a comprehensible doctrine. *Shaffer v. Heitner*⁴⁷ was the first

⁴⁰ 357 U.S. at 246 & n.12.

⁴¹ *Id.* at 246, 250.

⁴² *Id.* at 253.

⁴³ *Id.* at 251. The majority’s use of the “contacts” language of *International Shoe* contrasts with the dissenting Justice Black’s emphasis on its “fair play and substantial justice” language. *Id.* at 259. Justice Black, the author of *McGee*, argued in *Hanson* for a reasonableness test and looked, just as did the majority, to *International Shoe* for support.

⁴⁴ *E.g.*, Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Hazard, *supra* note 9.

⁴⁵ *E.g.*, *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

⁴⁶ For Supreme Court cases of some relevance during this period, see Hazard, *supra* note 9, at 244 & n.11.

⁴⁷ 433 U.S. 186 (1977).

and most important of the quartet, because it at least suggested all the current answers to the basic jurisdictional questions.

Alleging mismanagement occurring in Oregon, the plaintiff in *Shaffer* sought to assert in Delaware state court a shareholder's derivative suit against nonresident officers and directors of a Delaware corporation by going after their shares in the corporation. Delaware deemed those shares to be located within the state and permitted the plaintiff to sequester them, thus laying the foundation for jurisdiction quasi in rem subtype-two. However, the Supreme Court held that Delaware's exercise of jurisdiction violated the due process clause.

First, the Court alluded to *Mullane's* noncategorizing approach, but ultimately endorsed *Hanson's* resurrection of traditional categorization.⁴⁸ Indicatively, part III of its opinion took a quasi in rem approach to the case,⁴⁹ and part IV considered the possibility of in personam jurisdiction.⁵⁰

Second, the Court resolved which test applies to the various jurisdictional categories. In part III, the Court explained that jurisdiction quasi in rem, like the other categories, must pass the reasonableness test.⁵¹ The case at hand failed, seemingly because of Delaware's attempt to categorize a suit as quasi in rem with the sole apparent purpose of evading the restrictions on personal jurisdiction.⁵² Even though Delaware may have had power over the thing, its exercise of quasi in rem jurisdiction was not reason-

⁴⁸ *Id.* at 196-206. The Court's ultimate point was that the same jurisdictional test should apply to all categories, not that the categorization would have no effect on the outcome of the test.

⁴⁹ *Id.* at 207-12. The Court stated the facts in part I and discussed categorization in part II.

⁵⁰ *Id.* at 213-17.

⁵¹ "The case for applying to jurisdiction *in rem* [or quasi in rem] the same test of fair play and substantial justice' as governs assertions of jurisdiction *in personam* is simple and straightforward." *Id.* at 207. The Court described this test as "the fairness standard of *International Shoe*." *Id.* at 211.

⁵² The Court catalogued the situations where nonpersonal jurisdiction would be reasonable in view of the public's, the plaintiff's, and the defendant's interests, see text accompanying notes 75-80 *infra*, but held that *Shaffer* was not among those situations. Indeed, Delaware's jurisdiction would be proper only if it passed muster as an exercise of personal jurisdiction. "For in cases such as . . . this one, the only role played by the property is to provide the basis for bringing the defendant into court. . . . 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." 433 U.S. at 209 (footnote omitted); see *id.* at 208 & n.29. This theorem, which required the Court to overrule *Harris v. Balk*, 198 U.S. 215 (1905), became clearer in *Rush v. Savchuk*, 444 U.S. 320 (1980); see text accompanying note 60 *infra*.

able. Turning to the alternative possibility of jurisdiction in personam, the Court in part IV invoked a universally applicable power test.⁵³ Although the defendants were officers or directors as well as stockholders of a Delaware corporation, they had not “purposefully avail[ed themselves] of the privilege of conducting activities within the forum State, . . . in a way that would justify bringing them before a Delaware tribunal”;⁵⁴ and they had not otherwise subjected themselves to the state’s power. Even though personal jurisdiction may have been reasonable, Delaware had no power over the defendants. The surprising result, then, is that the formulations of both *McGee* and *Hanson* survive: an assertion of jurisdiction apparently must pass both the reasonableness and the power tests.⁵⁵

Not only did *Shaffer* rejoin the two divergent threads of reasonableness and power into a peculiarly restrictive doctrine applicable to all categories of jurisdiction, but also it revealed the threads’ common origin in the tapestry of *International Shoe*. In this light *Shaffer*’s phrasing becomes eloquent: “We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”⁵⁶ Three subsequent cases confirmed the implications of *Shaffer*.

*Kulko v. Superior Court*⁵⁷ invalidated California’s jurisdiction over a New York defendant/husband in an action for child support, where the plaintiff/wife and the children had moved to California. In personam jurisdiction failed the power test, because the defendant lacked any “relevant contact with the State.”⁵⁸

⁵³ After referring to *International Shoe*’s due-process standard of “minimum contacts,” the Court concluded that “Delaware’s assertion of jurisdiction over [the defendants] is inconsistent with that constitutional limitation on state power.” 433 U.S. at 216-17.

⁵⁴ *Id.* at 216 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *cf.* *Armstrong v. Pomerance*, 423 A.2d 174, 176-80 (Del. 1980) (consent statute cures lack of power). Other interests, such as those of the state, are irrelevant under a pure power test; and the Court so considered them. 433 U.S. at 214-15.

⁵⁵ The requirement of cumulatively applying the two tests may have been implicit in the *Shaffer* Court’s phrase of “the relationship among the defendant, the forum, and the litigation.” 433 U.S. at 204. That requirement became more explicit in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *see* text accompanying notes 62-64 *infra*. Justice Brennan, dissenting in *Shaffer* and *World-Wide* as the last defender of an exclusive test of reasonableness, highlighted the nature as well as the restrictiveness of the Court’s new approach. 433 U.S. at 219-28; 444 U.S. at 299-313.

⁵⁶ 433 U.S. at 212 (footnote omitted); *see* note 28 *supra*; note 73 *infra*.

⁵⁷ 436 U.S. 84 (1978).

⁵⁸ *Id.* at 101. The Court could therefore skirt the reasonableness issue, avoiding the admittedly difficult task of actually weighing the interests of California and the plaintiff. *See id.* at 98-101.

*Rush v. Savchuk*⁵⁹ struck down Minnesota's assertion of jurisdiction quasi in rem subtype-two in an action arising from an out-of-state automobile accident, where the resident plaintiff sought to garnish the nonresident defendant's liability insurance contract on the basis that the insurer did business in Minnesota. The Court found such jurisdiction unreasonable; Minnesota could not fairly overcome its lack of in personam jurisdiction by refusing so to categorize the action.⁶⁰

Finally, *World-Wide Volkswagen Corp. v. Woodson*⁶¹ rejected Oklahoma's attempt to extend its in personam power to nonresident automobile dealers in a products liability litigation, where the nonresident plaintiffs had suffered an accident while passing through Oklahoma. In relatively unambiguous terms, the Court explained that with respect to jurisdiction, the due process clause

can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁶²

The former of these protections "is typically described in terms of 'reasonableness' or 'fairness.' . . . Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors," that is, the public's and the plaintiff's interests.⁶³ The latter limitation looks

⁵⁹ 444 U.S. 320 (1980).

⁶⁰ The key to this conclusion is that the Court never inquired into the reasonableness of jurisdiction in light of all interests in the litigation, *see id.* at 332, which would have been the only question if the Court had allowed presence of property to satisfy any power test. Instead, the Court simply prohibited this use of quasi in rem jurisdiction, *see id.* at 328-30, which apparently would have permitted an unreasonable circumvention of the restrictions on personal jurisdiction. This analysis explains both the Court's derogation of the quasi in rem approach as ingenious but fictitious, *id.* at 328, and also its rejection of the realistic direct-action analogy, *id.* at 330-31. In short, the state had to have jurisdiction over the defendant—the insured.

Thus, treating the action as an in personam proceeding against the insured, the Court followed *Kulko* and found a lack of power, because the insured had no contacts with the forum state. *Id.* at 327-33.

⁶¹ 444 U.S. 286 (1980).

⁶² *Id.* at 291-92.

⁶³ *Id.* at 292. The Court mentioned the forum state's interest in adjudicating the dispute, the interstate judicial system's interest in efficiently resolving controversies, the states' common interest in furthering substantive social policies, and the plaintiff's interest in

to the defendant's contacts with the forum state and, "acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment" even where the balance of interests indicates that jurisdiction would be eminently reasonable.⁶⁴

2. Current State of the Law

a. *Doctrine.* The Supreme Court's recent return to territorial jurisdiction has done much to clarify the law, although perhaps not to improve or stabilize it. The current law for determining the propriety of state-court jurisdiction under the due process clause is, first, to categorize the action and, second, to apply both the power and the reasonableness tests.

So we still have categories of jurisdiction, just as *Pennoyer* said more than a century ago. However, these categories need not conform precisely to *Pennoyer's* threefold framework, even though the Supreme Court continues to speak in such terms for convenience.⁶⁵ It would serve us well to redistribute the original categories into jurisdiction over persons, jurisdiction over things (including in rem and quasi in rem subtype-one), and attachment jurisdiction (including the remnants of quasi in rem subtype-two).⁶⁶ Perhaps it would be desirable to create more categories.⁶⁷ But although the categories may change slightly, categorization generally along the traditional lines remains necessary as long as jurisdiction turns on a notion of power—because the question of power translates into power over whom or what.

The requirement that the sovereign have power over the target of the action has evolved considerably beyond *Pennoyer's* physical-power approach. Despite the somewhat medieval tone of the word, power here and now embraces the rather broad concept of "minimum contacts" mapped by *Hanson* and the later progeny of *International Shoe*. For personal jurisdiction, power can

obtaining relief "at least when that interest is not adequately protected by the plaintiff's power to choose the forum." *Id.*

⁶⁴ *Id.* at 294.

⁶⁵ See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 199 & n.17 (1977); *Hanson v. Denckla*, 357 U.S. 235, 246 & n.12 (1958).

⁶⁶ See F. JAMES, CIVIL PROCEDURE 612-13 (1965); RESTATEMENT (SECOND) OF JUDGMENTS § 9, Comments a-b (Tent. Draft No. 5, 1978) [§ 6].

⁶⁷ See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977) (jurisdiction over status); *Hanson v. Denckla*, 357 U.S. 235, 246 & n.13 (1958) (suggesting jurisdiction by necessity and jurisdiction over status, respectively, by citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950), and *Williams v. North Carolina*, 317 U.S. 287, 297 (1942)).

rest not only on presence, domicile, and consent, but also on a more metaphorical basis definable only by aggregating the case law;⁶⁸ at the least, power exists over a defendant who has purposefully availed himself of the privilege of conducting activities within the forum state. For nonpersonal jurisdiction, however, power still depends on presence. In short, the common element in the modern power test is the focus on the out-of-court relation of the target of the action to the forum state.

The requirement of reasonableness with regard to the litigation arose from the Court's emphasis on "fair play and substantial justice" in the early progeny of *International Shoe*. This relatively lenient test is basically similar for the different categories of jurisdiction, although the varying effects of the different kinds of judgment naturally enter into the wide-ranging consideration of reasonableness. Indeed, this multifaceted inquiry into the fairness of forum selection should cover the whole range of interests possessed by the public, the plaintiff, and the actual defendant.⁶⁹ Thus, the diagnostic key for distinguishing the reasonableness test from the power test, which looks only at the contacts of the defendant or thing with the forum state, is that an inquiry into reasonableness considers many interests, including those of the forum state and the plaintiff.

Of course, the state may choose not to exercise its full constitutional powers and so place further limitations on its jurisdictional reach. Such self-restraint is not yet my concern.⁷⁰

b. *Basic Applications*. Applying the doctrine elucidates it. Consider a case in which jurisdiction is categorized as in personam.

⁶⁸ See text accompanying notes 144-60 *infra*.

⁶⁹ See notes 35-37 & 63 and accompanying text *supra*; text accompanying notes 192-207 *infra*. See also RESTATEMENT (SECOND) OF JUDGMENTS, Reporter's Note § 8 at 67-68 (Tent. Draft No. 5, 1978) [§ 5]. In *Cornelison v. Chaney*, 16 Cal. 3d 143, 150-51, 545 P.2d 264, 268, 127 Cal. Rptr. 352, 356 (1976), the court phrased the inquiry this way:

We next consider whether it would be fair and reasonable to subject defendant to the jurisdiction of California in light of the inconvenience to him in defending an action in this state, when balanced against the interests of plaintiff in suing locally and of the state in assuming jurisdiction.

....

[Previously] we listed some of the considerations involved in this balance: the relative availability of evidence and the burden of defense and prosecution in one place rather than another; the interest of a state in providing a forum for its residents or regulating the business involved; the ease of access to an alternative forum; the avoidance of a multiplicity of suits and conflicting adjudications; and the extent to which the cause of action arose out of defendant's local activities.

⁷⁰ See text accompanying notes 137-41 *infra*.

Usually the court will first apply the power test, that being the higher hurdle for most such cases. If there is no power, there is no jurisdiction.⁷¹ If there is power, then the court must consider reasonableness.⁷² In a case brought under a long-arm statute, for example, reasonableness normally follows a fortiori from a finding of power, because looking at interests in addition to the defendant's most often favors jurisdiction.⁷³ But in the example of a case based solely on the defendant's transient presence, reasonableness might be absent despite the existence of power, because taking the defendant's interests fully into account disfavors jurisdiction.⁷⁴ At any rate, an exercise of personal jurisdiction must pass both tests.

Next consider jurisdiction over things, either in rem or quasi in rem subtype-one. To satisfy the power test, the plaintiff normally must bring the action where the thing is. Reasonableness will then be the key test, allowing jurisdiction when, for example, "claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant."⁷⁵ Noteworthy here is the play in the process of identifying the thing in dispute and attributing an in-state situs to it, especially for intangibles: arguably, courts must now ask, as a special aspect of the

⁷¹ Thus, *Hanson, Shaffer, Kulko, Rush, and World-Wide* decided only the power issue with respect to jurisdiction over the person. Power being absent, it was irrelevant that jurisdiction might be reasonable in, say, *Shaffer*.

⁷² "If a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with 'traditional notions of fair play and substantial justice.'" *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

⁷³ See, e.g., *CleveRock Energy Corp. v. Trepel*, 609 F.2d 1358, 1364 (10th Cir. 1979), cert. denied, 446 U.S. 909 (1980). This might explain why the *International Shoe* Court did not wholly extricate the reasonableness inquiry from the power test. See note 28 and accompanying text *supra*.

⁷⁴ Commentary, especially recently, has strongly opposed transient jurisdiction. E.g., *Bernstine, Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979); *Ehrenzweig, supra* note 9; *Glen, An Analysis of "Mere Presence" and Other Traditional Bases of Jurisdiction*, 45 BROOKLYN L. REV. 607 (1979) (limiting criticism to jurisdiction based on fortuitous, inadvertent, or coerced presence); *Werner, Dropping the Other Shoe: Shaffer v. Heitner and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565 (1979); *Transient Jurisdiction—Remnant of Pennoyer v. Neff: A Round Table*, 9 J. PUB. L. 281 (1960); *Comment, Minimum Contacts Analysis of In Personam Jurisdiction Over Individuals Based On Presence*, 33 ARK. L. REV. 159 (1979). Admittedly, the courts have not yet followed the commentators' suggestion. See, e.g., *Donald Manter Co. v. Davis*, 543 F.2d 419 (1st Cir. 1976); *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980); *Nielsen v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963); *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 687-88, 273 N.W.2d 285, 286-87 (1979) (dictum).

⁷⁵ *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977).

jurisdictional inquiry, whether the state reasonably performed this reification process.⁷⁶

Finally, consider attachment jurisdiction, as where the plaintiff by proper procedure attaches the defendant's property in the state to pursue an unrelated claim against the defendant. Again because power exists, reasonableness with regard to the litigation will be the key test. Among the situations that pass this test are those where personal jurisdiction would be constitutional,⁷⁷ where the action serves as security for a judgment being sought elsewhere,⁷⁸ where the action seeks to enforce a judgment,⁷⁹ and perhaps where no other forum is available.⁸⁰ Noteworthy here is the play in the process of categorization: arguably, courts must now ask whether the state had a reasonable purpose in categorizing the action as attachment jurisdiction and thereby evading the restrictions on personal jurisdiction.⁸¹

⁷⁶ The *Hanson* Court faced this reification issue in ruling that the trust assets were not in Florida, but the Court managed to duck it in *Shaffer* and *Rush*. *But cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 65 (1971) (applying only reasonableness test directly to exercise of jurisdiction); RESTATEMENT (SECOND) OF JUDGMENTS § 9, Comment e (Tent. Draft. No. 5, 1978) (same) [§ 6]. *See generally* Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 YALE L.J. 241 (1939); *Developments in the Law—State-Court Jurisdiction*, *supra* note 9, at 950-53; note 29 *supra*.

There is nothing unique about asking whether the assertion of power over things is somehow reasonable. The same question arises for attachment jurisdiction. A very similar question arises in personal jurisdiction, where reasonableness marks the outer limit on the state's ability to stretch the power metaphor. *See* text accompanying notes 147-60 *infra*. Analogously, reasonableness limits the state's ability to categorize a proceeding. *See* note 81 and accompanying text *infra*.

Admittedly, these ubiquitous questions concerning the reasonableness of power are largely superfluous or meaningless. Indeed, they nicely reveal the bankruptcy of the power concept. *See* note 160 and accompanying text *infra*.

⁷⁷ *Shaffer v. Heitner*, 433 U.S. 186, 208 & n.29 (1977).

⁷⁸ *Id.* at 210; *see* Note, *Attachment Jurisdiction After Shaffer v. Heitner*, 32 STAN. L. REV. 167 (1979).

⁷⁹ *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977).

⁸⁰ *Id.* at 211 n.37; *see* Note, *Quasi In Rem Jurisdiction over Foreigners*, 12 CORNELL INT'L L.J. 67 (1979); note 231 *infra*.

⁸¹ *See* notes 52 & 60 and accompanying text *supra*. The Court in *Shaffer* and *Rush* found unreasonable categorization, and therefore required power over the person. *But cf.* Hazard, *Interstate Venue*, 74 Nw. U.L. REV. 711, 718-19 (1979) (applying only reasonableness test directly to exercise of jurisdiction); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 72-74 (1978) (seeing role for attachment jurisdiction wherever contacts insufficient for personal jurisdiction).

There is nothing unique about asking whether the categorization is reasonable. A very similar question is when jurisdiction over things can substitute for personal jurisdiction. *Cf.* Carrington & Martin, *supra* note 44, at 235-36 (indispensable-party rule). *Compare* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) (garnishment of debt in dispute did not provide jurisdiction sufficient for interpleader), *with* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957) (suggesting opposite result under *Mullane* approach), *cert.*

c. *Application to Federal Courts.* Until this point I have implicitly limited discussion to the due-process limits on the territorial jurisdiction of state courts. To extend this discussion of current doctrine to federal district courts, I first note the traditional axiom: the due process clause of the fifth amendment imposes no jurisdictional impediment to the federal courts' reaching anywhere within the territorial limits of the United States.⁸² Accordingly, Congress or its rulemaker may authorize nationwide service of federal process, as they have done in specific instances such as interpleader.⁸³

However, the federal system has always exercised self-restraint regarding its jurisdictional reach.⁸⁴ As a general matter,

denied, 357 U.S. 569 (1958), and *St. Louis Sw. Ry. v. Meyer*, 364 Mo. 1057, 272 S.W.2d 249 (1954) (suggesting that opposite result follows from loosening of limits on jurisdiction over things), *appeal dismissed*, 349 U.S. 942 (1955). A similar question also exists as to when personal jurisdiction can substitute for jurisdiction over things. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 55, Comment c (1971) (for example, suit to partition foreign land); RESTATEMENT (SECOND) OF JUDGMENTS § 9, Comment e (Tent. Draft No. 5, 1978) [§ 6]; Carrington & Martin, *supra* note 44, at 233-34. See also note 76 and accompanying text *supra*.

⁸² See *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) ("due process requires only certain minimum contacts between the defendant and the sovereign that has created the court"); *Leroy v. Great Western United Corp.*, 443 U.S. 173, 191-92 (1979) (White, J., dissenting); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); *Iovino v. Waterson*, 274 F.2d 41, 45 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1960). See generally ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 437-38 (1969) [hereinafter cited as ALI STUDY]; F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.10, at 620 (2d ed. 1977) ("No such constitutional limitations confine the federal judicial system, which has legal authority throughout the nation."); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 64, at 304-05 (1976). There is no jurisdictional impediment even in diversity cases. See ALI STUDY, *supra*, at 437-41. But see *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 331 (1964) (Black, J., dissenting) (arguing that limits on state courts constitutionally restrict federal-court reach in diversity cases).

The axiom is significantly misleading, however, because the due process clause of the fifth amendment restricts federal venue. See text accompanying notes 115-23 *infra*. I shall contend that this restriction is equivalent to the reasonableness component of the *Shaffer* formulation. See text accompanying note 124 *infra*. See also note 132 *infra*.

Also, the fifth amendment imposes limits on the foreign reach of federal courts analogous to those on the reach of state courts. See *Wagman v. Astle*, 380 F. Supp. 497 (S.D.N.Y. 1974); 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[5], at 4-260 to -261 (2d ed. 1980); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24, Comment e (1971); RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comment a (Tent. Draft No. 5, 1978) [§ 4]; Foster, *Long-Arm Jurisdiction in Federal Courts*, 1969 Wis. L. Rev. 9, 36.

⁸³ 28 U.S.C. § 2361 (1976); see FED. R. CIV. P. 25(a)(1); cf. FED. R. CIV. P. 4(f) (100-mile bulge provision). See also 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1125-1126 (1969).

On the respective roles of Congress and the courts in delineating federal jurisdiction, see Foster, *supra* note 82, at 11.

⁸⁴ See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925). See also Abraham, *Constitutional Limitations upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 532-33 (1963); Blume, *Place of*

the federal courts reach only as far as the local state courts can.⁸⁵ Sometimes the applicable federal statute or rule incorporates by reference or implication the various state jurisdictional limits.⁸⁶ Sometimes the *Erie* doctrine dictates the similar application of state law.⁸⁷ And even where the federal courts feel free to define their own reach, they adopt the due-process limits on state-court jurisdiction.⁸⁸ In short, the jurisdictional doctrine heretofore discussed applies in the federal district courts, unless specifically modified by federal statute or rule.

d. *Summary.* The current law of territorial jurisdiction requires courts to categorize first and then test for power and

Trial of Civil Cases: Early English and Modern Federal, 48 MICH. L. REV. 1, 29-34 (1949); Comment, *Federal Jurisdiction over Foreign Corporations and the Erie Doctrine*, 64 COLUM. L. REV. 685, 690-95 (1964).

⁸⁵ See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1107-08, 1118-21 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 166-67, 768-73 (4th ed. 1978); 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[7] (2d ed. 1980); 4 C. WRIGHT & A. MILLER, *supra* note 83, § 1075; FOSTER, *supra* note 82, at 9-28.

⁸⁶ An example would be out-of-state service pursuant to the second sentence of FED. R. CIV. P. 4(e). See, e.g., *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 449 F.2d 775 (10th Cir. 1971). See also 4 C. WRIGHT & A. MILLER, *supra* note 83, § 1075, at 312-14; text accompanying notes 128-29 *infra*.

When a federal court so applies "state law," it applies both the jurisdictional limitations self-imposed by state statute or rule and those imposed on the state by the Federal Constitution. See 4 C. WRIGHT & A. MILLER, *supra* note 83, § 1075, at 316; FOSTER, *supra* note 82, at 38-39.

⁸⁷ An example would be in-state service pursuant to FED. R. CIV. P. 4(d)(3) on a state-created claim. See, e.g., *Arrowsmith v. UPI*, 320 F.2d 219 (2d Cir. 1963). See also 4 C. WRIGHT & A. MILLER, *supra* note 83, § 1075, at 303-12; text accompanying notes 221-24 *infra*.

⁸⁸ An example would be in-state service pursuant to FED. R. CIV. P. 4(d)(3) on a federally created claim. See, e.g., *Frale v. Chesapeake & O. Ry.*, 397 F.2d 1 (3d Cir. 1968); *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147 (5th Cir. 1954); *Scott v. Middle East Airlines Co.*, 240 F. Supp. 1 (S.D.N.Y. 1965); cf. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 666-67 (1953) (by implication) (new service after removal). See also HART & WECHSLER, *supra* note 85, at 1119; 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[7], at 4-290 to -291 (2d ed. 1980).

The text gives the most widely accepted view. A possible, more restrictive view is that the federal courts should adopt all of the forum state's jurisdictional law as the federal common law. Cf. *Arrowsmith v. UPI*, 320 F.2d 219, 228 n.9 (2d Cir. 1963) (suggesting this view as possibility). A much more permissive alternative, with slightly more support, is that the federal courts should apply only the jurisdictional restrictions that the Constitution and international law impose on the nation as a whole. *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730 (E.D. Tenn. 1962); Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961); see *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973) (*semble*); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381, 389-90 (S.D. Ohio 1967) (dictum).

I shall consider the wisdom of the current view at text accompanying notes 130-33 *infra*.

reasonableness. As radically strange and strangely reactionary as this formulation sounds, it seems to be the message of the cases.⁸⁹ In extracting that formulation, I have tried to show how it solves certain celebrated problems of case interpretation. Seemingly different lines of cases were simply developing or stressing different ideas, which the Court has now integrated into a comprehensible doctrine. Of course, some of the Court's language does not quite fit, often because of inconsistencies in terminology; but to an eye-opening degree, the holdings and essential language fall into place.⁹⁰ Also, I have explored the major implications of the current doctrine, because this is the law under which we shall live for years to come. Finally, in extracting and exploring the doctrine, I have laid the groundwork for exposing its inadequacies and showing the need for a new approach, tasks to which I now turn.

⁸⁹ *Accord, e.g.*, *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 158-59 (9th Cir. 1980); *Louis, The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407, 422 & n.107 (1980); 11 STAN. L. REV. 344 (1959).

In his response to this Article, Professor Hazard somewhat misstates my position and then proceeds to champion the view that the recent Supreme Court cases have somehow injected reasonableness into power to create a single jurisdictional test. He seemingly would require no more than a reasonable transactional nexus. Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 570-72 (1981). I read this to be a rewording of the test that he earlier phrased as "minimum contacts between the forum and the transaction in litigation." Hazard, *supra* note 9, at 281.

Such a view simply does not accord with the Court's statement of its position in *World-Wide*. See text accompanying note 62 *supra*. Moreover, no single test can explain why the *Shaffer* Court shifted from its broad focus on all interests when dealing with nonpersonal jurisdiction in part III of its opinion to its narrow focus on contacts for personal jurisdiction in part IV. Finally, to the extent any single test emphasizes *reasonableness*, as Professor Hazard's test does, it fails to explain why the Court in *Hanson*, *Kulko*, *Rush*, and *World-Wide* restricted its focus to the out-of-court relation of the target of the action to the forum state. Therefore, I justify my slightly more complicated formulation by pointing to the complications in the cases themselves.

Nevertheless, I am not suggesting that we should forever remain bound by the implicit complications of current case law. The rest of this Article argues for an evolution toward a single test of reasonableness. Also, I shall present a reformulated framework for analysis. As Professor Hazard recognizes, 66 CORNELL L. REV. at 572, the validity of that reformulation ultimately does not depend on resolving in my favor our differences regarding the meaning of these recent Supreme Court cases.

⁹⁰ *Mullane* alone seems endangered, as power was lacking there. Indeed, *Mullane* falls unless there is a jurisdiction-by-necessity exception to the current scheme. See *Fraser, supra* note 31, at 311, 319; notes 67 & 81 *supra*. But *Mullane's* result is so obviously right that its endangerment casts doubt on the whole current scheme. See note 146 and accompanying text *infra*; note 203 *infra*.

B. Predictive View of the Current Law

1. Relationship of Territorial Jurisdiction and Venue

Expounding the current doctrine of territorial jurisdiction raises policy problems whose resolution demands an unexpected preliminary step: studying how the doctrine relates to venue. I shall do this initially in the context of the federal district-court system, where the relationship of territorial jurisdiction and venue is more suggestive of a solution; but after reformulating the relationship there, I shall extend the discussion to state courts.

a. *Common History.* Territorial jurisdiction and venue were largely indistinguishable concepts for more than the first half of the existence of the federal courts. Under the First Judiciary Act, the governing provision for both stated:

[N]o person shall be arrested in one district for trial in another, in any civil action And no civil suit shall be brought . . . against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ⁹¹

In those days this meant that personal jurisdiction and venue were normally proper in the same districts.⁹² And under the prevailing power theory of jurisdiction and the ancient local-action doctrine,⁹³ jurisdiction and venue for actions in rem and quasi in rem were normally both proper in the same district as well.⁹⁴

In 1887 Congress distinguished the two requirements by superimposing a venue scheme essentially equivalent to the modern one.⁹⁵ Although still both territorial jurisdiction and venue lim-

⁹¹ Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73. See generally 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3802 (1976); note 84 and accompanying text *supra*.

⁹² See 1 MOORE'S FEDERAL PRACTICE ¶ 0.140[3], at 1322 (2d ed. 1980); Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 609-10 (1954).

⁹³ See generally *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411); C. WRIGHT, *supra* note 82, § 42, at 178-79.

⁹⁴ See Blume, *Actions Quasi In Rem Under Section 1655, Title 28, U.S.C.*, 50 MICH. L. REV. 1, 29 (1951); Blume, *supra* note 84, at 35.

⁹⁵ [N]o civil suit shall be brought . . . against any person by any original process of [sic] proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant [sic]

Judiciary Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552 (current version at 28 U.S.C. § 1391 (a)-(b) (1976)).

ited where a plaintiff could bring an action, the former continued to prescribe "the court's power to adjudicate" while the latter undertook to specify "the place where that authority may be exercised."⁹⁶ Venue thus took on a new restrictiveness in a rather crude attempt "to insure that litigation is lodged in a convenient forum and to protect defendant against the possibility that plaintiff will select an arbitrary place in which to bring suit."⁹⁷ Nevertheless, in subsequent practice the two concepts remained closely linked,⁹⁸ and in today's litigation, they still repeatedly intersect.⁹⁹

Indeed, some of the differences that emerged in the last century may now be disappearing. Venue has recently become more permissive and rational, for example, by usually offering as a choice the district "in which the claim arose."¹⁰⁰ At the same time, territorial jurisdiction has expanded in the same direction,

⁹⁶ 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3801, at 5. See also A. EHRENZWEIG, D. LOUISELL & G. HAZARD, *JURISDICTION IN A NUTSHELL* § 2-1 (4th ed. 1980); F. JAMES & G. HAZARD, *supra* note 82, § 12.1.

⁹⁷ 4 C. WRIGHT & A. MILLER, *supra* note 83, § 1063, at 203.

⁹⁸ For example, the *Neirbo* doctrine provided for simultaneous satisfaction of the two requirements when a corporation had designated an agent for service of process. *Neirbo Co. v. Bethlehem Shipbldg. Corp.*, 308 U.S. 165 (1939); see HART & WECHSLER, *supra* note 85, at 1121-22, 1124.

Of course, some developments after 1887 further separated territorial jurisdiction and venue, such as the authorization of statewide service of process by FED. R. CIV. P. 4(f) and the enactment of various special venue statutes like 28 U.S.C. § 1397 (1976).

⁹⁹ For example, venue in actions against aliens is proper wherever the plaintiff can satisfy the jurisdictional requirement. See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3810. Conversely, jurisdiction exists in patent infringement actions wherever the plaintiff can satisfy the venue requirement. See Barrett, *supra* note 92, at 623-24. The two requirements thus fold together.

Venue in antitrust and securities actions generally lies wherever the defendant is an inhabitant or may be found. See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, §§ 3818, 3824.

Under 28 U.S.C. § 1391(c) (1976), venue in an action against a corporate defendant generally lies wherever it is "doing business," the definition of which should turn on jurisdictional law. See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3811, at 64-71. But see HART & WECHSLER, *supra* note 85, at 1123 (suggesting more stringent standard for venue). The same definitional point holds true for the antitrust corporate defendant that "transacts business" under 15 U.S.C. § 22 (1976). See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3818, at 110-11.

Venue and territorial jurisdiction receive the same treatment with respect to the manner of raising and waiver, see FED. R. CIV. P. 12, transfer under 28 U.S.C. § 1404(a) (1976), see *Hoffman v. Blaski*, 363 U.S. 335 (1960), and transfer under 28 U.S.C. § 1406(a) (1976), see *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978).

¹⁰⁰ Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (codified at 28 U.S.C. § 1391(a)-(b) (1976)).

usually allowing suit where the claim arose. More significantly, as jurisdiction has moved toward notions of fairness and convenience, it has come to serve many of the purposes of venue. Hence pressure for closer alignment grows: obvious questions include why jurisdiction may sometimes be lacking in the fairest venue, and why venue may sometimes be improper where jurisdiction is very reasonable and available.¹⁰¹

b. *Similar Purposes.* Several courts and commentators have gone beyond the traditional view of territorial jurisdiction as power and of venue as the place to exercise that power,¹⁰² and have recognized the intimate connection between the two doctrines in federal court. Indeed, concluding that the two serve similar purposes, but that redundancy leads to sometimes clumsy application and impedes reform, a few of these authorities have suggested some sort of doctrinal merger.

Where is the connection? The traditional view resulted from focusing only on the ends of a spectrum with territorial jurisdiction at the pure-power end and venue at the mere-convenience end. It is now apparent that at least jurisdiction extends into the middle zone of fairness and gross inconvenience. Thus, the doctrines are connected. "Both are designed to test the fairness to the defendant and the degree of inconvenience caused him by requiring him to litigate in a particular court."¹⁰³ But how then to maintain the distinction? One court recently explained "that the question of jurisdiction, which is relatively more concerned with fairness, is distinct from that of venue, which is more concerned with convenience."¹⁰⁴ But this distinction seemingly intimates the doctrines' redundancy. So how then to unite them?

Professor Edward L. Barrett, Jr.,¹⁰⁵ suggested a scheme of nationwide service of federal process, whereby the task of ensur-

¹⁰¹ See, e.g., C. WRIGHT, *supra* note 82, § 42, at 172-73.

¹⁰² See notes 96-97 and accompanying text *supra*. The traditional view has created its share of confusion. See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3801, at 4 n.4; notes 216 & 222 and accompanying text *infra*. The courts and commentators going beyond the traditional view are those discussed in notes 103-08 and accompanying text *infra*.

¹⁰³ *Time, Inc. v. Manning*, 366 F.2d 690, 696 (5th Cir. 1966).

¹⁰⁴ *Hutson v. Fehr Bros.*, 584 F.2d 833, 837 (8th Cir.), *cert. denied*, 439 U.S. 983 (1978).

¹⁰⁵ Barrett, *supra* note 92, at 627-35. *Accord*, F. JAMES & G. HAZARD, *supra* note 82, § 12.11, at 622; C. WRIGHT, *supra* note 82, § 42, at 172, § 64, at 305.

The American Law Institute chose a similar route for federal-question and certain diversity cases. ALI STUDY, *supra* note 82, §§ 1314-1315, 2372, 2374. *Accord*, A. EHRENZWEIG, D. LOUISELL & G. HAZARD, *supra* note 96, § 54.

ing a reasonably convenient forum would fall solely on a new federal venue statute. A plaintiff could generally lay venue in any district where the wrongful act or a part thereof had occurred or where any defendant resided. Professor Barrett would also provide for transfer of venue.¹⁰⁶

Professor David P. Currie¹⁰⁷ took a different route to union. He suggested abolishing the concepts of federal venue and transfer of venue, and would look solely to the restrictions of a new federal long-arm statute to ensure a convenient forum. Long-arm service would generally extend from any district where a substantial part of the events in suit had occurred, where any defendant resided if all defendants resided in the same state, or where any defendant resided if all defendants resided in this country and if service was not otherwise possible.¹⁰⁸

This focus on the middle zone between territorial jurisdiction and venue represents a major advance, because it reveals the doctrines' connection and redundancy. But such analysis does not offer a complete solution, either because the doctrinal distinction remains fuzzy or because attempted union proves unsatisfactory in a number of ways. First, Currie's choice to preserve the concept of jurisdiction opposes Barrett's preference for venue. Such a polarization implies that neither offers the optimal route. Second, squeezing everything into either jurisdiction or venue will carry over unwanted doctrinal baggage of these old ideas. For example, problems of collateral attack¹⁰⁹ or *Erie* questions¹¹⁰ might turn on

One commentator offered a theoretically similar but practically extreme proposal for "federal causes of action." He would adopt a Barrett-like approach, but would permit a plaintiff to lay venue in any district. Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82, 84, 100 (1968).

¹⁰⁶ Professor Barrett did not consider the foreign reach of federal process. See Barrett, *supra* note 92, at 609 n.2. He would treat all nonpersonal proceedings as local actions. See *id.* at 634.

¹⁰⁷ Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 299-311 (1969).

A similar proposal, except that a federal court with jurisdiction could freely transfer the case within the federal system, appeared in Keefe, *Twenty-Nine Distinct Damnations of the Federal Practice—And a National Ministry of Justice*, 7 VAND. L. REV. 636, 647-54, 656-57 (1954).

¹⁰⁸ Professor Currie's long-arm would reach appropriate parties outside the United States. See Currie, *supra* note 107, at 300 n.412. He would abolish the traditional categorization of proceedings. See *id.* at 301, 305 n.441.

¹⁰⁹ See note 216 and accompanying text *infra*. A desire to control the result of collateral attack caused Professor Currie to depart from the Barrett approach. See Currie, *supra* note 107, at 303-04.

¹¹⁰ See note 222 and accompanying text *infra*.

the single chosen label. A less constraining approach might yield more discriminating solutions. Third, these proposals are too specific. Their basic intellectual frameworks do not readily transfer to the state-court setting. Admittedly, this drawback is merely unfortunate, not damning. Fourth, and perhaps most telling, these proposals are also too broad. By focusing on the overlap in the middle, they ignore the ends of the spectrum. Jurisdiction and venue serve some distinct as well as some similar purposes. A closer look at these purposes is necessary to create a theoretical framework that can handle them all.

c. Parallel Structure. A careful look at territorial jurisdiction has already discerned two cumulative components: power and reasonableness. Upon closer inspection, federal venue also reveals a dual structure.

The more widely perceived aspect of federal venue is largely statutory. It undertakes the mundane task of distributing judicial business around the country in a purportedly convenient, efficient, or otherwise desirable manner. For example, the general venue statute provides that a federal-question case may lie in the district where all defendants reside or where the claim arose,¹¹¹ and that a case founded only on diversity jurisdiction may lie in the district where all plaintiffs or all defendants reside or where the claim arose.¹¹² A more extreme example is the special statute dictating that a transitory action against a national bank lies only in the district in which the bank has its principal office.¹¹³ Congress has also provided for transfer of venue, which allows the courts to narrow the choice of venue on a case-by-case basis.¹¹⁴

The more hidden aspect of venue derives from the due process clause of the fifth amendment, which establishes a minimum standard or floor that the statutory venue scheme must exceed to survive constitutional challenge. This floor requires that the place of litigation be fundamentally fair. For example, despite any provision for nationwide service of process and any statutory venue authorization, an action could not be brought in a district wholly unconnected with the litigation and grossly inconvenient for the defendant. If such a case were not transferable to a proper feder-

¹¹¹ 28 U.S.C. § 1391(b) (1976).

¹¹² 28 U.S.C. § 1391(a) (1976).

¹¹³ 12 U.S.C. § 94 (1976); see 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3813.

¹¹⁴ 28 U.S.C. § 1404(a) (1976); see Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 137-38 (1965).

al forum,¹¹⁵ the court should dismiss for improper venue or perhaps on the ground of forum non conveniens.¹¹⁶

Arguments for the existence of this second aspect of federal venue rest more on logic than on case law. The issue arises rarely in the courts.¹¹⁷ The constitutional requirement apparently is not

¹¹⁵ See 28 U.S.C. § 1406(a) (1976).

¹¹⁶ Federal forum non conveniens survived the enactment of the transfer provisions, but it now applies only where the case is exceptional and the more convenient forum is a state or foreign court. See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3828. With the federal doctrine of forum non conveniens so contracted and with the modern idea of due process so expanded, what we call federal forum non conveniens may conceivably be available only where due process dictates outright or conditional dismissal. See *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 175 F.2d 184 (2d Cir.), *cert. denied*, 338 U.S. 867 (1949), *on remand*, 91 F. Supp. 469 (S.D.N.Y. 1950). *But see* *Alcoa S.S. Co. v. M/V Nordic Regent*, 636 F.2d 860 (2d Cir. 1980) (en banc), *cert. denied*, 101 S. Ct. 248 (1980); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 431 (9th Cir. 1977). Concomitantly, this continued use of forum non conveniens by the federal courts may supply some proof, albeit weak and ambiguous, of the existence of this constitutional aspect of venue.

State forum non conveniens (and, for that matter, transfer under 28 U.S.C. § 1404(a) (1976)) also involves considerations similar to due process, but it extends considerably beyond the range of that constitutional clause. The difference is one of degree, with forum non conveniens looking to convenience and other such considerations but due process interceding only when the balance tips toward violation of fundamental fairness. As a theoretical matter, it is sounder to separate the discretionary doctrine from the constitutional command, and thus apply the term "forum non conveniens" only when a court declines jurisdiction in the absence of constitutional compulsion. See F. JAMES & G. HAZARD, *supra* note 82, § 12.29.

¹¹⁷ See, e.g., *Kipperman v. McCone*, 422 F. Supp. 860, 871 (N.D. Cal. 1976) (despite provision for nationwide service, due-process reasonableness test applies); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 198-204 (E.D. Pa. 1974) ("We reject the notion that there are no limitations upon extraterritorial service of process under federal statutes such as the securities acts; the existence of the Fifth Amendment would indicate otherwise. However, [there is] persuasive justification for upholding the view that any constitutional due process limitations upon a federal extraterritorial (nationwide) service of process statute must be broadly defined [as a fairness test]." *Id.* at 201.); *Dijulio v. Digicon, Inc.*, 325 F. Supp. 963, 965-66 (D. Md. 1971) (in securities action, "plaintiffs must satisfy the venue requirements, both statutory and constitutional," *id.* at 965; court defines latter in terms of fair play and substantial justice); *cf.* *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 567-68 (S.D. Iowa 1973) (in securities action, venue and personal jurisdiction limited by due process). *But see, e.g.,* *Driver v. Helms*, 577 F.2d 147, 156-57 (1st Cir. 1978) (suggesting territorial limits on federal courts are within congressional discretion), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980); *Briggs v. Goodwin*, 569 F.2d 1, 8-10 (D.C. Cir. 1977) (same), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980); *Stern v. Gobeloff*, 332 F. Supp. 909, 912-14 (D. Md. 1971) (dictum) (same); *cf.* note 82 *supra* (when speaking strictly of federal territorial jurisdiction, authorities downplay role of due process); *Fitzsimmons v. Barton*, 589 F.2d 330, 334 n.5 (7th Cir. 1979) (same, although leaving open issue of venue's constitutional aspect). See also note 132 *infra*.

I later contend that the cases adopting as federal common law the due-process limits on state-court jurisdiction, see note 88 *supra*, are, in effect, applying this constitutional aspect of venue. See text accompanying notes 130-33 *infra*. See also note 116 *supra*; note 133 *infra*.

very demanding. Moreover, the restrictiveness of the jurisdictional and statutory venue schemes now in place, as well as the permissiveness of the provisions for transfer of venue, means that the requirement has little role to play in current practice. However, several commentators have explored this constitutional restraint on the federal courts.¹¹⁸ Professor G. W. Foster, Jr.,¹¹⁹ argued that a venue-like concept required the particular forum to be a reasonable one. "Thus the imposition of an unreasonable choice of districts within the system should raise fifth amendment due process considerations."¹²⁰ He viewed those considerations as somewhat analogous to the standard for territorial jurisdiction of state courts under the fourteenth amendment. Professor Gerald Abraham¹²¹ earlier had made a somewhat different suggestion. He argued that the due process clause of the fifth amendment directly restrained the jurisdictional reach of the federal courts. That restraint was similar to the fourteenth amendment limitation, which he viewed roughly in terms of reasonableness. We protect a defendant against state-court jurisdiction "considered so unfair to him as to offend the 'traditional notions of fair play and substantial justice' embodied in the due process clause of the Fourteenth Amendment. Might it not also be unfair to force him to litigate in the federal court across the street?"¹²²

¹¹⁸ Admittedly, some maintain that there is no constitutional restraint at all. *E.g.*, Seidelson, *supra* note 105, at 82, 88; *cf.* Seidelson, *Jurisdiction over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes*, 6 DUQ. U.L. REV. 221, 251-52 (1968) (extremely lax view of due-process restraints on state-court jurisdiction). Compare RESTATEMENT OF JUDGMENTS § 5, Comment b (1942) (no constitutional restraint), with RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comment f (Tent. Draft No. 5, 1978) (possibly some constitutional restraint) [§ 4].

An argument against the existence of constitutional restraint may lie in the assertion that even for routine litigation Congress could convert the whole country into a single district, with the federal court sitting in one place. *See* *Briggs v. Goodwin*, 569 F.2d 1, 9-10 (D.C. Cir. 1977), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980). However, that assertion may be false. Moreover, even a complete lack of constraint on congressional establishment of trial courts would not necessarily imply the absence of constitutional restraint on venue among the currently existing district courts. *See generally* C. WRIGHT, *supra* note 82, § 10 (congressional control of jurisdiction); 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3508 (specialized federal courts).

¹¹⁹ Foster, *supra* note 82, at 28-38.

¹²⁰ *Id.* at 36 (footnote omitted).

¹²¹ Abraham, *supra* note 84, at 533-36; *cf.* Seeburger, *The Federal Long-Arm: The Uses of Diversity, or 'Tain't So, McGee*, 10 IND. L. REV. 480, 482 n.11, 505-06 (1977) (limiting similar argument to diversity cases).

¹²² Abraham, *supra* note 84, at 533-34.

Thus, the authorities¹²³ are uncertain whether this constitutional restraint on the federal courts arises from concerns of territorial jurisdiction or of venue. This uncertainty is a symptom of yet another link between the two doctrines—indeed the key link that reveals the route to reformulation.

d. *Reformulation.* The cases that developed the due-process limits on state courts show that territorial jurisdiction involves cumulative tests of power and reasonableness. And the foregoing discussion suggests that federal venue comprises notions of both constitutional “fairness” and mere “convenience.” It is by now obvious that the overlap between the doctrines falls mainly in the middle zone of reasonableness and fairness. This overlap accounts in part for the common history of jurisdiction and venue and for their similarity of purposes. Finally, this overlap prompts the critical step to reformulation: recognizing that the reasonableness component of state-court jurisdiction and the fairness aspect of federal venue are one and the same constitutional concept.¹²⁴

I propose to act upon this identity by distilling the existing four notions into three conceptual receptacles, a structure that will prove useful in both federal and state settings. First, there is pure territorial jurisdiction, the constitutional requirement that the sovereign have power over the target of the action. Although this same concept applies to federal and state courts, federal power obviously reaches much farther than state power. Second, there is mere venue, which concerns at a nonconstitutional level the convenient, efficient, or otherwise desirable distribution of judicial business on a geographic basis. The federal and state sovereigns might make different decisions regarding that distribution. Third, there is a new concept, derived from both jurisdiction and venue, that addresses the reasonableness or fairness of the forum district or state. In awareness of its mixed parentage and in hope of proceeding without old conceptual baggage, I propose “forum-reasonableness”¹²⁵ as a name for this due-process requirement. I submit that recognition of these three separate concepts is the rational denouement of the grand themes: the vicissitudes of the

¹²³ The cases exhibit the same uncertainty as the commentators. Of the cases cited for support in note 117 *supra*, the *Dijulio* case looked to venue, but *Kipperman* and *Oxford First* spoke in terms of jurisdiction.

¹²⁴ On differences in the application of the reasonableness test in federal and state settings, see text accompanying note 202 *infra*.

¹²⁵ For a related concept, Professor Ehrenzweig suggested the term “forum *conveniens*.” Ehrenzweig, *supra* note 9, at 292; see text accompanying note 142 *infra*.

contesting standards of power and reasonableness in jurisdiction, and the uneasy and shifting relationship of jurisdiction and venue.

The operation of these concepts in federal court may be readily seen. Pure jurisdiction requires only minimum contacts with the United States as a source of power, accounting for the axiom that the fifth amendment imposes no impediment to nationwide service.¹²⁶ Congress may utilize mere venue to distribute the federal judicial business, for example, by restricting the place of suit against national banks if it so chooses.¹²⁷ Nevertheless, the permissiveness of pure jurisdiction and the malleability of mere venue do not mean a federal action may lie anywhere—the constitutional requirement of forum-reasonableness demands that the particular district be fundamentally fair in light of all the interests of the public and the parties concerning the litigation. I believe this fresh way of looking at an old subject does much to clarify current law and to facilitate the reform of that law.

As an example of the clarification of current law, consider the common application of state jurisdictional law in federal court pursuant to federal rule 4(e).¹²⁸ Concerns regarding federal power are certainly not critical here. Applying state law usually ensures satisfaction of the requirement of forum-reasonableness. But primarily the incorporation of state restrictions serves the purposes of mere venue in federal court. Indeed, much of the confusion inherent in my earlier description of the “territorial jurisdiction” of federal courts stemmed from using the accepted language of jurisdiction to discuss what is essentially a venue concept. The confusion dissipates upon the realization that by narrowing the choice of forum, Congress and its rulemaker are only distributing the federal judicial business, whether they employ words of jurisdiction or of venue. Federal rule 4(e) is thus a mere-venue provision.¹²⁹

Next consider the problem of a corporation served within the state pursuant to federal rule 4(d)(3) on a federally created

¹²⁶ See note 82 and accompanying text *supra*.

¹²⁷ See text accompanying note 113 *supra*; Nifong, *Diversification and Sophistication of Banking Services and Exclusive Venue Privilege on a Collision Course*, 8 FLA. ST. U.L. REV. 209 (1980); cf. *Northside Iron & Metal Co. v. Dobson & Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973) (rejecting constitutional attack made on grounds of over-restrictiveness).

¹²⁸ FED. R. CIV. P. 4(e); see note 86 and accompanying text *supra*.

¹²⁹ In this Article, I am proposing a theoretical framework. I am not suggesting how courts should construe terms such as “jurisdiction” and “venue” already embodied in, say, FED. R. CIV. P. 12(b) or 82.

claim.¹³⁰ Federal law governs territorial authority to adjudicate, but what is that federal law? Amidst confusion emerges the most widely accepted view, under which the court adopts as federal law the due-process limits on state-court jurisdiction. Confusion further surrounds the reason for so doing. The court might do so "because the Fourteenth Amendment requires it, or because the Fifth Amendment requires it, or because venue statutes require it, or because the Court merely assumes that something requires it."¹³¹ The relevance of the due-process limit on state power is indeed mystifying, at least in federal court on a federally created claim and in the absence of clear compulsion by Constitution, statute, or rule. I attribute the accepted view to the federal judges' desiring a reasonableness test, finding it in the due-process limits on state courts, and then importing the power test too because the prevailing concept of jurisdiction lumps reasonableness and power together. I believe that the clarity of the reformulation reveals an alternative in the search for the federal law: the court would apply the obligatory but easily satisfied test of federal power, and rely on the existing requirement of forum-reasonableness as the means for restricting reach. Hence, the court would ask whether it was reasonable to hear this case against this corporation in this particular district. This resembles what the courts are doing and in fact may be exactly what they are trying to do,¹³² but the suggested approach would nicely avoid the anomaly of applying a power test geared to state courts.¹³³

¹³⁰ FED. R. CIV. P. 4(d)(3); see note 88 and accompanying text *supra*.

¹³¹ *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 736 (E.D. Tenn. 1962).

¹³² See *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 424 n.19 (9th Cir. 1977); *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276, 1284 (D.N.J. 1980) (dictum). Although the leading cases have invoked *International Shoe*, they did so at a time when courts interpreted that opinion as imposing only a reasonableness test. See, e.g., *Fraleigh v. Chesapeake & O. Ry.*, 397 F.2d 1, 3 (3d Cir. 1968) (equating *International Shoe* with basic principles of fairness); *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147, 155 (5th Cir. 1954) (same). Compare *Abraham*, *supra* note 84, at 534-35 (suggesting federal courts may invoke *International Shoe* in attempt to apply fifth amendment reasonableness test), with Note, *Corporate Amenability to Process in the Federal Courts: State or Federal Jurisdictional Standards?*, 48 MINN. L. REV. 1131, 1143-45 (1964) (suggesting federal courts may invoke *International Shoe* for its power aspect).

On the other hand, the misconception that *International Shoe* turned solely on power was the source of confusion in the *First Flight* school of thought discussed in note 88 *supra*. If the only issue were power, then it would become logical to require only minimum contacts with the United States, as those authorities did. Similarly, the tendency to ignore the separate concept of forum-reasonableness explains the misleading statements in the *Stafford*-type authorities cited in note 82 *supra* and the *Driver*-type cases cited in note 117 *supra*.

¹³³ This idea that state lines are essentially irrelevant, other than for regulating the place of service, also clarifies the operation of the 100-mile bulge provision of FED. R. CIV. P.

The reformulation also facilitates reform of the currently clumsy federal scheme, primarily by clarifying the key concepts through isolation. As I shall detail in Subsection 2, the reformulation starkly exposes the relative irrelevance of pure jurisdiction and the relative insignificance of mere venue in the federal system. Reform should sink those two concepts to their rightful status. Federal power is neither a relevant concern within the nation nor an appropriate tool for distributing judicial business around the country; Congress should therefore authorize the exercise of jurisdiction to the extraterritorial limits imposed on the United States as a whole. Congress should further eliminate most of the current venue provisions, using the concept only selectively to refine the distribution of judicial business; venue is the appropriate tool for narrowing the choice of forum on a subconstitutional level. Thus, more of the task of fairly controlling selection among federal courts should fall to forum-reasonableness. Congress could specify forum-reasonableness in a provision siting each case where a substantial part of the events in suit had occurred or some other defined connections existed. Or the courts could ensure the reasonableness of the forum, or even seek the most convenient venue, by using transfer provisions.

Reassuringly, the projected destination of this federal reform is quite close to the proposals of Professors Barrett and Currie. Both sought to extend the courts' reach while siting each action in a reasonably convenient forum. Barrett would do this by squeez-

4(f). The most progressive of the current views holds that federal law governs territorial authority to adjudicate when there is proper service in the bulge, and this federal law embodies the due-process limits on the hypothetical state consisting of the forum state plus the bulge. See *Sprow v. Hartford Ins. Co.*, 594 F.2d 412, 416-17 (5th Cir. 1979). The better approach would apply as that federal law the easily satisfied test of federal power and the requirement of forum-reasonableness; this would reduce the function of the bulge contour to merely defining the permissible place of service. See Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 633 n.136 (1964); cf. Note, *The Limits of Federal Diversity Jurisdiction Under Rule 4(f) of the Federal Rules of Civil Procedure*, 48 GEO. WASH. L. REV. 268, 294-97 (1980) (requiring only minimum contacts with United States); Comment, *Return to the Twilight Zone—Federal Long-Arm Jurisdiction and Amenability to Federal Rule of Civil Procedure 4(f) Bulge Service of Process: Sprow v. Hartford Insurance Co.*, 41 OHIO ST. L.J. 685 (1980) (similar).

Problems of asserting additional claims, see, e.g., *Hallin v. C.A. Pearson, Inc.*, 34 F.R.D. 499 (N.D. Cal. 1963) (cross-claim between interpleaded parties), should also turn on the forum-reasonableness concept. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 12 (Tent. Draft No. 5, 1978) [§ 9]; note 236 *infra*. Consider also the possibility that the ancillary venue concept, see C. WRIGHT, *supra* note 82, § 9, at 24, should expand to dispense in appropriate circumstances with all provisions within the reformulation's broad definition of mere venue.

ing current concepts into a venue mold; Currie chose a jurisdiction mold. They thereby deformed those concepts, incurring the disadvantages I have mentioned. Nevertheless, the soundness of their proposals is evident in the perception that both essentially sought to abolish pure jurisdiction, to downplay mere venue, and to build primarily on forum-reasonableness. It is cleaner to do so straightforwardly.

e. *Application to State Courts.* The reformulation applies readily to state courts. I have shown that state-court territorial jurisdiction employs dual due-process requirements to determine whether the state may entertain the case at all, while venue serves the different, inferior, and subsequent purpose of determining the place of trial within the state.¹³⁴ Indeed, the ease with which the reformulation fits those three functions affirms its validity. On the other hand, the foregoing dissection of the relationship between federal territorial jurisdiction and federal venue holds certain less obvious lessons concerning the interstate reach of state courts.

Hence, in state court pure jurisdiction currently requires minimum contacts with the state as a source of power over the target of the action.¹³⁵ The state is free to use the concept of mere venue to distribute its judicial business among its counties or other divisions.¹³⁶ And by virtue of the forum-reasonableness requirement, the state's entertaining the litigation must accord with fair play and substantial justice.¹³⁷

¹³⁴ See Currie, *supra* note 107, at 300. *But cf.* note 137 *infra* (explaining that current distinctions are not entirely free of confusion).

¹³⁵ See text accompanying note 68 *supra*.

¹³⁶ See generally F. JAMES & G. HAZARD, *supra* note 82, § 12.3.

¹³⁷ See text accompanying note 69 *supra*.

"The fourteenth amendment cases have not produced so refined an analysis that inquiry has been made into the reasonableness of a particular venue within a given state system of courts." Foster, *supra* note 82, at 37. For this reason, the relationship between territorial jurisdiction and venue is not as confused in the state setting as in the federal setting.

However, some states have introduced a note of confusion by tying together service of process and venue, as by limiting effective service to the county of venue. See Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 326-27 (1951). This is analogous to the current use of the power concept to restrict choice of forum in the federal courts, as in the incorporation of state jurisdictional limits by FED. R. CIV. P. 4(e). See text accompanying notes 128-29 *supra*. Both are misguided uses of jurisdiction to do the work of venue. "Every state should have a clear and unequivocal statute providing for service anywhere in the state in any action filed anywhere in the state." Stevens, *supra*, at 327.

Confusion also results from failure to recognize that a state's self-imposed limitations on jurisdictional reach are really rules of interstate venue. See text accompanying notes 137-41 *infra*.

This structure clarifies by recognizing that self-imposed limitations on the state's jurisdictional reach are really rules of venue. Consider long-arm statutes. We tend to classify them as jurisdictional, because historically they acted to extend the state's reach. But insofar as they fall short of the constitutional limits on that reach, they act as venue restrictions. So does forum non conveniens. Primarily aimed at the convenient, efficient, or otherwise desirable distribution of judicial business—albeit on an interstate level—such state restrictions serve virtually the same purposes as federal venue provisions. Such interstate restrictions also have much in common with intrastate venue, and little in common with the constitutional requirements of pure jurisdiction and forum-reasonableness.

Realization of the relative inappropriateness of pure jurisdiction and the subordinate nature of mere venue provides the stimulus for reform, as Subsection 2 details. First, when viewed in isolation, power appears ultimately as a senseless concern, at least on an intranational level. Congressional abolition of pure jurisdiction is probably not feasible, but this requirement might wither away as the Supreme Court reawakens in the distant future. Second, distribution of judicial business around the state by use of the venue concept is primarily a state concern, although the states could surely improve on their current performance.¹³⁸ In the idealized future, a state might even routinely utilize venue on an interstate level to decide in certain cases that no court within the state was suitable and that proper venue lay elsewhere; the states could do so through the legislative enactment of "short-arm statutes"¹³⁹ or the judicial invocation of forum non conveniens.¹⁴⁰ We could

¹³⁸ See generally Stevens, *supra* note 137.

¹³⁹ See Ehrenzweig, *supra* note 1, at 112-13; cf. Louis, *supra* note 89, at 431-32 (noting some pressures on states to expand reach).

An even less likely legislative route to this goal would be a federal statute imposing venue rules or transfer provisions on the state courts. See Ehrenzweig, *supra* note 9, at 313; Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 22-24 (1945); Schlesinger, *Methods of Progress in Conflict of Laws: Some Comments on Ehrenzweig's Treatment of "Transient Jurisdiction,"* 9 J. PUB. L. 313, 319-20 (1960). But note that the federal statute treating national-bank venue, see note 113 and accompanying text *supra*, has a provision dictating venue in state court.

Alternatively, if the Supreme Court were to tighten up the constitutional requirement of forum-reasonableness, this could eventually lead to hearing the case in the most convenient forum. See F. JAMES & G. HAZARD, *supra* note 82, § 12.30, at 662-63.

¹⁴⁰ See note 116 *supra*; cf. Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 606 n.35 (1977) (noting some disadvantages of forum non conveniens route).

thus approach the goal of a coherent national court system with the common objective of the convenient administration of justice.¹⁴¹ Third, forum-reasonableness will always act as a floor to ensure that hearing the case in the state is fundamentally fair in light of all the interests in the litigation. This constitutional concern might even extend to the location of the particular courthouse within the bigger states, but such extension lies in the misty future if anywhere.

Also reassuringly, this picture of the future generally conforms to the proposals of others. For example, Professor Ehrenzweig sketched a scheme of "interstate venue" in which power was of little concern and the states exercised self-restraint to distribute judicial business throughout the nation on the basis of convenience.¹⁴² Moreover, my picture of the state courts' future conforms closely to my picture for federal district courts: the demise of pure territorial jurisdiction at least on the intranational scene, the selective use of mere venue to narrow the geographic choice of forum on a subconstitutional level, and the emergence of the separate constitutional concept of forum-reasonableness.¹⁴³

2. *Implications of the Reformulation*

Having reformulated the relationship of territorial jurisdiction and venue, and having generalized the reformulation's application to federal and state courts, I now intend to draw some specific lessons and to suggest some reforms in connection with each of the three components of the reformulated conceptual structure. Then I shall cover a couple of collateral implications of the reformulation. Here, even more so than heretofore, elusive brevity counsels me to favor pronouncing conclusions over arguing toward them and refining them.

¹⁴¹ See Hazard, *supra* note 81, at 712, 720.

¹⁴² See Ehrenzweig, *supra* note 1, at 108, 111-13 ("We would thus arrive at a law of interstate venue which would permit suit primarily in the state of the defendant's domicile, either individual or corporate, but also include venues based on defendant's activities related to the cause of action and, in certain cases, on the plaintiff's domicile." *Id.* at 111-12.); Ehrenzweig, *supra* note 9, at 312-14; note 125 *supra*. See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 312 n.21 (1980) (Brennan, J., dissenting); F. JAMES & G. HAZARD, *supra* note 82, § 12.30; Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41 (1930); Hazard, *supra* note 81, at 711-12, 720; Jackson, *supra* note 139, at 23-24, 30-33; Schlesinger, *supra* note 139, at 322-25.

¹⁴³ Furthermore, both pictures are similar to how a state or country distributes judicial business within its boundaries, see Jackson, *supra* note 139, at 24 n.94; Schlesinger, *supra* note 139, at 318-19, 323, and even to how some other countries distribute judicial business internationally, see Ehrenzweig, *supra* note 1, at 106-07, 113.

a. *Pure Jurisdiction.* Currently, the foundation of pure territorial jurisdiction is power: the sovereign must have power over the target of the action.¹⁴⁴ Quite frankly, it seems almost incredible that the Supreme Court has recently resurrected pure jurisdiction.¹⁴⁵ But for now we must relearn to apply the power test and renew the attack upon it. The proposed theoretical framework conceptually isolates pure jurisdiction and thus exposes the extent of its senselessness. I leave to brief allusion in the margin the familiar arguments against the power test.¹⁴⁶ Here I shall discuss only one special difficulty that the process of reformulation has suggested.

¹⁴⁴ See text accompanying notes 65-68 *supra*.

¹⁴⁵ But see Louis, *supra* note 89. For a possible socio-political explanation, see Kalo, *supra* note 9, at 1193-94.

¹⁴⁶ Power is a conceptual quagmire that begets quagmires like the traditional categorization of actions, see text accompanying notes 40-41 & 65-67 *supra*, among others, see, e.g., notes 76 & 81 *supra*. It also leads to barren conceptualism, epitomized by the Court's wooden approach in *Hanson v. Denckla*, 357 U.S. 235 (1958), its revival of fictional consent in *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977), and its rejection of the direct-action analogy in *Rush v. Savchuk*, 444 U.S. 320, 330-31 (1980). The power test and its trappings are just too complicated and rarefied to survive. See Hazard, *supra* note 9, at 243.

Power has weak theoretical underpinnings. The emptiness of the *Pennoyer* rationale of exclusive jurisdiction has long been obvious. See *id.* at 265-68, 277-81. Sovereignty concerns are at least questionable. See text accompanying notes 161-64 *infra*. Nor do fairness concerns adequately explain the power test; any test that is sometimes blindly pro-defendant because it ignores the interests of others, and sometimes merely blind because its sterile notion of contacts can ignore even the actual defendant's interests, ill serves fairness. Certainly the forum-reasonableness concept better handles fairness. See note 201 and accompanying text *infra*. So the test requiring power over the target of the action has little justification, and thus its conceptual superstructure serves principally to obscure the real concerns involved in determining rights and duties of persons. See von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-36, 1165 (1966).

The power concept is not sufficiently supple to take adequate account of the relation of the claim to the forum contacts, or to make the sound distinction between specific and general jurisdiction. See *id.* at 1136. Also, this concept fails to promote the needed adjustments of expanding specific jurisdiction and contracting general jurisdiction. See *id.* at 1164, 1177-79.

The power idea is incapable of adjusting to changes in technology or society. See text accompanying notes 205-07 *infra*. In the past, courts had to use artificial means to stretch power in pursuit of corporations, motorists, and others. See Carrington & Martin, *supra* note 44, at 228-30; Hazard, *supra* note 9, at 272-75. Old bases of power persist in the face of evolving notions of fairness. See Ehrenzweig, *supra* note 9, at 314. The future of power can hold only more of the same.

Finally, for all these reasons the power test simply gives the wrong answers. It allows jurisdiction where none should exist, see, e.g., note 74 and accompanying text *supra*, and stands in the way where jurisdiction would be perfectly appropriate or even necessary, see, e.g., note 90 *supra*. Supplementing the power test with the reasonableness test will solve only half of this problem. In short, power should be neither a sufficient nor a necessary condition for adjudication.

“Power” no longer has an ascertainable meaning. Upon shifting from physical power to metaphorical power,¹⁴⁷ the Supreme Court shattered all hope of restraining the definition of that word. Today we cannot attempt to define it without introducing elements of reasonableness. For example, in delineating power, we look for such minimum contacts as make it reasonable to require the defendant to defend.¹⁴⁸ Thus we permit a state to reach the defendant who has purposefully availed himself of the privilege of conducting activities within the state.¹⁴⁹ We sometimes stretch power to reach the defendant who has engaged in voluntary out-of-state activities with reasonably foreseeable in-state effects.¹⁵⁰ We then wonder about the similar defendant who has engaged in multistate activities, but who could not have foreseen consequences occurring in the forum state.¹⁵¹ This sequence demonstrates that looking at the reasonableness of requiring the defendant to defend inevitably entails looking at the relevant interests of others. The test truly becomes whether it is “reasonable to exercise power.” Reasonableness therefore precedes the power issue and so should ultimately consume it.

The Supreme Court has evidenced this slippage in several ways. First, consider closely its general formulae for power: the requirement of minimum contacts “will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State”;¹⁵² the defendant must engage in “purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable”;¹⁵³ and “an essential criterion in all cases

¹⁴⁷ See text accompanying notes 38 & 68 *supra*.

¹⁴⁸ See note 28 and accompanying text *supra*.

¹⁴⁹ See text accompanying note 42 *supra*.

¹⁵⁰ See Foster, *supra* note 82, at 33; *cf.* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (independent middleman). On which side of the line Gray would fall, after applying the currently prevailing power test, is open to question. See Siegel, “Longarm” Jurisdiction Pinched By High Court, But Not Broken, Nat’l L.J., March 17, 1980, at 18, col. 4; Sorg, World-Wide Volkswagen: Has the United States Supreme Court Taken the Illinois Civil Practice Act Section 17-1(b) Out of the Gray Zone?, 1980 S. ILL. U.L.J. 137, 143-44. Compare World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980), and Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980) (jurisdiction exists), with World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 306-07 (1980) (Brennan, J., dissenting), and Hutson v. Fehr Bros., 584 F.2d 833 (8th Cir.) (no jurisdiction), *cert. denied*, 439 U.S. 983 (1978). Whatever the answer, this confusion over Gray shows the arbitrariness of a dividing line based on power.

¹⁵¹ See von Mehren & Trautman, *supra* note 146, at 1172-73.

¹⁵² Hanson v. Denckla, 357 U.S. 235, 253 (1958).

¹⁵³ Rush v. Savchuk, 444 U.S. 320, 329 (1980).

is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State."¹⁵⁴ Attempts to define power seem to be its undoing. Second, certain dicta expose the weak points in the definitional line, where reasonableness has infiltrated. As examples I cite the Court's recent references to power in some circumstances over a defendant who has merely derived benefits from the forum state¹⁵⁵ or caused in-state effects,¹⁵⁶ and power over a defendant whose "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."¹⁵⁷ I also cite the Court's repeated surrender to the urge to consider, and then discount, interests of the public and the plaintiff, even though the Court insists that these are irrelevant once it finds power to be lacking.¹⁵⁸ Third, the Court's holdings reveal the arbitrariness of the bounds of power. Common sense suggests that the power test has lingered too long when the majority finds the state's contacts with nonresident automobile dealers inadequate to compose that mystical thing called power, and then the dissent just as convincingly demonstrates the adequacy of those contacts.¹⁵⁹ Guesswork and fiat based on inklings of reasonableness should yield to candor and the reasonableness test.¹⁶⁰

At the very least, the Supreme Court or Congress should relax the requirement of pure jurisdiction by redefining it in closer accordance with "sovereignty" and "the principles of interstate federalism."¹⁶¹ However, I do not believe any such reform could

¹⁵⁴ *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 317, 319 (1945)).

¹⁵⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298-99 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 94-96 (1978).

¹⁵⁶ *Kulko v. Superior Court*, 436 U.S. 84, 96-98 (1978).

¹⁵⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); see *Rush v. Savchuk*, 444 U.S. 320, 329 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977); cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 & n.18 (1980) (Brennan, J., dissenting) (arguing for direct application of reasonableness test).

¹⁵⁸ See notes 54 & 58 *supra*.

¹⁵⁹ Compare *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-99 (1980), with *id.* at 305-07 (Brennan, J., dissenting).

¹⁶⁰ Going beyond the recent Supreme Court cases, one could repeatedly make the point that the power test inevitably collapses into the reasonableness test. However, I shall only recall how reasonableness supplants power by fixing the ultimate limits on the reification process, see note 76 and accompanying text *supra*, and on the categorization process, see note 81 and accompanying text *supra*.

¹⁶¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980); see text accompanying notes 62 & 64 *supra*; cf. Woods, *Pennoyer's Demise: Personal Jurisdiction After*

go far enough. First, I see no way to meet the challenge of redefinition so as to avoid the problems of the current minimum-contacts approach. Second, I question whether sovereignty notions make much sense for territorial jurisdiction, especially within a federation.¹⁶² Third, I wonder which way those notions cut and, specifically, whether a permissive approach to state-court jurisdiction would not better serve the cause of state sovereignty.¹⁶³ Fourth, I think that any legitimate concerns of sovereignty and federalism that call for a restrictive approach find adequate expression in the reasonableness test and its attention to sovereign interests as part of the public interest.¹⁶⁴

Accordingly, the Supreme Court or Congress should abolish the concept of pure jurisdiction and, with it, the power test and the traditional categorization of proceedings. Constitutional his-

Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 882-90 (1978) (alternative redefinition).

It is unclear how any jurisdictional test devoted to sovereignty and federalism concerns would derive from the due process clause, which usually focuses on fairness to the defendant. See Abraham, *supra* note 84, at 532-33; Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 795-96, 816-17 (1955); cf. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 185-203 (1976) (discussing analogous problem regarding choice of law). But see Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 534-35; Hazard, *supra* note 9, at 270 & n.102; cf. Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 95-97 (1976) (choice of law). This cloudiness would thicken as the separate due-process concept of forum-reasonableness absorbed all fairness considerations. Perhaps it would be neater to draw any jurisdictional test protecting sovereignty and federalism from the full faith and credit clause, see Rheinstein, *supra*; but see Ehrenzweig, *supra* note 1, at 108 (questioning applicability of full faith and credit clause), or better yet from the structure of the Constitution, see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) ("a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment"). At any rate, the cloudy source of sovereignty and federalism concerns predictably leads to confusion over their meaning and even doubt of their existence.

¹⁶² See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 311-12 (1980) (Brennan, J., dissenting); Ehrenzweig, *supra* note 1, at 112; note 217 *infra*. But see Hazard, *supra* note 9, at 245-48. Professor Hazard, finding sovereignty concerns extant even among states that are not independent, would protect those concerns by his all-purpose requirement of "minimum contacts between the forum and the transaction in litigation." *Id.* at 281.

Obviously, sovereignty notions make more sense on the international level. However, the problems of the current power test and the sufficiency of the forum-reasonableness requirement argue for abolishing the concept of pure jurisdiction even for international use. See note 143 *supra*.

¹⁶³ See F. JAMES & G. HAZARD, *supra* note 82, § 12.30, at 662 ("It is paradoxical but true that the theory of state sovereignty, in elevating the position of the states individually to something like that of independent nations, has had the effect of constricting the judicial authority of the state court systems taken as a whole."); Hazard, *supra* note 81, at 712 n.2, 720.

¹⁶⁴ See *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1, 114-16 (1980).

tory should thus repeat itself, by reproducing *Mullane's* rejection of power in favor of sole reliance on forum-reasonableness.¹⁶⁵

b. *Mere Venue*. This broad concept encompasses all subconstitutional,¹⁶⁶ geographic restrictions on selection of forum, including (1) state provisions regarding venue within the state,¹⁶⁷ (2) exercises of self-restraint by the states, which distribute judicial business on an interstate level,¹⁶⁸ (3) federal venue provisions, embracing even those in the form of restrictions on service of process,¹⁶⁹ and (4) self-restraint on the international level.¹⁷⁰ Such a broad definition of venue is novel. In federal courts, the popular definition equates venue to those rules of territorial authority to adjudicate not linked to service provisions.¹⁷¹ This arbitrary line is devoid of theoretical and practical significance. In state courts, on the other hand, the popular definition limits venue to intrastate provisions.¹⁷² There is hardly a need for a separate concept to draw such an obvious distinction; yet the distinction has its theoretical difficulties, because an intrastate provision that is impossible to satisfy anywhere within the state acts as an interstate restriction. A leading alternative to this pair of definitions would limit venue to those territorial rules that do not constitute grounds for collateral attack. However, this line puts the cart before the horse by defining in terms of consequences; selecting one consequence as a basis for definition might provide a useless or misleading terminology with respect to other consequences; and this particular consequence increasingly fails to provide definition as relief from judgment becomes a more fluid procedure dependent on the circumstances of the attack.¹⁷³ Moreover, these and

¹⁶⁵ See text accompanying notes 31-32 *supra*.

¹⁶⁶ Here and elsewhere in this Article, such an expression refers to any level below the Federal Constitution. Thus, a state may choose to insert venue provisions in its own constitution.

¹⁶⁷ See notes 136-38 and accompanying text *supra*; note 143 *supra*.

¹⁶⁸ See text accompanying notes 137-41 *supra*.

¹⁶⁹ See text accompanying notes 128-33 *supra*.

¹⁷⁰ See note 143 *supra*; cf. note 116 *supra* (federal forum non conveniens).

¹⁷¹ See RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comment h (Tent. Draft No. 5, 1978) [§ 4]; cf. 28 U.S.C. § 1406(b) (1976) (arguably drawing such a distinction). *But see* text accompanying notes 128-29 *supra*.

¹⁷² See RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comment h (Tent. Draft No. 5, 1978) [§ 4]. *But see* text accompanying notes 137-41 *supra*. Simply distinguishing when appropriate between intrastate venue and interstate venue would recognize their similarities as well as their differences.

¹⁷³ See text accompanying notes 216-24 *infra*. The *Restatement Second* had to avoid using this definition based on collateral attack, because such a definition is inconsistent with the *Restatement Second's* fluid approach to relief from judgment. See text accompanying note 239 *infra*.

other conceivable definitions that would distinguish venue from nonconstitutional territorial jurisdiction all make nonsensical distinctions in the border zone where they encounter rules of "fraud and force"¹⁷⁴ and immunity from service of process,¹⁷⁵ the doctrine of forum non conveniens,¹⁷⁶ door-closing statutes,¹⁷⁷ and the National Bank Act.¹⁷⁸ Any line drawn down the middle of a unitary concept will prove unsatisfying in the gray zone. Accordingly, I propose the broad view as a more sensible definition and a fruitful way of thinking about the subject: mere venue in both federal and state courts encompasses all geographic provisions on which the legislatures and the courts can freely work reform in pursuit of an integrated scheme for the convenient, efficient, or otherwise desirable distribution of judicial business.

Because it employs a more sensible terminology, the proposed framework clarifies troubling conceptual distinctions. Mere venue, like pure territorial jurisdiction and forum-reasonableness, confines the place of litigation; but mere venue, unlike the other two, does not arise from the Federal Constitution. Consider the difference between these three concepts and subject-matter jurisdiction. The latter concerns the court's authority to adjudicate particular types of proceedings grouped in essentially nongeographic terms; pure territorial jurisdiction, forum-reasonableness, and mere venue dictate where, if anywhere, that authority is exercisable within the court system. In particular, some commentators observe that venue and subject-matter jurisdiction can be difficult to distinguish: Where, for example, does the local-action doctrine fall?¹⁷⁹ In my view, it is a rule of venue. Admittedly, confusion may surround the proper procedure for raising that issue and the consequences of raising or failing to raise it.¹⁸⁰ But even if we resolved these issues much as we do for subject-matter jurisdiction, reclassifying the local-action doctrine as jurisdictional would be conclusory and would only hinder analysis. Instead of pigeonholing, we should directly face these questions of procedure, *res judicata*, waiver, and default, recognizing that the

¹⁷⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 82 (1971).

¹⁷⁵ See *id.* § 83.

¹⁷⁶ See note 116 *supra*.

¹⁷⁷ See C. WRIGHT, *supra* note 82, § 46, at 199.

¹⁷⁸ 12 U.S.C. § 94 (1976); see notes 113, 127 & 139 *supra*.

¹⁷⁹ See, e.g., A. EHRENZWEIG, D. LOUISELL & G. HAZARD, *supra* note 96, § 43, at 131-32; F. JAMES & G. HAZARD, *supra* note 82, § 12.1, at 603-04. See also RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comment h (Tent. Draft No. 5, 1978) [§ 4].

¹⁸⁰ See 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3822, at 128-29.

answers may vary with the nature and importance of the particular venue rule under examination.¹⁸¹

By so consolidating and isolating mere venue, the proposed framework exposes that concept's relative insignificance as well as its malleability. The legislatures and the courts should freely rework venue, using it only to refine the distribution of judicial business in pursuit of convenience, efficiency, and other such goals.¹⁸² As an ideal first step, legislatures should wipe clean the venue slate and begin anew. For example, they should discard the confusing local-action doctrine¹⁸³ and the patchwork of special venue statutes.¹⁸⁴ Any new provisions narrowing the choice of forum¹⁸⁵ should emerge clearly cast in venue language, not buried in service or notice provisions. However, some of the past is worth continuing. Courts probably should still play a role in the venue scheme through transfer provisions¹⁸⁶ and the doctrine of forum

¹⁸¹ See note 239 and accompanying text *infra*. A similar example would be territorial jurisdiction over things. This too is distinct from subject-matter jurisdiction, even though there is confusion over the procedure for raising it and the consequences of raising or failing to raise it. Compare RESTATEMENT OF JUDGMENTS §§ 9-10 (1942), with RESTATEMENT (SECOND) OF JUDGMENTS § 13 (Tent. Draft No. 5, 1978) [§ 10], and *id.* § 15 (Tent. Draft No. 6, 1979) [§ 12]. See also *id.*, Introductory Note to ch. 2, at 15-16 (Tent. Draft No. 5, 1978); *id.* § 14, Comment b [§ 11]; 1978 ALI PROCEEDINGS 146.

¹⁸² I leave to later the possible constraint of the *Erie* doctrine. See text accompanying notes 221-24 *infra*. Conceivably, Congress might choose to conform federal venue to state-court access, in the pursuit of easy application. See Abraham, *supra* note 84, at 535 n.95.

¹⁸³ See Currie, *supra* note 107, at 305 n.441. See also 1 MOORE'S FEDERAL PRACTICE ¶ 0.142[2] (2d ed. 1980).

¹⁸⁴ See ALI STUDY, *supra* note 82, at 219, 498; HART & WECHSLER, *supra* note 85, at 1111; Barrett, *supra* note 92, at 633-35; Stevens, *supra* note 137.

¹⁸⁵ For some preliminary ideas, see notes 105 & 107 and accompanying text *supra*, and also notes 138 & 142 *supra*.

¹⁸⁶ See HART & WECHSLER, *supra* note 85, at 1140-41; notes 99, 105, 107, 114-16 & 139 *supra*. But see Currie, *supra* note 107, at 309 ("only excuse for transfer [provisions] or [their] harsh predecessor, forum non conveniens, was the inexcusable overbreadth of the venue and personal-jurisdiction laws"); Kitch, *supra* note 114, at 142 ("under well drawn venue code," burdens of transfer procedure would outweigh benefits). Congress should, however, amend the federal transfer provisions at least by eliminating the "where it might have been brought" language from 28 U.S.C. § 1404(a) (1976), see C. WRIGHT, *supra* note 82, § 44, at 189, possibly by eliminating the equivalent language from 28 U.S.C. § 1406(a) (1976), see Currie, *supra* note 107, at 307-08, and probably by further restricting appealability and reviewability, see Barrett, *supra* note 92, at 631-32; Currie, *supra* note 107, at 309-10.

We could indeed manage in the federal courts with only the present transfer provisions and the forum-reasonableness requirement. Cf. Seidelson, *supra* note 105, at 100 (proposal to eliminate venue restrictions). Presumably, transfer from a reasonable forum to a more convenient federal forum would be under § 1404(a) and would entail application of transferor law, while any transfer from an unreasonable forum would be under § 1406(a) with application of transferee law but with tolling of the statute of limitations. See generally Note, *Choice of Law in Federal Court After Transfer of Venue*, 63 CORNELL L. REV. 149

non conveniens.¹⁸⁷ Initially, then, more permissive venue in the federal system¹⁸⁸ and more restrictive interstate venue among the state courts¹⁸⁹ are desirable. Ultimately, perhaps, a progressively more restrictive approach on both federal and state levels might begin to realize in part the dream of allocating each case to the one right court, which would then apply local law.¹⁹⁰

c. *Forum-Reasonableness*. The Constitution requires that the forum be a reasonable one.¹⁹¹ This flexible approach promises several benefits.

First, this test takes into account all interests in the litigation, which I have roughly catalogued as those of the public, the plaintiff, and the defendant. I leave the task of refining the technique of analyzing and balancing these interests to some excellent studies that precede me on the workings of the reasonableness test.¹⁹² In passing I note my preference for a comprehensive approach, considering both the "substantive interests" chronicled by Professors Carrington and Martin¹⁹³ and the concerns of Professors von Mehren and Trautman for "the relationship of the parties and of the controversy to the forum" and "other litigational and enforcement considerations."¹⁹⁴ Such comprehensiveness has a number of implications: (1) no constitutional clauses other than due pro-

(1977). Any proposal of this scope happens to obviate the need to eliminate the "where it might have been brought" language. However, federal courts would frequently be applying nonlocal law, unless the forum-reasonableness requirement tightened up or either *Van Dusen v. Barrack*, 376 U.S. 612 (1964), or *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), ceased to govern. Incidentally, an analogous approach for state courts is conceivable. See notes 139-42 *supra*.

It is interesting to note that if in one of the ways just mentioned we overcame the problem of having to apply transferor law, and if we eliminated forum-reasonableness as a basis for relief from default judgments, see text accompanying note 217 *infra*, we could manage with a scheme founded solely on a transfer mechanism. Forum-reasonableness would effectively drop out of the picture.

¹⁸⁷ See notes 116, 140 & 142 *supra*.

¹⁸⁸ See text accompanying notes 133-34 *supra*.

¹⁸⁹ See text accompanying notes 138-43 *supra*.

¹⁹⁰ See Ehrenzweig, *Ehrenzweig in Reply*, 9 J. PUB. L. 328, 328 (1960); Ehrenzweig, *supra* note 9, at 292; Jackson, *supra* note 139, at 23; Kalo, *supra* note 9, at 1194; Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 663-64 (1959); cf. note 139 *supra* (similar result by tightening up forum-reasonableness requirement); note 200 and accompanying text *infra* (effect of choice of law on forum restrictions). But see Currie, *supra* note 107, at 307 ("It would be mellow to try every action in the most convenient forum. But deciding where that forum is costs altogether too much time and money.").

¹⁹¹ See note 69 and accompanying text *supra*.

¹⁹² E.g., Smit, *supra* note 140, at 607-14; Woods, *supra* note 161, at 890-98; works cited notes 193-94 *infra*.

¹⁹³ Carrington & Martin, *supra* note 44.

¹⁹⁴ von Mehren & Trautman, *supra* note 146, at 1166.

cess need become directly involved in limiting territorial authority to adjudicate, because the policies behind such provisions as the first amendment¹⁹⁵ and the commerce clause¹⁹⁶ enter into the due-process balance; (2) rules such as "fraud and force"¹⁹⁷ and immunity from service of process,¹⁹⁸ which in the days of the power theory seemed to be only self-imposed limitations on jurisdictional reach, now have a constitutional underpinning;¹⁹⁹ (3) the actualities of choice-of-law practices enter into the calculus;²⁰⁰ and (4) the balancing of interests is finally party-neutral.²⁰¹

¹⁹⁵ See Carrington & Martin, *supra* note 44, at 237 n.44, 239 n.55, 240-42 (state needs greater contacts to assert jurisdiction where first amendment interests are at stake); cf. *Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.*, 355 A.2d 808, 813 & n.11 (D.C. 1976) ("government contacts" principle).

¹⁹⁶ See Carrington & Martin, *supra* note 44, at 234 (state jurisdiction may be more limited where it would burden interstate commerce).

¹⁹⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 82 (1971).

¹⁹⁸ See *id.* § 83.

¹⁹⁹ See *Shaffer v. Heitner*, 433 U.S. 186, 208 n.25 (1977); cf. Carrington & Martin, *supra* note 44, at 234-36 (constitutional core of rule against disrupting foreign trusts and estates, "internal affairs" doctrine, and indispensable-party rule).

²⁰⁰ In deciding the reasonableness issue, a court must consider the effect of its decision on the law applied. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 n.19 (1980) (Brennan, J., dissenting); Ehrenzweig, *supra* note 9, at 292; Foster, *supra* note 82, at 42 & n.129 (choice of law also relevant to venue). See generally Fischer, *Shaffer v. Heitner: Some Thoughts on Its Impact on the Doctrines of Choice of Law and Preclusion by Judgment*, 30 CASE W. RES. L. REV. 74, 93-97, 110-17 (1979); von Mehren & Trautman, *supra* note 146, at 1128-33, 1174-77.

By the way, the reworking of constitutional authority to adjudicate that this Article suggests might facilitate a rethinking of the similar constitutional limits on choice of law. See *Allstate Ins. Co. v. Hague*, 49 U.S.L.W. 4071 (U.S. Jan. 13, 1981). Compare Kirgis, *supra* note 161, with Martin, *supra* note 161, Martin, *A Reply to Professor Kirgis*, 62 CORNELL L. REV. 151 (1976), and Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980). See also Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282 (1960); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

²⁰¹ The power test was erratically pro-defendant. See Kalo, *supra* note 9, at 1149. With *International Shoe*, the pendulum swung toward the plaintiff. See *id.* Some proposals, e.g., Seidelson, *supra* note 105, at 85-88, now excessively favor the plaintiff. The superior approach lies in the middle, looking at all interests without bias for the defendant or the plaintiff but with an awareness that the parties may not be in identical positions. See Ehrenzweig, *supra* note 1, at 110-11; cf. Kalo, *supra* note 9, at 1194-95 (party-neutrality may be possible as inconvenience of distant litigation decreases in future).

The fact that the current reasonableness test is less likely to permit the plaintiff to sue at his own home than at the defendant's home does not imply a bias for the defendant. With the parties' interests equally weighted and with all other things equal, the defendant's home is naturally a reasonable forum, because at the defendant's home the plaintiff's interest in having a forum aligns with the defendant's interest in defending at home. Equivalently, no bias for the defendant lies in recognizing that he has an interest in defending at home and that elsewhere other net interests must outweigh this interest. *But see* Smit, *supra* note 140, at 608 (plaintiff's interest in suing at home must give way because social policy discourages litigation); von Mehren & Trautman, *supra* note 146, at 1127-28, 1147, 1167-73 (traditional bias favoring "attacked").

Second, the same balancing test applies in federal and state courts, although the results might differ sometimes because different interests are on the scales.²⁰² For example, in federal court the public's interests depend in part on the basis of federal subject-matter jurisdiction and on the role of federal courts, as in multiparty proceedings. However, often any federal court in the country can protect many of those interests, thus reducing their weight on the due-process scales. Similarly, the parties' interests differ from federal court to state court. For example, a federal court must determine the reasonableness of the district, while a state court must inquire into the reasonableness of the state. Thus, the parties sometimes must establish interests in relation to different geographic areas.

Third, and very important, this test does not entail any non-functional categorization along the *Pennoyer* lines of in personam, in rem, and quasi in rem.²⁰³ Conceptually the test is simple; it directly addresses the relevant concern of fairness in the broadest sense. It surely offers "a more functional and less mechanical methodology"²⁰⁴ than the power test.

Fourth, the reasonableness test can readily adjust to advances in communications, transportation, and other technology as well as to social, economic, political, and philosophic changes.²⁰⁵ The test may in effect relax as, for example, new technology lessens the inconvenience of distant litigation.²⁰⁶ Or it may tighten up, as an evolving sense of reasonableness becomes more demanding.²⁰⁷ In either case, the test's flexibility will prove a virtue.

²⁰² See *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 416 n.7 (9th Cir. 1977); *Foster*, *supra* note 82, at 34-35, 37. The Supreme Court reached an analogous conclusion regarding individual and corporate defendants: the same standard governs both, but "differences between individuals and corporations may, of course, lead to the conclusion that a given set of circumstances establishes state jurisdiction over one type of defendant but not over the other." *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977).

²⁰³ See, e.g., *Traynor*, *supra* note 190, at 660-63; von Mehren & Trautman, *supra* note 146, at 1135-36, 1164-65. Also, the reasonableness test demands none of the intellectual gymnastics currently associated with jurisdiction by necessity. See *id.* at 1173-74; notes 67, 80 & 90 *supra*; note 231 *infra*.

Of course, the varying effects of the different kinds of judgment still enter into the reasonableness consideration. See *Smit*, *supra* note 140, at 614, 626 n.101, 628 n.112. Also, there is room for a functional categorization along the lines of specific and general jurisdiction. See von Mehren & Trautman, *supra* note 146, at 1136; note 146 *supra*.

²⁰⁴ von Mehren & Trautman, *supra* note 146, at 1164.

²⁰⁵ See generally *Kalo*, *supra* note 9, at 1195.

²⁰⁶ See *id.* at 1191-92; *cf.* von Mehren & Trautman, *supra* note 146, at 1173 n.149 (bifurcated proceedings).

²⁰⁷ See notes 139 & 190 *supra*. In terms of balancing, the public interest in hearing the case in the best place would become weightier. *Cf.* *Kalo*, *supra* note 9, at 1193-94 (possibility of increased concern for defendants).

However, all this flexibility could also prove a curse. Perhaps "it is clear that the issue of the place of trials is one that should be settled by simple, formal tests."²⁰⁸ How should the objective of certainty affect forum-reasonableness?

The courts could pursue certainty by narrowing their consideration to certain specified interests²⁰⁹ or by fashioning rules for balancing.²¹⁰ Alternatively, legislators could attempt to specify forum-reasonableness by statute, thus injecting a degree of workability; such provisions would look like some of today's more expansive long-arm statutes.²¹¹ Both approaches concededly pose obvious problems; neither has worked well in the past to reduce uncertainty or holds much promise for the future.²¹² Perhaps we should learn to accept the uncertainty.

It is well to recall that forum-reasonableness is a constitutional test, for which certainty may be unattainable and indeed inappropriate. The Supreme Court surely has not yet pinned down reasonableness. "It may be that it is not possible to do so and that here as elsewhere in our constitutional law the Supreme Court must depend on the good faith and good judgment of the other courts in the American judicial system."²¹³ "The essence of due process is that proceedings shall be fair; whether they are fair must be a subjective judgment based on the common sense of the judge."²¹⁴ Moreover, this constitutional requirement of forum-reasonableness usually serves as a back-up check on venue. The legislatures may push it farther into the background by actively developing intelligent and workable venue rules to zero in on the more convenient of all the reasonable fora. Finally, I stress that I

²⁰⁸ Kitch, *supra* note 114, at 141. Significantly, however, Professor Kitch was writing of venue.

²⁰⁹ See Carrington & Martin, *supra* note 44, at 246-48; Smit, *supra* note 140, at 608-13.

²¹⁰ See von Mehren & Trautman, *supra* note 146, at 1167-69, 1173-75, 1177.

²¹¹ See Hazard, *supra* note 9, at 283; Smit, *supra* note 140, at 613; von Mehren & Trautman, *supra* note 146, at 1176 (discussing UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)).

²¹² The underlying problem is that reasonableness by its very nature opposes restraints. The best proof of this is the considerable experience of long-arm statutes degenerating into the reasonableness test. See R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 85, at 756-61.

It would seem better to find ways to limit the resources devoted to determining this preliminary issue, as by restricting oral testimony or reviewability, than to twist the reasoning behind the determination. Alternatively, we could simply continue to rely on the accretion of case law for the particularization of reasonableness. See Hazard, *supra* note 89, 66 CORNELL L. REV. at 571-72.

²¹³ Kurland, *supra* note 23, at 623.

²¹⁴ Currie, *supra* note 161, at 577.

am proposing nothing new in forum-reasonableness. It currently applies in federal and state courts, and we manage with its uncertainties. Life can only become simpler if forum-reasonableness becomes the sole constitutional test for territorial authority to adjudicate, which I do propose.

d. *Bases for Relief from Judgment.* The proposed theoretical framework aids in resolving numerous policy problems throughout the subject of authority to adjudicate. As a first example, I shall tentatively discuss the important problem of whether a defendant can obtain relief from a judgment rendered by a territorially improper forum in which he made no appearance. I believe that this discussion will reaffirm the soundness of the proposed framework.

The chief policy problem underlying such relief from a default judgment is when to force the defendant to appear initially and when to allow him later to attack the selection of forum. Alternatively stated, the problem is how to reconcile the desire for finality with the distaste for overstepping by courts and for harassment of defendants. The general approach has been to strike a compromise by allowing the defendant to attack a default judgment for lack of "jurisdiction," apparently because courts intuitively equate that term with requirements of special importance.²¹⁵ The prevailing but arbitrary and unclear definition of "jurisdiction" in this context includes pure jurisdiction, forum-reasonableness, and certain mere-venue rules such as long-arm statutes.²¹⁶

I submit that the more functional definitions of the proposed framework yield a wiser and clearer rule of thumb: the defendant should generally be able to attack a default judgment on the constitutional grounds of pure jurisdiction and forum-reasonableness, but not on grounds of mere venue. I am not suggesting that my new labels mandate new results, but better labels prompt sound rethinking. Rethinking suggests that the defendant should have to appear initially to raise any mere-venue defect, although of course the law of the rendering court could specifically provide otherwise. Thus, my general rule of thumb happens to follow a conceptual boundary of the proposed framework.

²¹⁵ See Currie, *supra* note 107, at 304 & n.430 (citing RESTATEMENT OF JUDGMENTS § 7, Comment b (1942), and noting dearth of authority that draws clear line).

²¹⁶ See *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257 (10th Cir. 1971); *Mooney Aircraft, Inc. v. Donnelly*, 402 F.2d 400 (5th Cir. 1968); *American Motors Sales Corp. v. Superior Court*, 16 Ariz. App. 494, 494 P.2d 394 (1972); RESTATEMENT OF JUDGMENTS § 5 (1942); *cf. id.* §§ 7-8 (certain other mere-venue defects deemed "jurisdictional").

In the distant future, perhaps the bases for attack should further contract. As the inconvenience of distant special appearances lessens and as relief mechanisms such as transfer improve,²¹⁷ we may decide to disallow any attack on grounds of unreasonable forum and thus to allow territorial attack only for lack of constitutional power. But the demise of pure jurisdiction would eliminate the latter grounds, even for an attack on a state-court judgment. Accordingly, we may be in transit to a regime under which the defendant could raise territorial authority to adjudicate, at least of the intranational variety, only by proper procedure in the original action.

To summarize, definitional confusion undermines the current doctrine, and reasons exist for progressively contracting the grounds for attack. This state of affairs explains, but does not justify, any attempt to preclude attack by arbitrarily reclassifying certain requirements as "nonjurisdictional."²¹⁸ Instead of relying on labels to control consequences, courts should rethink the policy problems of relief from judgment and then redelineate the grounds for attack. Such an approach could conform to the trend toward a fluid view of validity of judgments, a view that would accord the bases for successful attack with the nature and importance of the alleged impropriety as well as with the circumstances of the attack.²¹⁹ Finally, the idea that we may already be in transit to a more restrictive doctrine illuminates the stark differences of current opinion on the proper bases for relief from judgment.²²⁰

²¹⁷ Harassment concerns would hence decrease. Fears of judicial overstepping alone might not justify attack on forum-reasonableness grounds, as this structural concern is less important than subject-matter jurisdiction; it is not even significant enough to prevent early waiver by the defendant in the original action. *See, e.g.*, FED. R. CIV. P. 12. *See also* text accompanying notes 161-64 *supra*.

²¹⁸ *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comment d (Tent. Draft No. 5, 1978) [§ 4]. *But cf. id.*, Reporter's Note § 7, comment d at 60 ("The statutory limitations, to the extent they are more restrictive than the Constitution, can be viewed as an expression of a *forum non conveniens* policy. Under such an approach, their benefit would be available upon reasonable claim but noncompliance with them would not result in an inevitably void judgment.") [§ 4]. *See also id.* §§ 113-114 (Tent. Draft No. 6, 1979) [§§ 65-66].

²¹⁹ *See, e.g.*, *Myers v. Mooney Aircraft, Inc.*, 429 Pa. 177, 191, 240 A.2d 505, 513 (1967) (plaintiff's failure to follow service statute not fatal where defaulting defendant failed "to exercise even ordinary diligence" in objecting); text accompanying note 239 *infra*. *But see, e.g.*, *Mooney Aircraft, Inc. v. Donnelly*, 402 F.2d 400, 406 (5th Cir. 1968) ("The doctrine of laches has never been jurisdiction creating.").

²²⁰ *Compare Currie, supra* note 107, at 303-04 (favoring attack even for venue-like defects in federal court), *with Ehrenzweig, supra* note 1, at 113 (disfavoring attack even for "jurisdictional" defects in state court). Consider also this exchange, from 1978 ALI PROCEEDINGS 117-18, during the discussion of RESTATEMENT (SECOND) OF JUDGMENTS § 13 (Tent. Draft No. 5, 1978) [§ 10]:

e. *Erie Doctrine*. The proposed theoretical framework does not by itself preclude the application of state "jurisdictional" law in federal court pursuant to *Erie*.²²¹ It does, however, suggest at least the need to rethink the current approach to this problem. Today *Erie* requires a federal court, on a state-created claim and in the absence of a federal statutory directive or rule, to apply the state's "jurisdictional" law but not its venue provisions.²²² A seemingly better, albeit still crude,²²³ approach would carry into

PROFESSOR CHARLES ALAN WRIGHT (Tex.): I have a question for you, Professor Hazard. Assume that I have never been in Alaska in my life, never been in anything that possibly subject me to jurisdiction in Alaska. If I received a summons and complaint in the federal court in Alaska, is it my privilege simply to throw it in the wastepaper basket, or am I bound to go in and make a motion to dismiss on the grounds of lack of jurisdiction of my person?

PROFESSOR HAZARD: No, you are not required to contest it. You may contest it.

PROFESSOR WRIGHT: Pardon?

PROFESSOR HAZARD: You may contest it at that point, but you are not required to do that.

PROFESSOR WRIGHT: I can treat this simply as a nullity, all these papers that come with all the right forms? There is a very eminent treatise that goes to many volumes that gives a contrary answer. There is also an article on jurisdiction in the Georgia Law Review which says that you cannot ignore it. Homer nodded on the point. I would like to know what the answer is.

PROFESSOR HAZARD: I thought the rule is that you had a constitutional privilege to resist the enforcement of that judgment should effort be made to enforce it in some other remote place like Texas. (Laughter) Your objection would be to the inadequacy of notice or the lack of territorial jurisdiction in the rendering court. If you got notice, you would not have much to talk about, certainly under this Restatement; but if in fact it has been your misfortune never to be in Alaska, and you had nothing to do with Alaska at all, I suppose you would have a constitutional privilege to resist the judgment on the ground that the rendering court lacked that essential connection with you that was required to be the base of jurisdiction. Isn't that settled law?

PROFESSOR WRIGHT: If that case ever arises, I suppose I shall have to cite the proceedings of this meeting of the American Law Institute and Moore's Federal Practice, which is also wrong on the subject.

²²¹ See notes 82, 87 & 182 *supra*. See generally Comment, *Personal Jurisdiction over Foreign Corporations in Diversity Actions: A Tilted Yard for the Knights of Erie*, 31 U. CHI. L. REV. 752, 765-79 (1964).

²²² See C. WRIGHT, *supra* note 82, § 64, at 303-04, § 42, at 170. Although the popular meaning of "jurisdiction" under the *Erie* case law is as arbitrary and unclear as usual, it does not necessarily conform to the prevailing definition in other contexts. See, e.g., text accompanying note 216 *supra*. Nevertheless, there seems to be an analogous tendency to ignore state law on requirements arguably "nonjurisdictional." See, e.g., R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 85, at 772 ("fraud and force" and immunity from service); C. WRIGHT, *supra* note 82, § 46, at 199 (door-closing statutes); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 91, § 3828, at 181 & n.19 (forum non conveniens).

²²³ The Supreme Court appears devoted to resolving *Erie* problems by establishing a series of blanket solutions, each covering a broad area of law; and thus the Court appears

federal court in such circumstances only the pure-jurisdiction and forum-reasonableness requirements applicable to the state, thus closing the federal courthouse doors when the state could not choose to hear the case but leaving the federal court otherwise free to realize federal goals of convenience, efficiency, and the like by means of its own mere-venue provisions.²²⁴ In the distant future, if the state and federal court systems do develop similar schemes of territorial authority to adjudicate, the already small practical effects of either the current or the proposed approach to this choice-of-law problem will diminish even further.

II

Restatement Second's APPROACH

A. *Survey of Restatement Second's Treatment of Validity of Judgments*

The *Restatement (Second) of Judgments* in chapter 2 lists three requirements for a court properly to undertake an adjudication: notice, territorial jurisdiction, and subject-matter jurisdiction. Failure to satisfy any of them forms "a ground for objection to the maintenance of the proceeding in the court in which it has been brought."²²⁵

First, the *Restatement Second* requires fair notice, of a suitably formal appearance, to the affected person or his representative. Fair notice means either actual notice or notice that is reasonably certain to result in actual notice and that sufficiently complies with the procedure prescribed for giving notice. This same requirement applies whether the proceedings are in personam, in rem, quasi in rem, or otherwise.²²⁶

hostile to any more discriminating approach such as case-by-case balancing. *See, e.g.,* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975). *But cf.* Comment, *supra* note 84, at 702-09 (proposal to apply state jurisdictional provisions reflecting substantive state interests).

²²⁴ Some commentators are justifiably eager to go further than so rethinking *Arrow-smith v. UPI*, 320 F.2d 219 (2d Cir. 1963). They favor statutorily putting all of territorial authority to adjudicate outside the *Erie* doctrine, *see, e.g.,* Barrett, *supra* note 92, at 634-35; Currie, *supra* note 107, at 304-05, and even overturning *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), *see, e.g.,* Barrett, *supra* note 92, at 632-33; *cf.* Currie, *supra* note 107, at 305, 310-11 (more cautious approach); Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 27-29 (1968) (same).

²²⁵ RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note to ch. 2, at 1 (Tent. Draft No. 5, 1978); *see id.* § 4 [§ 1].

²²⁶ *Id.* §§ 5-6 [§§ 2-3]; *see* note 3 *supra*. The principles therein, as I perceive them, are sound. But I find their expression obscure, at least relative to the clarity of the rest of the *Restatement Second*.

Second, and critically for the purposes of this Article, Tentative Draft Number 5 of the *Restatement Second* introduces in section 7 the requirement of territorial jurisdiction and, for states and the federal sovereign, spells out the interplay of the Constitution with statutory and other determinants.²²⁷ Section 8 permits "jurisdiction over a person who has a relationship to the state such that the exercise of jurisdiction is reasonable."²²⁸ Section 9 allows jurisdiction "to determine interests in a thing if the relationship of the thing to the state is such that the exercise of jurisdiction is reasonable."²²⁹ Jurisdiction over status²³⁰ and attachment jurisdiction²³¹ receive similar treatment in sections 10 and 11, respectively.

Third, the *Restatement Second* treats subject-matter jurisdiction. In delineating this requirement, constitutions and statutes divide functions among the organs of government, thus accom-

²²⁷ RESTATEMENT (SECOND) OF JUDGMENTS § 7 (Tent. Draft No. 5, 1978) [§ 4].

²²⁸ *Id.* § 8 [§ 5].

²²⁹ *Id.* § 9 [§ 6].

²³⁰ *Id.* § 10 [§ 7]; see 1978 ALI PROCEEDINGS 104-05.

²³¹ RESTATEMENT (SECOND) OF JUDGMENTS § 11 (Tent. Draft No. 5, 1978) [§ 8]. Section 11 soundly spells out the situations where attachment jurisdiction over locally situated property would be reasonable. However, it fails to recognize the complications of having also to apply the power test. See, e.g., note 81 and accompanying text *supra*. There are other, lesser difficulties.

First, comment g of § 11 apparently suggests the abolition of the limited appearance. Cf. RESTATEMENT (SECOND) OF JUDGMENTS § 75(c) (Tent. Draft No. 7, 1980) (indirect abolition by granting preclusive effect to issues litigated pursuant to limited appearance) [§ 32(c)]. But see 1978 ALI PROCEEDINGS 109 (suggesting *Restatement Second* takes no position on limited appearances); cf. RESTATEMENT (SECOND) OF JUDGMENTS § 12 (Tent. Draft No. 5, 1978) (endorsing appearances restricted in effect) [§ 9]; *id.*, Reporter's Note § 75, comment d at 104 (Tent. Draft No. 7, 1980) (recognizing possible constitutional impediment to abolition) [§ 32]. It strikes me that a limited appearance without issue-preclusion effects remains essential to preserving the reasonableness of some marginal exercises of jurisdiction, such as certain instances of jurisdiction by necessity. See generally Smit, *supra* note 140, at 620-22, 627; von Mehren & Trautman, *supra* note 146, at 1139 n.38, 1164 n.137; Note, *supra* note 80, at 76 & n.48; Note, *Limited Appearances and Issue Preclusion: Resetting the Trap?*, 66 CORNELL L. REV. 595 (1981).

Second, comment c of § 11 seems to overstate the problem posed by *Fuentes v. Shevin*, 407 U.S. 67 (1972), by construing the case as a sometimes insuperable barrier. On the other hand, comment d seems to understate the problem by treating *Fuentes* as inapplicable in certain relevant circumstances. I think that the *Fuentes* problem could be solved by a carefully drafted attachment statute, analogous to the one in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), but applicable to all seizures of significant property interests for jurisdictional purposes, or, if need be, by simple abolition of this requirement of actual seizure. See generally Moore, *Procedural Due Process in Quasi In Rem Actions After Shaffer v. Heitner*, 20 WM. & MARY L. REV. 157, 223-34 (1978).

modating federal and state authority, separating courts from the other branches, and differentiating one court from another.²³²

While elaborating these three basic requirements, the *Restatement Second* discusses the procedure for raising them in the original action,²³³ as well as the res judicata consequences of raising them²³⁴ and the consequences of failing to raise them.²³⁵ Also, in an elegant and enlightening new section, Professor Geoffrey C. Hazard, Jr., as Reporter, elucidates the effect that litigating one claim has on personal jurisdiction for another claim.²³⁶

Two incidental points concerning this chapter of the *Restatement Second* deserve mention. First, it relies heavily on the American Law Institute's earlier work on conflict of laws.²³⁷ Second, an understanding of chapter 2 requires sorting out its reciprocal relationship with chapter 5, which treats relief from judgment. Chapter 2 covers the three basic "conditions that ought to exist (and ordinarily do exist) before a court can assume to decide the merits."²³⁸ However, these are neither necessary nor sufficient conditions for defeating relief from judgment, say, after conclusion of the original action. Instead, judgments not satisfying the three requirements sometimes and for some purposes have effect after conclusion of the original action, and judgments meeting

²³² RESTATEMENT (SECOND) OF JUDGMENTS § 14 (Tent. Draft No. 5, 1978) [§ 11]; see *id.*, Comment b. The *Restatement Second's* definition of subject-matter jurisdiction lacks some precision. See notes 179 & 181 and accompanying text *supra*. See also note 4 *supra*.

²³³ RESTATEMENT (SECOND) OF JUDGMENTS § 13(1) (Tent. Draft No. 5, 1978) [§ 10(1)]; *id.* § 14, Comment d [§ 11].

²³⁴ *Id.* § 13(2) [§10(2)]; *id.* § 15, Comment c (Tent. Draft No. 6, 1979) [§ 12].

²³⁵ *Id.* § 4, Comment a (Tent. Draft No. 5, 1978) [§ 1]; *id.* § 15 (Tent. Draft No. 6, 1979) [§ 12].

²³⁶ *Id.* § 12 (Tent. Draft No. 5, 1978) [§ 9]. As always, one can find room for disagreement. I would express the rule more along these lines: A state has *power* over any person who has *appeared* in a pending action in a court of the state and may exercise it when the claim involved may *reasonably* be determined concurrently with that action. See also notes 21 & 133 *supra*.

²³⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971); see 1978 ALI PROCEEDINGS 63. Thus, the new work's treatment of territorial jurisdiction "is largely an incorporation by reference of the applicable provisions of the Restatement Second of Conflict of Laws." RESTATEMENT (SECOND) OF JUDGMENTS, Reporter's Memorandum at xiv (Tent. Draft No. 5, 1978). The new work reflects some updating, but it proceeds in the belief that the earlier work's currency "remains largely intact." *Id.* The new work tends simply to mention "reasonableness" and then refer to the conflicts work. "That is, we have not undertaken here more fully to elaborate on the boundary line between minimum contacts and what might be called subminimum contacts." 1978 ALI PROCEEDINGS 98. Accordingly, this chapter of the new work manages to condense 37 sections of RESTATEMENT OF JUDGMENTS (1942) into 12 sections.

²³⁸ RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note to ch. 2, at 6 (Tent. Draft No. 5, 1978).

those requirements sometimes and for some purposes have no effect. It all depends, for example, on the nature and importance of the alleged impropriety and on the position of the parties. Chapter 5 lays out this fluid approach.²³⁹

B. Critique of Restatement Second's Approach to Territorial Jurisdiction and Venue

Certainly, the critic must beware "too simple an antithesis between an affirmation of what the law is and one as to what it ought to be."²⁴⁰ Yet there has been a shift in emphasis from the early Restatements, which undertook to "dispel uncertainty" by restating "what the law in point was,"²⁴¹ to the more recent Restatement efforts, which adopt the role of law reform.²⁴² Rather than develop subtle reconciliations or select among conflicting aims, however, I shall simply assume *arguendo* the antithesis and evaluate alternatively the attainment of goals.

The *Restatement Second*, in tentative but approved draft,²⁴³ inaccurately states the current law on territorial jurisdiction. Rejecting the power approach of the first *Restatement of Judgments*,²⁴⁴ the *Restatement Second* generally opts for the tempting alternative of reasonableness.²⁴⁵ But *Shaffer v. Heitner* demonstrated and *World-Wide* explained that the choice is not either-or; instead, both the power and the reasonableness tests apply. The failure to recog-

²³⁹ See *id.*, at 4-8; *id.*, Introductory Note to ch. 5, at 4-9 (Tent. Draft No. 6, 1979). The desirability of this movement away from rules toward fluidity is beyond the scope of this Article. But consider the possibility that such fluidity should also extend to the procedure for raising these requirements in the original action. See, e.g., *id.* § 14, Comment d (Tent. Draft No. 5, 1978) [§ 11].

²⁴⁰ Wechsler, *The Course of the Restatements*, 55 A.B.A.J. 147, 149 (1969); see *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, in 1923 ALI PROCEEDINGS 1, 14-18.

²⁴¹ H. GOODRICH & P. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961*, at 8 (1961); see Lewis, *History of the American Law Institute and the First Restatement of the Law*, in *RESTATEMENT IN THE COURTS* 1, 19 (1945).

²⁴² See Hazard, *supra* note 89, 66 CORNELL L. REV. at 587. See generally Wechsler, *supra* note 240. This trend received criticism in Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A.J. 152 (1970).

²⁴³ See 1978 ALI PROCEEDINGS 165. There was mention that the Institute should reconsider territorial jurisdiction after the dust from *Shaffer* settled, *id.* at 102, but reconsideration apparently never occurred, see 48 U.S.L.W. 2835 (1980).

²⁴⁴ See *RESTATEMENT OF JUDGMENTS* § 5 (1942).

²⁴⁵ See, e.g., *RESTATEMENT (SECOND) OF JUDGMENTS* § 7, Comment a (Tent. Draft No. 5, 1978) (equating "minimum contacts" to reasonableness test) [§ 4]; *id.* § 8, Comments a-b [§ 5]; *id.*, Reporter's Note § 8 [§ 5]; *id.* § 9, Comment e [§ 6]; 1978 ALI PROCEEDINGS 103-04; *id.* at 117 ("[t]erritorial jurisdiction is a matter of convenience").

nize this permeates sections 8 through 11, leaving them considerably more permissive than the current law. The draftsman's remedy would be to superimpose a power test on the reasonableness standard that those sections express for each category of jurisdiction. Of course, this would be no simple task, considering the complications of the power test.²⁴⁶

The *Restatement Second* serves better as a statement of what the law ought to be, but it preserves a conceptual structure that is inadequate to get us there. First, acknowledging the existence of the power test would probably be desirable if only to speed its demise. Second, section 7 draws an arbitrary, unclear, and ultimately unsound line between jurisdiction and venue.²⁴⁷ Part of what it considers venue is jurisdictional in nature, and much of its jurisdiction is really venue. A detailed consideration of this boundary suggests that the *Restatement Second* should have devoted much greater thought to the idea of venue. I am not suggesting that the scope of the project should have been broader. Nor am I suggesting that the product should have included the details of an ideal venue scheme. Instead, I am criticizing the intellectual structure for territorial authority to adjudicate that the *Restatement Second* actually did adopt. And its faulty structure affects the rest of its work; for example, slighting venue twists its treatment of relief from judgment.²⁴⁸ Third, its intellectual frameworks for state and federal courts do not mesh.²⁴⁹ A formulation based on power, reasonableness, and a redefined venue would reveal the commonality of the state and federal schemes and would permit parallel treatment. In short, making more explicit my presumptuousness, I submit that this Article's reformulation would have lent a better structure to section 7.

I am admittedly ignoring tactical realities that might demand compromise and also conformity with earlier works of the American Law Institute. However, I believe that a bolder approach would better represent current law and accommodate new developments.

²⁴⁶ See notes 144-64 and accompanying text *supra*.

²⁴⁷ Compare RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comments b-c (Tent. Draft No. 5, 1978) (territorial jurisdiction encompasses constitutional and nonconstitutional restrictions) [§ 4], with *id.*, Comment g ("scope of territorial jurisdiction is affected by the principle of forum non conveniens"), and *id.*, Comment h (rules of venue "easily distinguished" from territorial jurisdiction). See also notes 171-73 and accompanying text *supra*.

²⁴⁸ See note 218 and accompanying text *supra*.

²⁴⁹ See RESTATEMENT (SECOND) OF JUDGMENTS § 7, Comments a, f (Tent. Draft No. 5, 1978) (confusing shift from framework focusing on restrictions imposed on states to framework focusing on federal self-restraint) [§ 4]; 1978 ALI PROCEEDINGS 93-95, 106.

CONCLUSION

Be the aim to convey the law of today or to push it toward a better law for tomorrow, the proposed tripartite conceptual structure is a fruitful way of viewing state and federal territorial authority to adjudicate. First, pure territorial jurisdiction is the constitutional requirement that the sovereign have power over the target of the action. It is the product of a long history, but should enjoy a relatively short future. Second, the Constitution demands that the forum be a reasonable one. This rather recently discerned requirement of forum-reasonableness derives from both jurisdiction and venue, but should prevail as the sole constitutional test for territorial authority to adjudicate. Third, mere venue encompasses all nonconstitutional restrictions on geographic selection of forum. A clearer idea of its nature should lead to its more intelligent use.