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I. INTRODUCTION

Soon after the ratification of the fourteenth amendment,[1] the United States Supreme Court in *Pennoyer v. Neff*[2] held that the due process clause of that amendment[3] imposed limitations on the states' authority to exercise judicial jurisdiction over a nonresident defendant.[4] The Court stated that, with a few exceptions,[5] a state could exercise jurisdiction over a nonresident defendant only when he was served with process while physically present within the state, or when he owned property in the state that the court had seized at the commencement of the action.[6] These limitations were derived from two public law principles of state sovereignty that

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1. The states ratified the fourteenth amendment in 1868.

2. 95 U.S. 714 (1878).

3. The due process clause provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

4. The facts in *Pennoyer* arose before the states had ratified the fourteenth amendment. The Supreme Court relied on the full faith and credit clause to support its decision that Oregon lacked authority to exercise jurisdiction over the nonresident defendant. 95 U.S. at 729-30. The Court, however, indicated that the due process clause would be the important constitutional limitation in the future. *Id.* at 733-34.

5. These exceptions included voluntary appearance in a case, cases that dealt with the personal status of a claimant, and cases in which a partnership or association had appointed an agent for service of process in the state. *Id.* at 733-35.

6. *Id.* at 733. There is disagreement over whether the seizure had to be at the commencement of the action or at any time prior to judgment. *See* Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Pt. 2)*, 14 CREIGHTON L. REV. 735, 826 (1981).

Justice Story had propounded in his treatise on conflict of laws.[7] The Court in *Pennoyer* restated these two principles as follows: "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory [and] no State can exercise direct jurisdiction and authority over persons or property without its territory."[8] Thus, from the outset due process protections were based on a highly territorial conception of the states' authority.

Because of changing social conditions—including the increased use of the corporate entity in the business world, the development of the automobile and other forms of more rapid transportation, and the invention of far more sophisticated modes of communication—*Pennoyer*'s territorial view of a state's judicial jurisdiction soon became unworkable and bore little relation to people's everyday activities. Rather than abandon *Pennoyer*'s extremely restrictive territorial view of jurisdiction, however, the Supreme Court began formulating a series of legal fictions that expanded the scope of the states' jurisdiction, but which permitted the Court to stay within the theoretical confines of the *Pennoyer* doctrine.[9] The "implied consent" theory, which was applicable to both corporate activities[10] and nonresident motorists,[11] and the "presence" doctrine, which applied only to corporate activities,[12] were the most prominent among these fictions. For several decades, these two theories gave rise to an enormous amount of litigation—litigation that produced conflicting and confusing decisions.[13] To borrow an expression from Professor Rosenberg, a lawyer trying to predict the outcome on state judicial jurisdiction questions during these years had more need of a Ouija board than a Shepard's Citator.[14]

In 1945 the Supreme Court in *International Shoe Co. v. Washington*[15] finally abandoned these legal fictions and formulated a two-pronged approach to determine whether a state court constitutionally could exercise jurisdiction over a nonresident de-

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7. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20 (2d ed. 1841).

8. 95 U.S. at 722.

9. 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, 573-74 (1958).

10. For a discussion of this doctrine, see Kurland, *supra* note 9, at 578-82.

11. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927).

12. *See* Kurland, *supra* note 9, at 582-84.

13. *Id.* at 574-86.

14. Rosenberg, *Two Views on* Kell v. Henderson, 67 COLUM. L. REV. 459, 460 (1967).

15. 326 U.S. 310 (1945).

fendant who had neither consented to[16] nor acquiesced in[17] the court's jurisdiction over him. The first element of this approach is the "minimum contacts" standard. The Court stated that "[d]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the . . . forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[18] According to the Court, minimum contacts support an exercise of jurisdiction only when the contacts give rise to the particular controversy.[19] The Court stated that this relationship between the defendant's contacts with the state and the actual controversy is necessary because it demonstrates that the defendant enjoyed "the benefits and protection of the laws of that state" when it engaged in its activities; the burden of defending such an action in the state, therefore, could not be viewed as overly oppressive.[20]

The other prong of the *International Shoe* approach deals with the situations in which a state may exercise jurisdiction over a nonresident defendant even though the facts engendering the controversy occurred wholly outside the state. Speaking for the Court, Chief Justice Stone acknowledged that in some situations continuous activity within a state is not enough to subject a corporation to a state's jurisdiction in a lawsuit that is unrelated to that activity.[21] The Court, however, observed that "there have been instances in which the continuous corporate operations within a state were

16. Consent to a state's judicial jurisdiction presents policy questions that are different from those which are discussed herein and, therefore, are beyond the scope of this Article. For a brief and partial identification of the types of policies that are relevant to controversies concerning the defendant's consent to jurisdiction, see notes 172-75 *infra* and accompanying text.

17. Although commentators rarely make the distinction between to "consent to" and to "acquiesce in" jurisdiction, the distinction nevertheless should be made, since the concepts raise differing policy issues. When a defendant, by his words or actions, voluntarily waives any objections to the exercise of jurisdiction by the forum state, he is said to "consent to" jurisdiction in that state. On the other hand, when a defendant engages in certain activities within a state, or has some relationship with a state, and the same state asserts that the defendant thereby has consented to its jurisdiction, the defendant instead is said to have acquiesced in the state's jurisdiction. Acquiescence statutes are holdovers from the implied consent theory, which the Supreme Court previously employed, and which may still apply in limited situations. The Court specifically mentioned this type of statute in Shaffer v. Heitner, 433 U.S. 186, 216 (1977). *See* note 172 *infra* and accompanying text.

18. 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

19. *Id.* at 317-18.

20. *Id.* at 319.

21. *Id.* at 318.

thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[22]

Because the *International Shoe* opinion addressed in personam jurisdiction, it was unclear for more than three decades whether the *International Shoe* approach also was applicable to in rem and quasi in rem actions.[23] The Supreme Court recently clarified its position on this point by declaring in *Shaffer v. Heitner*[24] that the *International Shoe* approach is applicable regardless of how the particular action traditionally would have been characterized. The Court's decision in *International Shoe,* then, with some possible rare exceptions,[25] clearly has supplanted *Pennoyer*'s concept of power over person and property with more flexible doctrines that expand the states' authority to exercise judicial jurisdiction.

Even though the Supreme Court has abandoned *Pennoyer*'s dogma, it has not abandoned totally a territorial view of jurisdiction. The Court itself emphasized the point in *Hanson v. Denckla*[26] when, after briefly describing the historical development of jurisdictional doctrines, it observed,

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.[27]

The *Hanson* Court implemented its neo-territorial view of jurisdiction by articulating a limitation on the minimum contacts test. The Court stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the

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22. *Id.*

23. The Supreme Court in Hanson v. Denckla, 357 U.S. 235 (1958), summarized the differences between the three traditional categories of types of actions as follows: "A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property." *Id.* at 246 n.12.

24. 433 U.S. 186 (1977).

25. Professor Leflar observes, "The majority opinion . . . expressed some doubts about . . . marginal situations, such as in rem jurisdiction for divorce, cases in which no other forum is available to the plaintiff and cases in which 'the property is in the State because of an effort to avoid the owner's obligations.' " R. LEFLAR, AMERICAN CONFLICTS LAW § 24A (3d ed. 1977) (quoting Shaffer v. Heitner, 433 U.S. 186, 210 (1976)).

26. 357 U.S. 235 (1958).

27. *Id.* at 251.

privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[28] Two recent decisions highlight the significance of this "purposefully availing" element of the minimum contacts standard. In *Kulko v. Superior Court*[29] the Supreme Court rejected the proposition that a defendant who had caused "effects" within the state was subject to jurisdiction in that state.[30] The Court determined that before a state court can exercise jurisdiction over a nonresident defendant, the defendant must have purposefully availed himself of the benefits and protections of the forum state's law.[31] Two years later in *World-Wide Volkswagen Corp. v. Woodson,*[32] the Court refused to equate a defendant's ability to "foresee" the possibility of a suit in the forum state with the purposefully availing requirement. The Court stated that the foreseeability of a future suit in the forum state is relevant only when coupled with a defendant's conduct and connection with that state.[33]

Since *Shaffer* has extended the *International Shoe* doctrines, as subsequently modified by *Hanson,* to almost every exercise of state jurisdiction,[34] one must question both the underlying premises of the standards and their compatibility with facts as they exist in society today. Justice Brennan suggests the need for this inquiry in his joint dissenting opinion to *World-Wide Volkswagen*[35] and *Rush v. Savchuk.*[36] He states that the *International Shoe* standards "may already be obsolete as constitutional boundaries."[37] Of course, even if the *International Shoe* standards are obsolete, the Supreme Court will not abandon the standards unless it

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28. *Id.* at 253.

29. 436 U.S. 84 (1978).

30. *Id.* at 96-98.

31. *Id.* at 94. For a more detailed discussion of the *Kulko* case, see notes 176-80 *infra* and accompanying text.

32. 444 U.S. 286 (1980).

33. *Id.* at 297. For further discussion of the *World-Wide Volkswagen* case, see notes 181-88 *infra* and accompanying text.

34. The *International Shoe* test may not extend to a limited number of types of cases. Whether it applies to admiralty in rem procedures, for example, remains an open question. For a discussion of the admiralty problem, see Bohman, *Applicability of* Shaffer *to Admiralty In Rem Jurisdiction,* 53 TUL. L. REV. 135 (1978); Note, *Admiralty—Procedure for Maritime Attachment Found Unconstitutional,* 53 TUL. L. REV. 944 (1979).

35. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299-313 (1980) (Brennan, J., dissenting) (dissent also applies to Rush v. Savchuk, 444 U.S. 320 (1980)).

36. 444 U.S. 320, 333 (1980) (Brennan, J., dissenting) (dissent found at World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299-313 (1980)).

37. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 299 (Brennan, J., dissenting).

has available a viable alternative. Justice Brennan asserts that a form of interest analysis should be employed to establish the constitutional limits on the states' authority to exercise judicial jurisdiction.[38] His proposal is particularly intriguing because it suggests that controversies over judicial jurisdiction may be resolved in a manner similar to the way choice-of-law controversies frequently are resolved. Choice-of-law controversies, like the jurisdiction issues raised by nonresident defendants, arise when lawsuits concern either trans-state events or parties from different states.[39]

A close examination of the developments in these areas reveals that jurisdictional doctrines and choice-of-law theories have evolved in a parallel fashion. Justice Story's territorial principles, which served as the foundation for the *Pennoyer* jurisdictional approach, heavily influenced choice-of-law thinking for decades.[40] His principles form the theoretical underpinnings of the "vested rights" theory that is incorporated in the *Restatement (First) of Conflict of Laws*.[41] At about the same time that the Supreme Court began talking about minimum contacts rather than power over persons and property in jurisdictional cases, some state courts were beginning to consider contacts rather than vested rights in their resolution of choice-of-law controversies.[42] In the choice-of-law area, however, commentators soon noted that contacts are relevant only to the extent that they indicate the interests and policies at stake in a controversy.[43] Several courts also recognized the validity of this observation and began to view choice-of-law questions

38. *Id.* For a brief discussion of Justice Brennan's form of interest analysis, see note 72 *infra* and accompanying text.

39. Choice-of-law problems deal with what policy should be applied to resolve a trans-state controversy. *See* McDougal, *Choice of Law: Prologue to a Viable Interest-Analysis Theory*, 51 TUL. L. REV. 207 (1977). Judicial jurisdiction, on the other hand, is concerned with whether a particular state possesses the authority to apply policy and resolve the controversy.

40. *See* Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934).

41. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934). The basic premise of this theory is that the laws of the state in which certain selected events occurred create and thereby "vest" all rights that a claimant possesses. Section 332, for example, provides that the laws of the state in which a contract is made control the rights and obligations that are relevant to that contract. *Id.* § 332. The influence of Story's principles are found in several of the comments to the doctrines set forth in the First Restatement. For example, Comment a to § 377 states, "Each state has legislative jurisdiction to determine the legal effect of acts done or events caused within its territory."

42. *See, e.g.*, Barber Co. v. Hughes, 223 Ind. 570, 63 N.E.2d 417 (1945); Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

43. *See, e.g.*, Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1.

from the standpoint of a policy or interest analysis rather than simply a contacts standard.[44] In fact, a majority of states now employ some form of policy or interest analysis in the resolution of choice-of-law controversies.[45] Jurisdictional doctrines, however, have not yet evolved from the minimum contacts approach to an interest analysis. This Article, therefore, examines whether the courts should shift their focus to a policy or interest analysis in judicial jurisdiction cases.

The Article initially identifies some of the theoretical inadequacies of, and practical difficulties with, the Supreme Court's purposefully availing/minimum contacts approach to jurisdictional problems.[46] The Article then outlines an alternative approach that employs a comprehensive form of interest analysis. After setting forth this proposed framework, the Article proceeds to examine Supreme Court decisions since *International Shoe* from the standpoint of the outcomes that an interest analysis approach might produce. Finally, the Article appraises these varying results and recommends that the courts employ an approach that more realistically relates to people's everyday activities and more accurately reflects contemporary goals and policies.

Before examining these issues in more detail, three observations must be made about the scope of the discussion. First, this Article presumes that all nonresident defendants will receive notice that is "reasonably calculated, under all the circumstances, to apprise" them of the pending action.[47] Due process requires adequate notice regardless of the theory that is employed to determine the scope of a state's authority to exercise judicial jurisdiction.[48] Second, although the discussion in this Article is about the states'

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44. *See, e.g.*, Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964).

45. Professor Sedler lists twenty-nine states plus the District of Columbia and Puerto Rico that have abandoned the vested rights theory in tort cases. Sedler, *On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems*, 7 HOFSTRA L. REV. 807, 807 n.1 (1979). All these states employ one or more of the modern choice-of-law theories that take the defendant's interests into account, albeit in highly variant degrees. *See* McDougal, *supra* note 39, at 237-58.

46. Since any rational jurisdictional theory would sustain a state's jurisdiction over a nonresident defendant who has engaged in substantial, continuous, and systematic activities within that state, this element of the *International Shoe* approach is omitted from further discussion. The interest analysis theory proposed in this Article would permit a state to exercise jurisdiction under these circumstances.

47. The Supreme Court formulated this due process standard for giving notice in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

48. *Id.* at 312-13.

authority, it also applies, in most cases,[49] to a federal court's authority to exercise jurisdiction over a defendant who is not a resident of the state in which the federal court sits.[50] Last, the discussion focuses on controversies over the states' authority to exercise judicial jurisdiction in trans-state controversies; it does not include an analysis of trans-national controversies. Although much of the discussion applies to both types of disputes, it does not reflect adjustments that would be necessary because of the overwhelming importance of power considerations in trans-national controversies.[51]

II. THE THEORETICAL AND PRACTICAL INADEQUACIES OF THE MINIMUM CONTACTS STANDARD

A. *Undue Reliance on the Territorial Boundaries of States*

People in this country, whether acting as individuals or as members of a group, pay little attention to state boundaries. Moreover, when companies and individuals engage in business activities, state lines are of almost no moment, since these entities often distribute their products in many, if not all, states. Those who provide services typically either furnish them in several states themselves or rely on other individuals from these states to sustain their business, trade, or profession. Because state lines are of such little importance to the activities of the people in this country, reliance on the territorial boundaries of states as a basic limit on the states' authority to exercise judicial jurisdiction is destructive of relevant interests.

A typical casebook hypothetical[52] vividly demonstrates the irrational nature of a territorial theory of jurisdiction. Assume that a resident of Texarkana, Arkansas, crosses the state line into Texarkana, Texas, and sustains an injury as a result of the unauthorized conduct of a resident of Texarkana, Texas. Current doctrines preclude Arkansas from exercising jurisdiction over the Texas resident

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49. In certain circumstances Congress has expanded federal court jurisdiction. The interpleader statute, for example, authorizes nationwide service of process. 28 U.S.C. §§ 1397, 2361 (1970); *see* notes 94-99 *infra* and accompanying text. In addition, the Federal Rules of Civil Procedure authorize service on defendants who are brought into the action pursuant to rules 14 and 19, and who are located "outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced." FED. R. CIV. P. 4(f).

50. *See* FED. R. CIV. P. 4(e), (f).

51. For a discussion of judicial jurisdiction in trans-national controversies, see M. MCDOUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 646-56, 706-48 (1963).

52. *See, e.g.*, R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 513 (2d ed. 1975).

because the contacts causing the injury occurred in Texas, not Arkansas. No rational jusitification, however, exists for the proposition that the Texas resident will be deprived of due process of law by having to defend an action in a courthouse that is only a five-minute drive from his residence. Only an artificial view of the limitations that the due process clause of the fourteenth amendment imposes on the states can justify such a conclusion.

An incidental result, albeit not an inevitable one, of the territorial nature of the minimum contacts approach has been the Supreme Court's focusing—at least since *Hanson*[53]—solely on the due process protections of defendants. The Court thus has ignored the possibility that a plaintiff may also be deprived of due process of law. A claimant, as a practical matter, arguably suffers a denial of due process when a potential defendant resides in a distant state, and the claimant, because of his financial plight, cannot pursue the defendant either to the defendant's home state or to the state where the contacts engendering the controversy occurred.

A brief hypothetical illustrates such a predicament. Assume that a resident of New York, who earns slightly more than the minimum wage, receives a telephone call from a Florida hospital informing him that his mother has just suffered a heart attack. Assume further that the New Yorker uses almost all his available funds to purchase a round-trip bus ticket to Florida, and that his mother dies soon after his arrival at the hospital. He decides to walk to a nearby funeral home to make arrangements for his mother's funeral, and, while he is crossing the street, a truck owned by the local gas and electric company runs a red light and hits him. Although he is not severely injured, the New Yorker incurs medical expenses of three thousand dollars and suffers a loss of wages for six weeks. He returns to New York as soon as possible to avoid losing his job. The New Yorker's employer allows him to return to work, but warns him that he will be fired if he misses any additional work days in the next year. The gas and electric company's insurance company refuses to pay the New Yorker; it alleges that the traffic light was green, and that the New Yorker negligently walked in front of the truck.

Under these facts, the *International Shoe* doctrines would force the New Yorker to sue in Florida because the Florida gas and electric company has no contacts, ties, or relations with the State of New York. Litigating this controversy in Florida, however, will

53. *See* notes 26-28 *supra* and accompanying text.

impose an undue burden on the claimant, but litigating it in New York will merely inconvenience the defendant and its insurance company. The insurance company probably engages in business in New York, and the gas and electric company undoubtedly sends its employees to New York on occasion either to examine new products or to learn new operating or management techniques. This hypothetical raises the question whether any rational reason exists why the claimant, as a practical matter, should be denied his day in court when a New York forum would not impose an undue burden on the defendant. Due process protections should be equally applicable to both claimants and defendants. The territorial foundation of the minimum contacts approach, as developed by the Supreme Court, not only bears little relation to the activities of people in their everyday lives, but also operates as a barrier to an appropriate consideration of due process protections for all the parties involved in a controversy.

B. Vagueness of the "Fairness" Criterion

Even if a defendant has had minimum contacts with a state in which a particular claim arises and has purposefully availed itself of the benefits and protections of the laws of the state in engaging in the contact activities, that state still may not be able constitutionally to exercise jurisdiction over the defendant because to do so would "offend 'traditional notions of fair play and substantial justice.' "[54] Commentators commonly refer to this requirement as the "fairness" or "reasonableness" element of the minimum contacts approach.[55]

Predicting the meaning that a court will ascribe to the term "fairness" will in many controversies be extremely difficult, if not impossible. Although an articulation of some relevant criteria could provide considerable guidance in determining the appropriate content of the term in a particular case, the Supreme Court has failed to promulgate any such standards. Its opinions mention certain potentially relevant criteria, but deal with them in an inconsistent and confusing manner. The criteria that the Court has sug-

54. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

55. *See, e.g.*, R. CRAMTON, D. CURRIE & H. KAY, *supra* note 52, at 526; von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1166-67 (1966); Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 890 (1978).

gested include "an estimate of the inconveniences" a defendant would encounter by defending an action in the forum state[56] and the parties' locations during the events that precipitated the controversy.[57] Commentators also have suggested additional factors such as "the expectations of the defendant," "the relative aggressiveness of the parties," and "consideration of overall trial convenience."[58] Neither the commentators nor the Court, however, indicates how these various factors should be pieced together to determine whether a particular exercise of jurisdiction is "fair."

Although the Supreme Court sometimes might be justified in enunciating and employing highly abstract standards to account for societal changes, judicial jurisdiction issues do not lend themselves to such abstractions. Because judicial jurisdiction questions usually pose threshold problems that are separate from the merits of the case, courts should resolve these issues as quickly and inexpensively as possible. Vague standards, however, hinder the attainment of these policy goals. Defendants, in good faith, frequently object to a state's exercise of jurisdiction and thereby delay a resolution of the merits of the case and impose additional costs on the claimant. Considerable delay can also result when a defendant exercises his option in some states to seek appellate review of the jurisdictional issue prior to a decision on the merits.[59] In the federal courts, as well as in those states in which such interlocutory appeals are prohibited,[60] the defendant can delay a final judgment's enforcement and impose additional costs on claimants by appealing the jurisdictional issue. If the appellate court determines that the trial court failed to ascribe the proper meaning to the term "fair" and thus should not have proceeded to adjudicate the controversy, then the entire time spent during the trial on the merits will have been wasted—a result that is entirely inconsistent with current notions of judicial economy.

A rejection of the fairness standard as vague, however, does not mean that courts must formulate a mechanical solution to judicial jurisdiction controversies. Rather, the failure of the present

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56. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

57. Kulko v. Superior Court, 436 U.S. 84, 97-98 (1978).

58. R. CRAMTON, D. CURRIE & H. KAY, *supra* note 52, at 554-58. The authors list other criteria as well: "The identity of the parties" and "the nature of the plaintiff's claim." *Id.* Professor Woods lists some of the same factors and adds, among others, "[t]he importance of the governmental interest" and "choice of law." Woods, *supra* note 55, at 891-98.

59. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.22 (2d ed. 1977).

60. *Id.*

fairness standard suggests that courts should establish jurisdictional policies that are either abstract or sufficiently flexible to account for all the competing interests at stake in judicial jurisdiction controversies. This proposition leads to the final major inadequacy of the minimum contacts approach—its failure to consider sufficiently all the relevant interests at stake in controversies concerning a state's constitutional authority to exercise jurisdiction.

C. *Inadequate Consideration of Interests*

In several decisions since *International Shoe* the Supreme Court has identified a limited number of interests that are implicated in state jurisdiction controversies. In some cases the outcome of the Court's decision depended in large part upon the particular interests that the Court chose to recognize. In *McGee v. International Life Insurance Co.*,[61] for example, the Court relied upon California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[62] In subsequent decisions the Court noted that California's interest in *McGee* was an important factor because that state had enacted special legislation concerning the exercise of jurisdiction over nonresident insurance companies.[63]

In other cases, however, the Court has given little weight to relevant interests, primarily because it did not consider them to be "manifest interests." In *Shaffer*, for example, counsel argued that Delaware should be able to exercise jurisdiction over officers and directors of its corporations because of its strong interest in supervising the management of these corporations.[64] The Court, however, rejected this argument because Delaware had not enacted a specific jurisdictional statute to protect such an interest.[65] Moreover, in *Kulko v. Superior Court*,[66] which dealt with an action for child support that was filed in California, plaintiff argued that California had "substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive family environment in which the children

61. 355 U.S. 220 (1957).

62. *Id.* at 223.

63. Kulko v. Superior Court, 436 U.S. 84, 98 (1978); Hanson v. Denckla, 357 U.S. 235, 252 (1958).

64. Shaffer v. Heitner, 433 U.S. 186 (1977).

65. *Id.* at 214.

66. 436 U.S. 84 (1978).

of the State are to be raised."[67] Although the Court acknowledged that these interests were "unquestionably important," the Court held that they were not compelling, since California had not enacted a special jurisdictional statute asserting its particularized interests in resolving these issues.[68] The Court subsequently stated that the identifiable, substantial interests "simply do not make California a 'fair forum.' "[69]

In *World-Wide Volkswagen Corp. v. Woodson*[70] the Court initially identified interests other than the forum state's interest in adjudicating the controversy, but it failed even to mention them again. Speaking for the majority, Justice White articulated two specific interests: "[t]he interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies."[71] Since the Court failed to expand further on these interests, however, their significance for future judicial jurisdiction cases remains unclear.

These opinions evidence the Supreme Court's awareness that at least some interests are at stake in controversies concerning the constitutional authority of a state to exercise judicial jurisdiction over nonresident defendants. These same opinions, however, reveal that the Court has no definitive perception either of the significance of those interests or of the role that they should play in jurisdictional decisionmaking. A random and aimless consideration of the relevant interests in judicial jurisdiction cases only increases the likelihood that future decisions in this area will continue to be confused and inconsistent. This trend is in turn likely to result in decisions that unnecessarily deny the interests at stake in these controversies. The probability of such outcomes becomes even more obvious upon a close examination of the role that interests should play in judicial jurisdiction cases.

III. An Outline of a Systematic Interest Analysis Theory with Explicit Objectives

The foundations for a systematic interest analysis theory stem from the approach Justice Brennan advocates for resolving controversies over the authority of a state to exercise judicial jurisdiction.

67. *Id.* at 98.
68. *Id.*
69. *Id.* at 100.
70. 444 U.S. 286 (1980).
71. *Id.* at 292.

The Justice summarized this approach in his joint dissenting opinion in *World-Wide Volkswagen* and *Rush:* "If a plaintiff can show that his chosen forum State has a sufficient interest in the litigation (or sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest . . . should have no constitutional excuse not to appear."[72] With some modest reformulation and expansion, Justice Brennan's statement can be transformed into a systematic interest analysis approach to jurisdictional issues.

One necessary modification of the Justice's basic proposition is the expansion of the parenthetical reference to contacts. As previously noted,[73] contacts have no significance apart from the interests that they indicate. Contacts, as the Supreme Court has defined the term, comprise only a limited portion of the overall factual context of a particular controversy. The identification of all relevant interests in any controversy requires that each feature of the factual context—not simply the "contacts"—be examined. The parenthetical statement, therefore, should read as follows: "as determined by an examination of all the facts and circumstances in a particular controversy." This broader examination also removes any unnecessarily restrictive territorial perspective from the proposed form of interest analysis.

Another required modification of Justice Brennan's statement concerns the use of the adjective "sufficient," which the Justice employs to modify "interests." Rather than merely ascertaining whether the interest is "sufficient," courts should evaluate the *strength* of the forum state's interest in resolving the controversy. In several types of controversies the forum state's interest in exercising jurisdiction may be substantial.[74] Common examples might include child support actions for children residing in the forum state and suits against insurance companies that have issued policies to state residents. Although the existence of a specific jurisdictional statute frequently will indicate the existence of a substantial state interest in exercising judicial jurisdiction, the absence of such a statute does not automatically negate the presence of these inter-

72. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 299, 312 (Brennan, J., dissenting) (dissent also applies to Rush v. Savchuk, 444 U.S. 320 (1980)).

73. *See* note 43 *supra* and accompanying text.

74. *See* note 119 *infra* and accompanying text. Such substantial interests were present in two cases since *International Shoe: McGee v. International Life Insurance Co.*, *see* notes 153-56 *infra* and accompanying text, and *Kulko v. Superior Court*, *see* notes 176-80 *infra* and accompanying text.

ests.[75] The substantiality of a state interest in exercising jurisdiction turns on the potential impact that a failure to exercise jurisdiction may have on the state's internal value processes. In child support cases, for example, the inability of their state of residence to exercise jurisdiction over a nonresident defendant may cause the affected children to suffer deprivations, and the state thus will be forced to provide support so that the children can live at a minimum subsistence level. A court should consider the strength of the forum state's need to exercise judicial jurisdiction in its final accommodation of interests in a controversy over the state's constitutional authority to have the matter litigated in its courts.

Justice Brennan's summary deals strictly with the interests of the forum state; it fails to consider the interests of other states and of the collective community of states that are at stake in these controversies. As will be seen, these interests warrant consideration because they are of prime importance in certain cases that deal with the states' authority to adjudicate controversies.[76] Thus, a court should identify and consider the common interests of all affected states and the collective community of states in its resolution of jurisdictional issues.

These preliminary observations permit a more detailed outline of a systematic interest analysis approach to the question whether a state has the constitutional authority to exercise jurisdiction in a particular case. At the outset, a systematic interest analysis requires the identification of all relevant interests that potentially are at stake in a controversy. For convenience, the interests of particular states will be referred to as *exclusive* interests, and the interests of the collective community of states will be referred to as *inclusive* interests. An *interest* consists of demands for values in addition to expectations about the conditions under which the demands can be secured.[77]

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75. For criticism of the Supreme Court's position that these statutes are necessary, see notes 172-75 *infra* and accompanying text.

76. *See* notes 79-105 *infra* and accompanying text.

77. For a more detailed discussion of what constitutes an interest, see McDougal, *supra* note 39, at 212. The author expands on this definition as follows:

> This definition underlines the point that a mere hope is not an interest, and also suggests that extreme caution must he exercised to prevent a simple concern from being identified as an interest. Although some concerns may ripen into the stronger sentiment of a demand, others may not. Both hopes and simple concerns are excluded from the definition because they are not sufficiently intense sentiments to justify consideration by authoritative decisionmakers. The conditions under which demands are sought include the entire context, as well as expectations about mutuality and reciprocity.

Id.

Because the due process clause of the fourteenth amendment is designed to protect individuals and private associations from oppressive state action, private or individual interests arguably should also be considered in determining whether an exercise of jurisdiction is constitutional. The present inquiry, however, omits this separate category of private interests for two reasons. First, in most controversies the relevant exclusive and inclusive interests at stake reflect interests that are identical to those of the individual parties. In these cases, therefore, a separate identification of private interests would serve no useful purpose. Second, in those cases in which a party alleges that the exclusive and inclusive interests at stake are incompatible with his interest, or that he has additional interests that are not reflected in the relevant exclusive and inclusive interests, the interests thus asserted will be eccentric interests—interests that are inconsistent with normal demands and expectations. For example, the defendant may assert an interest in not having to defend the action in a distant state because he has a fear of flying and would need more time than most people to travel to and from the distant forum. Such idiosyncratic interests should not fall within the scope of due process protections. Moreover, the recognition of private interests would encourage ingenuity in conjuring interests for the sole purpose of arguing against an exercise of jurisdiction. These conjured interests would unduly complicate jurisdictional decisions and would serve no rational purpose. Thus, courts should view relevant exclusive and inclusive interests as adequately protecting the interests of private associations and individuals in disputes over a state's authority to exercise jurisdiction.[78]

For additional discussion of the definition of an interest employed in this article, see H. LASSWELL & A. KAPLAN, POWER AND SOCIETY §§ 2.1-.3 (1950); M. MCDOUGAL, H. LASSWELL & I. VLASIC, *supra* note 51, at 145-50 (1963).

78. Although courts traditionally have viewed due process protections in the jurisdictional context to be relevant only in trans-state controversies, the removal of existing territorial perspectives of jurisdiction suggests the potential for their application in intrastate controversies. Assume, for example, that an extremely wealthy resident of Dallas, Texas, sues a relatively poor resident of El Paso, Texas. Assume further that the state venue statute permits suit to be filed in the plaintiff's county of residence. The defendant's burden of having to defend the action in Dallas may be severe, and, therefore, due process violations may exist. In these intrastate cases, a category of private interests may be useful. Courts, however, should evaluate these interests from a third person's view of the facts rather than from the viewpoint of the parties themselves.

A. *Identification of All Relevant Interests*

1. Exclusive Interests

Because the various state legislatures enacted existing jurisdictional statutes in reliance upon the Supreme Court's interpretations of due process limitations on judicial jurisdiction, these statutes reflect little more than the interest of the various states' legislators in expanding the competence of their courts to exercise jurisdiction to the maximum extent permissible under the Supreme Court's interpretations.[79] Existing statutes thus provide little help in ascertaining the scope and content of the various states' exclusive interests in the jurisdictional competence of their tribunals. This inquiry, therefore, must focus on whatever supplemental interests are reflected in postulated policies on jurisdictional issues.[80] Only in this manner can one identify the relevant exclusive interests that reflect the probable demands and expectations which authoritative decisionmakers of the various states would assert if the territorial constraints of existing Supreme Court jurisdictional doctrines were removed.

Before identifying these supplemental exclusive interests, one must first determine when a state has an interest at stake in a jurisdictional controversy. For the purposes of this Article, a state interest may be said to exist whenever either the events precipitating the controversy or the ultimate decision significantly affects the state's people, resources, or institutions. These interests may be implicated regardless of whether the controversy is being liti-

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79. The statutes commonly referred to as "long-arm statutes" exemplify the type of statutes that state legislatures have enacted for such purposes. These statutes typically confer jurisdiction on the courts of a state when a cause of action arises out of the following occurrences, among others: business transacted within the state; the commission of a tort within the state; the ownership, use, or possession of real property in the state; or a marital relationship domiciled in the state. *See, e.g.*, Civil Practice Act § 17, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd Supp. 1981-1982); LA. REV. STAT. ANN. § 13:3201 (West 1968 & Supp. 1981); N.Y. CIV. PRAC. LAW § 302(a) (McKinney Supp. 1980-1981). State legislatures enacted these statutes and amended them to take advantage of the expanded scope of state court jurisdiction permissible under the minimum contacts approach enunciated in *International Shoe*. Certain states enacted even broader statutes, which permit their courts to exercise jurisdiction to the maximum extent that is constitutionally permissible. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (Deering Supp. 1981). This approach is preferable because it permits state courts to exercise jurisdiction without additional legislative action when and if the Supreme Court further expands the scope of the states' authority to exercise jurisdiction. These statutes also avoid any expressed reliance on the minimum contacts, neo-territorial approach of *International Shoe*.

80. These supplemental interests are defined from the standpoint of an observer identifying with all states.

gated in the state's own courts or the courts of a sister state.

Any judicial decision potentially causes impacts that are both direct and indirect. The phrase "direct impacts" refers to the value indulgences or deprivations that a decision imposes upon the parties to the litigation. The phrase "indirect impacts" refers to the value indulgences or deprivations that the ultimate decision may impose upon nonparties who have some relationship either to the litigants themselves or to other state residents. Indirect impacts commonly affect the members of a party's family, a parent corporation of a corporate party, the stockholders of a corporate defendant, a defendant's insurance company, or members of an association that is a party to the litigation. The phrase "ultimate decision" indicates that the inquiry should focus not only on the impacts that the jurisdictional decision may have on the parties and nonparties, but also on the impacts that may result from a decision on the merits of the case. Because the forum in which the controversy is litigated may significantly affect both a party's ability to participate in the litigation and the ultimate resolution of the controversy, this dual focus is necessary. A party who is forced to litigate in a distant state, for example, may effectively be precluded from prosecuting or defending the action; the controversy, therefore, may be resolved against him either because he is unable to present his case to authoritative decisionmakers or because his absence necessitates the entering of a default judgment.

States with potential interests at stake in a judicial jurisdiction controversy thus include the following: (1) the state of residence of each claimant; (2) the state of residence of each defendant; (3) a state in which any of the resources that are the subject of the controversy are located; (4) states in which all or part of the events engendering the controversy occurred; (5) states in which nonparties whom the ultimate decision may significantly affect reside; and (6) the forum state. The exclusive interests of each of these potentially interested states are examined next.

(a) A Claimant's State of Residence

States originally established and continue to maintain judicial systems primarily to provide a forum for the resolution of controversies in which their residents'[81] value positions may be affected.

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81. Individuals or private associations reside in a state whenever their factual relationship with the state reasonably entitles them to the state's enhancement or protective policies. Factors that should be considered in determining whether such a factual relationship

Thus, whenever a state resident becomes involved in a controversy, and the resident decides to have the controversy resolved through the application of the prevailing community policies, the claimant's state of residence has an interest in providing a forum for the resolution of that controversy. This exclusive interest exists even though the events engendering the controversy occurred in whole or in part beyond the territorial bounds of the state. Moreover, because a resident effectively may be deprived of a day in court if he is forced to seek judicial redress in some distant state, a claimant's state of residence has an interest in ensuring that its residents are not subjected to an undue burden in the prosecution of their claims by having to pursue their action in a distant forum.

(b) A Defendant's State of Residence

Not surprisingly, the exclusive interests of a defendant's state of residence mirror those of the state in which a claimant resides. A defendant's state of residence has an interest in providing a forum for the resolution of controversies in which its residents have become involved. It also has an interest in ensuring that its residents are not subjected to an undue burden by being forced to defend litigation in a distant forum and thereby being deprived of the opportunity to present defenses that they might want to assert.

(c) A State in Which Resources That Are the Subject of the Controversy Are Located

When countervailing claims exist for the entitlement to the use or ownership of any resource[82] located within a state, the state has an interest in providing a forum to resolve these claims. This interest is reflected in a variety of state resources policies, including a desire to ensure that resources are freely alienable and available for productive use by designating clearly the people who are entitled to use these resources. In some instances the state may also have an interest in identifying those persons who are responsible for paying state and local taxes on the resources.

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exists include both the length of time that the individual or private association has been acting within the state and the extent and nature of those activities.

82. The term "resource" is used in a broad sense to include not only land and its various valuable components, but also personal property in all its protean forms—including items such as stocks and bonds.

(d) A State in Which the Events Engendering a Controversy Occurred

Just because an event engendering a controversy between nonresidents occurred within the territorial bounds of a state does not automatically mean that the state in which the events occurred has an interest in providing a forum for the resolution of the controversy. Such a state acquires an interest in providing a forum only when the events engendering the controversy have significantly affected—or the ultimate decision in the controversy may significantly affect—the people, resources, or institutions of that state. This situation necessitates an examination of the facts of each case to determine whether the events engendering the controversy or the ultimate decision either has produced or may produce the requisite effect.

A hypothetical can best illustrate this proposition. If some nonresidents, while present in one state, execute an agreement that is to be performed in some other state, the mere execution of the agreement in the former state does not give that state an interest in providing a forum for the resolution of a controversy over the agreement. If, however, the agreement was to be performed in the state of contract, and either the parties' nonperformance or the manner in which the agreement was performed adversely affected the residents of the state, then this state would have an interest in providing a forum for the resolution of the controversy. This interest exists because resolution of the controversy might be advantageous to the state's residents. For example, damages paid for a breach of the agreement ultimately would result in the state's residents being paid for services or products that they provided to the party seeking enforcement of the agreement. The decision in a tort action likewise could significantly affect an injured state resident regardless of whether he is a party to the particular controversy. A reduction or elimination of the available insurance funds poses a significant threat to the resident nonparty. Furthermore, a number of state residents such as doctors and hospitals also may want the controversy resolved so they can receive compensation for the services that they rendered to the injured party.[83]

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83. The existence of these creditors ordinarily does not indicate that the state in which the injury occurred possesses an interest in applying its substantive tort law to resolve the controversy, since tort doctrines are not formulated for these purposes. *See* McDougal, *The New Frontier in Choice of Law—Trans-State Laws: The Need Demonstrated in Theory and in the Context of Motor Vehicle Guest-Host Controversies*, 53 TUL. L. REV. 731, 744-45 (1979). Nevertheless, the reasons why states choose to maintain their judicial

(e) A State in Which Significantly Affected Nonparties Reside

Because the ultimate decision significantly affects these nonparties, either favorably or adversely, the state in which they reside has an interest in providing a forum for the resolution of the controversy. This interest exists even though none of the parties resides in the state and the precipitating events occurred in another state.

(f) The Forum State

Just because a claimant elects to file suit in a particular state does not mean that the state has an interest in providing a forum for the resolution of the controversy. This proposition remains true even though the claimant may have served process on the defendant while the latter was temporarily present in the state. If, for example, none of the parties resides in a particular state, the controversy does not concern any of the state's resources, the ultimate decision will not significantly affect any nonparty residents, and none of the events engendering the controversy occurred in the state, then this state has no interest in providing the litigants with a forum because nothing has occurred that would affect its people, resources, or institutions. In this situation only a presumed interest—an interest based on unrealistic appraisals of the conditions under which the other states, both individually and collectively, would permit the state in question to provide a forum—could exist.[84] On the other hand, because of other exclusive and inclusive interests, a disinterested forum might provide an appropriate tribunal for resolving certain trans-state controversies.[85]

2. Inclusive Interests

The doctrines that relate to adjudicative jurisdiction allocate the business of judicial decisionmaking among the states and provide litigants from different states with fundamental protections. The collective community of states, therefore, possesses certain interests in jurisdictional controversies. The Supreme Court's early determination that the due process clause of the fourteenth amendment imposes limitations on the states' authority to exercise

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systems are broad enough to include the provision of a forum for the resolution of controversies that may benefit these creditors.

84. For an additional discussion of presumed interests, see H. LASSWELL & A. KAPLAN, *supra* note 77, §§ 2.3-.4.

85. For a discussion of these situations, see notes 139-46 *infra* and accompanying text.

judicial jurisdiction[86] is indicative of the significance of these inclusive interests.

As a basic policy, a free democratic society should seek to provide a claimant with at least one forum in which he may timely[87] present his claim against *all* those who allegedly have caused, are causing, or may cause the claimant to suffer value deprivations. A failure to provide such a forum may subject the claimant to conflicting decisions that completely or substantially deny him any redress, even though at least one of a number of defendants clearly should bear responsibility for the claimant's plight. In *Buckeye Boiler Co. v. Superior Court*,[88] for example, the claimant was injured in California when a pressure tank, which Buckeye Boiler had manufactured in Ohio, exploded. A California doctor's negligent treatment in a California hospital aggravated his injuries. Pretrial efforts yielded no conclusion about whether the explosion or the subsequent negligent treatment caused the claimant's incapacitating hemiplegic condition. If the court had forced the claimant to bring an action in Ohio against Buckeye and a separate action against the doctor and hospital in California, it conceivably could have denied him *any* relief; the Ohio court might have determined that the California doctor and hospital were responsible for the claimant's condition, and the California court might have found that the Ohio company was the culpable party. Thus, the claimant would have been denied recovery for his hemiplegic condition even though one of the defendants clearly was responsible for the injury.[89] The collective community of states possesses an interest in preventing such a result, and the due process clause cannot ration-

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86. *See* notes 1-8 *supra* and accompanying text.

87. The exclusive interests reflected in the various states' statutes of limitations limit the duration of this policy to reasonable periods of time. A claimant, therefore, must present his claim to authoritative decisionmakers in a timely manner. For further discussion of the interrelationship between the doctrines that are relevant to judicial jurisdiction and statutes of limitations, see note 146 *infra* and accompanying text.

88. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

89. In the *Buckeye* opinion Justice Peters relied in part on this potentiality for inconsistent results to sustain California's exercise of judicial jurisdiction. *Id.* at 906, 458 P.2d at 67, 80 Cal. Rptr. at 123. He also relied in part on California's interest and the undue burden that would be imposed on plaintiff if he were forced to proceed against Buckeye in Ohio. The justice stated that

> [t]he state has a substantial interest in affording the plaintiff, a California resident, a forum in which he may seek whatever redress is warranted, especially where, as here, it is quite likely that the plaintiff cannot, for financial as well as possible physical reasons, pursue his claim in the distant state where the defendant has its principal place of business.

Id. at 906, 458 P.2d at 66-67, 80 Cal. Rptr. at 122-23.

ally be viewed as compelling it.

An inclusive interest also exists in protecting defendants from exposure to multiple liability for the same conduct. *New York Life Insurance Co. v. Dunlevy*[90] demonstrated that such exposure was possible under traditional jurisdictional doctrines. The case centered on whether Gould had made a valid assignment to his daughter, Mrs. Dunlevy, of the cash surrender value of a life insurance policy that New York Life had issued to Gould. A Pennsylvania jury determined in an interpleader action that no valid assignment had occurred, and the cash surrender value was paid to Gould.[91] In a subsequent action a federal district court in California held that the assignment of the cash surrender value was valid and entered a judgment against the insurance company in favor of Mrs. Dunlevy.[92] The Supreme Court upheld this latter judgment on the ground that the Pennsylvania court lacked jurisdiction over Mrs. Dunlevy because she had not appeared in the action, she was not a citizen of Pennsylvania, and she had not been served with process in the state. According to the Court, therefore, the Pennsylvania court could not affect "her personal rights."[93]

Congress acted quickly to prevent such absurd results in a large number of cases by enacting an interpleader statute.[94] This statute provides that when two or more claimants of diverse citizenship are—or claim that they are—entitled to a fund or debt of five hundred dollars or more, the party who either has the fund or is responsible for the debt can force a resolution of all the conflicting claims in a single action.[95] Of particular significance to the present discussion is Congress' authorization of nationwide service of process under these circumstances.[96] This statute reflects the inclusive interest of the collective community of states in protecting a potential defendant from exposure to multiple liability.

The statute also indicates that the Supreme Court's territorial conception of due process limitations may not be absolute.[97] Al-

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90. 241 U.S. 518 (1916).
91. *Id.* at 520.
92. *Id.* at 519.
93. *Id.* at 521.
94. 28 U.S.C. § 1335 (1976).
95. *Id.*
96. *Id.* § 2361.
97. The Supreme Court has not specifically addressed the issue whether the minimum contacts approach applies to an interpleader action. In a case decided after *International Shoe* but before *Shaffer*, the Supreme Court stressed the utility of the interpleader statute for the resolution of multiple claims to a fund. *See* State Farm Fire & Cas. Co. v. Tashire,

though prior to *Shaffer* an argument could be made that the in personam classification of an interpleader action in *Dunlevy* was erroneous, and that the proper classification was in rem,[98] the *Shaffer* decision effectively precluded any further characterization attempts of this kind. Thus, minimum contacts are required regardless of how the action traditionally might have been characterized.[99] Nevertheless, modifying the facts in *Dunlevy* demonstrates how the interpleader statute permits a state to obtain jurisdiction over a defendant who has not had the requisite minimum contacts. In *Dunlevy* the questionable assignment occurred when both Gould and his daughter, Mrs. Dunlevy, were residents of Pennsylvania. Mrs. Dunlevy, however, moved to California before the interpleader action was filed in Pennsylvania. Had she filed an action against the insurance company in California prior to the action being filed in Pennsylvania, the insurance company could have employed the interpleader statute to force Gould to defend the action in California—even though he had no contacts with that state. Thus, even in the absence of a defendant's consent to jurisdiction, minimum contacts need not exist nnder prevailing jurisdictional doctrines when important inclusive interests are at stake in tlie controversy.

Tlie collective community of states also possesses an interest in providing the greatest possible economy in resolving trans-state controversies. Only in rare circumstances should due process require multiple litigation over identical, closely related, or overlapping factual issues. Sucli repetitive litigation in two or more states sacrifices judicial efficiency and imposes an obvious burden on individual claimants. The collective community of states, therefore, has an interest in precluding, to tlie maximum extent feasible, the unnecessary waste of individual and state resources on repetitive litigation.

The various statutes and court rules permitting class actions clearly reflect tliis particular inclusive interest.[100] Class actions pro-

386 U.S. 523 (1967). Because the resolution of all these claims in a single controversy is such an important goal, the Supreme Court is unlikely to undermine severely the utility of the interpleader statute by requiring all the defendants in the interpleader action to have minimum contacts with the forum state.

98. *See, e.g.*, 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1711 (1972).

99. *See* notes 24-25 *supra* and accompanying text.

100. *See, e.g.*, FED. R. CIV. P. 23. For a listing and brief outline of the various state statutes and court rules that permit class actions, see 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS §§ 1220-1220b (1977).

mote judicial and party economy; they also vividly demonstrate the difficulties inherent in a territorial conception of judicial jurisdiction, since the plaintiffs and the members of the defendant class frequently reside in several states. The Supreme Court has not addressed the issue whether minimum contacts are required in class actions, but several commentators have argued that such contacts should not be a prerequisite to jurisdiction in these cases.[101] A requirement that all defendants in a class action have contacts with the forum state would severely undermine the utility of the class action. Moreover, this requirement would frustrate the interests reflected in the statutes and court rules that authorize class actions. In *United States v. Trucking Employers, Inc.*,[102] for example, black- and Spanish-surnamed employees filed suit alleging that a nationwide class of trucking employers had violated Title VII[103] by engaging in discriminatory practices and policies. To deny a class action in this case because the plaintiff class failed to demonstrate that all the trucking employers had minimum contacts with the forum state would contravene the inclusive interest in resolving these controversies in a single action. This potential scenario supports the proposition that important inclusive interests should outweigh minimum contact protections.[104] This inclusive interest should not simply *permit* consolidation of claims against residents of several states when the facts are identical, closely related, or overlapping; it should *require* such consolidation unless other relevant exclusive and inclusive interests compel separate actions. Only in this manner can individuals and states enjoy a high degree of judicial efficiency and economy in litigation costs.

Just as each state possesses an *exclusive* interest in ensuring

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101. *See, e.g.*, Note, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411 (1974); Note, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 IND. L.J. 841 (1978); Note, *Toward a Policy-Based Theory of State Court Jurisdiction over Class Actions*, 56 TEX. L. REV. 1033 (1978).

102. 72 F.R.D. 98 (D.D.C. 1976).

103. 42 U.S.C. §§ 2000e to 2000e-15 (1976 & Supp. III 1979).

104. The court summarily rejected the claims against some trucking companies who had not been served with process on the ground of a lack of jurisdiction. The court stated,

> It has long been the law in the courts of the United States that in an otherwise proper class action suit, non-party members of the class need not be brought personally before the Court, as long as the requirements of due process—in this context, primarily notice and representativeness of named class members—are afforded them . . . . The class action thus stands as the outstanding exception to the general rule that one is not bound by a judgment *in personam* in litigation to which he/she has not been made a party by service of process.

United States v. Trucking Employers, Inc., 72 F.R.D. 98, 99-100 (D.D.C. 1976).

that its residents are not subjected to an undue burden in having to litigate a controversy in a distant forum, the collective community of states has an *inclusive* interest in avoiding precisely the same situation. Except in relatively rare instances,[105] traditional and existing jurisdictional doctrines reflect this interest. In addition, the collective community of states possesses an interest in ensuring that plaintiffs have open access to forums in which they can effectively present their grievances. Even a superficial examination of the exclusive and inclusive interests identified above reveals that, in the context of particular controversies, conflicting and competing interests may exist. In these cases courts must accommodate the various inclusive and exclusive interests.

B. The Accommodation of Relevant Interests

The objective of decisionmakers who are confronted with a controversy concerning a state's constitutional authority to exercise jurisdiction naturally will vary according to whether the state is an interested or disinterested forum. A state *with* a valid interest in providing a forum for the resolution of the ultimate controversy should have the constitutional authority to exercise judicial jurisdiction unless to do so would unnecessarily deny either the exclusive interests of other states or the inclusive interests of the collective community of states. A state *without* a valid interest in providing a forum should also have the constitutional authority to exercise jurisdiction when that exercise will most appropriately accommodate the exclusive and inclusive interests at stake in the controversy. A systematic interest analysis can be employed to attain these objectives. Its employment in a number of situations will now be examined.

1. An Interested Forum When Only a Single Defendant and a Single Claimant Are Involved in the Controversy

(a) When the Defendant Will Not Be Subjected to an Undue Burden in the Forum State

If an initial inquiry reveals that the state in which the plaintiff filed suit has an interest in providing a forum for the resolution of the controversy, the next question is whether the selected forum will impose an undue burden on the defendant. One might argue that if the forum state is an interested state, it should have the

105. *See, e.g.*, notes 4-6 & 53 *supra* and accompanying text.

authority to resolve the controversy without further inquiry.[106] This approach fails to consider the total impact that the exercise of jurisdiction may have on the other exclusive and inclusive interests at stake in the case and, therefore, may produce decisions that unnecessarily frustrate those interests. The exercise of jurisdiction by one interested state obviously contravenes the exclusive interests of other states that have an interest in providing a forum. This deprivation alone, however, should not preclude a state from exercising jurisdiction, since all states are on an equal footing in terms of judicial authority. A state should be permitted to exercise jurisdiction if to do so would not deny any interests other than the exclusive interests of other states in providing a forum. An opposite conclusion would result in a completely untenable situation: no forum would exist when more than one state has an interest in providing a forum, since exercise by one would defeat the interest of the other.[107] Only a determination of whether an exercise of jurisdiction will impose an undue burden on the defendant will ensure that a court will adequately consider both the exclusive interest of the defendant's state of residence and the comparable inclusive interest of the collective community of states.

Before one can examine the factors that courts should consider in determining whether an undue burden will be imposed on a defendant, a preliminary point warrants emphasis—state lines are of no moment in the determination. A resident of Connecticut, for example, cannot contend seriously that defending an action in New York City will impose an undue burden on him. A valid claim of a potential undue burden exists only when the distance between the defendant's residence and the state in which the plaintiff filed suit becomes so great that the time and expense required to defend the action in the forum state would impose a severe burden on the defendant.

When the forum state is sufficiently distant from the defendant's residence to create the possibility of an undue burden, the

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106. This argument parallels the assertions of Professor Brainerd Currie that the forum in choice-of-law cases should apply its law to resolve the controversy because courts should *not* weigh competing interests. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176-77, *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 182 (1963). For a criticism of this argument in choice-of-law cases, see McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 U.C.L.A. L. REV. 439, 451-52 (1979).

107. This potential situation demonstrates that in many cases a resolution of the controversy will be impossible without denying some interests.

defendant's past activities should be an initial, relevant factor in the decision concerning jurisdiction. If the defendant is a private association[108] that engages in a variety of activities in a large number of states, the argument that defending an action in any of these states—or even in neighboring states—will be unduly burdensome is unpersuasive. This proposition remains true even if the events engendering the controversy did not occur in the forum state. As the activities of a private association become more localized, the potential that litigating in a distant state will impose an undue burden on the defendant increases. A hypothetical that Judge Sobeloff posed in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*[109] demonstrates this notion. Assume that a California private association sells automobile tires primarily to California residents, but that it occasionally sells to nonresidents who are traveling in California. If the association sells a tire to a vacationing Pennsylvania resident, and the tire subsequently proves to be defective and causes an injury to the purchaser after his return to Pennsylvania, then a defense of the action in Pennsylvania—assuming that the private association is strictly a California enterprise with limited financial resources—will impose an undue burden on the California association. On the other hand, if the purchaser were a resident of Arizona, Oregon, or Nevada, and the plaintiff filed suit in one of these states, defense of the action probably would impose only a minimal burden on the private association. Of course, if the tire manufacturer distributes its tires in Pennsylvania or nearby states, it should not be able to claim successfully that defending a lawsuit in Pennsylvania would be overly burdensome.

The above discussion also applies to individual defendants. In many instances an individual's work frequently takes him to a number of states. Therefore, litigation in one of those states—even over controversies that did not arise out of his activities in those states—would not impose an undue burden on the defendant. The California case of *Cornelison v. Chaney*[110] provides an example of such a fact situation. In *Cornelison* a California resident's husband, who was also a resident of California, died when defendant's truck collided with the husband's automobile in Nevada. Defendant, a resident of Nebraska, drove a truck for a living and hauled goods between several states. He had driven to California approxi-

108. Private associations include the whole range of nongovernmental groups such as corporations, unincorporated associations, and partnerships.

109. 239 F.2d 502, 507 (4th Cir. 1956).

110. 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976).

mately twenty times in each of the previous seven years, and he was licensed by the California Public Utilities Commission to haul freight. On each trip he made a delivery to California and picked up a load to be delivered elsewhere. When an individual engages in such systematic activities within a forum state, one cannot rationally conclude that defense of an action in that state—even though the controversy arose elsewhere—will impose an undue burden on the defendant. Even when an individual's activities prove to be less than systematic in the forum state, his recent presence there—whether for business or pleasure—nevertheless may indicate that defending an action within the state will not impose an undue burden on the defendant. Service of process on a defendant within a particular state, however, has no significance apart from demonstrating the defendant's recent presence within that state—a presence that may be an isolated and insignificant factor.[111] If the defendant has not been in the forum state in the recent past, and he resides in a state that is a considerable distance from the forum state, then an increased possibility exists that a defense in the forum state will impose an undue burden on the defendant.

The defendant's wealth also warrants consideration when measuring the ultimate burden that litigating in a foreign forum will impose. Although many instances arise in which the wealth of individuals and private associations is irrelevant to a determination of the scope of protection that society will afford them, a realistic evaluation of the burden imposed by a defense in a distant forum must include a consideration of the litigants' financial resources. Even though courts that apply the fairness standard of *International Shoe* rarely explicitly identify wealth as a criterion,[112] the defendant's resources must influence their decisions.

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111. This explicitly rejects the so-called "transient jurisdiction" rule with which a state obtains jurisdiction over a nonresident defendant by service of process on the defendant while he is temporarily in the state. *See* R. LEFLAR, *supra* note 25, § 27. The *Shaffer* decision, by extending the fairness standard of *International Shoe* to almost all state court exercises of jurisdiction, casts a substantial doubt over the constitutionality of the transient jurisdiction rule. State courts since *Shaffer*, however, bave upheld the constitutionality of transient jurisdiction by relying on the "if he be not present within tbe forum" language the Supreme Court employed in *International Shoe* just before it set forth the minimum contacts test. *See, e.g.*, Humphrey v. Langford, 246 Ga. 732, 733, 273 S.E.2d 22, 23 (1980). A defendant's temporary presence within a state, however, should only be considered in determining whether defense of the action in that state would impose an undue burden on the defendant.

112. *But see* Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966). The court set forth several factors that a court should consider in determining

The consideration proves valuable in giving content to the notions of both fairness and undue burden. For example, if the forum state is California and the defendant is a New York multimillionaire who owns a private jet, reason dictates that defense of a controversy in California would not impose an undue burden on the defendant. If, however, the New York defendant earns only a moderate income and can barely sustain a minimal lifestyle, a determination that defense of an action in California would impose an undue burden on him would be a truism. The same differences in the burdens imposed exist between a multimillion dollar private association and a small private association that is struggling for financial survival. For individual defendants, additional factors such as the individual's health or age may also prove relevant to the determination whether a defense of a particular action would subject that individual to an undue burden.

As the above discussion suggests, drawing the line between a reasonable burden and an undue burden will often prove difficult. In borderline cases courts should presume the existence of an undue burden. Although this presumption may not ensure that defendants will always avoid defending an action in a distant forum,[113] it will give maximum deference to both the exclusive interest of the defendant's state and the inclusive interest of the collective community of states in protecting defendants from undue burdens.

If an examination of the relevant factors outlined above indicates that the defendant will not be subjected to an undue burden in the interested forum which the plaintiff has selected, the forum state should possess the authority to apply its policy and resolve the controversy. In this situation a state's exercise of jurisdiction will not deny any exclusive or inclusive interest at stake in the controversy other than, perhaps, the exclusive interest of some other

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whether an exercise of jurisdiction is "fair," including the following:

> First, the court should consider the nature and size of the manufacturer's business. As the probability of the product entering interstate commerce and the size or volume of the business increase, the fairness of making the manufacturer defend in the plaintiff's forum increases. Second, the court should consider the economic independence of the plaintiff. A poor man is likely to become a public ward if his injuries are uncompensated. Moreover, he may not be able to afford a trip to another jurisdiction to institute suit. In addition, he may feel unable to cope with the prospect of traveling to a strange state. The immobility of our lower economic class is well known.

Id. at 260, 413 P.2d at 738. *See also* Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 906, 458 P.2d 57, 66-67, 80 Cal. Rptr. 113, 122-23 (1969).

113. *See* notes 115-20 *infra* and accompanying text.

state in providing a forum. As previously noted,[114] this isolated denial is not a sufficient reason for depriving a state of the authority to exercise jurisdiction.

(b) When the Defendant Will Be Subjected to an Undue Burden in the Forum State

A conclusion that the defendant *will* be subjected to an undue burden by litigating in a distant forum necessitates a further analysis of other potentially relevant interests. In this situation the inquiry should shift to a determination whether another forum, such as the defendant's state of residence, exists in which the controversy can be adjudicated without imposing a burden on either the plaintiff or the defendant. An examination of the plaintiff's characteristics—including his activities, wealth, and other relevant factors—may reveal that the controversy can be resolved either in the defendant's home state or in some other state without imposing an undue burden on either party. This type of situation would exist, for example, when the plaintiff is a large, nationwide private association that engages in activities in the defendant's state of residence or another nearby state. If such a forum exists, it should be given jurisdictional precedence over the forum that was chosen initially. An opposite result would deny both the exclusive interest of the defendant's state of residence and the inclusive interest of the collective community of states in protecting defendants from undue burdens, and it would further only the initially chosen forum's interest in providing a tribunal for the resolution of the controversy.

Of course, in some instances every available forum may subject at least one party to an undue burden. In this situation either the plaintiff must file in a distant forum or the defendant must defend in a distant forum. A slight modification of the facts in *Kulko v. Superior Court*[115] demonstrates this potential scenario. Assume that a husband and wife, who are domiciled in New York, decide to separate and execute a separation agreement. The wife agrees to permit the couple's two children to remain with their father in New York so the children can graduate from the high school in which they presently are enrolled. She also agrees not to request any child support payments from her husband. The

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114. *See* notes 106-07 *supra* and accompanying text.

115. 436 U.S. 84 (1978). For a brief outline of the actual facts of this case, see notes 176-78 *infra* and accompanying text.

mother then moves to California, where both children later decide to join her. Assume further that the mother earns only the minimum wage, and the father earns less than twice the minimum wage. The wife, therefore, finally decides that she must seek child support payments. If the wife has to sue in New York, she will suffer an undue burden; if she sues in California, the undue burden shifts to her husband. In addition, trying the case in either forum necessarily will frustrate the exclusive interest of the state that is not chosen as the forum state. Thus, an exclusive interest analysis results in a stalemate, and the inclusive interest in protecting litigants from being subjected to an undue burden will be partially promoted and partially frustrated in whichever state the controversy is litigated.

Existing jurisdictional doctrines would require the plaintiff in the above hypothetical to litigate the controversy in the defendant's state of residence because the defendant does not have sufficient minimum contacts with the plaintiff's state of residence.[116] Thus, these doctrines would afford the defendant maximum protection from an undue burden, but they would ignore the undue burden that would be imposed on the plaintiff.[117] In today's society, however, one cannot rationalize this judicial preference for protecting defendants. In many cases a defendant will have no viable defense to the plaintiff's claim, and thus the court will be justified in entering a default judgment against him. In other cases the defenses will be based on certain documents—for example, a check or receipt to show payment of the obligation, or copies of the defendant's income tax returns to prove his financial ability to pay child support—that could be presented without the defendant's having to appear in court. Moreover, the defendant will be insured in the vast majority of tort cases; therefore, an insurance company will reduce the defendant's burden by bearing a large portion of

116. *See* Kulko v. Superior Court, 436 U.S. 84, 100-01 (1978).

117. In *Kulko*, both California and New York had enacted a version of the Uniform Reciprocal Enforcement of Support Act. *Id.* at 98-99. The Court asserted that these statutes provided both parties with an opportunity to resolve the controversy without either party having to leave his home state. *Id.* at 99. Although these statutes theoretically do provide such an opportunity, in practice the procedure frequently proves frustrating and futile. *See* Fox, *The Uniform Reciprocal Enforcement of Support Act*, 12 FAM. L.Q. 113, 124-33 (1978). The statutes often facilitate a last-ditch effort to obtain child support, but they cannot provide a viable alternative to a regular support proceeding when the location of the father is known, and the father has sufficient earnings to provide at least minimal child support. Thus, these acts do not justify overlooking the undue burden that is imposed on the mother by having to litigate a regular child support action in the father's state of residence.

the litigation costs. In still other cases the defendant may believe that he has a valid defense. In these cases the use of existing technology such as video tapes or television may alleviate the burden of defending an action in a distant forum. As the availability, employment, and judicial acceptance of these devices become more widespread, the undue burden that is imposed on a nonresident defendant will be diminished significantly.[118]

In sum, existing jurisdictional doctrines protect nonresident defendants when, as a practical matter, they may not need to be protected. Of course, many of the same considerations articulated above may suggest that a plaintiff will sustain no undue burden by having to prosecute an action in the distant state in which the defendant resides. If, for example, the defendant has no defense and permits a default judgment to be entered against him, the plaintiff will have no need to travel to the defendant's state to litigate the claim. Similarly, the plaintiff frequently may rely exclusively on documentation to present his case and, therefore, will not have to testify in the distant forum. Furthermore, the new devices for presenting testimony are just as available to plaintiffs as they are to defendants.

Although one could pose arguments and hypotheticals to demonstrate that more plaintiffs than defendants will be subjected to undue burdens and vice versa, this exercise would prove endless and unnecessary. Rather than formulating across-the-board doctrines that penalize one party or the other in a particular case, states should embrace jurisdictional doctrines that are flexible enough to react to the facts of any case.

When an interest accommodation stalemate occurs, the decisionmaker should ascertain the weight of the various states' interests in providing a forum. If the inquiry reveals that the initially chosen forum state has a substantial interest in exercising jurisdiction, it should possess the constitutional authority to resolve the controversy. In the hypothetical just discussed,[119] for example, California's substantial interest in providing adequate child sup-

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118. Such devices will aid in the resolution of these types of cases only if one or more of the interested states are willing to absorb the costs of utilizing them. To impose the costs of such equipment on either the party desiring their employment or the losing party would defeat their utility in the present context. Such an expenditure by the states must be viewed as both reasonable and highly desirable.

Of course, "long-distance litigation" may be less desirable than litigation in the traditional mold. Any disadvantages of long-distance litigation, however, are more acceptable than the imposition of an undue burden on either the plaintiff or defendant.

119. *See* notes 115-18 *supra* and accompanying text.

port to children residing in the state would tilt the balance of interests in favor of California's constitutional authority to exercise jurisdiction.

On the other hand, when the analysis reveals that a forum state's interest in providing a forum is not substantial, the interest accommodation stalemate remains. In these cases the plaintiff's state of residence—or another interested forum that the plaintiff selects—as well as the defendant's state of residence, should *all* possess the constitutional authority to exercise jurisdiction, unless the defendant can demonstrate that his burden in defending the action in the forum the plaintiff selected will be *substantially greater* than the burden imposed on the plaintiff if the latter were forced to prosecute the action in the defendant's state of residence. If the defendant can demonstrate such a situation, then the original forum state should defer to the jurisdiction of the defendant's state of residence. If, however, the defendant cannot establish such a disparity in burdens, no rational reason exists to prefer one interested state over another; they all should possess the constitutional authority to exercise jurisdiction.[120]

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120. Because the plaintiff's state of residence will be an available forum under this proposal in an increased number of cases, a danger exists that a plaintiff will fabricate a factual situation to obtain a default judgment against a defendant in a distant state and then rely on the full faith and credit clause to enforce the judgment. These fraudulent practices, of course, frustrate the interests of each state, as well as the collective community of states, but the possibility of such conduct exists even under the minimum contacts approach. Thus, a plaintiff under the current law simply has to allege that the defendant engaged in some activities within the forum state. Under existing jurisdictional doctrines, however, the defendant, if he did not appear in the action in the original forum, may successfully attack the judgment when the plaintiff seeks to enforce it in the defendant's home state on the ground that the original forum lacked jurisdiction over the defendant. *See* Hanson v. Denckla, 357 U.S. 235, 255 (1958). Under the proposed theory of jurisdiction, this attack may fail because the distant forum *would* have jurisdiction. The defendant, however, could attack the judgment for fraud, which courts traditionally have recognized as a valid basis for a state's refusal to grant full faith and credit to a judgment of a sister state. Unfortunately, the availability of the fraud defense is unclear under present doctrines. *See* Pryles, *The Impeachment of Sister State Judgments for Fraud*, 25 Sw. L.J. 697 (1971). In addition, in Christmas v. Russel, 72 U.S. (5 Wall.) 290 (1866), the Supreme Court decided that the rendering state's concept of fraud controls the determination whether fraud exists. *Id.* at 303-07. These two aspects of the existing doctrines create the possibility that a fabricated case would survive a subsequent attack based on fraud.

To avoid this possibility, Congress or the Supreme Court should adopt a uniform federal policy that authorizes a state to refuse to enforce a judgment when the defendant can demonstrate that the judgment was based on fabricated facts. As a limitation on the applicability of such a policy, the defendant would also have to show that defense in the state which rendered the verdict would have imposed an undue burden on him. This uniform federal policy should reduce the likelihood of a successful fraudulent claim. Moreover, a suit against the plaintiff for malicious prosecution, which a steadily increasing majority of states

(c) *When the Controversy Relates to Resources Located in Another State*

The discussion to this point has not dealt with controversies in which one state's interest in providing a forum arises because the subject of the controversy is a resource that is located within its boundaries. Because controversies over land within a state traditionally have created an especially strong interest on the part of that state in resolving the dispute, this analysis focuses on these particular controversies to determine whether the location of the relevant resources should alter the accommodation of interests that this Article has recommended.

The Supreme Court in *Shaffer*[121] rejected the fiction that in rem and quasi in rem actions are proceedings against property rather than people.[122] Prior to *Shaffer*, courts had used this fiction to justify an exercise of jurisdiction by a state in which property was located—regardless of the location of the parties. The *Shaffer* Court, however, quoted with approval the following statement by Justice Holmes: "All proceedings, like all rights, are really against persons."[123] Any rational jurisdictional theory must accept this proposition. Such a theory also must balance the interests of both the parties' states of residence and the state in which the land is located. Just because land is the subject of a controversy does not alter the results in the previous discussion concerning the exclusive interests of the states in which the parties reside and the relevant inclusive interests; all those interests remain at stake in the controversy. Thus, courts should accommodate the relevant interests in the manner recommended unless the interests of the state in which the land is located dictate a different accommodation.

As several choice-of-law commentators have noted, courts frequently exaggerate the interests of the state in which land is located.[124] The state, of course, has interests in providing a forum for the litigation of these controversies and in clearly establishing

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recognizes, would provide an additional deterrent to these claims. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 120 (4th ed. 1971).

121. Shaffer v. Heitner, 433 U.S. 186 (1977); *see* notes 24-25 *supra* and accompanying text.

122. 433 U.S. at 207.

123. *Id.* at 207 n.22 (quoting Tyler v. Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814, *appeal dismissed*, 179 U.S. 405 (1900)).

124. *See, e.g.*, R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 8.22 (2d ed. 1980); Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. (1967); Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095 (1965).

ownership of land that is located within its boundaries. The former of these two interests, however, carries no greater weight than the interests of the states of residence of parties who are claiming ownership of or authority to use the land. As for the state's interest in clearly establishing ownership of its land, a decision by a sister state court usually will protect this interest as well as a decision by its own courts. Several states recently have provided precisely this type of protection of a neighboring state's interests,[125] even though the full faith and credit clause does not compel them to do so.[126] The judgment of the sister state, of course, must be recognized and appropriately recorded before it would prejudice subsequent purchasers or creditors.[127]

In some actions dealing with land plaintiffs can join unknown claimants as parties to ensure that the ownership question is resolved completely.[128] The existence of these unknown claimants should not alter the accommodation of interests that is suggested here, since courts in another interested state can join unknown claimants just as easily as those in the state in which the land is located. Moreover, courts can require notice by publication in a newspaper in the county in which the land is located to satisfy the due process notice requirement enunciated in *Mullane v. Central Hanover Bank & Trust Co.*,[129] which entails providing notice that is reasonably calculated under the circumstances to notify unknown claimants of the suit.[130] As was noted earlier,[131] these notice requirements—although they are an essential component of due process—are separate and distinct from the issue of when a state has the authority to exercise jurisdiction.

In sum, when land—and a fortiori other resources—is the subject of a controversy, the state in which the land is located constitutes merely a potential forum that may or may not be the appropriate one in terms of the exclusive and inclusive interests at stake

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125. *See, e.g.*, Rozan v. Rozan, 49 Cal. 2d 322, 317 P.2d 11 (1957); Zorick v. Jones, 193 So. 2d 420 (Miss. 1966); Higginbotham v. Higginbotham, 92 N.J. Super. 18, 222 A.2d 120 (App. Div. 1966); McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

126. *See* Fall v. Eastin, 215 U.S. 1 (1909).

127. *See* 6A R. POWELL, THE LAW OF REAL PROPERTY ¶ 916 (1980).

128. This is, of course, the traditional in rem action in which unknown claimants can be joined. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.13 (2d ed. 1977). Such quiet title or confirmation of title actions rarely will be precluded even after the *Shaffer* decision. *See* Shaffer v. Heitner, 433 U.S. 186, 207-09 (1977).

129. 339 U.S. 306 (1950).

130. *Id.* at 314.

131. *See* notes 47-48 *supra* and accompanying text.

in the particular controversy. If a forum state's decisionmakers believe the particular controversy can best be resolved by the courts of the state in which the resource is located, it can voluntarily defer to that state's authority to exercise jurisdiction.[132] Similarly, the state in which the events engendering the controversy occurred should not emerge as the only proper forum. Courts should consider this state as simply one available forum that may or may not be the most suitable one in light of applicable exclusive and inclusive interests.

2. An Interested Forum When Multiple Defendants or Multiple Claimants Are Involved in the Controversy

(a) Multiple Defendants

The appropriate accommodation of the interests at stake in state judicial jurisdiction controversies will vary as the numbers of parties and interested states increase. When a case contains multiple defendants, the characteristics of the various defendants may differ greatly. If, however, their characteristics are similar, and the forum that the plaintiff has selected will not impose an undue burden on any of the defendants, then the forum state should possess the authority to exercise jurisdiction. On the other hand, if the forum selected by the plaintiff does impose an undue burden on all the defendants, one must determine whether another forum exists in which none of the parties—either the plaintiff or the defendants—will suffer an undue burden. If no such forum exists, the appropriate accommodation of the interests at stake in the particular controversies requires a consideration of the defendants' residences or places of business.

When the defendants reside in a number of states, the interested forum state that the plaintiff has selected should possess the authority to exercise jurisdiction over the entire controversy. This conclusion promotes the inclusive interests both in resolving an entire controversy in a single action and in economy for individuals and states. When the defendants all reside in a single state, the resolution of the controversy in either the plaintiff's or the defendants' state of residence would promote the same inclusive interests. In this latter situation the plaintiff should proceed in the

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132. Courts typically effectuate this deference by invoking the doctrine of *forum non conveniens*. For a general discussion of this doctrine, see Barrett, *The Doctrine of* Forum Non Conveniens, 35 CALIF. L. REV. 380 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929).

defendants' state of residence because the defendants' state's multiple, exclusive interests in protecting its residents from undue burdens outweigh the plaintiff's state's single, exclusive interest in protecting him from such burdens.[133] Of course, if multiple claimants from the same or different states are involved in the controversy, either the state that the claimants have selected or the defendants' state should have jurisdiction to adjudicate the controversy. The claimants undoubtedly will select the forum that they believe will impose the least burden on them as a group. This predictable pattern refutes the notion that to select the proper jurisdiction one simply should count the number of claimants and defendants and require the claimants' state to yield jurisdiction whenever the defendants outnumber the claimants. An appropriate accommodation of conflicting interests does not require such mathematical precision. A forum should yield to another state only when the forum's exercise of jurisdiction would deny a substantially greater number of exclusive interests than it would promote.

If the characteristics of the multiple defendants vary significantly, defending the action in the forum that the plaintiff has selected may subject some but not others to an undue burden. When this situation arises, one should determine first whether another forum exists in which the controversy could be litigated without subjecting any of the parties to an undue burden. If, for example, the plaintiff files an action in the state in which the events engendering the controversy occurred, and the plaintiff resides in a state that is close in distance to the state in which the potentially overburdened defendants reside, either the plaintiff's or the defendants' home state may provide a forum in which none of the parties will be burdened. If such a forum exists, the state that the plaintiff has selected should yield to the jurisdiction of that forum. Litigation in this mutually convenient state would promote not only the exclusive and inclusive interests in protecting litigants from having to litigate in an unduly burdensome forum, but also the interests of the various states and the collective community of states in promoting economy by resolving the controversy in a sin-

133. A plaintiff might file individual suits against the various defendants in his home state in the hope of obtaining jurisdiction over all of them in that state. If this tactic is attempted, any one of the defendants should be permitted to have all the actions dismissed for lack of jurisdiction. Only in this manner can plaintiffs be deterred from attempting to evade the proposed jurisdictional policies. If the actions are dismissed, the plaintiff will be forced to file the action in the defendants' state of residence where it should have been filed originally.

gle action. This latter interest negates the possibility of dismissing the actions against the unduly burdened defendants and then proceeding against the remaining defendants in the forum that the plaintiff has selected.

If no forum is available in which the parties can litigate the controversy without subjecting one or more of them to an undue burden, then the focus must shift to the claims that the plaintiff has asserted against the various defendants. If the plaintiff has sued the defendants in the alternative—which would create the possibility that severing the claims would expose the claimant to conflicting decisions—the forum that the plaintiff has selected should possess the authority to exercise jurisdiction. Although this exercise of jurisdiction denies both the exclusive interests of the states in which the overburdened defendants reside and the comparable inclusive interests of the collective community of states, to deny the forum state jurisdiction would destroy the inclusive interest in providing a single forum in which all those potentially responsible for a claimant's deprivations can be subjected to the applicable community policies. This inclusive interest warrants primacy in these situations to prevent the unacceptable outcomes that can occur when courts render conflicting decisions in a severed controversy. The promotion of this inclusive interest also would avoid the type of dilemma presented in *Buckeye Boiler.*[134] In addition, as was discussed above, in some situations courts can employ certain techniques to alleviate substantially the burdens that are imposed on a defendant by litigating in such a forum.[135]

On the other hand, if the plaintiff does not sue the various defendants in the alternative, the inclusive interest in providing a single forum should not control the determination of jurisdiction. This situation, however, does not automatically justify severing the claims against those defendants who will be subjected to an undue burden. The question of severance, which would force the plaintiff to seek other forums, depends first on the extent to which the claims are factually interrelated. When the facts are closely related and the defenses of the various defendants are identical or similar, the initially chosen forum should exercise jurisdiction over the entire controversy in a single action to promote the exclusive and inclusive interests in economy. When the facts are loosely related,

134. Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *see* notes 87-89 *supra* and accompanying text.

135. *See* note 118 *supra* and accompanying text.

however, and the defendants' defenses vary widely, the possibility exists that the claims against the overburdened defendants should be severed. In making this determination a court should analyze each defendant's situation as if only a single plaintiff and a single defendant were involved in the case.[136] If the analysis reveals that the present forum should yield jurisdiction to another state, then the court should sever the claims against this particular defendant. If, however, the analysis reveals that the initially chosen forum should possess the authority to adjudicate the claim, the court should proceed to resolve the action against the defendant together with the claims against those defendants who are not subjected to an undue burden.

(b) Multiple Claimants

When multiple claimants are involved in the controversy, they ordinarily can agree on a forum that will be the most convenient for them as a group. If they cannot reach agreement, however, two possibilities exist: those claimants who believe that the forum which a majority of the group has selected is unacceptable can refuse to join in the action and file suit in a forum that they find acceptable, or the dissatisfied group may select certain members to represent them in a class action.[137] However they proceed, the appropriate analysis for determining jurisdiction is the same as when only a single claimant is involved in the controversy. Thus, if litigation in the forum that the claimants have selected will not overburden any defendant, then that forum should resolve the controversy. If one or more of the defendants will be unduly burdened, the parties should seek a forum in which litigation will not unduly burden any defendants or claimants. If this pursuit is successful, the state that the claimants have selected should defer to the jurisdiction of the more convenient forum.

In the absence of such an option, the determination of the appropriate forum or forums depends on the plaintiffs' claims and the interrelationship of the facts. If the plaintiffs are suing the defendants in the alternative, or the facts are closely interrelated, the forum that the plaintiffs have selected should resolve the controversy. This arrangement promotes the inclusive interests in judicial economy and in providing a forum in which courts can apply com-

136. *See* notes 115-20 *supra* and accompanying text.

137. For references to the statutes and court rules that authorize these actions, see 1 H. NEWBERG, *supra* note 100, §§ 1220-1220b.

munity policies in a single action.[138] If neither of these situations exist, the court should consider severing the actions against those defendants who will be overburdened, taking into account the burdens that will be imposed on each claimant and each defendant.

3. A Disinterested Forum

This Article has already identified four situations in which a suit in a disinterested forum may accommodate most appropriately the exclusive and inclusive interests at stake in a controversy. The first situation exists in a case between a single plaintiff and a single defendant when the forum that the plaintiff has selected would impose an undue burden on the defendant, and suit in other interested forums would impose an undue burden on either the defendant or the plaintiff.[139] In this situation a disinterested forum in which neither the plaintiff nor the defendant would be subjected to an undue burden may be available. If, for example, the plaintiff is an Indiana resident and the defendant is a resident of New York, a suit in Pittsburgh, Pennsylvania—a city that is approximately halfway between the residences of the parties—conceivably may impose no undue burden on either party. Although a Pennsylvania court's exercise of jurisdiction in such a case would defeat the exclusive interests of Indiana and New York in providing a forum, it would promote the exclusive and inclusive interests in protecting both parties from an undue burden. These latter interests deserve primacy in cases of this kind, since the interests in protecting both parties from undue burdens outweigh the parties' home states' interest in providing a forum for the resolution of the controversy.

Because states maintain judicial systems primarily for the resolution of their residents' controversies, a disinterested forum may not wish to provide a forum for a controversy between nonresi-

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138. Courts need not separate this kind of case into multiple actions to ensure that only a minimal number of the defendants will be subjected to an undue burden. Those defendants who will *not* be subjected to a burden will represent adequately the overall class of defendants on common questions of law and fact. This representation should relieve most, if not all, of the burden that would be imposed on those defendants who would suffer if they were forced to present the common defenses themselves. In those situations in which issues exist that are peculiar to a particular defendant, forcing the plaintiffs to sever these claims and resolve them in some other forum would create complex problems by forcing other state courts to become familiar with all that has transpired in the initial forum. Although a court could proceed in such a manner, some claimants would be subjected to an undue burden in these cases, and the potential harm from this burden outweighs the benefits of severing the claims.

139. *See* notes 115-20 *supra* and accompanying text.

dents. In these cases, however, an exercise of jurisdiction by the disinterested forum will accommodate the common interests most appropriately; the full faith and credit clause, therefore, should require the disinterested state to provide a forum in its courts that are otherwise competent—according to its laws—to hear such a case. In *Broderick v. Rosner*[140] the Supreme Court stated,

> The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard therein is subject to the limitations imposed by the Federal Constitution. . . . A "State cannot escape its constitutional obligations [under the full faith and credit clause] by the simple device of denying jurisdiction in such cases to courts otherwise competent."[141]

Thus, a disinterested state, if it is a convenient forum, constitutionally should be able to refuse to exercise jurisdiction only in rare instances.[142]

The second situation in which a disinterested state may be the most appropriate forum for promoting relevant exclusive and inclusive interests occurs when a single plaintiff selects a forum that will impose an undue burden on each of the multiple defendants.[143] The third situation arises when a single plaintiff has selected a forum that will impose an undue burden on only some of the multiple defendants.[144] In both of these situations, a disinterested state may exist in which neither the plaintiff nor any of the defendants will be overburdened. If such a disinterested forum exists, it should resolve the controversy, since to do so would promote the exclusive and inclusive interests in protecting parties from an undue burden, the interests in providing a single forum for the resolution of interrelated controversies, and the interests in state and individual economy. Of course, the disinterested forum's exercise of jurisdiction contravenes the other states' interests in providing a forum. The interests that such an exercise of jurisdiction promotes, however, outweigh these exclusive interests.

The fourth situation in which jurisdiction might belong in a disinterested state arises when multiple claimants and multiple defendants are involved in the controversy, and the forum that the plaintiffs have selected will impose an undue burden on one or

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140. 294 U.S. 629 (1935).

141. *Id.* at 642 (quoting Kenney v. Supreme Lodge, 252 U.S. 411, 415 (1920) (citations omitted)). *See also* Hughes v. Fetter, 341 U.S. 609 (1951).

142. The *Broderick* Court identified one such instance: a state need not enforce the penal laws of a sister state. 294 U.S. at 642.

143. *See* notes 133-35 *supra* and accompanying text.

144. *See* note 136 *supra* and accompanying text.

more of the defendants.[145] Again, a disinterested forum may exist in which none of the plaintiffs or the defendants will suffer an undue burden. If so, that forum should exercise jurisdiction because it will—for the same reasons cited in the second and third situations—accommodate most appropriately the interests at stake in the controversy.

Although the discussion above presumed that the claimants initially selected an interested forum, the *original* filing in a disinterested forum should be not only possible but encouraged. This filing would require only one jurisdictional inquiry, and in many cases it would impose no burden on any of the parties during the resolution of the jurisdictional issue itself.

Yet another situation exists in which a disinterested forum should exercise jurisdiction to adjudicate: trans-state controversies in which no state has an interest in the controversy. For example, two United States citizens, who are both domiciled in Canada, may execute a contract in this country to be performed in this country. If a controversy arises over the contract, no state may have an interest in providing a forum or in protecting the parties. In these situations the exercise of jurisdiction by a disinterested forum promotes the inclusive interest in providing at least one forum in which a controversy can be resolved—so long as the suit is filed in a timely manner.[146]

4. A Response to Two Potential Criticisms of a Systematic Interest Analysis Theory

Two potential criticisms of the theory suggested in this Article warrant special consideration. First, some critics might argue that the approach may encourage forum shopping by claimants. Admittedly, the theory may increase the number of forums that are available in some controversies. For example, when at least one party will be unduly burdened in each available forum, and the parties will be subjected to approximately the same burden in all

145. *See* notes 137-38 *supra* and accompanying text.

146. Many jurisdictional controversies arise because a plaintiff has failed to file an action within the period prescribed by the statute of limitations in one or more interested states. The frustrated plaintiff may attempt to select another forum—which may or may not have an interest in deciding the case—in which the statute of limitations has not run. Certain choice-of-law theories encourage this forum shopping by characterizing statutes of limitations as procedural law. *See* R. WEINTRAUB, *supra* note 124, § 3.2C2. A more rational approach, however, is to treat statutes of limitations as substantive law and apply the statute that best promotes the relevant policies and interests. *See id.* This alternative approach, of course, would severely limit forum shopping to avoid statutes of limitations.

the potential forums, the claimant may file suit in his state of residence even when the defendant had no minimum contacts with that state. Criticisms of jurisdictional doctrines on the ground that they permit forum shopping usually spring from an assumption that different forums will apply dissimilar policies to resolve the same types of controversies.[147] Although courts indeed tend to prefer and apply the policies of the state in which they preside,[148] that fact alone fails to support a criticism based on a theory's potential for encouraging forum shopping.[149] Moreover, in the overwhelming majority of cases the appropriate employment of most contemporary choice-of-law theories will *not* produce divergent decisions in different forums.[150] Only Currie's governmental interest analysis theory would necessarily result in inconsistent outcomes, and this result would be true only in certain types of cases.[151] As states become less provincial in their outlook on choice-of-law issues, claimants' forum shopping will decrease proportionately in significance. In the meantime, commentators who fear forum shopping should focus their analysis on a modification of choice-of-law theory and practice, not jurisdictional theories.

A second potential criticism of the interest analysis theory is that it fails to consider the *substantive* interests of a potential forum in applying its laws to resolve a particular controversy.[152] Substantive interests, however, are not concerned with the question

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147. A prime example of such forum shopping can be found in Allstate Insurance Co. v. Hague, 101 S. Ct. 633 (1981). The Constitution limits a state's authority to apply its law to a controversy. U.S. CONST. art. IV, § 1. The *Hague* case demonstrates that the scope of due process limitations in this context is far from clear. Note, however, that the Supreme Court places far greater stress on interests in those cases than it does in jurisdictional cases. *See* 101 S. Ct. 633.

148. *See* Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 227-33 (1977).

149. A perusal of any conflict-of-laws casebook reveals a fairly sizeable number of cases in which the forum applied law other than that of its own state—even when the forum state was an interested state. *See, e.g.*, Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); Haag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961); Casey v. Monson Constr. & Eng'r Co., 247 Or. 274, 428 P.2d 898 (1967).

150. For a brief outline of most of the contemporary choice-of-law theories, as well as an appraisal of the extent to which they encourage the application of the forum's law, see McDougal, *supra* note 39, at 242-57.

151. For both an outline and a criticism of Currie's theory, see *id.* at 237-42. *See also* McDougal, *supra* note 106, at 449-50.

152. All the commentators cited in note 55 *supra* suggest that substantive interests should play some role in jurisdictional decisions. Some commentators suggest that substantive policies either have played or should play a role in jurisdictional decisions. *See, e.g.*, R. CRAMTON, D. CURRIE & H. KAY, *supra* note 52, at 557; Woods, *supra* note 55, at 896-97 (limited usually only to a forum's choice-of-law rules).

whether a state has the authority to exercise judicial jurisdiction; rather, their focus is on the question of what policy to apply *after* the state is held to have the authority to exercise jurisdiction. In other words, jurisdictional policies and interests seek to allocate judicial business in trans-state controversies properly; substantive interests deal with the application of the appropriate policies to resolve trans-state controversies. Substantive interests reflect demands and expectations that have nothing to do with the selection of a forum. They are significant in jurisdictional disputes only to the extent that they help determine the strength of a state's interest in providing a forum.

C. *An Application of the Interest Analysis Theory to Selected Supreme Court Decisions*

1. *McGee v. International Life Insurance Co.*[153]

In *McGee* plaintiff, a California resident, filed suit against defendant International Life Insurance Company to recover on a life insurance policy that the Empire Mutual Insurance Company had originally issued. International Life had assumed the insurance obligations of Empire Mutual, and the insured, plaintiff's son, had accepted International Life's offer, which had been mailed to him in California, to insure him on the same terms that Empire Mutual's original policy had contained. International Life later refused to pay on the policy because it believed that the son had committed suicide, a cause of death which was expressly excluded from the policy's coverage.

After determining that the insurance contract had a substantial connection with California, the Court recognized California's interest in providing a forum and the severe damage its residents would incur if they were forced to sue insurance companies in a distant state. The Court stated,

> 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. . . . Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process.[154]

The Court, albeit in terminology that was slightly different from

153. 355 U.S. 220 (1957).

154. *Id.* at 223-24. The first of these sentences clearly focuses on the undue burdens imposed on a plaintiff forced to litigate in a foreign forum; the second sentence stresses the mere "inconvenience" imposed on defendant by defending the action in California.

that which this Article has employed, concluded in effect that while plaintiff *would* be subjected to an undue burden if forced to litigate in defendant's state of residence, defendant *would not* be subjected to an undue burden if required to defend the action in plaintiff's state of residence.[155] It concluded that California properly could exercise jurisdiction.[156] This conclusion appropriately accommodated the interests at stake in the controversy. The Court's decision promoted both California's interest in protecting its residents from having to litigate in an unduly burdensome forum and the inclusive interest in protecting all litigants from being unduly burdened. Furthermore, the decision frustrated only the interest of the defendant's home state in providing a forum. Thus, the Supreme Court's decision in *McGee* is the same decision that would have been reached if the Court had employed the interest analysis theory presented in this Article.

2. *Hanson v. Denckla*[157]

One year after *McGee,* the Supreme Court in *Hanson* for the most part abandoned the approach it had taken in the earlier decision. By announcing the "purposefully availing" requirement,[158] the Court adopted a view of jurisdiction that was even more territorially oriented than the *International Shoe* approach. In *Hanson* Mrs. Donner, then a domiciliary of Pennsylvania, executed a trust instrument in 1935 in which she designated the Wilmington Trust Company of Delaware as trustee. She reserved a life interest in the income from the trust and provided that the corpus of the trust be distributed on her death to whomsoever she should appoint by an inter vivos or testamentary instrument. Mrs. Donner moved to Florida in 1944, but she maintained regular communication with the trust company.[159] In 1949 she executed an inter vivos power of appointment distributing $200,000 of the trust's corpus to each of two trusts that her daughter, Elizabeth Hanson, had previously created for the benefit of her own two children and their issue. The Delaware Trust Company oversaw both of these trusts as trustee. The power of appointment also made small appointments in favor

155. *Id.*

156. *Id.* at 224.

157. 357 U.S. 235 (1958).

158. *See* note 161 *infra* and accompanying text.

159. Justice Black emphasized this fact in his dissenting opinion. 357 U.S. at 259 (Black, J., dissenting). The majority, however, dismissed it as "several bits of trust administration." *Id.* at 252.

of a hospital and six servants. Mrs. Donner appointed the balance of the Wilmington Trust Company trust corpus—in excess of $1,000,000—to her executrix for a distribution that would be consistent with the residuary clause of her will. Mrs. Donner died in 1952, and her will was admitted to probate in Florida. In the probate proceeding the residuary legatees asserted that the inter vivos power of appointment executed in Florida was not effectively exercised, and that, therefore, the funds should pass to them under the residuary clause.

The issue in *Hanson* was whether Florida constitutionally could exercise jurisdiction over the Delaware trustees—the $400,000 had been paid to the Delaware Trust Company shortly after Mrs. Donner's death—the hospital, the servants, and certain potential beneficiaries, none of whom was a resident of Florida. The Florida Supreme Court held that "jurisdiction to construe the will carried with it 'substantive' jurisdiction 'over the persons of the absent defendants' even though the trust assets were not 'physically in this state.' "[160] The United States Supreme Court, however, disagreed and stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[161] The Court concluded that the Wilmington Trust Company was not subject to Florida jurisdiction because it had performed no "purposefully availing" act. Since the majority determined that the trustee was an indispensable party to this type of action under Florida law,[162] it reversed the Florida judgment against all the parties, including those who resided in Florida.

Because the *Hanson* decision turned on Florida's ability to obtain jurisdiction over the Delaware trustee, any analysis of the case initially must focus on the controversy between the residuary legatees and the Delaware trustee. Under an interest analysis, both Florida and Delaware possessed an interest in providing a forum for the resolution of the controversy, since Florida was the state of residence of the primary beneficiaries in the allegedly invalid power of appointment, and Delaware was the state of residence of

160. *Id.* at 243.

161. *Id.* at 253 (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

162. *Id.* at 254. Justices Black, Burton, and Brennan argued in dissent that even if the majority was right in its jurisdictional holding, the issue whether the trustee was an indispensable party should have been remanded to the Florida courts. *Id.* at 261-62 (Black, J., dissenting).

the trustee and the location of the trust funds. Because Florida had such an interest, the question would be whether forcing the Delaware trustee to defend the action in Florida would infringe upon Delaware's interest in protecting its residents from an undue burden. One cannot contend persuasively that one of Delaware's larger financial institutions[163] would have been unduly burdened by defending an action in Florida. Such a contention would be even more untenable in the *Hanson* case because the Delaware trustee was a disinterested party whose role in the litigation should have been minimal.[164]

Since Florida thus was an interested state and the trust company would not have been subjected to an undue burden, the Court should have sustained Florida's jurisdiction over the Wilmington Trust Company. Once the Court made that decision, the issue would be whether Florida possessed the authority to exercise jurisdiction over *all* the nonresident defendants. Although the Delaware Trust Company is a smaller financial institution than the Wilmington Trust Company,[165] it certainly is not so small that defending an action in Florida would have overburdened it. Unfortunately, the opinion does not mention any facts about the residence or characteristics of the other defendants.[166] Some of the defendants such as Mrs. Donner's former servants would have suffered an undue burden if they had been forced to defend the action in Florida and had resided in a distant state. Thus, if no interested forum existed in which all the parties could have participated without having been subjected to an undue burden, then the question would be whether the claims against the overburdened defendants should be severed from the other claims. All the claims in *Hanson* hinged on the same facts, and the potential defenses available to the various defendants thus were either identical or very similar. Therefore, the inclusive interests both in resolving an interrelated controversy in a single action and in judicial and indi-

163. As of December 31, 1979, the Wilmington Trust Company's total assets equalled $1,392,526,000. 1 AM. BANK DIRECTORY, Del. 7 (Spring 1980). Although the assets probably were less when this litigation occurred, the trust company obviously was not a struggling financial institution.

164. Justice Douglas emphasized this factor in his dissenting opinion. 357 U.S. at 263 (Douglas, J., dissenting).

165. As of December 31, 1979, the Delaware Trust Company had total assets of $551,337,000. 1 AM. BANK DIRECTORY, Del. 9 (Spring 1980).

166. The hospital was the Bryn Mawr Hospital located in Pennsylvania. Brief for Appellants at 7, Hanson v. Denckla, 357 U.S. 235 (1958). The briefs, however, do not disclose the residence of all the servants, three of whom were not even made defendants. *Id.*

vidual economy support a conclusion under an interest analysis that Florida should have had the authority to exercise jurisdiction over all the defendants.[167]

3. *Shaffer v. Heitner*[168]

Almost two decades elapsed after *Hanson* before the Supreme Court made another definitive statement on the question of judicial jurisdiction. In *Shaffer* the Court effectively eliminated the distinction between in rem, quasi in rem, and in personam causes of action by extending the *International Shoe* protections to all state court exercises of jurisdiction.[169] Although this aspect of the Court's holding is praiseworthy, the later portion of the opinion, in which the court applied the minimum contacts test to the facts in *Shaffer,* probably failed to accommodate appropriately the interests at stake in the case.

In *Shaffer* plaintiff, a nonresident of Delaware who owned one share of Greyhound Corporation stock, filed a shareholder's derivative action in Delaware against the corporation, its wholly owned subsidiary Greyhound Lines, Incorporated, and twenty-eight past and present officers and directors of the corporation and its subsidiary. Although Greyhound Corporation was a Delaware corporation with its principal place of business in Arizona, none of the individual defendants resided in Delaware. Plaintiff alleged that the officers and directors violated their fiduciary duties to Greyhound by causing the corporations to engage in activities in Oregon that ultimately exposed the corporation and its subsidiary to a $13,000,000 antitrust judgment and criminal contempt fines of $600,000. The Supreme Court held that the individual defendants had no minimum contacts with Delaware, and that Delaware's exercise of jurisdiction thus confiicted with the due process limitations on state

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167. Ultimately the two daughters who had already received more than $500,000 each would have prevailed because Mrs. Donner's inter vivos power of appointment was invalid. This result obviously defeats the decedent's expectations about the distribution of her estate and, therefore, is unsatisfactory. On the other hand, to distort jurisdictional policies to avoid an inequitable result in a single case is even more unacceptable, since it only serves to penalize future plaintiffs. Even if a desire to avoid an unjust result is not what motivated the *Hanson* Court, which is unlikely, the decision is still unacceptable because it fails to accommodate the interests at stake appropriately—unless one assumes that no party would have been subjected to an undue burden in a Delaware forum. Considering the wealth of the plaintiffs, this assumption would be quite reasonable.

168. 433 U.S. 186 (1977).

169. *Id.* at 212.

power.[170]

Because Greyhound was incorporated in Delaware, under an interest analysis theory that state possessed an interest in providing a forum for the resolution of the controversy. Since the initially chosen forum had such an interest, therefore, the question under the theory would be whether one or more of the individual defendants would suffer an undue burden by defending the action in Delaware. In *Shaffer* the individual defendants resided in states located in almost every region of the country.[171] Since Greyhound is a major national corporation, and since a national corporation's officers and directors usually are selected for their business acumen, one can assume that all Greyhound's officers and directors were relatively wealthy individuals. If this assumption is correct, then Delaware's exercise of jurisdiction in *Shaffer* would not have overburdened any of the defendants and would have contravened only the equivalent interests of other states in providing a forum. If the assumption is incorrect, however, then some of the defendants *would* have suffered an undue burden if the Court had forced them to litigate in Delaware. The question then would be whether an alternate forum—interested or disinterested—existed in which this burden could be eliminated. Because of the lack of information on the individual defendants' characteristics, however, one cannot determine whether such a forum existed. If it did, then under an interest analysis theory Delaware would have to yield jurisdiction because the other forum could adjudicate the dispute with a minimal effect on the exclusive and inclusive interests at stake in the controversy. If no such forum existed, however, the question would be whether the claims against the overburdened defendants should be severed. Although the opinion does not detail all the plaintiff's claims or all the defendants' defenses, the facts and potential defenses that were relevant to the various defendants likely were either very similar or identical. If so, an interest analysis theory would dictate that Delaware should have the authority to exercise jurisdiction to adjudicate the entire controversy and thereby promote the inclusive interests in judicial and individual economy. If the facts and defenses were only loosely related, however, the theory would require that the claims against

170. *Id.* at 213-17.

171. Nine defendants resided in Arizona, eight in California, three in New York, two in Connecticut, and one each in Texas, New Jersey, Pennsylvania, Georgia, and Oklahoma. The residence of the other defendant was unknown. Appendix to Appellant's Jurisdictional Statement at A26, Shaffer v. Heitner, 433 U.S. 186 (1977).

the defendants subjected to an undue burden should have been severed for litigation in other, more appropriate forums.

One other facet of the *Shaffer* opinion requires specific consideration. The Court in *Shaffer* placed considerable emphasis on the absence of a Delaware statute that expressly sanctioned the competence of its courts to exercise jurisdiction over officers and directors of Delaware corporations. In fact, the Court hinted that it would have sustained jurisdiction if Delaware had had a statute that, like some states, "treats acceptance of a directorship as consent to jurisdiction in the State."[172] Because Delaware undoubtedly possesses an interest in providing a forum to resolve controversies like the one in *Shaffer,* the presence or absence of a specific jurisdictional statute should be irrelevant. No reason exists to require state legislatures to consider and enact long lists of special jurisdictional statutes that expressly assert their state's interests in providing forums for various types of controversies. In addition, because the issue in these cases concerns the limitation that the due process clause imposes on state authority, the relevance of a specific state statute is difficult to comprehend; states cannot change the scope or content of due process limitations merely by enacting a statute.

This facet of the *Shaffer* opinion poses another, more significant question: When should a defendant, who will be subjected to an undue burden if forced to litigate in a particular forum, be considered to have waived any objections to the state's jurisdiction by acts or statements arising prior to the controversy? The fictional consent statutes, which can more accurately be described as acquiescence statutes, are not definitive on the question.[173] These stat-

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172. 433 U.S. at 216.

173. Nonresident motorist statutes were constitutionally upheld in Hess v. Pawloski, 274 U.S. 352 (1927), and are a common type of fictional consent statute. The statute in *Hess* provided that a nonresident who operated a motor vehicle upon the public highways of the state appointed the state registrar as his agent for service of process for any case or action arising out of an accident on those highways. *Id.* at 354. The officers' and directors' consent statutes are couched in similar terms. They provide that a nonresident who accepts election or appointment as a director—and in some states an officer of an organization incorporated in the state—thereby consents to service of process on the corporation's registered agent, or, if the corporation has no registered agent, on the secretary of state. *See, e.g.,* DEL. CODE ANN. tit. 10, § 3114 (Supp. 1980) (enacted by the Delaware legislature shortly after *Shaffer*). The Supreme Court recognized the fictious nature of the consent in nonresident motorist statutes in Olberding v. Illinois Central R.R., 346 U.S. 338 (1953). The Court stated,

> It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has "impliedly" consented to be sued there. *In point of fact, however, juris-*

utes wrongly presume not only that certain defendants consent to the jurisdiction of the state, but also that "everyone is presumed to know the law." Although this maxim may be valuable in some contexts, it is an inappropriate standard for determining due process protections, particularly when more satisfactory alternatives exist. Because of the weight of the constitutional interests that are implicated in these situations, a waiver of due process protections prior to the emergence of a controversy should require an explicit waiver based on actual knowledge. For example, although some corporate directors may understand that their position subjects them to the jurisdiction of the state in which the corporation was incorporated, many may not. Requiring incoming directors and officers to execute a form which states that they realize the state of incorporation can exercise jurisdiction over them in controversies concerning the corporation's activities would provide them with actual knowledge of their waiver and would more closely comport with traditional due process notions of fairness. A knowing waiver provides a better approach to this issue than the implied consent fiction that the Court rejected in another context in *International Shoe*.[174] Although the proposed procedure will increase considerably the amount of paperwork in states such as Delaware in which a large number of organizations incorporate, meaningful due process protection warrants such a price.[175]

4. *Kulko v. Superior Court*[176]

The facts in *Kulko* were that Ezra and Sharon Kulko were married in 1959 in California while Ezra was en route from Texas to Korea for a military tour of duty. Immediately after the marriage, Sharon returned to New York, and Ezra joined her there later after his discharge from the military. The couple remained in

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diction in these cases does not rest on consent at all. . . . The defendant may protest to high heaven his unwillingness to be sued and it avails him not.

Id. at 340-41 (emphasis added). These observations are equally applicable to the corporate director consent statutes. Therefore, such statutes are more appropriately labeled as acquiescence statutes because the nonresident has acquiesced in the state's jurisdiction by operating a motor vehicle in the state or agreeing to serve as a director of an organization incorporated in the state; he has not voluntarily consented to the state's jurisdiction.

174. For a discussion of the impact of *International Shoe* on these fictive concepts, see Kurland, *supra* note 9, at 573-90.

175. The Court in D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-86 (1972), and Swarb v. Lennox, 405 U.S. 191, 200 (1972), indicated that it would sustain a contractual waiver of due process protections only if the waiver was both voluntary and informed.

176. 436 U.S. 84 (1978).

New York until they were separated in 1972, at which time Sharon moved to California. Ezra and Sharon entered into a separation agreement providing, *inter alia,* that, except for school vacations, their two children—Darwin and Ilsa—would live in New York with Ezra. He agreed to pay three thousand dollars per year in child support for those periods in which the children visited their mother in California. Sharon flew from California to New York to execute the agreement; she then flew to Haiti and procured a divorce.

In 1973 Ilsa decided that she wanted to live with her mother. The father agreed and bought her an airplane ticket to California. In 1976 Darwin also decided he wanted to live with his mother. He advised her of his decision, and she sent him an airplane ticket. The mother subsequently filed suit in California seeking, among other relief, an increase in Ezra's support payments. Ezra, however, objected to California's exercise of jurisdiction over him to adjudicate the increased child support claim. The California courts overruled his objections on the ground that the defendant had caused an "effect" in the state.[177] The United States Supreme Court reversed, since the father had not purposefully derived "benefit from any activities relating to the State of California."[178]

Under an interest analysis theory, California, as the state of residence of both the mother and the children, clearly had an interest in providing a forum for the resolution of the child support controversy. Thus, the question would be whether California's exercise of jurisdiction over the defendant would impose an undue burden on him. It appears that Ezra Kulko had not engaged in sufficient activities in California to conclude on that basis alone that defending the action in California would not overburden him. Although the Court did not discuss Ezra Kulko's wealth, three facts suggest that litigation in California would not have imposed an undue burden on him. First, the case was appealed through the California court system and then to the United States Supreme Court. The expenses incurred in such extensive litigation certainly suggest that Ezra Kulko was not a poor man. Second, the separation agreement provided three thousand dollars per year in child support payments to the mother, even though the children were to stay with her approximately only three months out of the year.

177. *Id.* at 89.
178. *Id.* at 96.

Last, Ezra Kulko was a dentist.[179] Since these facts suggest that he would not have heen subjected to an undue burden by defending the action in California, the Court should have upheld California's exercise of jurisdiction under an interest analysis theory. Such an exercise of jurisdiction would not contravene any exclusive or inclusive interest other than New York's equivalent interest in providing a forum. Furthermore, even if litigating in California would have subjected the defendant to an undue burden, California's strong interest in resolving its residents' child support controversies would justify the exercise of jurisdiction.[180]

5. *World-Wide Volkswagen Corp. v. Woodson*[181]

In *World-Wide Volkswagen* Harry and Kay Robinson, who were both New York residents, purchased a new Audi automobile in 1976 from Seaway Volkswagen, Incorporated, in New York. The following year, while the Robinsons were moving to Arizona, a car ran into their Audi as they were driving through Oklahoma. A fire broke out and severely burned Kay Robinson and her two children. The Robinsons subsequently filed a products liability action in Oklahoma claiming that the defective design and placement of the Audi's gas tank and fuel system had in part caused their injuries. The suit named the following parties as defendants: Audi NSU Auto Union Aktiengesellschaft, the manufacturer; Volkswagen of America, Incorporated, the importer; World-Wide Volkswagen Corporation, the regional distributor for New York, New Jersey, and Connecticut; and Seaway Volkswagen, Incorporated, the dealer.

All the defendants objected to Oklahoma's exercise of jurisdiction, but the trial court overruled their objections. The regional distributor and the dealer sought a writ of prohibition[182] from the Supreme Court of Oklahoma. The court denied the writ based on

179. Brief for Appellee at 2 n.1, Kulko v. Superior Court, 436 U.S. 84 (1978).

180. *See* notes 119-20 *supra* and accompanying text.

181. 444 U.S. 286 (1980).

182. Because the final judgment rule requires a final judgment by a trial court before a party can appeal any ruling by a trial judge, a party is precluded from appealing a trial court's decision sustaining its authority to exercise jurisdiction until after the trial of the case and the entry of a final judgment. Some states, rather than authorizing an interlocutory appeal, permit a party to seek a writ of prohibition which, if issued by an appellate court, would prohibit the trial judge from doing a specific act, such as proceeding to try the case when the court lacked judicial jurisdiction. *See* D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE 13 (4th ed. 1979). This procedure is authorized in Oklahoma by OKLA. CONST. art. 7, § 4.

an inference that both petitioners "derive substantial income from automobiles which from time to time are used in the State of Oklahoma."[183] The United States Supreme Court reversed, finding "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction."[184]

Since none of the parties resided in Oklahoma, the initial question under an interest analysis theory would be whether Oklahoma possessed a valid, as opposed to a presumed,[185] interest in providing a forum for the resolution of the controversy. Significantly, Kay Robinson and her children spent more than five months in a Tulsa hospital recovering from the severe burns that they suffered in the automobile fire.[186] Plaintiffs' attorneys alleged that the plaintiffs were "pauperized" as a result of the hospital and medical expenses that they had incurred.[187] Under these circumstances, the only logical conclusion is that Oklahoma possessed an interest in providing a forum for the resolution of the controversy both to aid in the timely payment of any unpaid hospital and doctors bills and to help compensate plaintiffs for the enormous expenses that they had incurred as the result of an accident on an Oklahoma highway.

Since Oklahoma thus had an interest in providing a forum, the issue under an interest analysis theory would be whether having to litigate the controversy in Oklahoma would subject the defendants to an undue burden. Although the briefs and opinions contain no mention of the assets, liabilities, or annual earnings of either the regional distributor or the New York dealer, one can infer—in the absence of evidence to the contrary—that defense of the action would not have overburdened either of these defendants, since they both almost surely possessed adequate financial resources. In his dissenting opinion Justice Blackmun alluded to another factor that also would negate a contention that these defendants would have been unduly burdened: the various defendants' insurance companies were really the true interested parties in the case.[188]

The Court in *World-Wide Volkswagen,* therefore, could have

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183. 444 U.S. at 290 (quoting from World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (1978)).

184. *Id.* at 295.

185. *See* note 84 *supra* and accompanying text.

186. Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma, Brief of Respondent at 3, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

187. *Id.* at 22.

188. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 318 (Blackmun, J., dissenting).

applied an interest analysis and held that Oklahoma had the authority to exercise jurisdiction in the case. The only interest that such a holding would have defeated was New York's equivalent interest in providing a forum for the resolution of the controversy. In addition, Oklahoma's exercise of jurisdiction over all the defendants would have promoted the inclusive interest in economy. Moreover, if defendants really were blaming one another for plaintiffs' injuries, then Oklahoma's exercise of jurisdiction also would have promoted the inclusive interest in providing a single forum for defendants who may be alternatively responsible for the claimants' deprivations.

6. *Rush v. Savchuk*[189]

In *Rush,* which was decided the same day as *World-Wide Volkswagen,* Minnesota attempted to obtain jurisdiction over a controversy by proceeding directly against the injuror's insurance company rather than against the injuror himself. Plaintiff, who was a passenger in the allegedly negligent party's car, was injured in a single-car accident in Indiana. Both plaintiff and the injuror resided in Indiana at the time of the accident. Approximately eighteen months after the incident, however, plaintiff moved to Minnesota with his parents. After the Indiana statute of limitations had run, plaintiff filed suit in Minnesota, relying on a Minnesota garnishment statute to support that state's jurisdiction over the controversy.[190] The statute authorized Minnesota residents to garnish a defendant's insurance policy proceeds even when the accident generating the claim against the insured occurred outside of Minnesota. The insurance company objected to Minnesota's jurisdiction, but the Minnesota courts overruled its objections.[191] On appeal, the United States Supreme Court reversed the lower court's holding on the jurisdiction issue on the ground that the injuror had never had any contacts with Minnesota, even though the defendant insurance company regularly did business in this state.[192]

An interest analysis initially would focus on the question whether a state has a valid, as opposed to a presumed, interest in providing a forum for the resolution of a controversy when the de-

189. 444 U.S. 320 (1980).

190. MINN. STAT. § 571.41 (2) (1978), *quoted in* Rush v. Savchuk, 444 U.S. at 322-23 n.3.

191. 444 U.S. at 324.

192. *Id.* at 328.

fendant's insurance company does business in that state. In the *Rush* case, of course, the state legislature had expressly asserted such an interest. Nevertheless, the issue remains whether the expectations *supporting* this interest are realistic in terms of an appropriate allocation of judicial business among the states.[193] From a realistic perspective, one cannot ignore the existence of potential insurance proceeds in a tort action; in most litigation a defendant's insurance status frequently plays a major role, among other things, in the initial determination of whether to file suit, in subsequent decisions concerning a settlement of the action, and in the plotting of strategy for the presentation of the plaintiff's case. To assert that *every* state has an interest in providing a forum to resolve any controversy in which the defendant is insured by a national insurance company, however, is unrealistic. Every state establishes prerequisites that an insurance company must meet before it can engage in business in the state.[194] States, for example, may require minimum amounts of capital, reserves, and deposits to ensure the liquidity of the company.[195] In addition, losses on policies issued in any particular state primarily determine the premiums that insurance companies charge residents of that state.[196] Thus, a state does not have an interest in providing a forum to resolve a controversy simply because the defendant's insurance company does business there, since the outcome of the controversy does not affect significantly the insurance company's operation in that state. This conclusion is most clear when none of the parties resides in the forum state and the events engendering the controversy arose elsewhere.

In *Rush* the defendant insurance company conducted business in Minnesota, and the plaintiff began residing in that state prior to the commencement of the action. An interest analysis, therefore, would focus on the question whether Minnesota had an interest in providing a forum, since plaintiff, who was not a resident of Minnesota when he sustained the injury, was a resident of that state when he filed the action. One cannot reasonably conclude that a state has an interest in providing forums for its residents only if the claims arose after the person took up residence in the state.

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193. *See* notes 77 & 84 *supra* and accompanying text.

194. F. BARRETT, ATTORNEY'S GUIDE TO INSURANCE AND RISK MANAGEMENT §§ 33.1-.18 (1978).

195. *See* 19 J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 10481, 10483, 10487 (1946 & Supp. 1979).

196. *See* Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554, 567-69 (1961).

Although the *events* engendering the controversy may not have significantly affected the claimant while he was a resident of the forum state, a judicial decision concerning those events certainly will affect him. Therefore, under an interest analysis theory, the claimant's state of residence at the time that the events engendering the controversy occurred, as well as his state of residence at the time suit was filed, both possessed an interest in providing a forum for the resolution of the controversy.[197] Moreover, even though the plaintiff in *Rush* moved away from Minnesota before the resolution of the controversy,[198] this fact should not extinguish Minnesota's interest in providing a forum. To allow such a result would discourage the free movement of people from one state to another and is inimical to the inclusive interest of the collective community of states in the free flow of goods, services, and people across state lines.[199]

Since Minnesota thus possessed an interest in providing a forum, the issue under an interest analysis theory would be whether requiring the injuror to appear in the action in Minnesota would subject him to an undue burden. Elkhart, Indiana, the injuror's home, is in northern Indiana, which is not very far from Minnesota. In addition, since the injuror's insurance company probably would bear the costs of litigating the controversy in Minnesota, plaintiff's forum at most would impose only an inconvenience on the injuror. Thus, in his dissenting opinion Justice Brennan observed that "the defendant would bear almost no burden or expense beyond what he would face if the suit were in his home state."[200] Indeed, the defendant insurance company in *Rush* did not even contend that it would be unduly burdened by litigating the case in Minnesota. Thus, the *Rush* Court could have applied

197. The latter state would possess such an interest because the outcome in the controversy will significantly affect one of its residents.

198. 444 U.S. at 322 n.1.

199. Another policy supports this conclusion: federal courts adhere to the general rule that diversity jurisdiction is determined at the time the action is commenced, rather than at the time the claim arose. An interest analysis presumes that a court should determine jurisdiction at the outset of the litigation, and that, once established, jurisdiction should continue until the final disposition of the case. This presumption provides maximum stability and certainty in the action and precludes repeated jurisdictional challenges. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3608 (1975). As is true in diversity actions, courts should scrutinize the plaintiff's actions to ensure that he actually has become a resident of the forum state and is not simply feigning residence to gain some advantage in the litigation. *See* 14 *id.* § 3638 (1976).

200. 444 U.S. at 333 (Brennan, J., dissenting) (dissent found at World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 304 (1980) (Brennan, J., dissenting)).

an interest analysis theory and held that Minnesota possessed the authority to exercise jurisdiction to adjudicate the controversy. Minnesota's exercise of jurisdiction would have contravened only Indiana's equivalent interest in providing a forum for the resolution of the controversy.

IV. CONCLUSION

The United States Supreme Court's decision in *International Shoe* represented a major step forward in the development of judicial jurisdiction doctrines. The Court in that case promulgated more realistic standards to deal with people's everyday activities and rejected the territorial dogma of, and fictional exceptions to, the *Pennoyer* approach.[201] The Court further advanced this enlightened trend when it refused in *Shaffer* to continue varying due process protections according to whether an action was in rem, quasi in rem, or in personam.[202] Nevertheless, these developments should constitute only the beginning of the reform that is necessary to make judicial jurisdiction doctrines compatible with both the everyday activities of people in this country and relevant community goals and policies.

Since *International Shoe,* only *McGee* has suggested that the Court has been developing and employing doctrines which appropriately accommodate the various exclusive and inclusive interests at stake in judicial jurisdiction controversies.[203] The other decisions of the Court fail to suggest such a trend largely because the neo-territorial minimum contacts theory promulgated in *International Shoe*[204]—a theory that *Hanson*'s purposefully availing requirement[205] made even more territorial—does not consider adequately the different interests that are implicated in these controversies. Only by abandoning these already obsolete doctrines can the Court hope to achieve more appropriate results.

The Supreme Court should abandon the minimum contacts approach because contacts, apart from the interests they engender, are meaningless occurrences. Rather than totally abandoning the existing doctrines, however, the Court can shift its emphasis to the fairness or reasonableness aspects of its doctrines.[206] The Court

201. *See* notes 1-25 *supra* and accompanying text.
202. *See* notes 23-25 *supra* and accompanying text.
203. *See* notes 153-56 *supra* and accompanying text.
204. *See* notes 15-22 *supra* and accompanying text.
205. *See* notes 26-28 & 157-67 *supra* and accompanying text.
206. *See* notes 54-60 *supra* and accompanying text.

should not define these amphorous concepts in terms of some vague notions of natural law or justice; rather, it should define them in terms of the interests of particular states and the collective community of states. Only in this manner can the Court ensure, to the maximum extent feasible, that its decisions will appropriately consider and accommodate the significant exclusive and inclusive interests at stake in jurisdictional controversies.

To summarize, the exclusive interests that may be at stake in a jurisdictional controversy include the following: the interest of a state in providing a forum for the resolution of the controversy when either the events engendering or the ultimate decision in the controversy have significantly affected that state's people, resources, or institutions; and the interest of the states in which the parties reside in protecting their residents from the undue burden of prosecuting or defending an action in a distant forum.[207] The inclusive interests that may be at stake in these controversies are as follows: the provision of at least one forum in which a claimant may timely present his claims against all those who allegedly caused, are causing, or may cause the claimant to suffer deprivations; the protection of defendants from exposure to multiple liability for the same resource, debt, or obligation; the achievement of the greatest possible economy in litigation for both individuals and states; and the protection of parties from the undue burden of prosecuting or defending an action in a distant forum.[208]

When these interests conflict with one another, as they are bound to do, the objective of the courts should be to sustain the jurisdictional authority of an interested forum unless its exercise of jurisdiction will unduly frustrate other exclusive and inclusive interests at stake in the controversy. If the plaintiff selects a disinterested state in which to file suit, that state should retain the power to resolve the controversy so long as its exercise of jurisdiction will accommodate most appropriately the conflicting and competing interests. Courts should systematically examine the factors that indicate both whether an exercise of jurisdiction by an interested state will unduly frustrate other interests and whether an exercise of jurisdiction by a disinterested state will accommodate those interests most appropriately.[209] Courts can employ this systematic examination quicker and easier than they now can under

207. *See* notes 79-85 *supra* and accompanying text.

208. *See* notes 86-105 *supra* and accompanying text.

209. These statements summarize the systematic interest analysis that was outlined above. *See* notes 106-46 *supra* and accompanying text.

the amorphous minimum contacts/purposefully availing/fairness doctrines. In addition, a systematic interest analysis would produce decisions that better allocate judicial business among the states and would impose fewer burdens on litigants than the neo-territorial doctrines that the Supreme Court currently employs.