Vanderbilt Law Review

Volume 37
Issue 1 *Issue 1 - January 1984*

Article 1

1-1984

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VANDERBILT LAW REVIEW

VOLUME 37 JANUARY 1984 NUMBER 1

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The author is grateful to his colleagues Ivan Rutledge and Bruce Posnak and to John Drobak of Washington University School of Law for their thoughtful observations on a draft manuscript. Sam Wethern, a student at Mercer University School of Law, made especially valuable contributions to part IV of the Article.

I. INTRODUCTION

The year 1984 offers legal theorists an unusual opportunity to unify the various strands of the theory of personal jurisdiction. The United States Supreme Court actually demanded unification seven years ago in *Shaffer v. Heitner*[1] when it declared that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* [*v. State of Washington*[2]] and its progeny."[3] The opportunity to act on this demand, however, has had to await the coalescing of two features of existing doctrine. First, the Court's decisions since *Shaffer* facilitate an attempt to organize personal jurisdiction theory around the rights of the individual parties without reference to the supposed interests of forum states or to other states' interests in "sovereignty." Second, although the current jurisdictional tests that are geared to individual rights are somewhat in disarray, their underlying theories are now readily reconcilable. These tests are expressed in two distinct lines of decision: a largely coherent body of cases based on *International Shoe*'s multiple factor concept of "minimum con-

1. 433 U.S. 186 (1977).
2. 326 U.S. 310 (1945).
3. 433 U.S. at 212.

tacts,"[4] and a separate decisional strain composed of several "single factor" tests that dispense with contacts altogether.[5] Neither the Court nor scholarly comment has ventured to explain how to use this patchwork of contacts-based and noncontacts-based tests to decide whether a particular exercise of jurisdiction is fair.[6]

This Article accepts the challenge to unify personal jurisdiction theory by proposing an approach that accommodates both the contacts-based and noncontacts-based tests under uniform jurisdictional standards. The analysis builds on the major assumption, elaborated in part II, that the Supreme Court's decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*[7] removed the principal barrier to a unified theory by ousting governmental interests from their long held place in personal jurisdiction decisions.[8] The principal thesis is that *International Shoe* has made two general, lasting contributions to jurisdictional theory. First, *International Shoe* recognized, although less clearly than *Ireland*, that the goal of due process in personal jurisdiction is to assure a forum that is fair to the parties, including the plaintiff, rather than one that furthers forum state interests or vague notions of state sovereignty. Second, *International Shoe* implicitly identified two comprehensive standards or criteria—described here as "expectation" and "benefit"—for measuring a forum's fairness to the parties. These broad criteria should replace the opinion's familiar minimum contacts tests as the real "standards" of *International Shoe* that *Shaffer* prescribed for universal application. Under this analysis the particularized contacts tests are simply

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4. In its most general terms, the concept requires that a defendant not present in a territory have certain minimum contacts with that forum in order to be subject to its jurisdiction, so that the suit will not "offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

5. *See* Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273, 276-78. These single factor, noncontacts bases of jurisdiction include consent, waiver, in-state personal service or "tagging," place of incorporation, domicile, determinations of status, jurisdiction by necessity, and a cluster of other exceptions to the basic contacts framework of *International Shoe*. *Id.*

6. *See* McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 11 (1982).

7. 456 U.S. 694 (1982).

8. In this view, *Ireland* recognized that the sole concern of due process in the personal jurisdiction setting is to assure a forum that is relatively fair to the parties; consequently, the only considerations relevant to the jurisdictional decision are those that pertain to the parties' individual rights. *See id.* at 702 n.10; Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME LAW. 699, 722-26 (1983).

useful, nonexhaustive surrogates for the "expectation" or "benefit" yardsticks that should be the ultimate measures of fairness to the parties.

Part II surveys the current contacts-based and noncontacts-based tests of jurisdiction and describes how those tests serve the two general fairness standards. The "expectation" standard inquires retrospectively whether a reasonable person in the defendant's position should be surprised by having to defend a particular claim in the plaintiff's chosen forum.[9] The "benefit" standard asks whether, apart from the defendant's expectations, the benefit he has derived from his forum-related activities justifies requiring him to defend in the forum any claim—even one wholly unrelated to those activities[10]

Part III proposes four modifications to the existing contacts tests so that these tests might serve as more reliable indicators of the determinative criteria of expectation and benefit. The first modification is explicit recognition of a plaintiff's due process interest in the jurisdictional question. In virtually all cases, however, the proposed interest is limited to situations in which the plaintiff would have to bring multiple suits if the forum could not assert jurisdiction over all of the defendants. The second suggested modification is assignment of jurisdictional significance to all the defendant's forum contacts, regardless of when he made them. By concentrating on the defendant's "historical" forum contacts, classical contacts analysis has failed to take into account the benefits a defendant has reaped after the events giving rise to litigation; it also has ignored the possible relevance of the defendant's conduct after the start of litigation to his expectations about place of suit. Third, for certain claims against multiple foreign defendants with similar defenses, contacts analysis should consider whether each defendant needs to appear to protect his interests. The plaintiff may have to fragment his claim if the forum lacks jurisdiction over any one defendant. To avoid this consequence, the forum should be able to assert jurisdiction even over defendants with no forum contacts, if other defendants actually defending in the forum well represent the absent defendants' interests. Fourth, because the minimum contacts tests are merely indicators of broader fairness criteria, courts should be free to exercise jurisdiction based on a blending of claim-related and nonclaim-related contacts.

9. *See infra* notes 70-79 and accompanying text.

10. *See infra* notes 80-82 and accompanying text.

Thus, independently insufficient claim-related and nonclaim-related contacts, considered together, may warrant jurisdiction under a more fundamental rationale of expectation or benefit.

In part IV this Article evaluates the constitutional validity of eleven particularized noncontacts-based tests under this proposed framework. Only one of these satellite tests clearly is incompatible with the two fairness criteria. The others gain renewed theoretical justification from their consistency with the reformulated contacts tests or with the broader criteria of expectation or benefit.

The most important practical consequence of this Article's thesis is that courts may treat the established contacts formulae as widely applicable litmus tests, rather than as essential thresholds to jurisdiction. Under the proposed approach, *International Shoe*'s primary significance is that it implicitly posits the overriding criteria of expectation and benefit for assessing the fairness of the forum to the parties. By contrast, *International Shoe*'s minimum contacts tests are merely convenient, reasonably objective devices for ascertaining whether those criteria are met. Courts may assert jurisdiction despite the absence of the customarily required contacts whenever such assertion is fair in light of the defendant's expectations, benefits, or both. Correlatively, the noncontacts-based satellite tests should receive a fuller and franker acceptance; most of these tests comport with the proposed approach's emphasis on fairness to the individual parties.

Under any legal standard, the endlessly varied fact patterns of future cases will raise new questions about jurisdictional fairness and undoubtedly will generate pressures either for further changes to the particularized jurisdictional tests or for new tests altogether. To permit these refinements and additions to evolve within a stable structure, this Article proposes that expectation and benefit become the exclusive, unvarying, and ultimate criteria for judging not only the fairness of all particularized tests but also the fairness of all individual assertions of jurisdiction. These uniform standards should foster continuity, predictability, and certainty in jurisdictional theory without sacrificing the flexibility necessary to accommodate desirable changes in the particularized tests.

II. The Fissures in Personal Jurisdiction Doctrine Since *International Shoe* and An Analytical Framework for Reunification

In the sixty-eight years preceding *International Shoe*, judges labored to justify their personal jurisdiction decisions within the

tight theoretical confines of *Pennoyer v. Neff*.[11] When faced with facts that strained *Pennoyer*'s territorial view of jurisdiction,[12] courts based their decisions on considerations inconsistent with *Pennoyer*'s basic premise that jurisdiction flows from state power[13] or even on outright fictions. One notable fiction was the supposed "consent" to jurisdiction by nonresident motorists, who in fact were most likely oblivious to the possibility of a lawsuit.[14]

The tension created by these expansive decisions in the face of formally restrictive doctrine inspired the Supreme Court's monumental recasting of jurisdictional theory in *International Shoe*, which has dominated jurisdictional theory since 1945. Just as the vagaries of new fact situations strained *Pennoyer*'s territorial view of personal jurisdiction, however, the demands of subsequent cases began to apply pressure to *International Shoe*'s celebrated tests of "contacts." This pressure has fostered two major tendencies in personal jurisdiction decisions. The first of these tendencies undervalues the interests of the parties. In deciding personal jurisdiction questions, courts have assigned weight not only to the parties' interests but also to the interests of individual forum states and of the states collectively. Whether used to support jurisdiction—for example, when a court identifies a strong forum interest in adjudicating a dispute—or to defeat it—for example, when a court fears that the forum's assertion of jurisdiction would impinge on another state's sovereign rights—reliance on governmental interests has detracted from the importance of *International Shoe*'s focus on the defendant's connections with the forum, the plaintiff's claim, and any relationship between the claim and those connections.[15] The second tendency appropriately keeps the focus on the parties but overglorifies the contacts tests by treating them as the exclusive measures of the forum's fairness. Until now, each of these tenden-

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11. 95 U.S. 714 (1878) (overruled in Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977), to the extent that it is inconsistent with *Shaffer*'s standard of determining personal jurisdiction over the defendant).

12. *Pennoyer* held that, with certain exceptions, a state could exercise jurisdiction in an action involving the personal liability of a defendant only if the defendant were served personally with process while in the state or voluntarily appeared before the court. 95 U.S. at 734.

13. A salient example is the weight that the Court gave to a forum state's general "interest" in asserting jurisdiction over persons outside its borders. *See* Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 771-83 (1982).

14. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927); Kane v. New Jersey, 242 U.S. 160 (1916).

15. *See International Shoe*, 326 U.S. at 318-19.

cies has been a barrier to a system of uniform jurisdictional standards.

A. Individual Rights Versus Governmental Interests

Several post-*International Shoe* decisions pay at least rhetorical homage to the role of governmental interests in the forum-selecting process. Beginning with its first decisions after *International Shoe*, the Supreme Court repeatedly stated[16] or suggested[17] that putative interests of the forum state are at least "relevant" considerations in determining whether that forum is fair to the parties. Even though this "forum state interest" doctrine seldom, if ever, dictated the outcome of jurisdiction decisions,[18] its persistence in the language of judicial opinions posed an ongoing threat that some ill-defined notion of states' rights might displace the parties' forum-selection interests.[19] The related governmental interest concept of "interstate federalism" appeared somewhat later. First in *Hanson v. Denckla*[20] and later in *World-Wide Volkswagen Corp. v. Woodson*,[21] the Court stressed that the purposes of *International Shoe*'s contacts tests are not only to ensure that the plaintiff's choice of forum is fair to the defendant, but also to preserve the interests of the states as sovereigns.[22]

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16. *See, e.g.*, Rush v. Savchuk, 444 U.S. 320, 332 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647-48 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

17. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 214-15 (1977); Hanson v. Denckla, 357 U.S. 235, 252 (1958).

18. Only in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), did the Court actually rely on the "forum state interest" doctrine to a degree that seemed important to the holding—that is, only in *Mullane* did the Court uphold the jurisdiction despite forum-defendant contacts that lagged behind the contacts which the Court usually recognizes as constitutionally sufficient to support jurisdiction. Moreover, even in *Mullane* the Court could have rationalized its decision upholding jurisdiction strictly by reference to considerations concerning fairness to the parties, with no reliance upon the interest of the forum state. *See infra* notes 265-79 and accompanying text. Finally, in no case has the Court struck down an assertion of jurisdiction when the defendant had the normally required contacts merely because the forum state had no discernible interest in the controversy. Lewis, *supra* note 13, at 783-807; *see infra* text accompanying notes 274-79.

19. Lewis, *supra* note 13, at 828-32.

20. 357 U.S. 235, 251 (1958).

21. 444 U.S. 286, 293-94 (1980).

22. In *World-Wide* the Court vigorously renewed this sovereignty argument. It announced that a forum fair to the parties nevertheless might lack jurisdiction if its assertion of jurisdiction offended the "sovereignty" of a putative alternative forum state: "[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to

These governmental interest doctrines have impeded the development of uniform standards for deciding jurisdictional questions by turning *International Shoe*'s minimum contacts analysis into a helter-skelter balancing process. Courts have had to juggle the defendant's due process right to avoid suit in an unreasonable forum, the plaintiff's due process right to bring suit in an otherwise reasonable forum, the various unquantifiable interests of the forum state in asserting jurisdiction, and the conjectural interests of other states in asserting jurisdiction.[23] This quagmire directly results from the lack of any congruence between the policies underlying the governmental interest doctrines and the policies of protecting the individual rights of the parties.[24] For example, a forum state that a court independently adjudges fair to the litigants is no less fair because the forum state lacks an interest in the controversy or because its assertion of jurisdiction may threaten the sovereignty of another state. Conversely, a forum unfair to the parties does not become fair simply because that forum has an interest in deciding the case. Accordingly, an increasing number of scholars now insist that the interests of the parties should be the exclusive concern of jurisdiction analysis.[25]

Even more important, recent Supreme Court decisions have recognized—both implicitly and, with *Ireland*, explicitly—that the due process question raised by the personal jurisdiction defense is "ultimately" one of individual rights alone.[26] In *Rush v. Savchuk*[27]

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divest the state of its power to render a valid judgment." 444 U.S. at 294. The Court did not specify what exercises of jurisdiction would offend the sovereignty of another state.

23. *See* Lewis, *supra* note 8, at 716-17.

24. *See* Lewis, *supra* note 13, at 821; Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1120-21 (1981).

25. *See, e.g.*, Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1016-17 (1983); Jay, *"Minimum Contacts" As a Unified Theory of Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429, 450 (1981); Lewis, *supra* note 8, at 733-35; Lewis, *supra* note 13, at 810, 821; Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 203 (1976); Redish, *supra* note 24, at 1135; Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (part 2), 14 CREIGHTON L. REV. 735, 843 (1981). *But see* Jay, *supra*, at 441.

Indeed, even some writers who cling to the view that courts to some degree may "consider" state interests in the jurisdiction decision maintain that this consideration is merely part of an appropriate balancing of the litigants' rights. *See* Drobak, *supra*, at 1055 n.157; Redish, *supra* note 24, at 1141-43; Whitten, *supra*, at 843, 846. Despite the internal inconsistency of this position, *see* Lewis, *supra* note 13, at 818-20, what is most significant is the emerging consensus that the sole rights at issue in the personal jurisdiction decision should be those of the parties.

26. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982); Lewis, *supra* note 8, at 734-35; Lewis *supra* note 13, at 808-13; *cf.*

the Court seemed to approve rejection, or at least subordination, of the forum state interest doctrine's role in personal jurisdiction. The Court condemned an attempted shift of focus from the defendant's forum contacts to the interests of the forum state, and it emphasized the primacy of party-fairness over merely "relevant" subsidiary factors, such as the interests of forum states.[28] Later the Court dealt a similar blow to the interests of the states collectively—"interstate federalism." In *Ireland*[29] the Court upheld an exercise of jurisdiction even though the record did not display the ordinarily required evidence of forum-defendant contacts and, as Justice Powell complained in concurrence,[30] thus failed to establish the predicate for an exercise of jurisdiction consistent with notions of state sovereignty. Writing for the majority, Justice White, the author of *World-Wide*, all but obliterated *World-Wide*'s dictum[31] about interstate federalism by describing that concept "as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns."[32] The Court's language surely is broad enough to condemn in one stroke both forum state interest and the notion of interstate federalism.[33] By blunting and perhaps even eliminating these concepts unrelated to party fairness, the Court has cleared the way for unified jurisdictional standards organized entirely around the interests of the parties.[34]

Redish, *supra* note 24, at 1121 (asserting that limits on the reach of personal jurisdiction, a doctrine now well-established, had no constitutional basis prior to the adoption of the fourteenth amendment and its focus on "any" person); Whitten, *supra* note 25, at 843 (arguing that the Court has moved toward the use of the minimum contacts test itself to "intuitively" focus on the inconvenience to the defendant rather than on the state's interest in the litigation).

27. 444 U.S. 320 (1980).

28. *Id.* at 332. Admittedly, in the same passage the Court condemned a shift of focus from the defendant's forum contacts to the contacts linking the forum and the plaintiff. This observation is contrary to the argument—which this Article advances—that jurisdictional due process should be as concerned with the plaintiff as with the defendant. *See infra* text accompanying notes 87-113.

29. 456 U.S. 694 (1982). For a detailed analysis of *Ireland*'s implications for personal jurisdiction theory, see Lewis, *supra* note 8, at 727-42.

30. *See* 456 U.S. at 713-14 (Powell, J., concurring).

31. The references to sovereignty in *World-Wide* were entirely unnecessary to that decision since the Court concluded independently that the defendant had "no" forum contacts. *See* Lewis, *supra* note 8, at 715-16.

32. 456 U.S. at 702 n.10.

33. Lewis, *supra* note 8, at 722-24, 739.

34. *See* Lewis, *supra* note 8, at 739-40; Recent Developments, *Personal Jurisdiction in Flux:* Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee, 69 CORNELL L. REV.

B. The Uneasy Coexistence of the "Contacts" Tests and the Single Factor Satellite Bases of Jurisdiction

Admittedly, the second major post-*International Shoe* development—the overglorifying of contacts analysis at the expense of other measures of fairness to the parties—gains some support from the pronouncement in *Shaffer v. Heitner*[35] "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[36] Nevertheless, this broad statement need not have meant that the Court was ordaining contacts tests as the sole, comprehensive touchstones of jurisdiction. For example, these "standards" might refer instead to *International Shoe*'s more general concern for "fair play and substantial justice." Still, the *Shaffer* opinion repeatedly did equate these "standards" with *International Shoe*'s particularized "minimum contacts" tests.[37] The Court's next three personal jurisdiction decisions further confirmed that the *International Shoe* "fair play" inquiry "must focus on 'the relationship among the defendant, the forum, and the litigation' "[38]—in other words, the tests of contacts. Moreover, none of these opinions employs any tests other than "minimum contacts."

Late in the *Shaffer* opinion, however, the Court curiously opened the door for noncontacts-based single factor tests for jurisdiction. The Court suggested that Delaware might have had jurisdiction over the nonresident corporate directors if it had "enacted a statute that treats acceptance of a directorship [in a domestic corporation] as consent to jurisdiction in the State."[39] This sugges-

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136, 164 (1983). Of course, many of the specific formulae for determining the scope of these individual rights still speak in terms of connections with states; in that limited sense, the rights are still a "consequence," "effect," or "by-product" of state boundaries. Drobak, *supra* note 25, at 1016, 1033, 1047, 1064-66; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 4 comment a (1980). This view is possibly the source of the confusion about the real stakes at issue. Lewis, *supra* note 8, at 707; *see infra* text accompanying note 46. For example, *Pennoyer* itself, long regarded as the mother lode of sovereignty, may be read without torturing its text as concerned in the end with individual rights, despite its territorially-laden vocabulary. Drobak, *supra* note 25, at 1028-29; Lewis, *supra* note 8, at 704-05. The Supreme Court has now recognized, however, that the parties' interests are paramount and accordingly that their rights should govern the personal jurisdiction decision.

35. 433 U.S. 186 (1977).

36. *Id.* at 212.

37. *See, e.g., id.* at 204, 207, 209.

38. Rush v. Savchuk, 444 U.S. 320, 327 (1981) (citing Shaffer v. Heitner, 433 U.S. at 204); *see also World-Wide*, 444 U.S. at 291-93; Kulko v. Superior Court, 436 U.S. 84, 92, 100-01 (1978).

39. 433 U.S. at 216. Sustaining jurisdiction on that basis would have represented a small step beyond jurisdiction founded on more advertent forms of consent, which the Court

tion implies that the Court considered certain forms of jurisdiction consistent with "fair play and substantial justice" even though recognition of such forms represents a departure from a strict contacts formula. Indeed, *Shaffer* recognized two other valid jurisdictional doctrines—the rules governing adjudications of status and jurisdiction by necessity.[40] The Court further noted that these two exceptions did not constitute an exhaustive catalogue of the doctrines that approve jurisdiction under circumstances deemed "fair" to the defendant even when the defendant lacks sufficient contacts to satisfy one of the minimum contacts tests.[41] In short, the Court authorized certain single factor bases of jurisdiction.

Ireland provided further evidence that the *Shaffer* Court really did not intend to subject every jurisdictional dispute to a contacts test. The Court sustained jurisdiction in *Ireland* by finding that the defendants' obstructive conduct—which effectively prevented the plaintiff from adducing evidence of minimum contacts—amounted to a waiver of the defendants' objections to jurisdiction.[42] In upholding jurisdiction despite an insufficient showing of contacts linking the defendant, the forum, and the litigation, the Court acknowledged that a variety of tests—not just the assessment of contacts—could indicate satisfaction of *International Shoe*'s "fair play" requirement.[43]

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recently had approved without reliance on tests of contacts. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964).

40. *See* 433 U.S. at 208 n.30, 211 n.37. The "status" theory gives the state personal jurisdiction over an absent defendant because of the defendant's status as a member of an identifiable group. *See generally* Williams v. North Carolina, 317 U.S. 287 (1942); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 655, 660-61 (1959). "Jurisdiction by necessity" arises when there is no other forum available to the plaintiff in which to bring the action. Shaffer v. Heitner, 433 U.S. at 211 n.37. The Court in *Shaffer* specifically declined to decide whether "the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." *Id.*

41. *See* 433 U.S. at 208 n.30. Even before *Shaffer* the Court had recognized that these two other theories of jurisdiction survived *International Shoe*. Although Hanson v. Denckla, 357 U.S. 235 (1957), treated the *International Shoe* contacts analysis as embracing "in rem" and "in personam" jurisdiction, the Court observed that those classifications "do not exhaust all the situations that give rise to jurisdiction . . . ." 357 U.S. at 246. In citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Williams v. North Carolina, 317 U.S. 287 (1942), in the accompanying footnote, the Court recognized that standards other than the minimum contacts test apply to cases of jurisdiction by necessity and status adjudications. 357 U.S. at 246 & n.13.

42. 456 U.S. at 704-05.

43. By contrast, in *Kulko*, *World-Wide*, and *Rush* the evidence in the record was amenable to contacts analysis. Further, none of these decisions, unlike *Ireland*, raised a question concerning any of the consent, jurisdiction by necessity, or status exceptions that had quietly coexisted alongside contacts analysis in the years preceding *Shaffer*.

A comparison of Justice Powell's approach in the concurring opinion to the majority's approach illustrates the majority's retreat from *Shaffer*'s exaltation of minimum contacts as an omnibus jurisdictional test. Justice Powell framed the issue in *Ireland* narrowly: "Whether 'minimum contacts' exist between [the defendants] and the forum State that would justify the State in exercising personal jurisdiction."[44] In contrast, the majority harked back to *International Shoe* and proclaimed that "the test for personal jurisdiction requires only that 'the maintenance of the suit . . . not offend traditional notions of fair play and substantial justice' "[45]—apparently regardless of whether the customary defendant-forum contacts are present. *Ireland*, therefore, plainly implied that the current Court does not insist on minimum contacts as an invariable constitutional requirement,[46] but rather views them only as nonexclusive particularized tests that help to answer the ultimate question—whether jurisdiction comports with fair play and substantial justice to the parties.

Thus, recent Supreme Court decisions make the articulation of uniform jurisdictional standards more feasible today than at any time since *International Shoe*. First, with the distractions of the forum state interest and interstate federalism concepts put aside, jurisdiction analysis can concentrate exclusively on the due process rights of the parties. Second, despite *Shaffer*'s broad injunction, subsequent cases culminating with *Ireland* demonstrate that the Court actually has used a variety of tests—not just minimum contacts tests—to resolve those questions of individual rights. In sum, the time is ripe to attempt to articulate a uniform set of standards adequate to accommodate all of these jurisdictional tests.

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44. 456 U.S. at 713 (Powell, J., concurring).

45. *Id.* at 703.

46. *Id.* at 713 (Powell, J., concurring). The majority protested that it did not dispense with evidence of minimum contacts, but rather was willing to presume such evidence as a punishment for the defendants' refusal to cooperate in discovery proceedings aimed at ascertaining the jurisdictional facts. *Id.* at 702 n.10. The accompanying text, however, actually indicates that the majority, unlike Justice Powell, found insufficient evidence of contacts and therefore upheld jurisdiction independently on grounds of waiver. *See id.* at 703-05. Thus, *Ireland* is authority for the proposition that individual liberty interests may be satisfied in some cases even without evidence of defendant-forum contacts. Recent Developments, *supra* note 34, at 163.

C. Pinpointing International Shoe's *"Standards of Fair Play and Substantial Justice": The Criteria of Expectation and Benefit*

Following the Supreme Court's example, commentators have grappled with diverse theories of jurisdiction but have failed to articulate a unified approach. At one extreme, certain scholars contend that *Shaffer* already provides a "uniform" or "unified" approach to jurisdiction.[47] These scholars, however, differ as to what the supposedly uniform standard emanating from *Shaffer* actually is. Some describe this standard as a free floating, amorphous one of "fair play and substantial justice" or "reasonableness,"[48] while others see it as a particularized test of minimum contacts.[49] Among the former group, some limit "fairness" and "reasonableness" to the interests of one or both parties, while others view the same concepts as also concerned with the individual or collective interests of the states.[50] Of course, the view that *Shaffer* requires a unified approach limited to minimum contacts analysis simply overlooks other decisions that approve, without regard to minimum contacts, satellite "single factor" bases such as consent, waiver, domicile, state of incorporation, and personal service within the state. For example, *Ireland*, in reaffirming the express consent and waiver bases,[51] sustained jurisdiction even though the plaintiff was unable to demonstrate the forum-defendant contacts that the minimum contacts rubric requires.

At the other extreme, advocates of the "substantive interest" view implicitly oppose jurisdictional standards that focus solely on the parties' rights and instead incorporate various public interests and policies in the personal jurisdiction decision.[52] While different

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47. *See, e.g.*, Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?*, 26 KAN. L. REV. 61, 83 (1977); Fischer, *"Minimum Contacts": Shaffer's Unified Jurisdictional Test*, 12 VAL. U.L. REV. 25, 27 (1977); Jay, *supra* note 25, at 429; Posnak, *A Uniform Approach to Judicial Jurisdiction After* World-Wide *and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 771 (1981); Note, *Quasi in Rem Jurisdiction Over Foreigners*, 12 CORNELL INT'L L.J. 67, 75 n.43 (1979); Note, Shaffer v. Heitner: *The Supreme Court Establishes a Uniform Approach to State Court Jurisdiction*, 35 WASH. & LEE L. REV. 131, 140, 152 (1978) [hereinafter cited as Note, *Uniform Approach*].

48. *See, e.g.*, Note, *Quasi in Rem Jurisdiction Over Foreigners*, *supra* note 47, at 75 n.43; Note, *Uniform Approach*, *supra* note 47, at 152.

49. *See* Fischer, *supra* note 47, at 45.

50. *See* Drobak, *supra* note 25, at 1041-42 nn.116-19.

51. *See* 456 U.S. at 703-05.

52. Foremost among this group are Professors Carrington and Martin, who argue that the constitutionally requisite quantum of defendant-forum contacts "does and should vary with the measure of the values affected and the costs inflicted by the attempted exercise of power." Carrington & Martin, *Substantive Interests and the Jurisdiction of State Court*, 66

rationales underlie the various substantive interest theories,[53] all at least tacitly agree that a sufficiently great forum state interest may justify an exercise of jurisdiction even without the ordinarily required defendant-forum contacts.[54] Whatever merit these governmental interest justifications may have had in the past, little remains after the Supreme Court's de facto exclusion of governmental interests from jurisdiction analysis in *Rush* and *Ireland*.[55]

MICH. L. REV. 227, 230 (1967-68). Substantive interest advocates frankly admit that they echo the approach of basing jurisdiction decisions on state interests (for example, the interests in regulating conduct or affording residents a forum) that reigned during the waning years of the *Pennoyer* regime. *See* Carrington & Martin, *supra*, at 228-29; Comment, *The Reasonableness Standard in State-Court Jurisdiction:* Shaffer v. Heitner *and the Uniform Minimum Contacts Theory*, 14 WAKE FOREST L. REV. 51, 68-69 (1978). For a summary and critique of this forum state interest doctrine, see Lewis, *supra* note 13, at 776-81.

53. Some commentators argue that the influence of substantive considerations on jurisdictional decisions often is unavoidable. Comment, *supra* note 52, at 68, 70. These commentators cite cases raising first amendment and commerce clause issues as examples of situations in which substantive considerations necessarily intrude in the jurisdiction decision. *See id.* at 70 n.104; Note, *Due Process and Long Arm Jurisdiction in Minnesota: A Criticism of the Minimum Contacts Standard*, 5 WM. MITCHELL L. REV. 287, 326-28 (1979); *see also* Note, *Exercise of Jurisdiction Over a Newspaper Vacated on the Basis of the First Amendment*, 35 FORDHAM L. REV. 726 (1967); Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156, 173-77 (1982); Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342 (1967). Others insist that the defendant's forum contacts must have "substantive relevance" to the plaintiff's claim to ensure that the defendant's conduct is a proper subject of state substantive regulation. *See* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 81, 86.

In two cases decided this Term, the Court unanimously and "categorically" has rejected "the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry." Calder v. Jones, No. 82-1401 (U.S. Mar. 20, 1984); Keeton v. Hustler Magazine, Inc., No. 82-485, at n.12 (U.S. Mar. 20, 1984) (available March 22, 1984, on LEXIS, Genfed Library, Sup file). This rejection is fully consistent with the Court's recent emphasis on the rights of the individual parties rather than on substantive considerations related to the plaintiff's claim.

54. For example, Justice Brennan suggested in his dissent in *World-Wide* and *Rush* that a high level of forum state interest in the litigation may justify jurisdiction even absent the ordinarily required contacts unless the defendant can show "some real injury to a constitutionally protected interest." *Rush*, 444 U.S. at 333; *World-Wide*, 444 U.S. at 312; *see also* McDougal, *supra* note 6, at 5.

55. *See supra* notes 26-34 and accompanying text. Even analysts who concede that the forum state interest doctrine is on the wane and reject it in principle because of its potential for damaging individual rights seem unable to break the attachment. *See* Drohak, *supra* note 25, at 1055-56 n.157; Redish, *supra* note 24, at 1139-42. A fondness born of tradition, inertia, or perhaps even sentiment for the substantive interest approach stands between these commentators and the logical conclusion that government interest factors should not enter into the jurisdictional decision at all.

Professor Drobak, for example, after acknowledging that personal jurisdiction analysis is concerned entirely with individual rights, nevertheless takes issue with this author's position, Lewis, *supra* note 13, at 769, that forum state interests should play no part whatsoever

Finally, an intermediate view, espoused by Professors Hazard[56] and Vernon,[57] maintains that *International Shoe* has the potential to displace *Pennoyer* as the basis of a general jurisdictional theory if it is supplemented to encompass the noncontacts, "satellite" tests. Professor Hazard, writing hefore *Shaffer,* saw the need for a supplement because he considered *International Shoe* as narrowly focused on a "minimum-contacts approach" or a "minimum-contacts principle."[58] Professor Vernon, with the hindsight of *Shaffer,* could state the problem more specifically. He was perplexed that while the *Shaffer* Court proclaimed that "all" exercises of jurisdiction must satisfy the standards of *International Shoe*—which the Court said required a "minimum contacts" nexus

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in the decision. He agrees that the Supreme Court has failed to provide meaningful constitutional limits on choice of law despite decades of references to forum state interests in its jurisdiction decisions. His conclusion, though, is that "[u]ntil the Court, or Congress, establishes these limits, the personal jurisdiction doctrine may as well be used as best it can"—that is, as an end run method of promoting the states' legitimate choice of law concerns. *See* Drobak, *supra* note 25, at 1055-56 n.157.

Professor Drobak's argument is vulnerable to the objection that two wrongs do not make a right. The Court has erred in failing to impose workable constitutional restrictions on a state court's choice of substantive law, and it should not compound that error by allowing judges to uphold jurisdiction in a forum unfair to the defendant simply because the state has an interest in the proceeding. Nor should a plaintiff lose access to a fair forum because the forum state has no discernible interest in the controversy, as when the parties to a contract agree in advance on a forum that has no other connection with the parties or the transaction. *See infra* part IV, section C.

Further, as Professor Drobak appears to concede, the Supreme Court's passing references to forum state interests in its personal jurisdiction decisions have had no evident impact on the outcome of the decisions. As a result, personal jurisdiction doctrine has been a wholly ineffective device for promoting the states' very real choice of law concerns. (As both Professor Drobak and this author agree, the full faith and credit clause is better suited than the due process clause to address state interests in choice of law disputes.) If the Supreme Court erroneously perceives that its passing references to the governmental interest doctrines in cases raising the personal jurisdiction issue have protected those state interests, that perception may be retarding the development of truly effective constitutional choice of law rules in cases raising the choice of law issue directly. If, however, the Court realized that the attempt to impose meaningful constitutional choice of law restrictions through personal jurisdiction decisions has failed, it would be more likely to try to develop those restrictions in cases directly raising questions about choice of law. Lewis, *supra* note 13, at 835. Professor Drobak says he is "not so optimistic" because he thinks "the Court's feeble attempts in the constitutional choice of law cases indicate the difficulty and enormity of the task required to create workable constitutional limits." Drobak, *supra* note 25, at 1055-56 n.157. If, however, the task is as difficult as he says even when tackled head on—that is, in choice of law cases—the task should prove all the more difficult when approached obliquely, in personal jurisdiction cases.

56. Hazard, *A General Theory of State-Court Jurisdiction,* 1965 SUP. CT. REV. 241.

57. Vernon, *Single-Factor Bases of In Personam Jurisdiction—A Speculation on the Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273.

58. *See* Hazard, *supra* note 56, at 242, 288.

among the forum, the litigation, and the defendant—the Court at the same time expressly excepted from its contacts requirements some traditional single factor bases of jurisdiction.[59] This third view thus identifies an inconsistency in current doctrine that *Ireland* has only intensified.

Merging the contacts-based and noncontacts-based strands of personal jurisdiction theory could correct this inconsistency. By upholding jurisdiction in *Ireland* despite its express understanding that the record did not display the ordinarily required minimum contacts, the Court has hinted at the existence of broader standards of fair play and substantial justice to the parties that override—although they certainly embrace—the particularized contacts tests.[60] Of course, precisely identifying these broader standards of fair play is the key task in any attempt to unify the theory of jurisdiction.

Perhaps the surest method of locating the all-important criteria of fair play is to root out the standards that underlie the prevalent contacts tests. Presumably the judges who formulated these tests thought them adequate to meet minimum constitutional requirements of fairness. The most common model of the minimum contacts test emphasizes "claim-relatedness." As announced in its unadorned form the test requires only a nexus between the plaintiff's claim and a single forum contact of the defendant, so that the claim "relates to" or "arises out of" the contact.[61] The Court's subsequent restatements of the test have encumbered it with additional restrictions. *Hanson v. Denckla* required that the defendant's forum contact must have been "purposeful."[62] *Kulko v. Superior Court*, in the domestic relations setting, implied that the

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59. Vernon, *supra* note 57, at 294.

60. A quarter century ago, in the wake of *Hanson v. Denckla*'s strict approach to defendant-forum contacts, one commentator astutely perceived that "fair play and substantial justice" does not require "that all persons subjected to the personal jurisdiction of a state court have 'certain minimum contacts' with that state." Comment, *In Personam Jurisdiction in Multiple-Party Suits*, 26 U. CHI. L. REV. 643, 650 (1959).

61. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957).

62. *See* 357 U.S. at 253-54. *Hanson*'s "purposefulness" accretion was the Court's first expression of concern for sovereignty since *International Shoe*. *See* 357 U.S. at 251, 253. To the extent that *Ireland* vitiates a concern for sovereignty, the Court may be willing to relax or to abandon the purposefulness requirement of the claim-related test of contacts. More recently, however, the Court has defended the requirement in different terms. Specifically, the Court has suggested that a defendant who purposefully avails himself of the privilege of conducting forum activities "has clear notice that [he] is subject to suit there." *World-Wide*, 444 U.S. at 297. This observation reflects the Court's view that the purposefulness requirement relates to fairness to the individual defendant rather than just to sovereignty. *See infra* text accompanying note 76.

contact must have been made in the course of commercial relations.[63] *World-Wide* tilted the balance even more toward the defendant by insisting that the purposeful, arguably commercial, claim-related contact must have generated some nontrivial benefit to the defendant in a noncollateral way.[64] Finally, *Rush* explained that "each defendant" must have the requisite contacts, and that neither contacts by the plaintiff nor supposed interests of the forum state may substitute for contacts of the defendant.[65]

The other major contacts test demands multiple defendant-forum contacts of a regular, substantial, and continuous nature, but dispenses with the requirement of a link between any of those contacts and the plaintiff's claim. This test, which stood on its own in *Perkins v. Benquet Consolidated Mining Co.*,[66] has its roots in *International Shoe*, in which the Court recognized jurisdiction over businesses whose "continuous corporate operations within a state were 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."[67] Strangely, *Shaffer*'s formulation of the contacts requirement ignored this jurisdictional basis altogether. Moreover, the Court's next three decisions[68] also insisted on contacts affiliating the defendant, the forum, *and the litigation*; thus these decisions in effect required a relationship between at least one of the defendant's forum contacts and the plaintiff's claim. A careful reading of *Rush*, however, leaves little doubt that a basis of jurisdiction founded on the defendant's multiple forum contacts entirely unrelated to the plaintiff's claim did survive *Shaffer*. In *Rush* the Court implied that jurisdiction over the defendant's insurer would have been fair "even for an unrelated cause of action," given the scope and extent of that insurer's nonclaim-related forum contacts.[69]

These polar definitions of minimum contacts—at one extreme, a purposeful, beneficial, claim-related forum contact; at the other,

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63. *See* 436 U.S. at 94-95.

64. Lewis, *supra* note 13, at 792-804; *see World-Wide*, 444 U.S. at 298-99.

65. 444 U.S. at 332.

66. 342 U.S. 437 (1952); *see* Lewis, *supra* note 13, at 793.

67. 326 U.S. at 318.

68. Kulko v. Superior Court, 436 U.S. 84 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v. Savchuk, 444 U.S. 320 (1980).

69. 444 U.S. at 330. Perhaps *Shaffer* did not address explicitly this brand of nonclaim-related minimum contacts jurisdiction because the Court believed that the forum contacts of the nonresident corporate directors and officers were too insubstantial even to invoke that version of the contacts tests.

a series of regular, substantial, and continuous but not claim-related forum contacts—facilitate the identification of the broader criteria of fair play. Underpinning the claim-related or "nexus" test is an elusive concept of *expectation*, sometimes also described as anticipation,[70] foreseeability,[71] or fair notice.[72] From the nexus test's requirement of minimally purposeful forum-related activity, judges in effect fashion a conclusive presumption that a nonresident whose conduct affects a foreign state reasonably should expect to defend in that state any lawsuit challenging that conduct.[73]

Although "foreseeability" is an alternative label for the expectation criterion, expectation as used here does not refer to "foreseeability" of the type that *World-Wide* condemned: "the mere likelihood that a product will find its way into the forum State."[74] The kind of expectation proposed here, like the kind of foreseeability that the *World-Wide* Court found "critical" to due process, arises only when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[75] Unfortunately, though, the Supreme Court apparently has not been convinced that even this rigorous level of foreseeability will satisfy due process, since, at least until *Ireland* the Court also has required that the defendant have pur-

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70. *See World-Wide*, 444 U.S. at 297.

71. *See* Ripple & Murphy, World-Wide Volkswagen Corp. v. Woodson: *Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65, 80 (1980).

72. *See* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

73. *See* Lewis, *supra* note 13, at 781-82. As Justice Stevens said, "If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks." *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

The *World-Wide* Court evidently recognized this rationale for the claim-related contacts test when it described Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), as holding that jurisdiction lies against a nonresident who "delivers products into the stream of commerce with the expectation that they will be purchased hy consumers in the forum State." 444 U.S. at 298. A more detailed discussion of the variable contours of the expectation criterion appears in part IV of this Article, which assesses a number of the noncontacts, satellite bases of jurisdiction in terms of that criterion.

74. 444 U.S. at 297.

75. *Id.* (quoting *Kulko*, 436 U.S. at 97-98, and *Shaffer*, 433 U.S. at 216). Thus, the Court correctly stated that purposefulness, its recent accretion to the claim-related test of contacts, is significant because it enables a court to impute to the defendant an expectation of suit in the forum. *See supra* note 62. In two very recent decisions, the Court has cited the quoted statement from *World-Wide* in upholding exercises of jurisdiction justified only doubtfully by defendant-forum contacts. Calder v. Jones, No. 82-1401 (U.S. Mar. 20, 1984); Keeton v. Hustler Magazine, Inc., No. 82-485 (U.S. Mar. 20, 1984) (available Mar. 22, 1984 on LEXIS, Genfed library, Sup file).

poseful, beneficial forum contacts.[76] This invariable insistence on

76. In addition to "foreseeability," the *World-Wide* Court seemed to insist that due process requires that a defendant's claim-related contacts with the forum be purposeful and that the defendant derive more than a "marginal" benefit from these contacts. Although the purposefulness and benefit requirements of a claim-related test of contacts may predict the requisite expectation of suit in that forum, they should not be invariable prerequisites to jurisdiction. If, as *World-Wide* states, the purposeful element is useful only because it justifies imputing to the defendant an expectation of having to defend in that forum, why insist on a purposeful contact when the facts fairly enable the same imputation without one? If the purposeful requirement instead serves to further "interstate sovereignty," as *Hanson* suggested, 357 U.S. at 251, 253, it should wash out in the wake of *Ireland* with the demise of that governmental interest consideration. Similarly, a "benefit" requirement is questionable if meant as an invariable limitation on jurisdiction. The Court in *Kulko* seemed to recognize that jurisdiction should exist in situations completely outside the commercial realm, so long as the Court's conceptions of expectation about suit were satisfied. *See* 436 U.S. at 96 (hypothetical of "shooting bullet from one State into another"). Of course, the overall tone of the *Kulko* opinion seems to contradict this assertion; indeed, commentators frequently view *Kulko* as requiring that contacts, to be sufficient, must occur in a commercial setting. *See supra* note 63 and accompanying text.

If no such commercial contact requirement exists, the Court's insistence that a defendant's forum contacts be beneficial, and not just enable a prediction about foreseeablility of suit, probably explains the result in *Kulko*. The *Kulko* Court observed that the New York father could not "reasonably have anticipated" suit in a California forum, 436 U.S. at 97-98, even though he had arranged for his daughter to fly to California to live with her mother, and thus probably should have foreseen that a later action for child support might take place in California. *See World-Wide*, 444 U.S. at 296. The Court stressed that sending the daughter to California, while arguably a purposeful forum contact, would not provide defendant father any benefit. *Id.* at 94-95, 100.

An alternative explanation of *Kulko* is that the Court denied California's jurisdiction because a contrary decision would have imposed an "unreasonable burden on family relations" by discouraging parents in similar situations from acquiescing in their children's wishes. 436 U.S. at 98. The Court later referred to this jurisdictional consideration as "the shared interest of the several States in furthering fundamental substantive social policies." *World-Wide*, 444 U.S. at 292. With the hindsight of *Ireland*, which so seriously questions the relevance of governmental interests to jurisdictional decisionmaking, this "shared interest" factor pales as an explanation of the result in *Kulko*. At best this interest was an underlying, emotionally loaded concern that tilted the Court's standard, contacts-based analysis against jurisdiction in an otherwise close case. Further, general reliance on this factor would not be widely useful for deciding challenges to personal jurisdiction because there are few issues, other than the "best interests of the child," upon which all of the states so evidently and strongly agree.

That the plaintiff could have pursued her claimed right to child support in California under the Revised Uniform Reciprocal Enforcement of Support Act (URESA), while still allowing the defendant to appear and defend in his home state of New York, 436 U.S. at 98-100, provides yet another explanation of the result in *Kulko*. The Court considered the URESA procedure significant because it would have furthered the forum state's interest in providing for the welfare of resident minors without the state's having to assert jurisdiction. 436 U.S. at 98. Of course, this state interest rationale also loses force after *Rush* and *Ireland*, but the same procedure is also significant from another standpoint: it shows that the plaintiff's need to secure jurisdiction at home was not overwhelming.

This author favors asserting jurisdiction when the plaintiff has an interest in avoiding fragmented litigation if, from the defendant's perspective, the expectation or benefit criteria are satisfied. *See infra* part III. The converse, however, does not follow. If jurisdiction is fair

purposeful, beneficial contacts misapprehends the limited function of a claim-related contacts test: to serve as a nonexhaustive predictor of the broader criterion of expectation. Thus expectation—the capacity of a reasonable person in the defendant's position to foresee that a particular claim may be brought against him in the forum—is not only critical to due process but also should be sufficient to satisfy it, regardless of the nature or level of the defendant's forum contacts.

As in the criminal law, it would often be impossible for courts to ascertain defendants' actual subjective expectations about place of suit. Evidence of actual subjective expectations is seldom available. Moreover, many defendants do not expect that their conduct will give rise to litigation anywhere, as would always be true when the plaintiff asserts a wholly novel cause of action. Accordingly, the measure of expectations should be objective.[77] The court must assume, somewhat arbitrarily, that the defendant contemplated that his forum-related conduct would result in a lawsuit somewhere; on that assumption the court realistically may inquire whether a reasonable person in the defendant's position should have expected to defend that claim in the forum.

How readily a court concludes that a reasonable person in the defendant's position should have expected suit in a particular forum state on a particular claim will vary with the source and probative value of the evidence about expectations. In the usual case the only evidence relevant to these expectations that will be adducible at a hearing on jurisdiction will be intrinsic to the lawsuit—it will consist of the facts about the defendant's allegedly actionable conduct and the place where that conduct occurred or had reasonably foreseeable effects. In such cases a court should proceed cautiously before concluding that a reasonable person in the defendant's position should have expected to defend the particular claim in the particular forum picked by the plaintiff. Nevertheless, the

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to the defendant under either or both criteria of expectation or benefit, there is no reason to deny jurisdiction simply because the plaintiff, as in *Kulko*, has a somewhat diluted interest in proceeding in that forum. *See* Keeton v. Hustler Magazine, Inc., No. 82-485 (U.S. March 20, 1984) (available March 22, 1984 on LEXIS, Genfed library, Sup file). Thus, if the defendant father in *Kulko* should have been held to have expected any later child support action to be brought in California once he assisted his daughter in relocating there, jurisdiction should not have failed just because the plaintiff mother had other litigation options. If, however, as the Court itself found, 436 U.S. at 97-98, the father could not fairly be held to have anticipated such a suit from his isolated California contact, the decision in *Kulko* is sound quite apart from the absence of any personal benefit from his contact.

77. *Cf.* Ripple & Murphy, *supra* note 71, at 81.

situs of the defendant's conduct at issue in the lawsuit may often be enough, standing alone, to fairly support an inference of the required expectations. For example, if the plaintiff proves that the defendant's assertedly actionable conduct took place in or foreseeably affected State *X*, and State *X* is the forum, may it not be fairly concluded that a reasonable potential defendant (assuming he contemplated suit somewhere) should have included State *X* among the states in which he might be called to account? Indeed, on close examination, nonresident motorist statutes and other widely accepted means of securing personal jurisdiction that are rationalized in terms of contacts in fact may be constitutionally valid today only on this broader rationale of expectations generated by the situs of the defendant's challenged activity.[78]

A court should be far less hesitant to find that a reasonable person in the defendant's position ought to have expected to defend a particular claim in a particular state when extrinsic evidence of such an expectation is present—that is, evidence about circumstances, other than the defendant's conduct at issue in the lawsuit, that should put the potential defendant on notice of where an action might be brought. Examples of such circumstances include forum selection clauses in contracts, other affirmative indications of consent to jurisdiction, and state long-arm statutes that are keyed to specific transactions. These circumstances usually will enable courts to conclude fairly and confidently that the hypothetical reasonable defendant who contemplates suit should have expected to be sued in the state designated by the long-arm statute, contractual agreement, or other medium of consent. Fundamental fairness does suggest, however, two caveats on this rationale. First,

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78. The conventional contacts based rationale for nonresident motorist statutes is arguably in jeopardy after the restrictive refinements of *Kulko*, 436 U.S. at 94-95, and *World-Wide*, 444 U.S. at 298-99, that the defendant's claim-related forum contacts must be not only purposeful but also commercial or at least substantially "beneficial." *But see* Posnak, *supra* note 47, at 805 n.377 (arguing that *Kulko* and *World-Wide* should not be read literally to require commercial or beneficial activity as a prerequisite to contacts-based jurisdiction, since under that reading the Court inadvertently would be undercutting the basis of jurisdiction in situations in which jurisdiction has traditionally been upheld). The jeopardy arises because the only benefit a nonresident motorist derives from driving into another state is the exercise of the right to interstate travel, which he already enjoys under the privileges and immunities clause. U.S. CONST. art. IV, § 2.

If the expectation criterion superseded contacts analysis, however, the commercial activity and benefit hurdles of *Kulko* and *World-Wide* could be bypassed. Jurisdiction then would be fair if a court concluded that the defendant, by driving within the forum even on a purely noncommercial venture, should have expected that any litigation resulting from that activity would take place in the forum.

the evidence must show that the statute, forum selection clause, or other extrinsic source of the defendant's expectations about place of suit likely will put the defendant on notice that his conduct might subject him to the jurisdiction of a particular state. Second, if the extrinsic source of the defendant's expectations about place of suit is his own agreement, that agreement must be voluntary in the sense that the defendant could have withheld it without sacrificing a preexisting constitutional right.[79]

Just as scrutiny of the claim-related contacts test shows it to be a surrogate for expectation about place of suit, scrutiny of the alternative contacts test of regular, substantial, but nonclaim-related contacts shows it to be a surrogate for the substantial *benefit* the defendant has reaped or sought to reap from his ongoing connections with the forum. Wholly apart from a defendant's expectations of where a particular claim might be filed, the benefits and protections that he has received or anticipates receiving from the forum state fairly warrant imposing on him a reciprocal obligation to defend any civil claim in that state.[80] The Supreme Court's awareness of this linkage surfaced in *International Shoe*. The Court in *International Shoe* presumed that the defendant's systematic, continuous, and substantial forum contacts yielded him "the benefits and protection of the laws of the state," and those benefits, in turn, justified jurisdiction under a "conception of fair play and substantial justice."[81] Later the Court expressly applied this rationale in *Perkins*.[82]

If, then, the defendant's benefits from the forum state and his reasonable expectations of suit there form the theoretical substructure of the minimum contacts tests, those two broader criteria should serve as the ultimate measures of jurisdictional fair play. Acceptance of this hypothesis would improve jurisdictional analysis in several respects. First, courts could apply the contacts tests to a broader range of circumstances.[83] Courts have unduly cramped

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79. *See* Flexner v. Farson, 248 U.S. 289 (1919) (holding unconstitutional an exercise of jurisdiction based on the non-resident defendant's implied "consent" assertedly flowing from his having chosen to transact interstate business affecting the forum, because he had a preexisting right to conduct such business under the privileges and immunities clause of the Constitution).

80. Lewis, *supra* note 13, at 782-83.

81. 326 U.S. at 320. Of course, systematic contacts also lead to an element of expectation. A defendant baving substantial, ongoing connections with a state arguably should expect to defend in that state any lawsuit brought against him.

82. 342 U.S. at 446-48.

83. *See infra* part III.

the scope of the contacts tests by failing to appreciate that they are merely means to the end of ascertaining the requisite level of the defendant's expectation or benefit, and that even these criteria must be considered against the countervailing interests of the plaintiff. Second, acknowledgment that the underlying criteria of expectation and benefit—and not the contacts tests themselves—are determinative would justify explicit reliance on the "single factor" particularized tests not based on contacts. If independently recognized, these satellite tests, which have coexisted uneasily with the "multiple factor"[84] contacts tests that *Shaffer* misleadingly endorsed as universal guides to decision, could serve alongside the contacts tests to assure the satisfaction of one or both of the ultimate fairness criteria. Third, in the event that an exercise of jurisdiction fails all the contacts and noncontacts tests, the hypothesis would allow a plaintiff to argue that jurisdiction in the forum would nevertheless be fair to the parties because of the presence of one or both of the ultimate fairness criteria.

A theory of personal jurisdiction that accepts expectation and benefit as all-important criteria for assessing fair play and substantial justice would authorize a variety of particularized jurisdictional tests of two basic kinds: First, the prevalent tests that assess the defendant's forum contacts, suitably modified to enhance their roles as indicators of expectation or benefit; and second, those single factor tests that can withstand scrutiny under the broad criteria. The contacts tests would continue to govern most cases, since the bulk of litigated personal jurisdiction motions probably cannot be resolved by reference to a single factor. A smaller number of cases would turn on a valid single factor test—one not now based on contacts but deemed consistent with either a modified contacts test or one of the ultimate fairness criteria. The single factor tests typically would be more economical to apply than the full-blown contacts tests because of the necessarily limited scope of the analysis required to evaluate them in any given case.[85] Finally, when

84. *See* Vernon, *supra* note 57, at 277-78.

85. As part IV discusses, many of the "single factor" bases of jurisdiction actually require consideration of a number of jurisdictionally significant facts. Domicile, one familiar example, demands reference to various circumstances relating to a defendant's physical, economic, political, and social connections with a forum. Nevertheless, the inquiry in most cases would still be more narrow than an appraisal of the regularity, continuity, and magnitude of a defendant's forum contacts under a *Perkins*-type analysis of nonclaim-related contacts, *see* Lewis, *supra* note 13, at 782-83 & n.73, or an appraisal of the purposefulness or beneficial nature of a defendant's forum contact, and the degree of relatedness between that contact and the plaintiff's claim, under a claim-related analysis.

none of the contacts-based or noncontacts-based particularized tests justifies jurisdiction, the plaintiff still would be able to argue that jurisdiction is fair as between the parties because of the satisfaction of one or both of the ultimate fairness criteria.[86]

The chart on the following page depicts the relationships among these jurisdictional tests and their role in a system that is organized around the uniform criteria of expectation and benefit. In part III this Article will explore four modifications to the particularized minimum contacts tests that are necessary to reconcile those tests with their function of signalling satisfaction of the fairness criteria. Part IV then will consider how each of eleven satellite bases of jurisdiction not explicitly geared to contacts would fare under the proposed scheme.

86. Given the wide range of particularized jurisdictional bases available, however, this argument should seldom prevail; courts should even approach it with a bias against jurisdiction. The contacts tests certainly are preferable to an ad hoc direct resort to the fairness criteria, because their satisfaction depends upon the determination of relatively objective facts. In contrast, a direct inquiry into whether the circumstances warrant imputing to the defendant an expectation of suit in the forum, or subjecting him to jurisdiction because of benefits that he has derived from the forum state, is considerably more open-ended and fraught with subjective judgments. Nevertheless, direct access to the ultimate criteria should remain open since the particularized tests simply facilitate drawing conclusions about expectation and benefit, and those criteria, in turn, are the ultimate signifiers of forum fairness between the parties.

Sole Postulated Determinant of Jurisdictional Due Process
Ultimate Fairness Criteria Signalled By Satisfaction of Particularized Tests
Particularized Tests
Relative Fairness/Unfairness of Forum To the Parties, Including the Plaintiff
Plaintiff's Forum Selection Interest
and/or
Defendant's Forum-Derived Benefit
Defendant's Expectations About Defending the Claim In the Forum
Claim-Related Extreme: Plaintiff's claim is related to a purposeful, beneficial contact of defendant with forum. Examples: McGee as restricted by Kulko, World-Wide, Rush.
Nonclaim Related Extreme: Plaintiff's claim is not related to any of defendant's regular, substantial, continuous forum contacts. Example: Perkins
A Non-commercial Torts
B Convenience To Defendant ("Proximity")
C Voluntary, Express Consent
D Quasi-Voluntary Consent
E Waiver
F Domicile
G State of Incorporation
H Divorce
I Child Custody
"Status Exceptions"
J Personal Service Within Forum ("Tagging")
K Jurisdiction by Necessity
Analysis of Correspondence Between Satellite Tests and Fairness Criteria Reserved For Part IV, infra
Eleven Satellite Particularized Tests Not Currently Rationalized In Contacts Terms
Current Contacts-Based Particularized Tests (Forum State Interests and Sovereignty Considerations Excised; Individual Rights Modifications Reserved for Part III, infra)

III. Four Proposed Modifications of the Minimum Contacts Tests

The recognition that the overriding criteria of expectation and benefit should guide jurisdictional decisionmaking counsels at least four modifications to the minimum contacts tests as the Court has elaborated them through *Rush v. Savchuk.*

A. Recognizing the Plaintiff's Interests in Avoiding Fragmented Litigation

Due process protects any "person" from the unfair deprivation of property, and clearly one such person is the civil plaintiff. A state-created civil claim is a species of fourteenth amendment property that due process safeguards from arbitrary deprivation.[87] In the context of personal jurisdiction, a plaintiff may suffer deprivation of property by having to prosecute that claim in inconvenient or multiple forums, in much the same way that a nonresident defendant suffers such deprivation by having to defend in an unfair forum. A nonresident defendant who is unable to mount a defense in a distant forum may face a default judgment and consequently forfeit his defenses on the merits. Similarly, a plaintiff may lack the resources to conduct litigation far from home or to fund several overlapping suits against multiple defendants, not all of whom are amenable to jurisdiction in a single forum. In this light the plaintiff's and defendant's interests in the jurisdiction question are essentially the same: each seeks an effective opportunity to secure a judicial determination of the issues.[88]

While in some cases "the desirability of giving the plaintiff a forum in which to adjudicate his claim"[89] may outweigh the protection afforded defendants by a focus on contacts,[90] the Court's

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87. *See* Brinkerhoff-Faris Trust & Sav. v. Hill, 281 U.S. 673 (1930); Forbes Pioneer Boat Line v. Board of Comm'rs, 258 U.S. 338 (1922); *infra* note 277 and accompanying text; *see also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-30 (1982) (claims before state administrative agency must receive full due process protection); *cf.* Martinez v. California, 444 U.S. 277, 281-82 (1980) (due process not denied by application of state immunity to defeat tort claim).

88. Lewis, *supra* note 13, at 810.

89. Comment, *supra* note 60, at 652. The author argues that "fairness to all the parties" is more consistent with due process than an exclusive concern with defendants. *Id.*

90. Justice Brennan emphasized this point when he wrote in his *World-Wide* dissent that the interests of "other parties . . . are entitled to as much weight as are the interests of the defendant." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 309 (Brennan, J., dissenting). In the same sentence Justice Brennan also suggested that the interests of "the forum State" merit comparable weight. For reasons stated previously, *see supra* text accom-

recent decisions reflect an "almost exclusive focus on the rights of defendants."[91] In *Kulko* the Court stated that the process due to defendants is "essential," while the plaintiff's interests are merely to be "considered."[92] *Rush* then specifically condemned an attempt to shift the focus of decision from the defendant's contacts to those of the plaintiff.[93] This "defendant oriented"[94] approach is consistent with *Shaffer*'s focus on the triangular relationship "among the defendant, the forum, and the litigation."[95] In sum, the current bias of personal jurisdiction doctrine tilts sharply in favor of the defendant.[96]

Unfortunately, some theorists who would redress this imbalance have seized on the forum's convenience to the plaintiff as the crux of his interest in the jurisdiction question.[97] The origin of this solicitude for plaintiffs, however, is the discredited forum state interest doctrine,[98] which never adequately protected many plaintiffs' interests because its chief concern was to provide a forum for forum residents.[99] More important, this characterization of the plaintiff's interests is overbroad. Emphasis on a factor as vague and conjectural as the forum's convenience to the plaintiff would call on trial judges to use practically unbridled discretion in sorting through a plethora of considerations: the relative distances the

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panying notes 23-24, this Article strongly disagrees with the latter part of his observation.

91. *World-Wide*, 444 U.S. at 308 (Brennan, J., dissenting) (opinion also applies to *Rush*, 444 U.S. 320 (1980)).

92. 436 U.S. at 92.

93. 444 U.S. at 332.

94. *See* Jay, *supra* note 25, at 450; Brilmayer, *supra* note 53, at 111.

95. 433 U.S. at 204.

96. *See* Brilmayer, *supra* note 53, at 111; Lewis, *supra* note 13, at 811.

97. For example, Justice Brennan's dissent in *World-Wide* and *Rush* demonstrates this tendency to oversimplify the plaintiff's interest in securing a forum. Out of concern for convenience to the plaintiff, Justice Brennan would relax the contacts requirements (and presumably also jurisdictional guidelines geared to the defendant's reasonable expectations or benefits) and would permit jurisdiction absent a "heavy and disproportionate hurden" on the defendant. 444 U.S. at 310 (quoting Hanson v. Denckla, 357 U.S. at 258-59 (Black, J., dissenting)). Justice Brennan noted that modern means of travel have eased a nonresident defendant's burden of defending, *see id.* at 311, failing to mention that the same means presumably would equally ease the plaintiff's burden of prosecuting.

98. *See* Brilmayer, *supra* note 53, at 107; Brilmayer, *Legitimate Interests in Multi-State Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1322-23 (1981); Lewis, *supra* note 8, at 733 n.182; Lewis, *supra* note 13, at 836; *see also supra* note 25. The Court in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), exemplified this use of the doctrine by stressing California's interest in providing the resident plaintiff a convenient forum. *Id.* at 223.

99. *See* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 227-28 (1967); Lewis, *supra* note 13, at 816 n.269.

parties would have to travel;[100] the parties' wealth;[101] the opportunity costs of prosecuting or defending in a distant place;[102] and countless other considerations clustered about the elusive concept of an "undue burden"[103] on the defendant. A concern with simple convenience would replace the current multifactor contacts analysis with a vastly increased number of factors composing a complicated, subjective inquiry that would lead to even less predictable decisionmaking. Accordingly, just as the traditional insistence on contacts assures something other than simple convenience for the defendant,[104] jurisdiction theory should not express the plaintiff's interest in terms of his need for a convenient forum.[105]

A more limited liberalization of the contacts tests to take into account the plaintiff's limited interest in avoiding fragmented litigation would inject consideration of the plaintiff into the jurisdictional analysis without subjecting courts to the approach just described. The Court's recent decisions appear to recognize the plaintiff's need to avoid fragmented litigation.[106] This more confined, objectively ascertainable plaintiff's interest would avoid certain cases of extreme hardship even more effectively than an open-ended interest in relative "convenience."[107] If the plaintiff is able to demonstrate a special, fragmentation-avoidance reason for litigating in his forum of choice, it is hardly a radical proposition to suggest that such an interest may offset a deficiency in the nature or extent of the defendant's forum contacts. Even *Pennoyer* indi-

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100. Whitten, *supra* note 25, at 846.

101. McDougal, *supra* note 6, at 9, 29-30.

102. Whitten, *supra* note 25, at 846. Professor Whitten specifically included as part of his proposed inquiry consideration of travel necessities and the costs of living away from home and of transporting evidence. *Id.*

103. McDougal, *supra* note 6, at 30.

104. *See* Lewis, *supra* note 8, at 712; *infra* text accompanying note 164.

105. Rejecting the characterization of the plaintiff's interest as "convenience" does not constitute an argument for relegating plaintiffs to inconvenient fora. To the contrary, this Article's proposals—limited liberalization of the contacts tests, explicit endorsement of most of the satellite noncontacts-based particularized tests, and an ultimate direct resort to the fairness criteria of expectation and benefit—combine to reduce the sets of circumstances that would force plaintiffs to file suit in a manifestly inconvenient place.

106. *See, e.g., World-Wide*, 444 U.S. at 292 (noting "plaintiff's interest in convenient and effective relief"); *Shaffer*, 433 U.S. at 211 n.37 (excepting jurisdiction by necessity from the general minimum contacts framework).

107. For example, defining the plaintiff's interest as simply one of geographical convenience ignores the plaintiff's fragmentation-avoidance interest. It is easy to imagine a situation in which one of several defendants is amenable to jurisdiction in plaintiff's home state but the plaintiff must also institute separate suits against other defendants in proximate states.

cates a concern for the ability of plaintiffs to prosecute their claims.[108] The Court has repeatedly at least acknowledged the relevance of the plaintiff's jurisdictional interests,[109] and in one case, *Mullane v. Central Hanover Bank & Trust Co.*,[110] the plaintiff's interest in avoiding fragmented litigation seems to have been a decisive factor supporting jurisdiction.[111]

Recognition of a plaintiff's fragmentation-avoidance interest would sometimes lead to sustaining jurisdiction within the existing minimum contacts framework. The result in *Shaffer*, for example, might have been different if the Court had counted that interest.[112] On the other hand, the fragmentation-avoidance interest would sometimes sustain jurisdiction apart from any particularized test, under the overall criterion of expectation. For example, in an action by a trustee for judicial settlement of the accounts of a common trust fund in which none of the many beneficiaries domiciled outside the forum has purposeful forum contacts, jurisdiction in the forum might rest on the plaintiff's interest in avoiding fragmented litigation in the beneficiaries' several home states.[113]

B. Recognizing Contacts Occurring After the Claim Arises

Traditional minimum contacts analysis considers only the "pre-litigation" or "historical" contacts that the defendant has

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108. *See* Lewis, *supra* note 13, at 810.

109. In *Kulko*, *World-Wide*, and *Rush*, the Court acknowledged that assessing the fairness of the forum to the defendant should proceed "in light of" forum selection interests of the plaintiff. Ultimately, however, in each decision the Court found that the "primary" consideration should he the defendant's interest in avoiding exercises of jurisdiction not supported by contacts and that other interests, like the plaintiff's, were merely "relevant." *Kulko*, 436 U.S. at 91-92; *World-Wide*, 444 U.S. at 292 (also applies to *Rush*); *see supra* text accompanying notes 92-93.

110. 339 U.S. 306 (1950).

111. As Justice Brennan later observed, the only articulated hasis of jurisdiction in *Mullane* was tbe interest of the forum state, since the defendants had not personally entered into any discernible association with the forum. *World-Wide*, 444 U.S. at 310 n.17 (Brennan, J., dissenting); *Shaffer*, 433 U.S. at 224 (Brennan, J., concurring in part and dissenting in part). The interest of the plaintiff bank, however, actually appears to have been even more important to the decision. *See infra* text accompanying notes 274-77. Although commentators have described McGee v. International Life Ins. Co., 355 U.S. 220 (1957), as turning on the plaintiff's general convenience interest, that description is inaccurate. The defendant in *McGee*, unlike the defendants in *Mullane*, had entered into a purposeful association with the California forum, and thus satisfied the regular claim-related minimum contacts tests without reference to the plaintiff's interest or that of the forum state. *See* Lewis, *supra* note 13, at 792.

112. *See infra* text accompanying notes 280-83.

113. *See infra* part IV, section K.

made with the forum,[114] an approach that may have been a natural consequence of sovereignty theory. Interstate sovereignty seems to demand a formal basis of a state's authority to adjudicate at the commencement of suit. Jurisdiction failed in *Pennoyer*, for example, because the defendant acquired property within the forum—the theoretical basis of state power to adjudicate—only after the action had commenced.[115] If, however, the proper concern of the personal jurisdiction decision is individual rights alone, and not sovereign power, there is no *a priori* reason for courts to ignore contacts occurring after the events that generated the claim.[116] Indeed, a relationship seems to exist between certain conduct of the defendant after a lawsuit commences—for example, whether he asserts a claim to the property at issue in the case—and his reasonable expectations about place of suit.[117]

A close inspection of the decisions since *International Shoe* reveals that the Court occasionally has taken into account post-litigation contacts. In *Hanson*, for example, the Court apparently approved jurisdiction in the Delaware action even though the defendants' only purposeful contacts with Delaware were their claims in the litigation to trust assets located in the forum.[118] Dictum in *Shaffer* is even more pointed; the Court observed that when the controversy concerns forum property, "the defendant's *claim to* property located in the State would normally indicate that he expected to benefit from the State's protection of his interest."[119] In other words, the defendant's ownership of forum property becomes

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114. *See* Drobak, *supra* note 25, at 1042 n.118, 1049-50, 1057-58; Comment, *The UCCJA: Coming of Age*, 34 MERCER L. REV. 861, 870 (1983) (contacts analysis requires the defendant's "previous connection" with the forum); *see also Ireland*, 456 U.S. at 704 ("historical" contacts significant).

115. Lewis, *supra* note 8, at 703.

116. By contrast, questions of federal subject matter jurisdiction are principally concerned with the allocation of power between competing state and federal systems. Thus, a challenge to subject matter jurisdiction raised at the inception of an action suspends the power of a federal court to inquire into other questions. Similarly, an assessment of facts relevant to citizenship, on which diversity jurisdiction depends, properly considers only the facts as of the commencement of the action. C. WRIGHT, THE LAW OF FEDERAL COURTS § 28 (4th ed. 1983).

117. Brilmayer, *supra* note 53 at 99 & nn.97-99; *see* Vernon, *supra* note 57, at 295-96; Note, *Uniform Approach*, *supra* note 47, at 140.

118. Lewis, *supra* note 13, at 789-90 n.103.

119. 433 U.S. at 207-08 (emphasis added) (footnote omitted); *cf.* Lehr v. Robertson, 103 S. Ct. 2985 (1983) (whether alleged biological father enjoys a liberty interest, protected by due process, in receiving advance notice of adoption proceeding turns on whether he demonstrates concern for the child, the subject of the proceeding, by filing with a state putative father registry).

a cognizable contact precisely because the defendant, after the onset of litigation, has responded to the complaint by claiming the forum property as his own; the defendant should not be surprised that he must defend that property in the state from which, as the Court presumes, he should expect to receive some benefit.[120]

Ireland is the best indication that the Court accepts the jurisdictional significance of postlitigation contacts. In the majority's view, personal jurisdiction may exist as a matter of law if a plaintiff demonstrates the ordinarily required "historical facts" about defendant-forum contacts.[121] The Court went on to observe, however, that evidence of past contacts is "not the only way" to establish personal jurisdiction.[122] Instead, the majority accorded dispositive jurisdictional significance to the defendants' actions after the litigation had commenced.[123] This analysis is sound. Because the contacts tests should function as predictors of expectation, they should explicitly recognize that a defendant's forum contacts made after the conduct that generates the claim sometimes may shed light on the defendant's reasonable expectations about place of suit.[124]

C. *Recognizing An Unusually Slight Need of Any Particular Defendant to Appear*

Contacts analysis should also recognize that in some multiple defendant lawsuits an individual defendant may not have the usual need to appear in the action. Professor McDougal has suggested the useful example of an action brought under Title VII of the 1964 Civil Rights Act by a class of employees against a class of employers, not all of whom have contacts with the forum. To Professor McDougal this hypothetical raised the disturbing possibility

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120. That the benefit in this example flows from the forum state, rather than from the defendant's private commercial relations, does not render the benefit jurisdictionally irrelevant. Indeed, government-afforded benefit was the very kind considered significant in *International Shoe*. *See supra* text accompanying notes 80-81.

121. 456 U.S. at 704.

122. *Id.*

123. *Id.* at 704-05. The critical conduct of the defendants in *Ireland* consisted of obstructing the progress of discovery about jurisdictional facts.

124. In fact, the Court already may have accepted the significance of forum contacts that defendants make after the events that provoke a plaintiff's claim. For example, in Perkins v. Bengnet, 342 U.S. 437 (1952), the claim-generating conduct of the defendant took place in the Phillipines, before the onset of World War II. The Court, however, predicated jurisdiction on the defendant's substantial activities in Ohio, the forum, and those took place some time thereafter. *Id.* at 438; *see* Lewis, *supra* note 13, at notes 125-30 and accompanying text.

of duplicative litigation in several states and a consequent burden on the parties and on the "collective community of states." He concluded that to "deny a class action . . . because the plaintiff class failed to demonstrate that all the . . . employers had minimum contacts with the forum state would contravene the . . . [collective state] interest in resolving these controversies in a single action."[125] Therefore, he approved the result of a lower court decision[126] upholding jurisdiction, which accorded greater weight to the various public interests reflected in class action statutes and rules than to the standard minimum contacts protections.[127] According to Professor McDougal, this result is founded on the premise that governmental interests warrant some compromise of the interests of the parties. That premise, however, is no longer sound after the recent Supreme Court decisions that elevate the interests of the parties over any competing governmental interests.[128] In any event, it is difficult to understand how policies in statutes and rules governing class actions may overcome the constitutional imperative of protecting the interests of the parties.[129]

A unified jurisdictional theory based on individual rights yields fair results in these multiple defendant cases consistent with current Supreme Court doctrine. Two party fairness features stand out in these cases. First, the plaintiffs have a clear fragmentation-avoidance interest in maintaining the action in their chosen forum. Second, as long as at least one defendant from each defendant subclass appears in the action, no single defendant has the ordinarily critical need to appear and defend because at least one important defense will be common to all defendants.[130] Most individual fact

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125. McDougal, *supra* note 6, at 25.

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

127. McDougal, *supra* note 6, at 24-25.

128. *See supra* text accompanying notes 26-34.

129. *See* Lewis, *supra* note 8, at 726 (contending that *Ireland* is not satisfactorily explained as simply a decision promoting federal discovery rules over sovereignty interests since it is "unlikely that a constitutional imperative would be shelved in favor of rules of procedure").

130. By definition, defendants in a Rule 23 class action will share important common defenses because under the Rule such an action would lie only if "there are questions of law or fact common to the class," the "defenses of the representative parties are typical of the . . . defenses of the class," and "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

Similarly, in Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950), the Court explained why personal service upon each member of a class of defendant trust beneficiaries was not essential to give the notice that procedural due process requires:

> The individual interest does not stand alone but is identical with that of a class. The rights of each [defendant] in the integrity of the fund and the fidelity of the trustee

or law questions unique to particular defendants, even within a unified subclass, would relate to individual relief and typically would arise in a Title VII bifurcated trial only after an initial determination of liability.[131] At the liability stage defendants who clearly are subject to jurisdiction or who for other reasons voluntarily elect to appear and defend could represent the interests of the absent defendants. Of course, in the second stage of the bifurcated trial, each defendant previously found liable would admittedly have the usual strong interest in appearing to present its individual defenses to relief. There is no reason in principle[132] why these defendants could not save their constitutional objections to jurisdiction until this second phase of the trial. The court then could appraise this jurisdictional defense in light of the plaintiff's interest in avoiding fragmented litigation.[133] This approach does less violence to the defendant's due process rights than does the substantive interest approach, which all but sweeps those interests aside in the name of judicial economy. At the same time, it allows a realistic appraisal of the defendant's actual need to defend, balancing that need against the plaintiff's special need to prosecute the action in the forum.

A more difficult problem arises when multiple defendants do not share essentially the same defenses to liability. In these cases—*World-Wide* and other multidefendant tort actions are representative—courts may not relax contacts strictures on the ground that an individual defendant has an unusually slight need to appear. *World-Wide*'s solution to the problem is to remit plaintiffs to multiple suits in the several states that would have jurisdiction over the various defendants. Of course, plaintiffs then could face different approaches to the critical choice of law questions that might dictate the outcome of the dispute. Understandably,

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[plaintiff bank] are shared by many other [defendant] beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all.

Id. at 319.

131. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); J. FRIEDMAN & G. STRICKLER, THE LAW OF EMPLOYMENT DISCRIMINATION 711 (1983).

132. Rules requiring the assertion of the personal jurisdiction defense before trial present a practical obstacle to the effectiveness of the proposed procedure. *See, e.g.*, FED. R. CIV. P. 12(g). Modification of these rules is necessary for multiple defendant cases so that defendants can risk deferring the jurisdictional defense to the remedy stage of such a bifurcated proceeding.

133. See Comment, *supra* note 60, at 651-52, for a consideration of some of the mechanics of weighing the interests of multiple defendants against the plaintiff's fragmentation-avoidance interest.

this approach has evoked loud complaint from segments of the trial bar[134] and from Justice Brennan, who fairly characterized it as reflecting an "extreme concern for defendants."[135]

The flaw in *World-Wide*, however, is not so much its overrating of the defendants' interests as its disregard of the fragmentation-avoidance interests of the plaintiff. The Court evinces little awareness that the defendant's interest in a fair forum is only one consideration in a search for a forum *relatively* fair to both parties. Relative fairness refers not just to the process that requires courts to weigh the defendant's interests against the plaintiff's; it also contemplates results that may be somewhat unfair to the defendant, as they sometimes are to the plaintiff.[136]

D. Blending Disparate Defendant's Contacts and Plaintiff's Interests

Perhaps the most significant implication for contacts analysis of an individual rights theory of personal jurisdiction organized around uniform forum-fairness criteria is that an exercise of jurisdiction need not satisfy any single minimum contacts formula. The decisions often have limited contacts analysis to the polar extremes, insisting that the defendant have either a forum contact that is directly related to the plaintiff's claim[137] or ongoing multiple forum contacts that in the aggregate are regular and substantial.[138] If, however, the sole justification for these tests is to enable confident predictions about the fairness of the forum, by reference to the criteria of expectation and benefit, it follows that jurisdiction need not independently satisfy either of these polar extremes. If the record suggests partial satisfaction of both versions of the contacts tests, a court should be free to consider the strength of the resulting inferences about expectation and benefit in making its ultimate judgment about forum fairness.

Although the Court has not subscribed expressly to blending claim-related and nonclaim-related contacts, its decisions certainly do not foreclose that approach. For example, *International Shoe*

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134. *See, e.g.*, Kennelly, *Choice of Laws, Jurisdiction and Forum Non Conveniens*, 1982 TRIAL LAW. GUIDE 260 (1982).

135. 444 U.S. at 309 (Brennan, J., dissenting in *World-Wide* and *Rush*).

136. The plaintiff faces the same unfairness when a forum perfectly convenient to the defendant is found to offend due process for want of the requisite defendant-forum contacts. *See infra* text accompanying notes 164-67.

137. *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

138. *E.g.*, Perkins v. Benguet, 342 U.S. 437 (1952).

did not suggest that satisfaction of any given contacts model is the only way to demonstrate the requisite degree of expectation or benefit for a fair exercise of jurisdiction. On the contrary, the opinion discussed situations in which a defendant's several forum contacts may not amount to regular, substantial, and continuous forum activity, but in which jurisdiction would still be appropriate because some of those contacts are at least tangentially related to the plaintiff's claim.[139] *Perkins*, consistent with *International Shoe*'s warning that the due process inquiry "cannot be simply mechanical or quantitative,"[140] announced that the "amount and kind of activities which must be carried on by the [nonresident defendant] in the state of the forum so as to make it reasonable and just to subject [the defendant] to the jurisdiction of that state are to be determined in each case."[141] Furthermore, the Court stated in *Shaffer* that the "presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation . . . ."[142] Finally, in *Rush* the Court cited that statement in observing that a defendant's ownership of forum property which the Court considered unrelated to the cause of action was still a cognizable forum contact capable of supporting jurisdiction under "the fairness standard of *International Shoe*"[143] when combined with other defendant-forum contacts.

In practice, however, the Court's willingness to embrace a blending of contacts has not been so evident. *Shaffer* would have been an ideal case for adopting this feature of jurisdictional analysis. Some degree of claim-relatedness surely was present: the injury to the Delaware corporation from the alleged conduct of the defendant fiduciaries would have had repercussions, at least to some degree,[144] in the Delaware forum. Just as clearly, however,

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139. It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less . . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

International Shoe, 326 U.S. at 319.

140. *Id.*

141. 342 U.S. at 445.

142. 433 U.S. at 209.

143. 444 U.S. at 328.

144. *But see* Ratner & Schwartz, *The Impact of* Shaffer v. Heitner *On the Substan-*

Shaffer's facts failed to display the close degree of relatedness required in *McGee v. International Life Insurance Co.*[145]—the plaintiff's claim did not attack the defendants' management of corporate affairs in Delaware. Still, the defendants also had some nonclaim-related forum contacts of the *Perkins*[146] genre: the numerous benefits and protections of Delaware law that they enjoyed as officers or directors of a Delaware corporation.[147] These contacts, however, evidently were not of sufficient magnitude to meet independently the Court's conception of the *Perkins* test.[148] Finally, the derivative action plaintiff in *Shaffer* had a substantial fragmentation-avoidance interest in securing jurisdiction in Delaware. Unless Delaware or some other state could have exercised jurisdiction over all the defendants, the plaintiff would have had to prosecute his claims in the several states with which the individual defendants had constitutionally adequate contacts. Even in some of those states jurisdiction might have failed without a basis for jurisdiction over the corporation itself, since a corporation is an indispensable party to shareholders' derivative actions.[149] Facts such as *Shaffer*'s demand that contacts analysis be sufficiently elastic to consider whether partial satisfaction of claim-related and nonclaim-related tests of the defendant's contacts, coupled with the plaintiff's interest in avoiding fragmented litigation, suffice to make jurisdiction "fair" even though the defendant's contacts satisfy neither polar test independently.

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tive Law of Corporations, 45 BROOKLYN L. REV. 641, 648-49 (1979) (arguing that there is "very little real substance" to asserted concerns for "a victimized local corporation, a manifest state regulatory interest, and an interest in supervising the affairs of its own creation").

145. 355 U.S. 220 (1957). The *McGee* Court followed a strict, claim-relatedness contacts approach. *See supra* note 137 and accompanying text.

146. The *Perkins* Court utilized a typical, nonclaim-related contacts test. *See supra* note 82 and accompanying text.

147. As Justice Brennan pointed out in dissent, Delaware law makes available to the officials of its corporations a number of benefits, including interest free loans and indemnification. 433 U.S. at 228 (Brennan, J., dissenting). The majority also acknowledged these benefits and the plaintiff's argument that they should trigger a reciprocal obligation on the part of the defendants to respond in Delaware to claims that they had abused their corporate offices. 433 U.S. at 215-16.

148. Without specifically addressing whether the regularity and quantum of these benefits sufficed for jurisdiction on the *Perkins* basis of regular, substantial, and continuous nonclaim-related activities, the Court observed that because Delaware had not enacted a statute deeming acceptance of a directorship as consent to jurisdiction, the defendants "had no reason to expect to be haled before a Delaware court" in connection with their non-Delaware activities. 433 U.S. at 216.

149. 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5997 (rev. perm. ed. 1980).

While critics may object that this blending approach calls for an ultimate judgment on forum fairness that is beyond the capabilities of a court, the court's task would be really no more difficult than evaluating forum fairness under either polar test alone. A claim-related test demands that the court assess the degree to which the defendant's alleged conduct relates to or has an effect in the forum. Worse yet, *World-Wide*'s incremental refinement of the relatedness test requires the court to decide whether a defendant's forum contacts have afforded him a nontrivial benefit in a noncollateral way.[150] The Court furnishes no standards for determining when a benefit is too marginal or arises from a relation too collateral to the defendant's forum contact to support jurisdiction. Similarly, no clear criteria define how substantial, regular, or continuous a defendant's nonclaim-related contacts must be to satisfy the test of *Perkins*.[151]

In short, judges already face the unenviable task of pinning down the ever-elusive phantom of forum fairness. That task unavoidably requires judges to quantify and to weigh several speculative and possibly unmeasurable considerations. To avoid complicating that task unduly, jurisdictional analysis should include only factors that strongly correlate with the goal of forum fairness. Extraneous factors such as governmental interests, while undeniably important on such issues as choice of law, bear no logical relation to the fairness criteria that alone should control questions of personal jurisdiction.[152] Therefore, these extraneous considerations should play no role in the jurisdiction decision. Equally important, however, the jurisdictional equation must include all considerations that *do* yield the relevant correlations with expectation and benefit, even at the price of further speculation and measurement. Accordingly, courts should consider as a whole the blend of a defendant's claim-related and nonclaim-related contacts in reaching a conclusion about the defendant's expectation and benefit—the

150. 444 U.S. at 299; *see* Lewis, *supra* note 13, at 803-04.

151. Indeed, the Court may have avoided deciding whether the *Perkins* basis was independently satisfied in *Shaffer* precisely because the concept of substantiality is so largely undefined. In *International Shoe*, the Court assessed the magnitude of the defendant's forum dealings in terms of its aggregate sales volume generated from forum activities. In *Perkins*, by contrast, the defendants conducted no or virtually no profit-generating activity at the relevant times; nevertheless, the Court found the defendant's forum activities substantial under a proportionate measure of substantiality represented by the percentage of defendant's overall activities carried on in the forum. *See* Lewis, *supra* note 13, at 782-83 n.73.

152. *See* Lewis, *supra* note 8, at 735-36.

ultimate criteria of fairness to the parties—tempered also by the plaintiff's interest in avoiding fragmented litigation.

IV. Validity of the "Satellite" Jurisdictional Tests Not Based on Contacts

Three possible fates await each of the satellite jurisdictional tests not based on contacts. Some may warrant continued recognition because they are consistent with the liberalized, reformulated contacts tests proposed in part III of this Article. Other tests falling outside the contacts mainstream may survive due process scrutiny if they confidently can predict satisfaction of one of the ultimate fairness criteria of expectation or benefit. Finally, jurisdictional analysis should discard any satellite tests that cannot be squared either with the modified minimum contacts tests or with the ultimate fairness criteria.

A. The "Noncommercial Tortfeasor"

After *Hanson* and *World-Wide*, the class of cases involving "noncommercial tortfeasor" defendants analytically is a satellite area outside the developed minimum contacts framework altogether. Quite simply, the factual situations do not lend themselves to a contacts approach. These defendants have made no purposeful forum contact, or their isolated forum contact has yielded them no commercial benefit. For example, assume that *B*, a resident and domiciliary of New York, stands in New York and, without knowledge of his proximity to New Jersey, fires a gun at a target in New York. A bullet discharged from this round enters New Jersey, where it strikes and injures *A*, a resident and domiciliary of that state.[153] Assume further that *B* has no other New Jersey contacts, claim-related or otherwise. *B*'s sole interaction with New Jersey is neither beneficial to him nor even advertent. Traditional minimum contacts analysis, at least after *World-Wide*, would preclude New Jersey from asserting jurisdiction over *B*. Although *B*'s conduct produced, perhaps foreseeably, an effect in New Jersey, his conduct is not a purposeful or beneficial contact with that state.[154] Even the proposed minimum contacts modification that relates to the plaintiff's interests[155] would not change the result, since *A* has

153. A discussion of a similar hypothetical appears in the Restatement (Second) of Conflict of Laws § 37 caveat a (1971).

154. *See World-Wide*, 444 U.S. at 298-99.

155. None of the other modifications suggested in part III has any application to this

an alternative forum available (New York, *B*'s state of domicile) and he faces no threat of fragmented litigation.[156]

The Supreme Court recently appeared to endorse an expectations approach for assessing the constitutionality of personal jurisdiction over tortfeasors who cause effects in the forum by entirely noncommercial acts committed elsewhere. The relevant question, the Court wrote, is whether the defendant should have expected to be "haled before" a court of the forum state.[157] In context, the Court clearly implied that contacts which hold no promise of benefit might nevertheless suffice to render an exercise of jurisdiction fair to the defendant so long as they generate expectations about the place of suit.[158] Thus, the bullet hypothetical may be resolved by immediate reference to the fairness criterion of expectation, despite defendant *B*'s lack of purposeful and beneficial forum contacts.

Still, on the necessary assumption[159] that *B* should have expected suit somewhere, it would be quite a stretch to subject him to jurisdiction in New Jersey. He cannot fairly be held to any "intrinsically" generated expectations about suit in New Jersey, for he is oblivious (perhaps with the characteristic noblesse oblige of a New Yorker) to his proximity to the border. Nor does the evidence point to any "extrinsic" factors—a contractual agreement to submit to New Jersey's jurisdiction or a long-arm statute of which he is likely to be aware—that should have warned him that New

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situation.

156. *See supra* text accompanying notes 87-113.

157. *Kulko*, 436 U.S. at 98 (quoting Shaffer v. Heitner, 433 U.S. 186, 216 (1977)).

158. The Court's consideration of expectation as an independently sufficient rationale for jurisdiction in the noncommercial tortfeasor situation comes as a curious aside in *Kulko*, a domestic relations case. The Court introduced the expectations rationale for noncommerical tortfeasor cases hy citing § 37 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, which generally authorizes states to assert jurisdiction "over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects . . . ." 436 U.S. at 96. The Court referred specifically to the Restaters' example of a defendant's "shooting [a] bullet from one State into another." *Id.* The Court stated that when a defendant's wrongful acts outside the forum cause injury within it, the test of jurisdiction is whether, given the nature of the defendant's out-of-state act, a reasonable person in his position should have expected to be "haled hefore" a court of the forum. *Id.* at 96, 97-98 (quoting Shaffer v. Heitner, 433 U.S. 186, 216 (1977)). Later the Court in *World-Wide* appeared to embrace the same expectations rationale as the ultimate justification not just for tort cases but for any exercise of jurisdiction formally predicated on a test of contacts. 444 U.S. at 297. In *Calder*, No. 82-1401 (U.S. Mar. 20, 1984) (available Mar. 22, 1984 on LEXIS, Genfed library, Sup file), the Court again approved jurisdiction based on the "effects" that a defendant's out-of-state acts produce in the forum, relying explicitly on § 37.

159. *See supra* text accompanying note 77.

Jersey might be the forum. True, many observers would say that jurisdiction in New Jersey, in a rough sense, would be minimally "fair" without regard to expectation since, if one of the parties will have to cross state lines to participate in the lawsuit, it should be the affirmative actor rather than the passive victim.[160] The hypothesized facts are unusual, though, and it would do little damage to substantive fairness in the aggregate to deny jurisdiction in that situation and insist on adherence to the ultimate criteria of fairness. New Jersey's jurisdiction on the hypothetical facts should therefore be denied. If, however, as would more often be the case, the defendant were aware of his proximity to the border, jurisidiction should be upheld on a rationale of intrinsically generated expectations: *B*'s knowledge that he is acting near the border should lead a reasonable person in his position to expect that the consequences of his conduct may be felt in that state and, therefore, to expect that if those consequences provoke a lawsuit, he may have to defend it there.

B. "Proximity" or "Convenience"

On rare occasions, although the foreign forum is one with which the defendant has no "contacts, ties, or relations,"[161] it is also the single most convenient place for the defendant to litigate. Some commentators have contended that in such cases the foreign forum's proximity to the defendant arguably serves as an alternative basis of personal jurisdiction.[162] Expectation or benefit analysis would enable a court to assess whether jurisdiction based on proximity satisfies due process.

Consider a New Jersey plaintiff who files suit in New Jersey after being injured in an accident in New York with a defendant who is a New York resident and domiciliary. The defendant has no contacts with New Jersey, but the New Jersey courthouse is closest to his residence and thus more convenient to him than any in New York. The forum's attempted exercise of jurisdiction would fail if traditional minimum contacts tests exhaust the categories of "fair play," since the defendant has no contacts with New Jersey that would satisfy the requirements expounded in the Court's most recent decisions.[163] *World-Wide* made it abundantly clear that rela-

160. The Court in *Kulko* expressly relied on this "who has gone to whom" factor as relevant to the defendant's expectations about place of suit. 436 U.S. at 97-98.

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

162. *See* Whitten, *supra* noto 25, at 846; McDougal, *supra* note 6, at 9, 29-30.

163. Professor Posnak posed this hypothetical and concluded that a court should

tive convenience to the defendant does not equate with and may not substitute for contacts.[164] In addition, *Rush* instructed that the relevant forum contacts are the contacts of each defendant, rather than the aggregated contacts of defendants and plaintiffs.[165]

Under an approach that bypasses contacts and proceeds directly to fairness criteria, jurisdiction theoretically might be proper in this hypothetical if the evidence warrants a conclusion about the defendant's expectations of suit that comports with the broader "standards" of *International Shoe*. In application, however, the analysis still would not point to New Jersey as a fair forum because either of two opposing expectations is equally imputable to the defendant. First, he reasonably might expect to defend only in his home state of New York, particularly when he has not purposefully initiated any contacts with New Jersey. Alternatively, the defendant reasonably might expect to defend in the court closest to his residence, a New Jersey court, even though he has had no traditionally cognizable connection with that state. Each of these expectations is *a priori* as reasonable as the other. Given opposing expectations of relatively equal strength, the court should not arbitrarily hold the defendant to one expectation rather than the other. Accordingly, on these facts direct resort to an expectation rationale does not support jurisdiction any more than do the standard tests of contacts.

This denial of jurisdiction and the broader denial of proximity as a satellite jurisdictional basis is probably the most prudent, if not the most fair, result. Departing from the uniform jurisdictional guidelines would sacrifice efficiency and countervailing fairness values. Moreover, the plaintiff has another available forum—the defendant's state of domicile—adjacent to the plaintiff's home state and hence not seriously inconvenient to him. Accordingly, this plaintiff would rarely even try to avoid filing suit in the defendant's state of domicile, particularly since under *World-Wide*'s tightened contacts tests his attempt to secure jurisdiction at home probably would prove unavailing. Although raw fairness or conve-

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grant a timely motion to dismiss for lack of personal jurisdiction because the defendant has no "judicially cognizable ties" with New Jersey in the sense that *World-Wide* intended. New Jersey therefore should defer to New York in order to promote interstate federalism. Posnak, *supra* note 47, at 780; *see e.g.*, McDougal, *supra* note 6, at 8-9; R. CRAMTON, D. CURRIE & H. KAY, CONFLICTS OF LAWS 513 (2d ed. 1975).

164. *See* Lewis, *supra* note 8, at 712; *see also* Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 22, 35 (1982-83).

165. *See supra* text accompanying note 65.

nience, instead of their surrogates of expectation and benefit, might point to jurisdiction in the plaintiff's preferred forum as the most "just" result,[166] the need for a more objective rule[167] and the absence of significant prejudice to the plaintiff support a denial of jurisdiction.

C. *Voluntary, Express Consent*

Expectation analysis also supports voluntary, express consent as an alternative, noncontacts basis of jurisdiction. The paradigm example of such consent is a forum selection clause. Assume that *B*, a sophisticated, wealthy Florida domiciliary represented by skillful counsel, enters into a contract negotiated, executed, and to be performed entirely in Florida, with *A*, a New York corporation. Assume also that neither *B* nor *A* has any contacts whatsoever with Nebraska, but that the contract stipulates that Nebraska will be the forum for all contract-related litigation. If *B* breaches the contract and *A* files suit in Nebraska, traditional minimum contacts analysis would not approve jurisdiction because the defendant has no Nebraska contacts apart from the mention of Nebraska in the agreement. That lone contact would fail to support jurisdiction because the claim would relate not to the defendant's reference to Nebraska in the contract, but to his alleged acts of breach in Florida.

The proposed expectation bypass analysis, however, supports jurisdiction in this situation. The Supreme Court reconfirmed in *Ireland* that "parties to a contract may agree in advance to submit to the jurisdiction of a given court."[168] Still, inclusion of a forum selection clause in the parties' agreement should not obviate a fairness determination altogether. The parties' characteristics or conduct might indicate that the forum is substantively unfair, or that the defendant actually did not understand that the supposedly "agreed upon" forum was part of his agreement.[169] Instead, the ap-

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166. Some jurists and writers remain committed to the superficially appealing concept that a court may assess fairness in terms of raw convenience to the parties. *See supra* 97-102 and accompanying text.

167. *See supra* text accompanying notes 100-03.

168. 456 U.S. 694, 703-04 (1982) (citing National Equip. Rental v. Szukhent, 375 U.S. 311, 316 (1964)); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); The Bremen v. Zapata Off-Sbore Co., 407 U.S. 1 (1972).

169. In D. H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972), the Supreme Court cautioned that a forum selection clause might not support jurisdiction independent of minimum contacts if the "contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [forum selection clause]." *Id.* at

propriate analysis for fairness is the same as for other extrinsically generated expectations. First, the defendant must have notice that jurisdiction may lie in a forum with which he has negligible contacts. This element is present in our hypothetical because the contract expressly designates a particular forum for all contract-related litigation. In other cases, however, when the defendant is relatively unsophisticated, a forum selection clause, even if read, may fail to generate a reasonable expectation that litigation over the contract may take place in the forum.[170] Second, the defendant's consent must be voluntary. This element, too, usually should present no problem because the defendant's decision to submit to the forum selection clause ordinarily would not cause him to forfeit a preexisting constitutional right to engage in the transaction contemplated by the contract.[171] Thus, an analysis of the defendant's extrinsically generated expectations justifies in general fairness terms what until now has been a distinct exception to the minimum contacts tests.

D. Quasi-Voluntary Consent

Some state statutes provide that a nonresident who engages in certain forum-related conduct is deemed to have consented to the jurisdiction of the state's courts for resolving claims arising from that conduct.[172] These statutes, unlike the bargained-for contractual forum selection clauses, at best represent a form of implied, rather than actual, consent and create only an uncertain possibility of notice to a given nonresident that his conduct may subject him to a forum's jurisdiction. Such statutes—the nonresident motorist statutes are again an example—cannot provide a basis of jurisdiction under the traditional analysis since by themselves they cannot supply a purposeful or beneficial defendant-forum contact when one is otherwise absent. That a statute cannot make contacts pur-

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170. In National Equip. Rental v. Szukhent, 375 U.S. 311 (1964), Justice Black expressed concern that a cleverly drafted forum consent clause that appears only to appoint an agent for service may force an unsuspecting, unsophisticated party into costly litigation. *Id.* at 326-27 (Black, J., dissenting). Similarly, in *Overmyer* the Court considered the sophistication of the parties when it acknowledged that Overmyer "has been party to 'tens of thousands of contracts with many contractors.'" 405 U.S. at 186.

171. Voluntariness for these purposes means that the defendant could have chosen to withhold the consent without sacrificing a preexisting constitutional right. *See supra* text accompanying note 79.

172. A collection of these long-arm statutes appears in R. CASAD, JURISDICTION IN CIVIL ACTIONS A-32-102 app. (1983).

poseful or beneficial holds true even if the statute evinces a strong state interest in asserting jurisdiction, because *Rush* has made clear that state interests may not substitute for defendant-forum contacts.

Nevertheless, statutory notice to certain defendants of potential litigation within the forum arising from their forum-related conduct sometimes may provide a basis of jurisdiction founded on expectations instead of contacts. The statute may extrinsically generate an expectation in relatively sophisticated primary actors that they must defend in the forum any litigation arising from their activities covered by the statute. The Supreme Court in *Shaffer* appeared to approve this proposed expectation approach as an alternative to the minimum contacts analysis. The opinion asserted that even if Delaware had expressed a manifest state interest in asserting jurisdiction over the corporate fiduciaries,[173] jurisdiction still would not have been "fair," since the plaintiff's claim did not arise out of the defendant's forum contacts as directly as the Court thought the minimum contacts "nexus" test required.[174] The Court proceeded to state, however, that one reason the defendants should not have expected to be "haled before the Delaware court" was that Delaware had not enacted a separate statute that would treat acceptance of a corporate directorship as consent to jurisdiction.[175] Thus, the Court apparently considered quasi-voluntary consent as a distinct alternative to minimum contacts—the latter founded on the familiar defendant-forum-litigation contacts, the former founded on a statute that generates an expectation on the part of the defendant that he must conduct his defense in the forum.[176]

Within weeks after the *Shaffer* decision, the Delaware legislature passed precisely such an expectation-generating statute. It provided that a nonresident's acceptance of or continued service in a directorship of a Delaware-chartered corporation amounts to consent to suit in Delaware for claims arising from his corporate conduct.[177] The Delaware Supreme Court, on jurisdictional facts

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173. The Court concluded that Delaware's sequestration statute failed to express such an interest, since it reached only defendants who happened to own property within the forum, and Delaware law did not require corporate fiduciaries to purchase shares in their corporations. 433 U.S. at 213-14.

174. *Id.* at 215-16.

175. *Id.* at 216; *cf. id.* at 227 n.6 (Brennan, J., dissenting in part).

176. *See* Lewis, *supra* note 13, at 798 n.158.

177. DEL. CODE ANN. tit. 10, § 3114 (Supp. 1980). Section 3114 provides in pertinent part:

similar to *Shaffer*'s, later upheld jurisdiction but eschewed *Shaffer*'s "consent" theory and relied instead on the statute's expression of Delaware's interest in asserting jurisdiction over the corporate fiduciaries.[178] After *Rush*, however, forum state interests are no longer legitimate elements in the personal jurisdiction equation. Nevertheless, the expectations rationale that *Shaffer* foreshadowed would have enabled the same result in party fairness terms.

An expectation-generating statute like Delaware's should pass muster as a means for a forum to assert jurisdiction over a defendant regardless of that defendant's contacts with the forum. The prospective defendants are relatively sophisticated and most likely rely on the advice of counsel in deciding to affiliate with the corporation. It would not be unfair, then, for a court to assume that they in fact received statutory notice and, accordingly, to construe their acceptance of a directorship as a limited consent to jurisdiction in accordance with the statute's terms. Further, this consent would be voluntary: a would-be director could avoid the jurisdictional consequences by declining the directorship. In declining he would not forfeit a preexisting constitutional right; he would forfeit only

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(a) Every nonresident of this state who after September 1, 1977, accepts election or appointment as a director, trustee or member of the governing body of a corporation organized under the laws of this State or who after June 30, 1978, serves in such capacity and every resident of this State who so accepts election or appointment or serves in such capacity and thereafter removes his residence from this State shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as his agent upon whom service of process may be made in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such director, trustee or member is a necessary or proper party, or in any action or proceeding against such director, trustee or member for violation of his duty in such capacity, whether or not he continues to serve as such director, trustee or member at the time suit is commenced. Such acceptance or service as such director, trustee or member shall be a signification of the consent of such director, trustee or member that any process when so served shall be of the same legal force and validity as if served upon such director, trustee or member within this State and such appointment of the registered agent (or, if there is none, the Secretary of State) shall be irrevocable.

178. *See* Armstrong v. Pomerance, 423 A.2d 174, 180 (Del. 1980). "The only substantive difference for present purposes between *Shaffer* and the instant case is the existence of § 3114 as the basis for jurisdiction; we think that is sufficient to render the assertion of *in personam* jurisdiction constitutional in this case." *Id.*

North Carolina has a similar "consent" statute for corporate directors. *See* N.C. GEN. STAT. § 55-33 (1982) (enacted 1955). In a post-*Shaffer* decision a North Carolina appeals court, like the Delaware Supreme Court, upheld jurisdiction over a nonresident corporate director largely because of the state's statutorily expressed jurisdictional interest. *See* Swenson v. Thibaut, 39 N.C. App. 77, 92, 250 S.E.2d 279, 290 (1978), *appeal dismissed*, 296 N.C. 740, 254 S.E.2d 181 (1979).

those special benefits and protections that Delaware law provides directors of Delaware corporations.[179]

This "consent" process is also a substantively fair trade-off of burdens and benefits. The forum's benefits to corporate directors justify burdening them with the reciprocal obligation of defending in the forum all claims related to their corporate duties.[180] Thus, this "consent" basis is theoretically even stronger than the pure expectation rationale underlying jurisdiction for express contractual consent. Under the implied or quasi-voluntary consent theory, the fairness of subjecting the defendant to suit rests not only on his presumed expectations but also on the benefits he accepted from the forum despite statutory warning about the consequences of accepting them.[181]

E. Waiver

Cases concerning a defendant's "waiver" of the personal jurisdiction defense further illustrate the flexibility of the expectation criterion. For instance, in *Ireland*[182] the Court found a waiver of the personal jurisdiction defense in the defendants' repeated failure to comply with discovery orders to produce information relevant to the personal jurisdiction issue. To implement this waiver—or perhaps as an alternative rationale for upholding jurisdiction—the Court presumed the existence of constitutionally adequate minimum contacts as a sanction for the defendants' recalcitrant conduct.[183] Thus, the Court has found personal jurisdiction based on waiver to fall within the broad "standards" of *International Shoe,* even absent a showing of a defendant-forum relationship sufficient to satisfy a traditional test of minimum contacts.

The specific *International Shoe* standard that supports the

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179. The Delaware Supreme Court noted that the benefits conferred on the directors of Delaware corporations include "the power to manage the business and affairs of the corporation [DEL. CODE ANN. tit. 8 § 141(a)], the opportunity to receive interest-free unsecured loans from the corporation [DEL. CODE ANN. tit. 8 § 143] and the opportunity to receive indemnification in actions against them by reason of the fact that they are directors [DEL. CODE ANN. tit. 8 § 145]." Armstrong v. Pomerance, 423 A.2d at 176 n.4 (bracketed matter in original).

180. *See* Lewis, *supra* note 13, at 798-99.

181. This melding of expectations and benefits is analogous to the blending of claim-related and nonclaim-related contacts proposed *supra* in part III, section D.

182. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

183. *Id.* at 706. Similarly, the Court in *Ireland* reaffirmed the validity of procedural rules declaring that a defendant waives his personal jurisdiction defense if he fails to raise it in a timely fashion. *Id.* at 190.

Ireland holding is expectation. *Ireland*'s foreign defendants, once served with process, had two options. First, they could have ignored the proceeding in the forum, risked a default judgment, and collaterally challenged the judgment for lack of jurisdiction if the plaintiff sought enforcement.[184] Alternatively, the defendants could have submitted to the court's authority for the limited purpose of challenging jurisdiction. Because the *Ireland* defendants opted to appear, expectations analysis may fairly impute to them an understanding of the discovery requirements and the sanctions for disobedience[185] of the judicial system to which they submitted. Thus, after frustrating the court's determination of the jurisdictional question, the defendants reasonably should have expected the court to invoke one of the sanctions designated by the Federal Rules.

F. Domicile

A well-established principle of jurisdiction is that the state of domicile of a nonresident, unconsenting defendant, not served with process within the forum, may exercise personal jurisdiction over that defendant on any claim, without regard to contacts, on the basis of domicile alone.[186] The most common version of domicile is

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184. *See* R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 729-30 (4th ed. 1978).

185. One available sanction for a failure to comply with discovery orders is that "[a]n order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." FED. R. CIV. P. 37(b)(2)(A).

Expectation analysis also provides a realistic way to explain the waiver doctrine that subjects a nonresident plaintiff to jurisdiction on a compulsory counterclaim. *See* FED. R. CIV. P. 13(a). A reasonable person in the position of the plaintiff should expect to have to defend in the forum those claims of the defendant that are closely related to the claims the plaintiff himself has chosen to prosecute there. This reasoning, however, does not extend to permissive counterclaims, which by definition do not arise out of the same factual nucleus as the plaintiff's claim. *See* FED. R. CIV. P. 13(b). Therefore, subjecting the plaintiff to jurisdiction on a consent theory, as in Adam v. Saenger, 303 U.S. 59 (1938), is suspect to the extent that it treats the plaintiff as having voluntarily submitted to permissive counterclaims.

To some degree the fairness criterion of benefit fortifies this expectation basis of jurisdiction over compulsory counterclaims. The plaintiff's invocation of the benefits of the forum's judicial process to prosecute his claim should carry with it an obligation to submit to at least those counterclaims that are closely related to the plaintiff's claim. *See id.*; RESTATEMENT (SECOND) OF JUDGMENTS § 9 (1980). This application of the benefits rationale, however, has its limits. It seems inapplicable when the relief sought in the counterclaim is much greater than that requested in the plaintiff's main claim. The lesser forum benefits and protections that the plaintiff invokes in his claim would not justify extracting from him a reciprocal obligation to submit to claims of far greater magnitude.

186. Milliken v. Meyer, 311 U.S. 457 (1940). *Milliken* confirmed similar dictum in

"domicile of choice,"[187] typically defined in a "technical"[188] fashion to require the concurrence of the defendant's physical presence in the forum and his intent to make that place his home.[189] The rationale for this single factor basis of jurisdiction is that a state affording privileges and protection to a defendant and to his property may exact reciprocal duties "by virtue of his domicile."[190] Under this technical definition, however, an absent defendant may not have received any substantial privileges or protection from the forum, or may have received them too long ago for jurisdiction to be fair. In other words, technical domicile as a jurisdictional basis is too broad because it permits jurisdiction over foreign defendants without adequate indicia of expectation or benefit. For example, a Texas domiciliary, long absent from Texas and now living and performing military duties in Florida, might have to defend any claim asserted against him in Texas, despite an absence of any indication that he should expect to defend in Texas and despite Texas' failure to furnish him any recent benefits.[191]

If domicile is to survive as a single factor basis of jurisdiction under general standards of fairness, the concept must be redefined to reflect more particularly the defendant's benefits and expectations about place of suit. The revised definition should measure the defendant's current or recent physical, economic, and social connections with the forum against his similar connections with other states.[192] If the defendant's aggregate connections with the

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Pennoyer v. Neff, 95 U.S. at 720.

187. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 15 (1971).

188. *See* Vernon, *supra* note 57, at 301 & n.128.

189. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 15, 16, 18 (1971).

190. Milliken v. Meyer, 311 U.S. at 463.

191. Professor Vernon considers assertions of jurisdiction based only on a technical domicile theory "unjust." He argues that after *Shaffer* exercises of jurisdiction based on domicile alone will meet constitutional standards only for claims related to the status of domicile. Vernon, *supra* note 57, at 300-01. This restriction raises the question whether domicile should remain a separate jurisdictional basis at all, since jurisdiction in most cases to which Professor Vernon would limit domicile also would be valid under the claim-related form of minimum contacts.

192. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS suggests several factors for determining whether jurisdiction exists on the basis of residence that might be relevant to a revised definition of domicile. These factors include the amount of time the individual spends in the state, the nature of his place of abode there, and the full range of his recent activities in or affecting the state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 comment a (1971).

Residence may provide a more workable jurisdictional standard than domicile because it "does not require the existence of an attitude of mind similar to that required for the acquisition of a domicile of choice." *Id.* Among the considerations in determining residence, the Restaters list a different kind of "attitude of mind toward the state," namely, whether

forum are more meaningful than his connections with any other state, a court reasonably could impute to the defendant an expectation that he may have to defend any civil claim in the forum. Although this analysis would not support jurisdiction whenever the defendant is a technical domiciliary of the forum, it usually[193] would afford plaintiffs at least one forum other than the state in which the claim arose.

Because courts under the revised domicile approach must consider so many factors in reaching ultimate conclusions about domicile and, hence, expectation and benefit, this redefined domicile concept might lose some appeal as a satellite basis of jurisdiction. Most certainly, efficiency would not characterize the revised domicile test as it does most single factor tests. Instead, courts might as well measure expectation and benefit directly, bypassing all particularized tests. In any event, as long as the focus of jurisdictional analysis is ascertaining the fairness of a forum, courts should not continue to recognize the current technically defined concept of domicile as a single factor jurisdictional test.

G. State of Incorporation

Under traditional theory the state of incorporation, like the state of domicile for a natural person, may exercise personal jurisdiction over a corporation for any claims asserted against the corporation in the chartering state.[194] The principal rationale behind this noncontacts jurisdictional basis, however, is flawed; the satellite test focusing on state of incorporation derives from the notion that such a test is fair because the chartering state "created" the corporation,[195] when a corporation is really a creation of its initial organizers, who voluntarily incorporate in the state of their

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the defendant currently "regards it with affection and as a place to which he likes to go whenever possible." *Id.* This inquiry seems more manageable than the state of mind element of the domicile test, which requires an assessment of the defendant's intention to make a state bis home for the indefinite future. *Id.* § 18.

193. Of course, if the claim arises in the state of the defendant's domicile, the single factor domicile basis adds nothing to the jurisdiction afforded under a claim-related test of contacts. Nor would the domicile basis assist in deciding whether the forum has jurisdiction over a perpetual drifter whose connections with any state are so insubstantial that any suggestion that his marginally greater contacts with one state are jurisdictionally significant would be misleading.

194. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 41 comment b (1971); R. CASAD, *supra* note 172, at 3-64.

195. *Pennoyer*, 95 U.S. at 735. An alternative rationale, that the "domestic corporation can be seen as analogous to an individual domiciliary," R. CASAD, *supra* note 172, at 2-16, simply begs the question of the fairness of jurisdiction based on domicile.

choice.[196] As an alternative justification, contacts theory is as inadequate as the abstract "creation" theory. State of incorporation is an independently useful basis of jurisdiction only when constitutionally adequate contacts are lacking.[197] Thus, if state of incorporation is to continue as a single factor basis of jurisdiction, a rationale not based on contacts is necessary to explain why jurisdiction on that basis is fair to the corporation.

The proposed expectation and benefit bypass approach provides a much more persuasive justification for the state of incorporation jurisdictional basis. Corporate managers should *expect* to defend suits in the state of incorporation, even if the claims arise elsewhere. The chartering state's statutes that invariably provide for jurisdiction over domestic corporations[198] are the sources of these extrinsically generated expectations.[199] Moreover, giving weight to these expectations is fair because the act of incorporation is voluntary.[200] Similarly, corporate organizers might decide to incorporate in a certain state because they anticipate more favorable treatment—that is, benefit—from the laws, courts, and government of that state than from others.[201] Although the benefits of incorporation in a state may not meet the *Perkins* criteria of continuity and substantiality, when the incorporators select the state of incorporation and the successor managers continue doing business under that state's charter, they invoke these benefits in an especially purposeful and deliberate manner. On balance, there-

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196. Ratner & Schwartz, *supra* note 144, at 649.

197. The *Perkins* rationale, for example, could not support jurisdiction if the corporation's only current activity in the chartering state consists of maintaining its corporate status. Even though a corporation maintains at least a limited continual contact with the chartering state hy periodically filing corporate reports and reincorporation documents, these contacts are not suhstantial either in aggregate dollar terms or in proportion to the company's business operations. *See supra* note 151.

198. *See* R. CASAD, *supra* note 172, at 3-64.

199. Compared to the defendant in a typical tort or domestic relations action, incorporators presumably are knowledgeable about the legal consequences of their business conduct. If it is true, as contended in part II of this Article, that an individual prospective officer or director will be aware of a director consent statute, then it seems at least as likely that incorporators will be aware of the jurisdictional consequences of incorporating in the forum.

200. Voluntary in this sense means that the act of incorporation conferred no benefits to which the defendants were already constitutionally entitled. *See supra* text accompanying note 79.

201. Indeed, the managers retain the option of changing their state of incorporation if they become dissatisfied with the laws or government of their chartering state. Ratner & Schwartz, *supra* note 144, at 653. The managers of Greyhound Corporation actually exercised this option in response to the enactment of Delaware's director-consent statute in the wake of *Shaffer*. *Id.* at 649 n.46, 653-54.

fore, the extrinsically generated expectations flowing from the forum's jurisdictional statutes, coupled with the purposefully invoked benefits associated with selecting the forum as the chartering state, justify retaining state of incorporation as a single factor basis of jurisdiction.

H. Divorce

When faced with questions of family status, the Supreme Court customarily has eschewed its primary jurisdiction theories in favor of "doctrines peculiar to domestic relations law."[202] The Court initially based its relaxation of the customary defendant-centered jurisdictional approach in divorce cases on the theory that a divorce proceeding determined interests in a *"res"*—the marital status.[203] Thus, regardless of the parties' other forum connections, jurisdiction existed where that "res" was deemed located—at first, only in the state of the couple's marital domicile; later, in the defendant's state of domicile as well.[204] In *Williams v. North Carolina (Williams I)*[205] the Court declined to rely on the artificial distinctions between in rem and in personam actions but, relying instead on the forum state's interest in the status of its domiciliaries, further expanded the permissible locus of suit to include the state of domicile of the plaintiff.[206] Even with the forum state interest doctrine in decline,[207] and even though the status bases operate outside the minimum contacts rubric and thus sometimes uphold jurisdiction when the defendant has no discernible connection with the forum, the Court in *Shaffer* declined to condemn jurisdiction based on status as repugnant to fair play.[208]

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202. D. LOUISELL, G. HAZARD & C. TAIT, CASES ON PLEADING AND PROCEDURE 379 (5th ed. 1983).

203. R. CASAD, *supra* note 172, at 2-14; Posnak, *supra* note 47, at 734 n.24; *Developments in the Law, State Court Jurisdiction*, 73 HARV. L. REV. 909, 969 (1960).

204. *Developments in the Law, State Court Jurisdiction, supra* note 203, at 967.

205. 317 U.S. 287 (1942).

206. *Id.* at 298-99. Based on this holding, one commentator has concluded that "personal jurisdiction of the defendant is unnecessary. Domicile of the plaintiff in a divorce action is a basis, not for personal jurisdiction, but for jurisdiction of the subject matter." R. CASAD, *supra* note 172, at 9-13.

207. *See supra* text accompanying notes 26-35 and *infra* text accompanying note 209.

208. 433 U.S. at 208 n.30; *see supra* text accompanying note 41. Recent state court decisions have followed expressly the suggestion in the *Shaffer* footnote that assertions of jurisdiction in status cases do not offend a defendant's due process rights, even absent minimum contacts. *See, e.g., In re* Marriage of Leonard, 122 Cal. App. 3d 443, 453, 175 Cal. Rptr. 903, 908 (1981) (jurisdiction over absent parent not required for modifying child custody determination); *In re* Marriage of Hudson, ___ Ind. App. ___, 434 N.E.2d 107, 119 (1982) (in personam jurisdiction over absent spouse not required in a child custody action),

After *Shaffer, Rush,* and *Ireland,* the "res" and "forum state interest" justifications for casual jurisdiction in divorce cases simply will not suffice. If decisions like *Williams I* and *Mullane*[209] blurred the in rem-in personam distinction, *Shaffer* obliterated it.[210] Further, *Rush*[211] and *Ireland*[212] confirmed the suggestion in *Shaffer*[213] and *Kulko*[214] that even a strong forum state interest in adjudicating will not justify an exercise of jurisdiction unfair to the defendant. Rather, assertions of personal jurisdiction must satisfy the contacts tests or, as this Article contends, the broader *International Shoe* standards of fairness as denoted by expectation and benefit. Although *Shaffer* excepted from its contacts prescription cases involving status and jurisdiction by necessity, the Court did not explain why those categories qualified as independent jurisdictional bases.

A footnote in *Shaffer*[215] does provide a clue to the persistent exception of status adjudications from the Court's general insistence on defendant-forum contacts. Citing an article by Justice Traynor,[216] the Court seemed to hint that in divorce actions, unlike most civil proceedings, the plaintiff's due process interest is one of personal liberty, and that the defendant's interest in opposing that liberty deserves little protection.[217] In other words, the Court

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cert. denied, 103 S. Ct. 1187 (1983); *In re* Marriage of Rinderknecht, 174 Ind. App. 382, 388, 367 N.E.2d 1128, 1133 (1977) (in-state residence of one spouse sufficient basis for divorce jurisdiction); Carr v. Carr, 46 N.Y.2d 270, 273 n.1, 413 N.Y.S.2d 305, 307 n.1, 385 N.E.2d 1234, 1236 n.1 (1978) (court has little doubt that status-based jurisdiction survives *Shaffer*); *In re* M.S.B., 611 S.W.2d 704, 706 (Tex. Civ. App. 1980) (mother's residence in Texas sufficient basis of jurisdiction over father in custody action).

209. 339 U.S. 306 (1950).

210. *See* 433 U.S. at 212.

211. *See* 444 U.S. at 332-33.

212. *See* 456 U.S. at 703.

213. *See* 433 U.S. at 209-10.

214. *See* 436 U.S. at 96-97.

215. 433 U.S. at 208 n.30.

216. Traynor, *Is This Conflict Really Necessary?,* 37 TEX. L. REV. 657 (1959). Justice Traynor noted that "divorce proceedings are not for the most part adversary except in name. In any event, a defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom." *Id.* at 661.

217. *Shaffer*'s implicit concern for a divorce plaintiff's liberty interest and the widespread acceptance in succeeding years of "no fault" divorce suggest that there is even more reason now than when *Williams I* was decided for easing jurisdictional requirements in cases of divorce. *See also* Boddie v. Connecticut, 401 U.S. 371 (1971) (due process prohibits states from conditioning access to judicial process on payment of filing fees by indigents). The relaxed jurisdictional standards for divorce may be inconsistent with the Court's more stringent requirements for child custody jurisdiction. Professor Casad, for example, notes that in Estin v. Estin, 334 U.S. 541 (1948), the Court required personal jurisdiction over the

seemed to distinguish the defendant's low level interest in opposing the divorce plaintiff's bid for liberty from his greater interest in resisting the same plaintiff's claims to marital property. The Court imposes the ordinary requirements for personal jurisdiction over the defendant in suits for alimony,[218] property distribution,[219] and child support.[220] Perhaps this limited reach of divorce jurisdiction founded solely on the plaintiff's domicile makes it more palatable.

The proposed expectations analysis may justify the *Williams I* result—effective approval of divorce jurisdiction in the state of domicile of either spouse—without reference to the contacts tests. If each spouse continues to reside in the state of the marital domicile, that is, where the couple last resided together, probably[221] in only that state would either spouse expect the other to file for divorce. If one spouse remains in the marital domicile and the other leaves it, initially each spouse would continue to expect that any divorce suit filed would be only in the state of marital domicile. As time passes, however, it becomes fairer to impute to each spouse the realistic expectation that the absent spouse might sue for di-

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defendant as a prerequisite to granting full faith and credit to a divorce decree that included an order of support, alimony, and division of property. Later, as Professor Casad observes, the Court, relying on *Estin*, required a similar, standard basis of personal jurisdiction over the defendant as a prerequisite to an award of child custody, reasoning that the right to custody was "far more precious than the property rights involved in *Estin* and therefore . . . entitled to similar jurisdictional protection." Professor Casad argues that the divorce defendant, too, "might well regard his or her marriage as 'far more precious' than property." R. CASAD, *supra* note 172, at 9-27. He concludes that the Court should no more have insisted on a strict basis of jurisdiction over the defendant in the custody situation than in the divorce setting, in which *Williams I* relaxed jurisdictional requirements. *Id.*

While the argument that the defendant may have a liberty interest in preserving the marital status is appealing, it does not cast doubt on the relaxed form of jurisdiction approved in *Williams I* for cases limited to divorce. The Court justified the more lenient divorce jurisdiction approved by *Williams I* in part by the "interest that the state in which a spouse is domiciled has in the marital status of that spouse." The more usual interest of the forum state, though, even when that is the state of the plaintiff's domicile, would be to support the institution of marriage rather than to facilitate its dissolution—and therefore to deny divorce jurisdiction. Courts, however, have recognized that the relevant public policy is to favor not any marriages but good marriages, and particularly to provide a supportive family environment for children. *See, e.g.*, Lehr v. Robertson, 103 S. Ct. at 2991. At any rate, governmental interests—whether in support of or in opposition to the institution of marriage—are no longer adequate justification for upholding or rejecting personal jurisdiction. *See supra* text accompanying notes 17-34. This Article considers child custody more fully *infra* section *I*.

218. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

219. *Vanderbilt*, 354 U.S. at 416.

220. Kulko v. Superior Court, 436 U.S. 84 (1978).

221. Conceivably, a state other than the one of marital domicile could exercise jurisdiction over one spouse under the *Perkins* analysis if that spouse had sufficient regular contacts with that state.

vorce in the state of his or her newly-acquired technical domicile or settled residence.[222] This expectations approach treats marriage as consisting of three separate statuses—the status of each spouse and the status of their joint relation—because each of these statuses is inextricably bound up in the formation, maintenance, and dissolution of a marriage.

I. Child Custody

The commentary and opinions about jurisdiction in child custody disputes are rife with confusing, often conflicting theories. In the leading case, *May v. Anderson*,[223] the Supreme Court described a parent's interest in child custody as embracing rights "far more precious" than property rights[224] and thus as deserving "at least as much protection as [a spouse's] right to alimony."[225] Because the Court previously had ruled that orders settling money disputes did not warrant full faith and credit unless the rendering court had a traditional basis of personal jurisdiction over the defendant,[226] it held in *May* that the forum state must have a similar basis of jurisdiction over a nonresident defendant parent in order to adjudicate that parent's right to the custody of a child.[227]

Professor Hazard aptly described the result in *May* as a "preamble to family law chaos."[228] The decision produced an immediate incongruity in doctrine and eventually created serious practical problems in regulating the family environment of the nation's children.[229] The doctrinal confusion stems from the Court's conclusion that a parent's rights to child custody should enjoy the same protection as his rights to property. This conclusion, however, seems inconsistent with *Williams I*,[230] in which the Court did *not* insist

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222. In Williams v. North Carolina, 325 U.S. 226 (1945) (*Williams II*), the Court emphasized the importance of the requirement that the plaintiff be legitimately domiciled in the forum in accordance with the forum state's rules governing the length of residence required to achieve domicile status. Under the analysis proposed in this Article, a state-defined period for acquiring a new domicile would meet due process standards for divorce jurisdiction only if the court could determine that the period was long enough to cause a shift of the defendant's (imputed) expectation about place of suit.

223. 345 U.S. 528 (1953).

224. *Id.* at 533.

225. *Id.* at 534.

226. *Estin*, 334 U.S. at 541.

227. 345 U.S. at 534.

228. Hazard, May v. Anderson*: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

229. *See infra* text accompanying notes 235-38.

230. *Williams I*, 317 U.S. at 287; *see supra* notes 205-17 and accompanying text.

on a traditional basis of personal jurisdiction over a divorce defendant, but instead treated divorce—despite the personal nature of the interests concerned—as a status exception to standard jurisdictional requirements. *May*, then, sharply raises the question why a parent's interest in a child custody dispute warrants greater jurisdictional protection than a divorce defendant's interest in remaining married.[231] The *May* Court could have recognized a status exception to jurisdiction for child custody that paralleled the *Williams I* status exception for divorce. The rationale for the *Williams I* status exception, however—forum state interest[232]—may no longer offer defensible support for a status exception to the requirements of personal jurisdiction.[233] Moreover, even if the Court were to reconcile *May* and *Williams* by overruling *May* and relaxing jurisdictional restrictions for custody litigation, another doctrinal incongruity would result. Because the Court recently has held[234] that due process requires a traditional basis of personal jurisdiction over a defendant parent in a child support action, any loosening of the *May* restrictions on custody jurisdiction would suggest that the Court places a higher value on the parent's interest in his property than on his interest in his child.[235]

Notwithstanding the interest of parents, the well-being of children—the real focus of custody litigation—demands the rejection of *May*'s traditional rule. *May* has so severely impeded the orderly determination of child custody disputes that an urgent need exists for a sound theoretical ground for overruling that decision and for applying *Shaffer*'s status exception in the child custody context.[236] Paradoxically, the unrealistic rigors of the *May* rule have caused most courts simply to ignore *May* by limiting it to the realm of full

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231. One answer today is that the defendant in a divorce proceeding has only a slight interest because, even if present, he would he unable to prevent the divorce. At the time of *Williams I* and *May*, however, no-fault divorce was generally unavailable, and defendants could still resist divorce petitions by rebutting the plaintiff's "grounds" or by relying on doctrines—like "recrimination"—that constituted affirmative defenses to the plaintiff's claim. *See* Orfield, *Divorce for Temperamental Incompatibility*, 52 MICH. L. REV. 659, 661-62 (1953).

232. *See Williams I*, 317 U.S. at 298; *see also* Comment, *supra* note 114, at 867.

233. *See, e.g.*, Comment, *supra* note 114, at 868; *supra* note 18 and text accompanying notes 23-25.

234. *Kulko*, 436 U.S. at 84.

235. Comment, *supra* note 114, at 869.

236. Some commentators have proposed grounds for applying the status exception in child custody cases. *See* Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After* Shaffer *and* Knlko, 12 U.C.D. L. REV. 229, 240 (1979); *Developments in the Law, The Constitution and The Family*, 93 HARV. L. REV. 1156, 1246 (1980).

faith and credit as opposed to due process. Accordingly, these courts find, based on the state's interest in children's welfare, that "personal jurisdiction over an absent parent is not indispensable to [original] custody jurisdiction, even if it may be indispensable to interstate recognition."[237] These decisions, coupled with the susceptibility of custody decrees to repeated modification in other states, "have combined to produce a climate that encourages child snatching and repetitive interstate custody contests."[238]

The Uniform Child Custody Jurisdiction Act (UCCJA),[239] drafted to curb the multistate litigation problems associated with child custody claims, offers one solution. The UCCJA's prerequisites to suit address subject matter more than they address personal jurisdiction; the Act itself contains no provision for extraterritorial jurisdiction in custody cases,[240] and its relaxed "jurisdictional" requirements potentially conflict with the Supreme Court's decision in *May*. The Act's general and most stringent requirement is that before a state court may determine custody, the child who is the subject of the proceeding must have "lived with his parents, a parent, or a person acting as a parent, for at least six consecutive months" in the forum state prior to the commencement of the custody proceeding.[241] This provision clearly implies that, unlike *May*, the Act does not require personal jurisdiction over defendant parents claiming an interest in the child's custody.[242] By 1981, forty-seven states had adopted the Act.[243] In

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237. R. CASAD, *supra* note 172, at 9-27. In *Kulko* the Supreme Court implicitly may have acquiesced in this attempt to limit *May* to a rule about full faith and credit. As Professor Casad observes, the claim for child support payments in that case was joined by a claim seeking modification of the custody award, and the Supreme Court, despite the objection of the nonresident defendant father, did not question California's jurisdiction to order a custody change. *Id.* at 9-27 to 9-28.

238. *Id.* at 9-28.

239. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 116 (1979) [hereinafter cited as U.C.C.J.A.].

240. U.C.C.J.A. § 12 commissioners' note, 9 U.L.A. 150; R. CASAD, *supra* note 172, at 9-31; Comment, *supra* note 114, at 864-66.

241. U.C.C.J.A. §§ 2(5), 3(a)(1), 9 U.L.A. 119, 122.

242. R. CASAD, *supra* note 172, at 9-31. The Commissioners noted that they had imposed "no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . . are proceedings *in rem* or proceedings affecting status." U.C.C.J.A. § 12 commissioners' note, 9 U.L.A. 150. The Commissioners argued that jurisdiction based solely on the forum's becoming the "home state" of the child is "not at variance with May v. Anderson . . . , which relates to interstate recognition rather than in-state validity of custody decrees." *Id.* (citation omitted). Their prefatory sentence to the note, however, contradicts this justification. That sentence states that § 12 (which declares binding the effect of a custody decree based solely on the child's forum contacts rendered under § 3, *see supra* note 241), "deals with the intra-state

1980, Congress in effect federalized the UCCJA by requiring that each state give full faith and credit to the child custody decisions of other states whenever "jurisdictional" considerations modeled after the UCCJA support the rendering state's decision.[244]

Because the status exception is only a thinly disguised version of the withering forum state interest doctrine, a supporting rationale for the UCCJA's single factor approach of basing jurisdiction on the child's residence should rely instead on the broader fairness standards of *International Shoe*. None of the contacts tests, however, even as modified in part III, supports this approach.[245] Likewise, an analysis that bypasses contacts and focuses directly upon the fairness criterion of benefit also fails to justify the UCCJA approach. Although the *Kulko* Court conceded that some financial benefit may accrue indirectly to a nonresident parent from a child's absence,[246] the Court also observed that the parent would receive comparable benefits from any state to which the child had

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validity of custody decrees *which provides the basis for their interstate recognition and enforcement.*" *Id.* at 149-50 (emphasis added). If intrastate personal jurisdiction is the "basis for" interstate recognition, however, the requirements for intrastate jurisdiction should be faithful to the requirements for interstate recognition enunciated in *May*.

243. Comment, *supra* note 114, at 862 & n.10.

244. *See* Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1976 & Supp. V 1981).

245. For example, consider the contacts modification proposed in part III that would recognize the defendant's forum contacts made after the events that generated the claim. *See supra* text accompanying notes 114-24. Assume that the plaintiff mother removed the child from the state of marital domicile to New York, and later files a child custody action in New York, her new state of domicile as well as the child's. The nonresident defendant father files an answer in which he objects that the forum lacks a basis of personal jurisdiction. The contacts modification would inquire whether the defendant, by contesting jurisdiction, has made a purposeful forum contact. The attempted analogy in this case would be to the situation in which the nonresident defendant, by objecting to the forum's jurisdiction in an "in rem" action concerning claims to forum property, supposedly acknowledges his connection with the forum.

The analogy, however, fails. In the instance of the defendant property owner, the defendant purposefully made his forum contact—his purchase or subsequent maintenance of the property—prior to the onset of litigation; his objection to jurisdiction is significant ouly because it constitutes an acknowledgement of that forum contact. In contrast, in the child custody hypothetical, because the child came to the forum without the active agency or tacit approval of the defendant, the defendant will have had no constitutionally adequate forum contact at any time. *Cf. Kulko*, 436 U.S. at 94 (denying jurisdiction despite defendant's "acquiescence" in child's move). To subject the defendant to jurisdiction on the theory that he made a forum contact merely by objecting to jurisdiction would be a reversion to the justly criticized procedure enforced for many years in Texas. That procedure withstood constitutional attack, *see* York v. Texas, 137 U.S. 15 (1890), but since then every state has repudiated it. R. FIELD, B. KAPLAN & K. CLERMONT, *supra* note 184, at 730.

246. 436 U.S. at 95.

moved.[247]

This Article's proposed bypass analysis geared to the defendant's expectations provides a sounder theoretical justification for jurisdiction under the UCCJA. Just as *Shaffer* seemed to approve a relaxed form of divorce jurisdiction by assigning primary importance to the plaintiff's liberty interest,[248] the analysis here should begin by identifying the welfare of the child as the primary interest at stake in a child custody proceeding.[249] Recognition of the child's interest as preeminent is critical because it allows courts to impute to the warring spouses a reasonable expectation that a custody adjudication might take place in a state having access to the most recent relevant information concerning the child's welfare and having the immediate ability to enforce the custody determination.

The expectations of the custody combatants, like the expectations of divorce litigants, may change over time, and appropriately the UCCJA reflects those changes. For example, assume that a married couple with a child lives together in California. One spouse leaves the martial domicile and, without the other spouse's knowledge, removes the child to Illinois. If the deserted spouse desires to regain custody of the child, he or she immediately could file a custody suit in California; in contrast, the fleeing spouse ordinarily could file suit in Illinois only after the expiration of the UCCJA's six month waiting period. California seems a fair forum for the custody determination in this hypothetical because the absent spouse certainly should expect that the litigation might take place there. California is not only the most recent family domicile—and therefore the state with which the absent defendant has had multiple claim-related contacts—but also the forum with the most recent and substantial information relevant to the child's welfare. If, however, the deserted spouse fails to file an action in California, and the Illinois spouse, more than six months after fleeing, files for a custody determination in Illinois, Illinois should be able to enter a binding custody decree. Six months after the child's departure

247. *Id.* at 95-96.

248. 433 U.S. at 208 n.30; *see supra* notes 215-20 and accompanying text.

249. That the welfare of the child, rather than an interest of the parent, is paramount in child custody proceedings is universally agreed. *See* U.C.C.J.A. prefatory note, 9 U.L.A. 114. In *Pennoyer*'s terms, the child is the very "object of the action." 95 U.S. at 727. In 1983 the Court reaffirmed that parental rights depend somewhat on the fulfillment of parental duties, owing to the "paramount interest in the welfare of children." Lehr v. Robertson, 103 S. Ct. at 2991; *see also* May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

the California spouse reasonably should expect that a custody determination might take place in the state of the child's new home, since that state would have the most recent relevant information. Thus, expectation bypass analysis offers a rationale consistent with standards of fairness to the defendant for the practical necessity to overrule *May* and uphold the UCCJA scheme. This approach seems preferable to an unreasoned reliance upon the historical "status" exception or the discredited forum state interest doctrine.

J. Personal Service Within the Forum

Ever since *Pennoyer*,[250] "tagging," the in-forum service of process on a nonresident, has been a sufficient jurisdictional basis to require a nonresident to defend any claim in that state.[251] Even though state courts have the discretion not to exercise available jurisdiction,[252] most courts continue to accept jurisdiction based on "tagging" without reference to the defendant's forum contacts[253] or to other measures of the forum's fairness. The traditional rationale for this single factor basis of jurisdiction is that each state, although part of a union, retains certain attributes of sovereignty,[254] and inherent in a state's sovereignty is the power to exercise jurisdiction over all persons served with process within its borders.[255]

"Tagging," however, is in jeopardy after *International Shoe*'s reformulation of personal jurisdiction standards in terms of the defendant's forum contacts and *Shaffer*'s flat rejection of quasi in rem jurisdiction as a single factor basis of jurisdiction.[256] The extensive commentary[257] that *Shaffer*'s frontal attack on *Pennoyer*'s

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250. 95 U.S. at 733.

251. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 28 (1971). The classic example appears in Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), which upheld Arkansas' jurisdiction solely on the basis of service on the defendant during an airplane flight in that state's airspace.

252. *Perkins*, 342 U.S. at 440; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 83-84 (1971); Lewis, *supra* note 13, at notes 406-09 and accompanying text. The recognition that a state court may construe the forum state's jurisdictional statutes narrowly so as to stay short of the reach allowable under the due process clause appears to underlie the decision of the Supreme Court of Texas in Hall v. Helicopteras Nacionales de Columbia, S.A., 638 S.W.2d 870, 877-81 (1982) (Pope, J., dissenting), *cert. granted*, 103 S. Ct. 1270 (1983).

253. *See* Vernon, *supra* note 57, at 302.

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

255. *Id.*

256. 433 U.S. at 209. *But see* Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980) (upholding "tagging" because the holding in *Shaffer* did not specifically condemn that basis of jurisdiction).

257. *See, e.g.*, Bernstine, Shaffer v. Heitner: *A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38 (1979); Fyr, Shaffer v. Heitner: *The Su-*

"power theory" of jurisdiction has generated is virtually unanimous in its opposition to the notion that in-state service of process on a transient nonresident defendant should confer jurisdiction.[258] These commentators maintain that retaining "tagging" as a jurisdictional basis often would permit courts to assert jurisdiction inconsistently with the contacts approach that they interpret *Shaffer* to mandate.[259] Because this Article is in complete accord with this conclusion, it will only briefly discuss the fate of "tagging" under its proposed minimum contacts modifications and uniform fairness criteria.

If the claim is unrelated to the defendant's activity in the forum and if that activity is not extensive, "tagging" would not be fair to the defendant under a traditional minimum contacts analysis.[260] Moreover, none of the modifications of the contacts tests proposed in part III would offer any more support for the "tagging" jurisdictional basis.[261] Nor would the proposed expectation bypass analysis tend to uphold this assertion of jurisdiction, since a court should not assume that a person's mere physical presence in a state generates an expectation of suit there on a claim unrelated to forum activity.[262] Finally, mere presence in a state confers no benefit to the defendant that he did not already have by virtue of the privileges and immunities clause or the judicially enunciated right to interstate travel.[263] Therefore, without a traditional or

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preme Court's Latest Last Words on State Court Jurisdiction, 26 EMORY L.J. 739 (1977); Lacy, *Personal Jurisdiction and Service of Summons After* Shaffer v. Heitner, 57 OR. L. REV. 505 (1978); Posnak, *supra* note 47; Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031 (1978); Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978); Vernon, *supra* note 57; Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997 (1978); Zammit, *Reflections on* Shaffer v. Heitner, 5 HASTINGS CONST. L.Q. 15 (1978).

258. Posnak, *supra* note 47, at 744.

259. *See, e.g.*, Bernstine, *supra* note 257, at 54; Posnak, *supra* note 47, at 738-39; Vernon, *supra* note 57, at 303.

260. Neither claim-related contacts of the *McGee* type nor a quantum of contacts adequate to meet the requirements of *Perkins* would exist.

261. Service within the state is unrelated to the plaintiff's need for forum jurisdiction, the defendant's purposeful contacts taking place after the events triggering the litigation, the degree of the defendant's need to appear, or the significance of a blending of contacts.

262. Justice Stevens' remark that "[i]f I visit another State . . . I knowingly assume some risk that the State will exercise its power over . . . my person while there," Shaffer v. Heitner, 433 U.S. at 218 (concurring opinion), is not necessarily to the contrary. A look at the context reveals that Justice Stevens offered this comment as an example of a situation in which a nonresident's "particular activity," not mere presence, may subject him to forum jurisdiction. *See id.*

263. *See* Flexner v. Farson, 248 U.S. 289 (1919) (affirmed constitutional right of a non-

modified contacts measure of fairness or a link to benefits or expectations about place of suit, courts should discard the single factor jurisdictional basis of "tagging."

K. Jurisdiction by Necessity

Under the name of jurisdiction by necessity[264] some courts have eased jurisdictional restrictions when the plaintiff has no other available forum. *Mullane*[265] is the one decision in which the Court appeared to rely on jurisdiction by necessity as its principal ground of decision.[266] Pursuant to New York statutes, trustees of 113 participating trusts with beneficiaries residing in various states deposited the assets of those trusts into a common fund under the care of a common trustee, the plaintiff bank. The implementing statutes required the bank, as trustee, to bring an action for judicial settlement of its accounts within twelve to fifteen months after the establishment of the common trust and to publish a notice of that action in a designated newspaper once weekly for four weeks. The statutory procedure also required the appointment of two gnardians: one for the beneficiaries with an interest in the trust income, and one for the beneficiaries with an interest in the trust principal.[267] An analysis of *Mullane* reveals that the New York court had no traditional independent basis of jurisdiction.[268] First, traditional in personam jurisdiction was not possible because the nonresident beneficiaries did not receive personal service in the forum[269] and, as far as the opinion reveals, had no purposeful[270] con-

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resident individual to enter into another state to do business); Shapiro v. Thompson, 394 U.S. 618 (1969) (recognized constitutional right to interstate travel).

264. *See* Fraser, *Jurisdiction by Necessity—An Analysis of the* Mullane *Case*, 100 U. PA. L. REV. 305 (1951).

265. 339 U.S. 306 (1950).

266. Although the Court has not applied the jurisdiction by necessity approach since *Mullane*, neither has it closed the door to continued use of the doctrine. In *Shaffer*, for example, the Court confronted a version of this argument; the plaintiffs in *Shaffer* argued that the Court should preserve in rem jurisdiction to assure plaintiffs a forum. 433 U.S. at 211. The Court did not consider this "necessity" issue to be present on *Shaffer*'s facts, *id.* at 211 n.37, probably because the defendants were amenable to suit in other American states, even though no one state likely could have secured jurisdiction over all of them. *See infra* note 282. The Court reassured plaintiffs "that the fairness standards of *International Shoe*" easily would justify jurisdiction in "the vast majority of cases." *Id.* at 211.

267. 339 U.S. at 307-10; *see* Fraser, *supra* note 264, at 308.

268. *See, e.g.*, Fraser, *supra* note 264 at 310.

269. *Id.* at 308.

270. Some writers have argued that the *Mullane* result can "fit squarely within the minimum contects analysis." Brilmayer, *supra* note 53, at 108; Note, *Uniform Approach*, *supra* note 47, at 141 n.63. This position apparently assumes that the trust beneficiaries

tacts with New York. Second, jurisdiction in rem failed because the action was to settle the trustee's personal obligation rather than to affect title to the trust assets.[271] Despite this lack of any accepted basis of jurisdiction, the Court held that the state court had the power to settle the trustee's account and to render a liability determination that would bind the absent beneficiaries. The Court rested its decision solely upon the forum state's "vital interest . . . in bringing any issues concerning its fiduciaries to a final settlement."[272] Thus, the Court in *Mullane* ignored the *International Shoe* defendant-fairness standards that *Shaffer* later proclaimed should govern "all" assertions of personal jurisdiction.

Because the beneficiaries' property rights were at risk,[273] but jurisdiction could not rest on ordinary contacts factors, the *Mullane* decision to uphold jurisdiction is justifiable, if at all, only under broader standards of fairness. By those standards the *Mullane* result seems fair. First, in view of the many trusts and beneficiaries scattered among different states, New York was "the only adequate forum available to the plaintiff."[274] While the bank could

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"have benefited from the protection of the laws of the forum in which the trust is located and have purposefully availed themselves of the privilege of conducting activities in the state." Note, *Uniform Approach*, *supra* note 47, at 141 n.63. The beneficiaries' sole forum contact, however, the presence in the forum of trust assets in which they had an interest, was the result of an act by the settlor, perhaps even without the beneficiaries' knowledge. The only relevant activity of the beneficiaries was their "receipt of royalties or income." *Id.* That the Court today would recognize the receipt of this benefit as purposeful activity sufficient to satisfy the requirements of *Hanson* seems unlikely. The *Mullane* defendants' receipt of benefits is precisely the kind of nonpurposeful contact consummated through the unilateral act of a third party that the Court has declared deficient in *Hanson*, *see* 357 U.S. at 253, and *World-Wide*, *see* 444 U.S. at 298.

This author once wrote that claim-related contacts might rationalize jurisdiction in *Mullane*; such a view entailed treating any beneficiaries' objections to New York's jurisdiction as purposeful New York contacts that effectively ratified the forum contact which the settlor previously had established for them. *See* Lewis, *supra* note 13, at 789 n.103. While this view has the virtue of recognizing the possibility that jurisdictionally significant contacts might follow the commencement of an action, it is ultimately unsound because it erroneously assumes that the beneficiaries themselves had made voluntary, purposeful forum contacts. Assigning jurisdictional significance to their objections to jurisdiction would be unfair. *See supra* note 245 (discussing the same analytical flaw in the child custody context).

271. Fraser, *supra* note 264, at 308-09.

272. *Mullane*, 339 U.S. at 313; *see World-Wide*, 444 U.S. at 310 n.17 (Brennan, J., dissenting); Lewis, *supra* note 13, at 787; Ratner & Schwartz, *supra* note 144, at 649 n.47; *Developments in the Law, State Court Jurisdiction*, *supra* note 203, at 961-62.

273. The beneficiaries' property interests were subject to diminution by the allowance of fees or expenses to the trustee. The court's decree also might have terminated their rights to have the trustee answer for mismanagement of their interests. *Mullane*, 339 U.S. at 313.

274. Note, *Quasi In Rem Jurisdiction Over Foreigners*, 12 CORNELL INT'L L.J. 67, 73 (1979). In fact, "jurisdiction . . . over all the beneficiaries could not be obtained in any

have instituted separate actions in as many states as necessary to subject each of the beneficiaries to jurisdiction,[275] this costly fragmentation would have defeated one of the primary purposes of common trusts—economies of management through the sharing of expenses.[276] Moreover, requiring duplicative law suits arguably would have deprived the plaintiff bank of property in the form of excess litigation costs, without due process.[277] Second, each beneficiary in *Mullane* had a lesser than usual need to appear and to defend because of the substantial identity of interest among the members of each beneficiary class and the appearance of at least one defendant from each subclass.[278] Last, once these beneficiaries became aware[279] of their interests in the common trust fund, it seems perfectly fair to have imputed to them an expectation that any lawsuits concerning their interests might take place in the state that regulated and protected the trust assets. In sum, a number of party-fairness factors justify the result in *Mullane*: the plaintiff's unusually strong need for a single forum; the unusually slight need of any particular defendant to appear in the action to advance a position that a similarly situated defendant was likely to assert; and the expectations of suit reasonably imputable to the defendants once they learned of the action.

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other state . . . ." *Developments in the Law, State Court Jurisdiction, supra* note 203, at 961.

275. Professor Fraser wrote that to settle the trustee's account, if ordinary personal jurisdiction over each beneficiary were necessary, usually would be impossible since the trustee could never acquire jurisdiction over all of them in any one place. Fraser, *supra* note 264, at 311. This view mistakenly equates strict impossibility with practical necessity, but Professor Fraser nonetheless makes a potent practical observation.

276. *Mullane*, 339 U.S. at 308. It wonld have been uneconomical for the bank to pursue separate judicial settlement actions in many states. Each participating trust in a *Mullane*-type common fund contributes relatively small assets, *id.*; therefore it presumably generates relatively small fees to the trustee bank. Consequently, forcing separate actions in several states might have amounted to "the equivalent of denying [the plaintiff trustees] an opportunity to be heard upon their claimed right[s]." Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) (quoting Boddie v. Connecticut, 401 U.S. 371, 380 (1971)).

277. The Court recently has described *Mullane* as holding that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." Logan v. Zimmerman Brush Co., 455 U.S. at 428. The Court observed that the due process clauses have long protected "civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429.

278. *See Mullane*, 339 U.S. at 309; *Developments in the Law, State Court Jurisdiction, supra* note 203, at 961.

279. The beneficiaries may have gained this awareness either in advance when the trust was established or through the published notice that the trustee gave upon commencing the action.

In another case a court could rationalize jurisdiction by necessity under the modified contacts approach alone—that is, even without reference to the ultimate fairness criteria of expectation or benefit. In *Shaffer*, for example, the Court almost surely would have sustained jurisdiction under a "blending of contacts" approach. Although the Court acknowledged that the nonresident defendant officers of the Delaware corporation had both claim-related and nonclaim-related forum contacts,[280] their contacts were insufficient to satisfy either polar contacts test independently.[281] Under the "blending of contacts" approach, the Court could have given substantial weight to the plaintiff's interest in avoiding fragmented litigation against numerous defendants in their several home states[282] and to the defendants' weak but palpable and ongoing forum contacts. A combining of these factors might well have yielded the conclusion that jurisdiction in Delaware was relatively fair to the parties. This result would have eased the "difficult and, at times, impossible task" that plaintiffs sometimes face, after *Shaffer*, in seeking a single forum for asserting claims against multiple defendants.[283]

Ironically, however, the limited plaintiff's interest developed in this Article probably should not support jurisdiction in an American court if the only alternative forum is a court of a foreign nation—even though those circumstances give rise to at least as strong a necessity argument as those present in *Shaffer*. For example, assume that a plaintiff seeking to sue a single defendant has only one forum in the United States that might satisfy even the most diluted fairness standard, but that a foreign court would be willing to decide the case. Although one decision upholds the American court's jurisdiction in this situation on a "necessity" rationale,[284] the revised contacts approach actually may indicate a

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280. *See supra* text accompanying notes 142-47.

281. 433 U.S. at 213. Because the defendants' conduct at issue took place in Oregon, the majority concluded that the plaintiff's claim was not sufficiently related to the defendants' contacts with Delaware to support jurisdiction. *See supra* text accompanying notes 143-44. Further, the Court did not consider the benefits and protections that Delaware law afforded to the defendants in their capacities as corporate fiduciaries sufficient to meet the magnitude requirements of the *Perkins* test of substantial, systematic contacts. *See supra* text accompanying notes 144-47 and 179.

282. This proposition assumes that no other state besides Delaware might have had jurisdiction over all the defendants on another theory—for example, claim-relatedness. No such alternative to the Delaware forum may have existed in *Shaffer*. *See* Fyr, *supra* note 257, at 771-73.

283. Vernon, *supra* note 57, at 314; *see also supra* text accompanying notes 126-36.

284. *See* Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d

different result, in large part because concern about fragmentation is irrelevant when there is only one defendant. A decision denying jurisdiction on these facts might not be unfair since the foreign nation's willingness to accept jurisdiction probably means that the plaintiff had some contact with that country and arguably should face the consequences of that contact. Of course, if the foreign nation were to decline jurisdiction, the plaintiff would be remediless unless the single American forum with a colorable claim to jurisdiction could exercise it. That plaintiff's interest is not in avoiding fragmented litigation but rather is in securing at least one effective forum to prosecute a civil claim.[285] Since a plaintiff is effectively deprived of property if he is unable to proceed in any court, the jurisdiction by necessity basis should be preserved for those few instances in which the only available forum anywhere is an American court[286] that lacks the ordinarily required contacts.

V. CONCLUSION

This Article has proposed a unified theory of personal jurisdiction based on a single jurisdictional goal—fairness to the parties—and two uniform criteria for assessing fairness—the defendant's expectations about place of suit and his forum-derived benefit. The theory will have varying consequences for the traditional jurisdictional tests. It demands at least four modifications to the traditional minimum contacts tests to make them consistent with the criteria of expectation and benefit. The single factor, satellite jurisdictional tests not based on contacts will rise or fall on their merits, depending on their compatibility with these fairness criteria. Of the eleven satellite tests surveyed, only "tagging"—personal service within the forum—is clearly inconsistent with these criteria. Another, domicile, may require such extensive redefinition before it can furnish a reliable prediction about expectation and benefit that it may no longer be useful as a surrogate. The other satellite tests, however, for the most part gain renewed theoretical justification from their correlation with expectation and

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439 (1965).

285. *See supra* text accompanying notes 87-90, 108-09, 277.

286. In the absence of guidance from the Court, lower court decisions interpreting *Shaffer*'s apparent preservation of a necessity exception understandably differ on whether "no other forum" means no other forum in the United States, *see* Louring v. Kuwait Boulder Shipping Co., 455 F. Supp. 630, 633 (D. Conn. 1977), or anywhere in the world, *see* J.S. Serv. Center Corp. v. Banco Continental, 103 Misc. 2d 325, 326, 425 N.Y.S.2d 945, 946 (1980).

benefit.

The proposed unified theory has the potential to improve the quality of personal jurisdiction decisions in several respects. Because it would make available to courts and litigants a range of flexible jurisdictional tests adaptable to the circumstances of a particular case, the theory would promote increased objectivity and efficiency in jurisdictional decision-making. The fairness criteria would free judges from the confines of the contacts tests; at the same time, they would furnish rational limitations for refinements to all of the particularized tests of jurisdiction. In brief, judges could maximize fairness to the parties by adhering to the constant, uniform criteria of expectation and benefit in deciding questions of personal jurisdiction.