Florida Law Review

Volume 32 | Issue 4 Article 9

July 1980

Constitutional Law--In Personam Jurisdiction: Federalism and Fairness as Functions of Minimum Contacts--A Conceptual Failure

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CONSTITUTIONAL LAW – IN PERSONAM JURISDICTION: FEDERALISM AND FAIRNESS AS FUNCTIONS OF MINIMUM CONTACTS – A CONCEPTUAL FAILURE

World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980)

Respondents purchased a new automobile in their home state of New York and were later involved in a collision in Oklahoma.[1] Subsequently, they brought a product liability suit in Oklahoma naming the automobile's retailer and regional wholesaler, *inter alios*, as defendants.[2] At a special appearance,[3] the trial court rejected defendant's due process claims and sustained in personam jurisdiction based only on the vehicle in question.[4] Denying a writ of prohibition,[5] the Supreme Court of Oklahoma held it reasonable to presume that petitioner's vehicles are periodically used in that state.[6] On writ of

1. 100 S. Ct. 559, 562 (1980). Respondents, Harry and Kay Robinson, moved from New York to Arizona a year after purchasing a new Audi automobile. While travelling through Oklahoma, Mrs. Robinson and her two children were severely burned when their Audi was struck from the rear. The ensuing complaint alleged that their injuries were proximately caused by the defective design and placement of the vehicle's gas tank and fuel system. *Id.*

2. *Id.* at 562-63. The suit named as defendants, Audi NSU Auto Union Aktiengesellscheft, the manufacturer; Volkswagen of America, Inc., the importer; World-Wide Volkswagen Corporation, the regional distributor for Connecticut, New Jersey, and New York; and Seaway Volkswagen, Inc., the retail dealer. The manufacturer and the importer distributed automobiles and parts nationwide to independent regional wholesalers, who in turn sold to retailers, all on a contractual basis. *Id.*

3. The petitioners in the instant case were joined in the special appearance by Volkswagen of America, Inc. but that party did not seek review by a higher court. *Id.* at 562 n.3.

4. *Id.* at 563. The respondents produced no evidence at the special appearance to indicate that petitioners did any business in Oklahoma, had an agent there, or advertised in a medium calculated to reach the forum. Respondent's counsel conceded at oral arguments, before the instant Court, that no showing was made of any contact with Oklahoma beyond the Robinson's vehicle. *Id.*

5. A writ of prohibition is an order directed to an inferior court, commanding it to cease prosecution of a case or claim because the matter does not belong to that jurisdiction. BLACK'S LAW DICTIONARY 1090-91 (5th ed. 1979).

6. 100 S. Ct. at 563-64, *quoting* World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978). The Oklahoma high court found the statutory basis for jurisdiction in the state's long arm statute, OKLA. STAT. ANN. tit. 12 §1701.03A(4) (West Supp. 1979-1980), which allows jurisdiction over a defendant who "caus[es] tortious injury in this state by an act or omission outside this state if he regularly does or solicits business . . . or derives substantial revenue from goods used in this state." *Id.* The court expressly rejected the trial court's reliance on a different section of the same statute which permits jurisdiction if the defendant, "caus[es] tortious injury in this state by an act or ommission in this state." 12 OKLA. STAT. ANN., tit. 12 §1701.03A(3) (West Supp. 1979-1980). The Supreme Court of Oklahoma reasoned that although the injury occurred in the state, the allegedly negligent acts took place elsewhere. World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 353-54 (Okla. 1978).

Although the Oklahoma court recognized that the proper jurisdictional test included both a constitutional and statutory examination, it failed to distinguish the two in its reasoning. The court held merely that the availability of the automobile and petitioner's participation in a nationwide service network allowed the presumption that substantial income was derived from vehicles which, "from time to time are used in the State of Oklahoma." *Id.* at 353-54.

The instant Court suggested that the failure to distinguish between the statutory and

certiorari, the United States Supreme Court reversed and HELD, petitioners lacked sufficient contacts with the forum to reasonably anticipate being haled before its courts, thus in personam jurisdiction offended principles of federalism and due process.[7]

In the 1877 landmark case of *Pennoyer v. Neff*,[8] the United States Supreme Court held that a state's in personam judgment against a natural person, not physically present in the forum, was violative of due process, and thus not entitled to full faith and credit.[9] The Court reasoned that jurisdiction was the physical power to serve process, and was therefore valid only if served within the state.[10] As a result, in personam jurisdiction could be exercised over a defendant only momentarily present in a forum only if served with process at that time.[11]

Similarly, in personam jurisdiction over corporate defendants was available only in the state of incorporation.[12] This view was predicated on the theory

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constitutional basis for jurisdiction was probably because the Oklahoma long arm statute has been interpreted to mirror the constitutional boundaries of jurisdiction. 100 S. Ct. at 563 & n. 8. *See* Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); Carmack v. Chemical Bank New York Trust Co., 536 P.2d 897 (Okla. 1975); Hines v. Clendenning, 465 P.2d 460 (Okla. 1970).

7. 100 S.Ct. 559 (1980).

8. 95 U.S. 714 (1877). In *Pennoyer*, petitioner brought an action to recover a tract of land in Oregon sold to the respondent under a sheriff's deed to satisfy an 1866 in personam judgment. *Id.* at 719-20. Petitioner maintained that because Oregon neither served him with process nor attached the land in question, the judgment, and thus the respondent's title, were invalid. *Id.* at 720. Moreover, petitioner was not in Oregon to receive a summons and the property was not conveyed to him until after the judgment was rendered. The respondent, however, argued that after an attempt to serve process, notice of summons was made by publication and upon petitioner's failure to appear, judgment was entered by default. *Id.*

9. *Id.* at 729, 733. Although based on the full faith and credit clause and the due process clause of the fifth amendment, the Court's reasoning was intended to apply to the due process clause of the fourteenth amendment. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 572 (1958).

10. 95 U.S. at 727-28. For a discussion and criticism of this rule, see generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); Rheinstein, *Michigan Legal Studies: A Review*, 41 MICH. L. REV. 83 (1942).

11. 95 U.S. at 727-28. An extreme example of this principle was evident in Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959), where in personam jurisdiction was upheld soley because the defendant was served with process while flying above the forum in an airplane. However, there seems to be general agreement that this theory was discredited by Shaffer v. Heitner, 433 U.S. 186 (1977). *See* Woods, Pennoyer's *Demise: Personal Jurisdiction After* Shaffer *and* Kulko *and a Modest Prediction Regarding* World-Wide Volkswagen Corp. v. Woodson, 20 ARIZ. L. REV. 861, 865 (1978).

12. Bank of Augusta v. Earle, 13 U.S. (1 Pet.) 519, 588 (1839). For a discussion of the history of corporate jurisdiction, see generally Hoffman, *The Plastic Frontiers of State Judicial Power Over Non-residents*: McGee v. International Life Ins. Co., 24 BROOKLYN L. REV. 291 (1958); Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and in Personam Principles*, 1978 DUKE L. REV. 1147 (1978); Seidelson, *Jurisdiction Over Nonresident Defendants: Beyond Minimum Contacts and the Long Arm Statutes*, 6 DUQ. L. REV. 221 (1968); *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 911 (1960).

that a corporation is a creature of the state, whose legal existence cannot exceed beyond the boundaries of its creator.[13] As the corporate form increased in popularity, however, less restrictive jurisdictional fictions evolved. The first, consent,[14] was soon followed by the presence doctrine.[15] Combining both of these, the subsequent doing business theory required that the defendant do sufficient business in the forum to imply consent to process or infer presence in the state.[16]

The growth of modern transportation and commerce led to a need for more workable jurisdictional doctrines for both corporations and individuals.[17] This search culminated in 1945 with *International Shoe Co. v. Washington*.[18] In that case, the United States Supreme Court held that in personam jurisdiction was consistent with due process[19] if minimum contacts existed with the

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13. 38 U.S. (13 Pet.) at 588.

14. The consent theory reasoned that by conducting transactions in the forum, the corporation implicitly consented to have a state official receive service of process as its agent. *See, e.g.*, St. Clair v. Cox, 106 U.S. 350 (1882); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855). *See also* Kalo, *supra* note 12, at 1166-76; Kurland, *supra* note 9, at 578-79.

15. The presence doctrine implicitly rejected Bank of Augusta v. Earle, see note 12 *supra*, by permitting jurisdiction over a corporation doing sufficient business in the state to warrant the inference that it was present. *See, e.g.*, Philadelphia & Reading R. Ry. Co. v. McKibbin, 243 U.S. 264 (1917); Barrow Steamship Co. v. Kane, 170 U.S. 100 (1898). *See also* Kalo, *supra* note 12, at 1176-80; Kurland, *supra* note 9, at 582-84.

16. The doing business concept did not achieve notoriety by its use in a single key decision. Rather, it resulted from confused distinctions between the consent and presence doctrines. Kurland, *supra* note 9 at 584-86. Judge Hand, in Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2d Cir. 1930), illustrated only a few. "Possibly the maintenance of a regular agency for the solicitation of business will serve without more. The [negative] answer in Green v. C.B. & Q. RR. Co., 205 U.S. 530 [(1907)] . . . and Peoples Tob. Co. v. Amer. Tobacco Co., 246 U.S. 79 [(1918)] . . . becomes somewhat doubtful in light of International Harvester Co. v. Kentucky, 234 U.S. 579 [(1914)] . . ." *Id.* at 141. Judge Hand continued in this style, citing other contradictory holdings, finally holding that "[i]t is quite impossible to establish any rule from the decided cases, we must step from tuft to tuft across the morass." *Id.* at 142. *See also* Kalo, *supra* note 12, at 1180-82.

17. Kalo, *supra* note 12, at 586; Kurland, *supra* note 9, at 1182-83; Comment, *In Personam Jurisdiction: Quality v. Quantity—A Dilemma in the Fifth Circuit*, 31 U. FLA. L. REV. 658, 659-60 (1979).

18. 326 U.S. 310 (1945). Appellant, International Shoe Co. was a Delaware corporation having its principal place of business in Missouri. It maintained no offices, made no contracts and kept no merchandise in Washington. Appellant, however, employed 11 to 13 salesmen who resided and worked as solicitors in the forum state. It also, on occasion, rented display rooms in the forum for use by the salesmen. However, the salesmen's authority was restricted to solicitation of orders that were subject to appellant's approval once received in Missouri. Finally, all merchandise shipped into Washington was F.O.B. *Id.* at 310-11.

The State of Washington, pursuant to a valid statute, sought to collect the employer's contribution for unemployment compensation from appellant. Upon appellant's refusal, the State served process on one of the salesmen as an agent for the company. The Supreme Court of Washington upheld jurisdiction, reasoning that appellant's business in the state was sufficient to constitute "doing business." On appeal, the United States Supreme Court rejected the doing business factor but affirmed based upon the new minimum contacts test. *Id.* For a contemporaneous view of *International Shoe*, see generally McBane, *Jurisdiction Over Foreign Corporations: Actions Arising out of Acts Done Within the Forum*, 34 CAL. L. REV. 331 (1946).

19. U.S. CONST. amend XIV, §1. The *International Shoe* Court based its holding ex-

forum such that jurisdiction would not offend traditional notions of fair play and substantial justice.[20] Further, the decision applied to individual and corporate defendants, thus abolishing the fictive basis for corporate jurisdiction.[21] Recognizing the complexities of interstate relationships, the Court held that even a single act is not an improbable basis for jurisdiction.[22] The *International Shoe* approach[23] thus mandated a case by case analysis to determine if jurisdiction would be fair and just. Because *International Shoe* offered no criterion for application, however, lower courts were inconsistent in applying this new fairness test.[24]

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clusively on the due process clause and explicitly rejected reliance on the commerce clause to resolve jurisdictional issues. 326 U.S. at 315. *But see* Erlenger Mills, Inc. v. Cahoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) (nonresident defendant's only forum connection was shipment of goods into the state F.O.B.; therefore, the court held that commerce would be burdened if jurisdiction was allowed to rest on that act).

20. 326 U.S. at 316.

21. *Id.* at 319. Although *International Shoe* purported to destroy the fictions of corporate jurisdiction, *id.* at 318, it did not overrule the older cases applying those doctrines. Rather, a substantial effort was made to remain consistent with those decisions. See Kurland, *supra* note 9, at 586.

22. 326 U.S. at 318. The single act as a basis for in personam jurisdiction has been one of the most controversial and inconsistently applied elements of *International Shoe*. Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249, 258-64 (1959); *See also* Kurland, *supra* note 9 at 592. *Developments in the Law, supra* note 12 at 925-30; Note, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028, 1031-35 (1965).

The single act has been held sufficient to allow jurisdiction most often when the act was subject to special state regulation. *E.g.*, Traveler's Health Ass'n v. Virginia, 339 U.S. 643 (1950) (jurisdiction permitted over a nonresident insurance company operating a mail order business resulting in forum policyholders and a claims agent in the state); Hess v. Pawloski, 274 U.S. 352 (1927) (a state may, as a prerequisite to use of its highways, require nonresident motorists to appoint a state official as agent to receive process). *Cf.* McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (jurisdiction was permitted where nonresident insurer solicited a single insurance policy by mail from within the forum).

Jurisdiction based on a tortious act causing a single injury in the forum faced more opposition. *See, e.g.*, Charia v. Cigarette Racing Team, Inc., 583 F.2d 184 (5th Cir. 1978) (no jurisdiction permitted over nonresident boat manufacturer that conducted negotiations in the forum, advertised in a nationwide magazine, and shipped an allegedly defective boat into the forum F.O.B.); Kerrigan v. Clarke Gravel Corp., 71 F.R.D. 480 (M.D. Penn. 1975) (jurisdiction denied over nonresident tractor dealer who was allegedly negligent in repairing plaintiff's tractor, thus causing injury in the forum); Beal v. Caldwell, 322 F. Supp. 1151 (E.D. Tenn. 1970) (jurisdiction denied over nonresident who advertised an allegedly defective airplane in a nationwide trade magazine and communicated with the resident buyer by telephone and post). *But see* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (jurisdiction allowed over nonresident manufacturer of a component part for a hot water heater manufactured and assembled out of state but causing an injury in state); Smyth v. Twin State Improvement Co., 116 Vt. 569, 80 A.2d 664 (1951) (jurisdiction upheld over nonresident who was allegedly negligent in repairing a resident's roof).

23. *International Shoe* was a 7-1-0 decision. Justice Black concurred, but rejected the majority's reliance on the "uncertain elements" and "vague Constitutional criterion" in favor of the well established rule that states may tax corporations whose agents work in the state. 326 U.S. at 322-26 (Black, J., concurring).

24. *See* note 22 *supra*; notes 32-38 *infra*. *See generally Developments in the Law, supra*

The Court did little to expand on *International Shoe until* some twenty years later[25] in *McGee v. International Life Insurance Co.*[26] In *McGee,* a nonresident insurance company was held amenable to suit based on a single insurance policy solicited by mail from within the forum state. Reinforcing the single act language of *International Shoe,* the isolated contract was held to be a sufficient connection with the forum.[27] More generally, the *McGee* Court recognized a trend toward expansion of in personam jurisdiction,[28] acknowledging the State's interest in providing a forum for its residents.[29]

The opportunity to expand on *McGee* was soon limited,[30] however, by *Hanson v. Denckla.*[31] The *Hanson* Court held that a Florida court could not assert jurisdiction over a Delaware trustee,[32] whose only contact with the forum was a series of communications with the settlor subsequent to her creation of the Delaware trust and relocation in Florida. The Court distinguished *McGee,*[33] noting that jurisdiction was improperly based on the

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note 22; Note, *In Personam Jurisdiction Over Foreign Corporations: An Interest Balancing Test,* 20 U. FLA. L. REV. 33 (1967).

25. From *International Shoe* in 1945 until *McGee* in 1957, the Supreme Court adhered to a non-interference policy in the area of in personam jurisdiction. This was accomplished by use of the fairness test from *International Shoe* which left the propriety of personal jurisdiction to the trial court, as a question of fact. Kurland, *supra* note 9 at 610. *But cf.* Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952) (jurisdiction upheld over a Philippine corporation, temporarily operating in the forum during World War II, in a suit unrelated to activities in the forum; "systematic and continuous" contacts).

26. 355 U.S. 220 (1957). The defendant was a Texas insurance company that had no offices, agents or contacts with California beyond the single insurance policy in question. The plaintiff, beneficiary under the policy, obtained a judgment in California and sought full faith and credit in Texas. That state's courts refused, holding the California judgment invalid for want of jurisdiction over the defendant. On writ of certiorari, the Supreme Court upheld the California judgment. *Id.*

27. *Id.* at 223.

28. *Id.* at 222.

29. *Id.* at 223.

30. Only one year separated *McGee* from *Hanson,* thus lower courts had little opportunity to construe the first decision free from the influence of the latter. Commentators, however, have been able to separate the decisions in theory. *See, e.g.,* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts,* 66 MICH. L. REV. 227, 235-36 (1967); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1160-79 (1966).

31. 357 U.S. 235 (1958). Dora Browning Donner executed a trust in Delaware in 1935 naming the defendant as trustee. The beneficiaries were eventually named by inter vivos instruments. Donner then moved to Florida but remained in contact with the trustee, received income from the trust and executed instruments persuant to it. Upon Donner's death, the residuary legatees under her will successfully challenged the validity of the appointment of the beneficiaries in Florida courts. A contrary result was reached, however, when the executrix initiated a similar suit in Delaware courts. Both cases were taken together on writ of certiorari and the United States Supreme Court held that Florida did not have in personam jurisdiction over the trustee, thus the Delaware judgment was affirmed. *Id.* at 256.

32. Prior to consideration of in personam jurisdiction, the *Hanson* court rejected in rem jurisdiction by Florida courts over the trust assets. In rem is the authority to determine title in property present in the jurisdiction, equally binding on all, and taking no cognizance of the claimants' domiciles. BLACK'S LAW DICTIONARY 713 (5th ed. 1979). The Court noted that determination of the situs of intangible property is difficult. However, in *Hanson*

settlor's unilateral move; therefore the trustee had not purposely availed itself of the privileges and benefits of forum laws.[34] Reaffirming the existence of limits on in personam jurisdiction, the *Hanson* Court rejected any move toward nationwide jurisdiction.[35] In general, *McGee* and *Hanson* indicated a clear intent by the Court to remain consistent with the *International Shoe* doctrine.[36]

The Supreme Court was again silent for two decades and inevitable inconsistencies developed between many lower courts. Some remained within the spirit of *International Shoe* and its progeny,[37] while others gradually ex-

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the issue was easily resolved because the record failed to indicate any presence of trust assets in Florida. Further, in rem could not attach in a probate court merely because the decedent domiciled in the forum. Rather, the property must be affiliated with the state to assert in rem jurisdiction. 357 U.S. 246-49. For a detailed examination of the Florida Long Arm Statute, see Note, *In Personam—Due Process and Florida's Short "Long Arm,"* 23 U. FLA. L. REV. 336 (1971).

33. See text accompanying notes 26-29 *supra.*

34. 357 U.S. at 251-53. The "purposely avail" language was not the creation of the *Hanson* Court. Rather, it can be traced to *International Shoe. See* 326 U.S. at 316.

35. 357 U.S. at 251. Justice Black, joined by Justices Brennan and Burton, dissented, maintaining that the trustee had sufficient contacts to assure that Florida jurisdiction was not unfair. Further, Florida's interest in the efficient administration of Donner's will and the examination of choice of law criterion also favored jurisdiction. The dissent concluded by criticizing the majority for adhering to "principles stated the better part of a century ago in *Pennoyer v. Neff.*" *Id.* at 259. See text accompanying notes 8-11, 35 *supra.*

36. See text accompanying notes 27-35 *supra*; Woods, *supra* note 11 at 868. Throughout *McGee* and *Hanson,* the Court relied on concepts and language from *International Shoe.* Implicit in those decisions was a continuation of the *International Shoe* reasoning with only slight deviation to accommodate different factual situations. However, parallel with the Court's silence in the following decade, and with the trend toward expansion of jurisdiction by lower courts, commentators maintained that a general broadening of jurisdictional bounds was not inconsistent with *McGee* and *Hanson. See, e.g.,* Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-arm Jurisdiction in District Courts,* 47 F.R.D. 73, 92 (1968).

37. *See, e.g.,* Benjamin v. Western Boat Bldg. Corp., 472 F.2d 723 (5th Cir. 1975) (jurisdiction denied in Louisiana because contacts were due to plaintiff's unilateral actions when he contracted with nonresident defendant in North Carolina to build and deliver a boat in Washington; the only forum contacts were sporadic communications by mail and telephone prior to delivery), *cert. denied,* 414 U.S. 830 (1973); King v. Hailey Chevrolet Co., 462 F.2d 63 (6th Cir. 1972) (jurisdiction permitted over nonresident's business that advertised in trade magazines and repaired plaintiff's truck with knowledge of its intended return to the forum); Aftanase v. Economy Baler Co., 343 F.2d 187 (8th Cir. 1965) (jurisdiction upheld over nonresident manufacturer of allegedly defective equipment that had been shipped directly into the forum for years, along with parts and advertising brochures); L. D. Reeder Contractors of Arizona v. Higgins Indus., 265 F.2d 768 (9th Cir. 1959) (jurisdiction denied over a nonresident manufacturer whose only contact with the forum was acceptance and negotiation of a single contract for sale of goods with another nonresident for delivery in a different state); Timberlake v. Summers, 413 F. Supp. 708 (W.D. Okla. 1976) (minimum contacts held not to exist in a libel action where defendant's only contact with the state was the allegedly libelous letter); Upgren v. Executive Aviation Servs., 304 F. Supp. 165 (D. Minn. 1969) (jurisdiction refused when nonresident defendant's only contact was an allegedly defective helicopter sold to a nonresident, but causing injury in the forum); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 761 (1961) (nonresident manufacturer of a component part held for in-state injury even though assembly was out of state).

panded their jurisdictional boundaries.[38] However, nationwide jurisdiction was again rejected by the Court in 1977 in *Shaffer v. Heitner*.[39] In that case, Delaware courts sought to "coerce"[40] in personam jurisdiction over nonresidents lacking minimum contacts by attaching in state property. While the case centered on quasi in rem jurisdiction, the Court again relied upon the in personam minimum contacts test.[41] The *Shaffer* Court, however, introduced a new element to the *International Shoe* doctrine: the extent to which a defendant would reasonably anticipate being haled before a forum's courts.[42] However, the Court appeared to attach no significance to the new language, and thus, lower courts failed to preserve any change in the area of in personam jurisdiction.[43]

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38. Phillips v. Anchor Hocking Glass Corp., 100 Ariz. 251, 413 P.2d 732 (1966) (when defendant's only contact with the forum was the unexplained presence of a single plate that exploded in plaintiff's oven, the Court rejected the language of *Hanson* and remanded for consideration of the economic strength of the parties, size of the defendant corporation, judicial economy, and "all other matters relevant"); Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976) (jurisdiction upheld over a nonresident, interstate truck driver for injuries resulting from a collision outside the forum with a resident plaintiff of the forum; jurisdiction was based on defendant's past routes that had brought him to the forum and his intent to enter the forum); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969) (jurisdiction upheld based upon the unexplained presence in the forum of a very large, nearly immovable boiler manufactured by the defendant); Roche v. Floral Rental Corp., 95 N.J. Super. 555, 232 A.2d 162 (1967) (jurisdiction permitted over a defendant with no contacts beyond the installation of a refrigerator unit on plaintiff's truck, defendant knowing the truck was to return to the forum).

39. 433 U.S. 186 (1977). Plaintiff filed a stockholder's derivative suit against past and present officers of a Delaware corporation, in that state, alleging, *inter alia*, that defendants violated their duties to the corporation resulting in civil and criminal liabilities. Simultaneously, plaintiff attached 83,000 shares of common stock in the corporation belonging to 19 of the 28 defendants. Defendant's special appearance was ultimately rejected by the Delaware supreme court, Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976), holding that sequestration to compel in personam jurisdiction, with failure to appear resulting in default, did not deny due process of law and was not controlled by *International Shoe*. The United States Supreme Court reversed and drastically altered principles of in rem jurisdiction by requiring that they satisfy *International Shoe* standards. 433 U.S. at 186.

40. *Id.* at 219. Justice Rehnquist took no part in the case, while Justices Powell and Stevens concurred separately and Justice Brennan concurred in part and dissented in part. Justice Powell agreed with the majority, subject to the reservation that quasi in rem jurisdiction remain available for real property located in the forum. *Id.* at 217. Justice Stevens agreed with Powell and the majority but emphasized the practical consequences of Delaware's action. Specifically, the purchaser of any stock in a Delaware corporation may be subject to suit in that state or face forfeiture of his investment. *Id.* at 217-19.

Justice Brennan agreed with the Court's application of minimum contacts to in rem actions, but disagreed with the Court's result under that test. He suggested that the case should have been remanded for application of the minimum contacts test. However, because the Court ruled on it, he expressed the view that a state has a legitimate interest in assuring a convenient forum for derivative suits and Delaware was a fair and convenient forum. *Id.* at 219-28.

41. *Id.* at 207-12.

42. *Id.* at 216. In the closing paragraph of its opinion, after mentioning the purposeful availment test of *Hanson v. Denckla*, see text accompanying notes 31-36 *supra*, the Court noted that "appellants had no reason to expect to be haled before a Delaware Court." *Id.*

43. The positioning of the phrase within the opinion and the tone of the paragraph,

The instant case[44] represented an attempt by the Court to resolve conflicts between lower courts and provide guidelines for future cases.[45] In doing so, the present Court declined to expand the jurisdictional boundaries established by *International Shoe* and its progeny.[46] Rather, the Court propounded two functions of the minimum contacts concept: overall fairness and maintenance of the federal system.[47] In terms of fairness, minimum contacts were said to ensure that jurisdiction does not offend traditional notions of fair play and substantial justice.[48] Further, while acknowledging the trend toward relaxation of jurisdictional requirements,[49] the Court maintained that federalism and the

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seem to indicate that the Court did not intend this language to be adopted as another element of the *International Shoe* doctrine. The instant case, however, indicates otherwise. See text accompanying notes 47-52 *infra*. *See* Woods, *supra* note 11 at 867-68 (the *Shaffer* Court failed to define the *International Shoe* standards and that their definition will continue to elude courts and commentators). Kulko v. Superior Court, 436 U.S. 84 (1978), reversed a California Supreme Court judgment permitting the assertion of jurisdiction over a non-resident defendant in a child support suit. The only forum contacts were defendant's acts that caused his two children to leave his domicile in New Jersey and travel to their mother in the forum state. In applying the traditional *International Shoe* test, the Court noted a distinction between commercial and non-commercial activity in determining the scope of jurisdiction. Also acknowledged, but again in a secondary manner, was the new element from *Shaffer*. *Id.*

Lower courts also attributed little significance to the "haled before a forum court" test. *See, e.g.*, Great Western United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978) (the Fifth Circuit conducted an exhaustive evaluation on the issue of in personam jurisdiction, including several citations to *Shaffer*, but no mention was made of the new test); Hutson v. Fehr Bros., Inc., 584 F.2d 833 (8th Cir. 1978) (an extensive review of in personam jurisdiction in a product liability suit heavily cited *Shaffer* and its predecessors, but ignored the new test); Swafford v. Avakian, 581 F.2d 1224 (5th Cir. 1978) (in an action for breach of promise against a nonresident, the court, in considering jurisdiction, cited *Kulko*, but not the new test); School Dist. v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978) (in a school segregation case, the court considered jurisdiction over Kansas officials alleged to have contributed to the segregation and denied jurisdiction by an extensive use of the *International Shoe* test, but failed to mention *Shaffer*).

44. 100 S. Ct. 559 (1980). The Court's disposition of the instant case included a majority opinion by Justice White joined by five others and dissenting opinions by Justices Brennan, Marshall and Blackmun separately, with Justice Blackmun also joining Justice Marshall.

45. *Id.* at 564 n. 9. The Court explicitly recognized a conflict between the Oklahoma supreme court and the high courts of four other states in cases with identical facts. Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972) (defendant knew of plaintiff's intent to take the vehicle to the forum); Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, 438 P.2d 128 (1968); Pellegrini v. Sachs & Sons, 522 P.2d 704 (Utah 1974) (expressly rejected the mobility and service network arguments); Oliver v. American Motors Corp., 70 Wash. 2d 875, 425 P.2d 647 (1967) (dicta indicated that jurisdiction would be proper if defendant knew of plaintiff's intent to enter the forum).

46. 100 S. Ct. at 563, quoting Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).

47. 100 S. Ct. at 564.

48. *Id.* As considerations of fair play and substantial justice, the Court included the plaintiff's interest in convenient relief, the forum's interest, reasonableness of requiring the corporation to defend in the forum, and principles of judicial economy. *Id.*

49. *Id.* at 565, quoting McGee v. International Life Ins. Co., 355 U.S. 220, 222-23 (1957). By the Court's reasoning, modern technology and an increase in commerce have rendered previously unfair jurisdiction reasonable and just. *See generally* Kurland, *supra* note 9; Woods, *supra* note 11.

sovereignty of sister states required a limit on the reach of a state's judiciary.[50] Federalism, the Court held, was preserved only if a defendant's acts constituted a purposeful availment of forum laws so as to reasonably anticipate being held before its courts.[51] Accordingly, even if all considerations of fairness are satisfied, principles of federalism could prevent a state from rendering a valid judgment.[52]

Because the respondents failed to satisfy the federalism test, the instant Court found it unnecessary to consider notions of fairness and reasonableness.[53] Specifically, the Court reasoned that respondent's vehicle, petitioner's only contact with Oklahoma, was in that state due to the unilateral actions of others.[54] Further, the petitioners had not tried to serve the forum market either indirectly or by placing its products in the stream of commerce.[55] Therefore, the Court concluded, the petitioners could not have reasonably foreseen a suit in Oklahoma.[56]

Justice Brennan's dissent[57] rejected substantial reliance on *International Shoe* as outdated.[58] Rather, under this view, minimum contacts should only be a part of the overall focus on reasonableness, justice and fair play.[59] Although this fairness test was similar to that of the majority, it expressly rejected consideration of the burden of defending in a distant forum.[60]

While the instant Court indicated a refusal to expand the constitutional boundaries of in personam jurisdiction,[61] the present case was seemingly

50. 100 S. Ct. at 565.

51. *Id.* at 565-67. The Court was particularly concerned with providing a degree of predictability so potential defendants could better structure their conduct. *Id.*

52. *Id.* at 565-66.

53. *Id.* at 568.

54. *Id.* at 566.

55. *Id* at 567. The stream of commerce theory has been popular since its adoption by the Illinois supreme court in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Although that court did not name the theory, it described it as the general proposition that, "if a corporation elects to sell its products for ultimate use in another state, it is not unjust to hold it answerable [to jurisdiction in that state] . . ." *Id.* at 439, 176 N.E.2d at 766. *Accord,* Cleary, *The Length of the Long Arm,* 9 J. PUB. L. 293, 296-98 (1960); Seidelson, *supra* note 12, at 227-28; Note, *supra* note 22 at 1032-34. *See also* Jetco Electronic Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973); Burton Shipyard, Inc. v. Williams, 448 F.2d 640 (9th Cir. 1971); Jones Enterprises, Inc. v. Atlas Serv. Corp., 442 F.2d 1136 (9th Cir. 1971); Eyerly Aircraft Co. v. Killian, 414 F.2d 591 (5th Cir. 1969).

56. 100 S. Ct. at 566-67. The Court rejected the Supreme Court of Oklahoma's reasoning. Rather, the mobility of the automobile notwithstanding, mere foreseeability of a product being taken into the forum is not sufficient. The relevant foreseeability is based on purposeful conduct, the defendant might be haled before a forum court. *Id.*

57. 100 S. Ct. at 580 (this dissent is applicable to the instant case and a sister case, Rush v. Savchuk, 100 S. Ct. 571 (1980)).

58. 100 S. Ct. at 581.

59. *Id.* at 581-82. Brennan's focus on reasonableness, fair play and justice basically included those considerations enunciated in the majority's fairness test. See note 48 *supra.*

60. 100 S. Ct. at 582. The two other dissents agreed with the substance of the majority's test, but reached a different result. They emphasized the uniqueness of the automobile and the nationwide service network. Further, the dissents maintained that due to these characteristics, the defendants could have foreseen their alleged negligence causing injury in the forum. 100 S. Ct. at 568. (Marshall, J., dissenting); *id.* at 570 (Blackmun, J., dissenting).

61. 100 S. Ct. at 565, quoting Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).

consistent with past doctrine. *International Shoe* and minimum contacts were reaffirmed,[62] as were the purposeful availment and unilateral action tests of *McGee* and *Hanson*.[63] Expanding on *Shaffer*, great emphasis was placed on the defendant's ability to anticipate being haled before a forum court.[64] Further, the Court was careful to resolve past ambiguities by confirming theories previously only implied. For example, jurisdiction based on advertisements reaching the forum state[65] and the stream of commerce theory[66] were favorably acknowledged. Aware of explicit boundaries, however, the Court rejected jurisdiction based on unforeseen circumstances[67] and questioned the validity of presuming continuous contacts upon proof of only a single forum connection.[68]

The only deviation from precedent was a shift in methodology; a new two pronged test was set forth.[69] Specifically, minimum contacts were said to serve the dual function of preserving federalism and ensuring fairness. The Court maintained that even if jurisdiction was fair to the defendant, the Constitution required that federalism be respected.[70] The necessary implication of this approach is that concerns of federalism remain constitutionally based, while traditional notions of fair play and substantial justice assume a subservient role.[71]

In applying this new Constitutional test, however, the Court inadequately addressed critical facts and overlooked a major inconsistency. With only a conclusory explanation, the Court dismissed as irrelevant the unique mobility of the automobile,[72] as well as petitioner's membership in a nationwide service network.[73] The court failed to note that automobile dealers join such networks

62. 100 S. Ct. at 564.

63. *Id.* at 566-67.

64. 100 S. Ct. at 567.

65. *Id.*

66. *Id.* For a general explanation of the stream of commerce theory, see note 55 *supra.*

67. 100 S. Ct. at 567.

68. *Id.* at 568. The Court questioned, but left unresolved, whether proof of the presence of one of the defendant's products in the forum was sufficient to establish a prima facie case of continuing contacts. The Supreme Court of Oklahoma based its holding on such a presumption, noting that, "under the facts we believe it reasonable to infer . . . that petitioners derive substantial income from automobiles which from time to time are used in the state of Oklahoma." 585 P.2d at 354.

69. See text accompanying notes 47-52 *supra.*

70. 100 S. Ct. at 565-66.

71. The Court did not expressly indicate that fairness was to be secondary to principles of federalism. However, whether accidental or intentional, the implication was easily drawn from the Court's enunciation of the tests and their application to the facts. In light of the Court's expressed desire for predictability in jurisdiction, the emphasis on federalism could be an attempt to achieve more objectivity. Federalism, unlike the fairness test, does not involve a subjective evaluation of convenience, forum interest and judicial economy. Rather, the Court attempted to adapt the reasonable man from tort law to its "reasonably anticipate being haled before a forum court" test.

72. 100 S. Ct. at 567 n.11 (the Court's discussion of the uniqueness and mobility of the automobile was limited to one footnote).

73. *Id.* at 568. The Court rejected the Supreme Court of Oklahoma's reliance on the nationwide service network by holding it only a collateral relation with the forum, providing no direct income. No mention was made of the applicability of the stream of commerce theory. *Id.*

to increase the attractiveness of their product as an interstate carrier,[74] a fact which, under the stream of commerce theory, would tend to support jurisdiction. The inconsistency between the federalism and stream of commerce theories, both acknowledged by the present court, is thus self-evident. Federalism requires a narrow view of the commerce clause and relies upon state sovereignty, while the stream of commerce theory implies a national common market, immune to state boundaries.[75]

The Court further failed to recognize a significant practical consequence of the new federalism test. Failure by a defendant to plead improper jurisdiction has traditionally constituted waiver of the issue.[76] However, if in personam jurisdiction is constitutionally limited by federalism and state sovereignty, no such waiver is possible, because improper jurisdiction is not an intrusion merely on the rights of a defendant, but on those of a sister state. This result contradicts a century of precedent[77] by elevating in personam jurisdiction to the level of subject matter jurisdiction,[78] thus leaving an improper suit open to dismissal at any stage.[79]

In a further practical consideration, ambiguities in the new two pronged test are certain to interpretively frustrate lower courts. While it is clear that federalism and fairness are to be distinct inquiries,[80] the intended relationship between the two is far from certain. The Court's reasoning suggests that federalism is a rigid constitutional standard, while fairness is a discretionary doctrine lacking constitutional magnitude.[81] It is equally possible, however,

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74. Justices Marshall and Blackmun, dissenting, agreed with the test used by the Court but arrived at contrary conclusions. Both dissents substantially emphasized the intended mobility of the automobile, the nationwide service network, and the national highway system. In concluding, the dissents maintained that the defendants not only foresaw use of their products in other states, but intended and relied upon it. 100 S. Ct. at 568-71.

75. Not only did defendants intend their products to be used in interstate travel, but absent that ability, they would lose substantial revenues. The Court's failure to recognize this illustrates the inconsistency. To the Court, federalism requires that jurisdiction be predicated on purposeful availment of forum laws. However, the stream of commerce theory requires only that a defendant enter its product into interstate travel, not that it know the ultimate destination. Thus, it would be impossible for the defendant to have availed itself of forum laws. See note 55 *supra*.

76. FED. R. CIV. P. 12(h)(1).

77. *See* Pennoyer v. Neff, 95 U.S. 714 (1877). One of the few holdings of this case not overruled is a defendant's ability to waive personal jurisdiction as a defense. *Id.* at 721. *Accord*, York v. Texas, 137 U.S. 15 (1890) (a special appearance to contest jurisdiction is not a right and may be interpreted as a voluntary submission to jurisdiction).

78. Subject matter jurisdiction refers to the court's competence to hear and decide issues concerning the general subject involved in the action. Broughon v. Oceanic Steam Navigation Co., 205 F. 857, 859 (2d Cir. 1913).

79. FED. R. CIV. P. 12(h)(3) "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Id.*

80. 100 S. Ct. at 564.

81. See text accompanying notes 47-52 *supra*. Although the Court was explicit in distinguishing the two prongs of minimum contacts, little direction was given for its application and the relative importance of each standard. The overall inference is that federalism is the constitutional standard, while fairness is a discretionary doctrine akin to forum non conveniens in a venue question. 100 S. Ct. at 564-66.

that the two inquiries were intended to both be constitutionally based. The latter construction, more practical and consistent with past doctrine[82] is likely to be received more favorably by lower courts.[83] Nevertheless, interpretive inconsistency is inevitable.

Rejecting the ambiguous federalism-fairness dichotomy,[84] the Brennan approach would focus on reasonableness and convenience for the plaintiff. This approach differs little from the case by case analysis of *International Shoe*,[85] despite Brennan's statements to the contrary.[86] Although superficially convincing, this approach loses much of its appeal beyond the instant facts because no consideration is given to the burden of defending in a distant state.[87] Thus, while this view would indeed provide uniformity, it would do so at the expense of inevitable inequities for future defendants.[88]

The instant case was purportedly an attempt to insure consistency among lower courts.[89] Unfortunately, the Court's reasoning has only confused the issue and limited the precedential value of the present case to its facts. Ambiguities may be lessened, however, if lower courts interpret federalism and fairness[90] as constitutionally based, similar to the analysis used in *International Shoe*.[91] Although still imperfect, any de-emphasis of the confusing federalism rationale will ultimately prove beneficial.

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Forum non conveniens is a discretionary doctrine using the equitable powers of a court to deny jurisdiction if considerations of convenience and justice require. 1 J. MOORE, FEDERAL PRACTICE ¶0.145[2] (2 ed. 1979). This analogy is entirely consistent with the Court's opinion. In practical application, however, future courts will not likely accord it precedential value. It is a drastic deviation from past doctrines, and thus, without expressly overruling or limiting past cases, it will likely go unnoticed. For a discussion of forum non conveniens and jurisdiction, see generally Morley, *Forum Non Conveniens: Restraining Long Arm Jurisdiction*, 68 NW. U. L. REV. 24 (1973).

82. See text accompanying notes 8-43 *supra*.

83. Justice Brennan suggested in his dissent that the Court's "reasonably anticipate being haled before a forum court" test is circular. A defendant cannot know if it should anticipate jurisdiction until the Court has declared what the law of jurisdiction is. 100 S. Ct. at 587 n.18.

84. *Id.* at 581. See text accompanying notes 57-60 *supra*.

85. See text accompanying notes 18-24 *supra*.

86. 100 S. Ct. at 581.

87. *Id.* at 582.

88. It can be argued that Justice Brennan's test provides for the small defendant by considering its lack of resources as a factor in the fairness test. However, this is inconsistent with the dissent's explicit rejection of defendant's convenience as a criterion. *But cf.* Beal v. Caldwell, 322 F. Supp. 1151 (E.D. Tenn. 1970) (jurisdiction not permitted over a nonresident individual who advertised his airplane in a magazine circulating in the forum while communicating with the resident buyer by post and telephone); Darby v. Superior Supply Co., 224 Tenn. 540, 458 S.W.2d 423 (1970) (jurisdiction not permitted over a nonresident who consumated a contract by mail in the forum and sent his agent into the state to receive the goods). For a general discussion of the inadequate bargaining position between corporations and private plaintiffs, *see generally* von Mehren & Troutman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

89. 100 S. Ct. at 564.

90. See text accompanying notes 47-52, 69-71 *supra*.

91. See text accompanying notes 18-24 *supra*.