

# IN SEARCH OF THE LINK BETWEEN DUE PROCESS AND JURISDICTION

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Jurisdiction offers to one of the parties in litigation the benefit of a convenient, familiar and, perhaps, friendly forum. If there is a valid reason to base those benefits merely on who files and who defends the lawsuit, it must be because of factors internal to the litigation process because the givens tell us nothing about external context. Such factors have generally suggested to commentators that a mild preference for defendants' forums is appropriate.<sup>1</sup> Yet the law has made major shifts from requiring first, that plaintiffs sue in defendants' forum to requiring, more recently, that defendants come to plaintiffs' forum. Still more recently, the shift has been to a revitalization of rules favoring defendants and their forums.<sup>2</sup> This instability suggests a basic dissatisfaction with making jurisdiction turn on party status and invites a glance at the roots of the decisions.<sup>3</sup>

The Supreme Court in *International Shoe Co. v. Washington*<sup>4</sup> an-

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1. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 591 (1958); Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority, Analysis of Underlying Policies*, 21 INT'L & COMP. L.Q. 335, 350-54 (1972); Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127-28 (1966). See also Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1177-97.

2. *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

3. See cases cited *supra* note 2. See Chase, *In Rem Jurisdiction in a Social Context*, 45 BROOKLYN L. REV. 617, 620-27 (1979) (analyzes pre-*Shaffer* in rem jurisdiction in terms of class bias); Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 430-61 (1981) (distinguishes territorial power, forum reasonableness, convenience and other nonconstitutional bases of decision). See also *supra* note 1; *infra* notes 56 & 83.

4. 326 U.S. 310 (1945).

nounced the principle that assertion of jurisdiction would satisfy due process so long as the forum state had minimum contacts with the defendants to satisfy notions of fair play and substantial justice.<sup>5</sup> The Court, however, left unclear the relationship between the minimum contacts test and the due process clause. The Court failed to explain how the test relates to other areas of constitutional doctrine or interpretations of the due process clause.

Prior to 1937<sup>6</sup> the Court minimized the concurrent powers of state and federal governments by defining special reserved domains peculiar to each.<sup>7</sup> Similarly, it limited government power over individuals with a well developed basket of rights protected by the due process clause.<sup>8</sup> Jurisdictional limitations fit easily into this approach. States had sovereign powers upon which others could not infringe. To determine the extent of jurisdiction, therefore, one merely had to examine the historic powers and functions of sister sovereigns.<sup>9</sup> Prior to *International Shoe*, however, and beginning in 1937, the Court adopted a more flexible and functional approach.<sup>10</sup> The Court abandoned independent limitations on governmental power based solely on the general language of the tenth amendment.<sup>11</sup> Fundamental rights like liberty of contract lapsed into disuse,<sup>12</sup> and the idea that there were matters which Congress could not touch because they were "local" in nature departed as well.<sup>13</sup> Due process, stripped of these expansive categories of local or private rights, remained to be renovated and redesigned.

Inevitably this change had implications for jurisdiction. Because old notions of inherent power had disappeared, a new understanding of the reach of state process had to be developed. The functions of the due process clause, however, have not been easy to determine.<sup>14</sup> Thus the interpretation of that clause has become embroiled in new disputes about the functions of judicial review and the methods of interpreting

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5. *Id.* at 316.

6. *See infra* text accompanying note 29.

7. *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (manufacturing and mining belong exclusively to the states).

8. *Lochner v. New York*, 198 U.S. 45 (1905).

9. *See Pennoyer v. Neff*, 95 U.S. 714 (1877).

10. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

11. *See United States v. Darby Lumber Co.*, 312 U.S. 100, 124 (1941).

12. *See supra* note 10.

13. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

14. *See Roe v. Wade*, 410 U.S. 113 (1973) (reviving substantive due process in the abortion context).

the Constitution.<sup>15</sup>

The Court's one attempt to set a course in this area before *International Shoe* was cast in a footnote to *United States v. Carolene Products Co.*, in which the Court announced the so-called preferred freedoms theory.<sup>16</sup> In *Carolene Products*, the Court, acting characteristically for this period of reinterpretation of the Constitution, deferred to Congress regarding the reasonableness of regulation. Justice Stone realized, however, that what might be appropriate in economic regulation might be less appropriate elsewhere. He was at pains, therefore, to preserve the freedom of the Court in other areas. In a footnote he added that deference to Congress might be improper in the face of specific constitutional provisions, infringement of democratic rights, or discrimination against particular ethnic, racial, religious or insular minorities. Thus was borne the idea that the Court had a special role to play in interpreting the Bill of Rights and the Civil War amendments. But Stone, the author of both *International Shoe* and *Carolene Products*, failed to mention these issues in *International Shoe*.

The purpose of this Article is to locate the sources of jurisdictional doctrine. A coherent theory of due process ought to help explain and guide the development of jurisdictional doctrine. In fact, the sources of due process analysis pose a challenge for jurisdictional doctrine because they expose both the importance and the irrelevance of jurisdiction to fairness, convenience, and due process.

A correlative issue concerns two major consequences of jurisdiction: the privilege of collateral attack and the opportunities for review involved in the constitutionalization of the area.<sup>17</sup> Few of the articulated explanations for the existing limitations on jurisdiction seem to justify those remedies. As the doctrinal bases of jurisdiction are explored, they will also be tested against these consequences of jurisdiction.

## I. PURPOSEFUL AVAILMENT

### A. *Sovereignty*

In early English practice the power of the court to adjudicate often

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15. J. ELY, DEMOCRACY AND DISTRUST 14-21 (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1070 (1980). See *infra* text accompanying notes 54-71.

16. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

17. See *Thos. P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (holding prior judgment invalid).

depended on obtaining custody of the defendant.<sup>18</sup> The Supreme Court in *Pennoyer v. Neff* made jurisdiction depend on the states' power to seize people and property.<sup>19</sup> The Court in *Pennoyer* explained this as a derivative of the sovereignty of each of the states, though its conclusions were grounded on international law where no full faith and credit clause operated.

Instead of physical power, sovereignty is now understood to create a requirement of intent or consent. In *Hanson v. Denckla*,<sup>20</sup> the Supreme Court allowed trustees to refuse Florida jurisdiction though both the principals and beneficiaries lived in Florida. In *World-Wide Volkswagen Corp. v. Woodson*,<sup>21</sup> the Court permitted an east coast dealer and distributor of foreign automobiles to refuse jurisdiction in Oklahoma though a car they sold had injured several people there. The Court held that unless the defendant purposefully availed itself of state protections no state jurisdiction was acquired. Purpose, not presence, defined the outer reaches of jurisdictional doctrine. In explaining these conclusions the Court in both cases referred to sovereignty. The Court warned that traditional notions of territorial power still govern, and explained that this conclusion was grounded in respect for each state "as coequal sovereigns in a federal system."<sup>22</sup>

Quasi in rem jurisdiction similarly had been based on the state's power over things within its jurisdiction. Property that could be seized could be subjected to litigation regardless of the whereabouts of the parties.<sup>23</sup> In early legal development, debts were analogized to physical property and subjected to quasi in rem jurisdiction as well.<sup>24</sup> These rules have been drastically overhauled. In *Shaffer v. Heitner*,<sup>25</sup> the Court held that stock could not be seized in the business' state of incorporation as a basis for jurisdiction in unrelated litigation if no other basis existed.<sup>26</sup> In *Rush v. Savchuk*,<sup>27</sup> the Court held that insurance

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18. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *ELEMENTS OF CIVIL PROCEDURE* 70 (3d ed. 1976).

19. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). See also *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

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

21. 444 U.S. 286 (1980).

22. *Id.* at 292.

23. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

24. *Harris v. Balk*, 198 U.S. 215 (1905).

25. 433 U.S. 186 (1977).

26. *Id.* at 204 n.20, 212.

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

obligations could not be seized as a basis of jurisdiction against the policyholders.<sup>28</sup> In *Shaffer* and *Rush* quasi in rem jurisdiction was largely eliminated. The Court refocused its inquiry from the location of the debt to the activities of the debtor—a result consistent with its concept of sovereignty, as it had been defined in the personal jurisdiction cases, which were avowedly based on sovereignty.

In a series of decisions beginning in 1937, however, sovereignty and inherent state powers began to lose their explanatory force.<sup>29</sup> It was in keeping with these developments that the Court in *International Shoe* expanded interterritorial state power at the expense of impermeable state boundaries. When the Court in *Hanson* and *World-Wide Volkswagen* revived the idea of sovereignty, it did not function against a background of clearly defined sovereign powers but of a functional approach to state needs.

Nevertheless, when focusing on state needs rather than concepts of inherent powers, it is difficult to understand how sovereignty explains the jurisdictional results. Sovereignty may be viewed from two practical perspectives: the needs of the parties and the needs of the state. For parties primarily interested in relief, sovereignty between unrelated nations poses a barrier because they may be unwilling to enforce each others' judgments.<sup>30</sup> Without dominion over person or property there may be little point in assuming jurisdiction. Among the states, however, unlike the community of nations, the enforcement of judgments is affected by the full faith and credit clause. The Court in *Pennoyer v. Neff* solved the problem of enforcement by equating the requirements of due process with those of full faith and credit.<sup>31</sup> The Court held that Oregon had denied due process to Neff, an out-of-state defendant, by purporting to entertain litigation against him personally. On that ground the Court concluded that Oregon's judgment would not be entitled to full faith and credit elsewhere. Conversely, had Oregon properly obtained jurisdiction under the fourteenth amendment its judgment would have been entitled to full faith and credit under article four of the Constitution. That in turn meant that the prevailing party would have been entitled to obtain satisfaction against Neff's out-of-

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28. *Id.* at 328.

29. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

30. See *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977); Kurland, *supra* note 1, at 585.

31. See U.S. CONST. art. IV, § 1.

state property. As a result of *Pennoyer*, the states are now generally required to enforce each other's judgments if the court of the forum state had proper jurisdiction. Thus, the significance of state sovereignty diminished to the extent that the problem of enforceability faded.

Another aspect of sovereignty is the interest or needs of the states.<sup>32</sup> It is not entirely clear, however, what risk to the interests of the states the Court is trying to protect through the medium of jurisdictional rules. The state has an interest in the well-being of its citizens, residents, and transients within its borders. Those interests would prove too much, however, for they are always present. The state has an interest in the enforcement of its own laws wherever they apply. Thus, a party to the litigation might assert that jurisdiction should be consistent with decisions governing the forum's choice of law.

Although relevant, the Court in *Hanson* refused to equate choice of law with jurisdiction.<sup>33</sup> The state's interest in the enforcement of its laws can be satisfied through litigation in other forums.<sup>34</sup> Moreover, under current doctrine the action is still transitory.<sup>35</sup> Several competing jurisdictions are frequently available; the defendant can be sued where the events took place, but also, among other possibilities, where he lives. Making actions transitory threatens the enforceability of state law when a multitude of plaintiffs are permitted a similar choice of forum. Thus, in *Rush*<sup>36</sup> plaintiffs were plainly escaping an Indiana guest statute. It is hard to rest on the damage to the Indiana interests

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32. See Smit, *supra* note 1 (arguing that the state interest in the transaction is a ground for asserting jurisdiction). The Court, in assessing the inconvenience to litigants, does give some consideration to the state interests. *E.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

33. 357 U.S. 235, 254 (1958). See *Shaffer v. Heitner*, 433 U.S. 186, 215-16 (1977).

34. Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 635-38 (1954). See also Von Mehren & Trautman, *supra* note 1, at 1128-33.

35. See *Developments in The Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 1012 (1960).

36. 444 U.S. 320 (1980). Underlying *Rush* were a number of problems of potential liability for the individual defendant. Most of those problems were present in the Louisiana direct action statute which the Court had sustained in *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954), which authorized a direct action against the insurance company on the policy. The *Rush* Court distinguished *Watson* but gave no indication that it was undermining it. Most of those difficulties could be solved, moreover, without denying plaintiff its choice of forum. *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 376 U.S. 844 (1969); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). See Justice Stevens' dissent in *Rush*, 444 U.S. at 333.

involved because guest statutes have declined radically in popularity<sup>37</sup> and many courts feel free to apply their own more liberal laws.<sup>38</sup> Nevertheless, if plaintiffs were allowed jurisdiction based on attachment of insurance policies, the common presence of insurance companies throughout the nation would allow plaintiffs to select forums noted for the highest awards. In large cases they might even move to establish residence if that were required. The result would be that insurance rates and premiums for the nation would be defined by the standards of a few generous jurisdictions. That kind of open ended forum shopping poses a true threat to sister state policies, although the Court in *Rush* did not seem to rely on this ground.

This would not have been true of the Louisiana direct-action statute sustained in *Watson v. Employers Liability Assurance Corp.*<sup>39</sup> Louisiana permitted the plaintiff to sue the tortfeasor's liability insurer as party-defendant if, but only if, the tort had been committed in Louisiana. Louisiana courts would be unavailable in cases of out-of-state torts despite the presence of liability carriers in Louisiana. Thus, plaintiffs could not generally seize upon advantageous provisions of Louisiana law to circumvent law applicable in their own states. Few long arm statutes, however, permit that wide a latitude for forum shopping.

In addition to unlimited forum shopping, the Court expressed concern in *World-Wide Volkswagen* about defendants' ability to plan their liabilities.<sup>40</sup> It insisted on jurisdictional rules which would affect the parties' actions and on which they could rely. Conversely, the Court expressed concern in *Kulko v. Superior Court* about the effect of jurisdictional rules on the private, cooperative behavior of the parties.<sup>41</sup> The opinion in *Kulko* supports a narrow rule: jurisdictional choices which affect the private prelitigation behavior of the parties are disfavored. This conclusion may sensibly be grounded on the effect on federal or sister state interests. The threat to state law is a problem in the matrimonial area because parties are likely to temper their activities with a look at the jurisdictional consequences. Although it is a matter

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37. R. LEFLAR, *AMERICAN CONFLICTS LAW* 190 n.3 (3d ed. 1977); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 279-80, 279 n.40 (2d ed. 1980).

38. R. WEINTRAUB, *supra* note 37, at 329.

39. 348 U.S. 66 (1954). Such ousting of local regulation has been the result of corporate freedom to domesticate itself at will and the common choice of Delaware as a state of incorporation.

40. 444 U.S. at 297.

41. 436 U.S. 86, 97-98 (1978).

of considerable anguish to lawyers who deal with domestic matters, it is necessary for them to advise their clients of the legal consequences of efforts to cooperate with or reconcile themselves with their spouses. Hence, state policies seeking reconciliation and cooperation would be frustrated by jurisdictional rules which make the substantive rules change to the detriment of cooperating parties. The Supreme Court's reinterpretation of purposeful availment in *Kulko* rests on a firm foundation insofar as it avoided jurisdictional doctrine which would have required Mr. Kulko to defend himself against support claims in California because of his willingness to let his children join their mother there.

In *World-Wide Volkswagen* it is difficult to identify any policy of the sister state that may be affected by Oklahoma's assertion of jurisdiction. Conflicts principles could be asserted to apply New York law to the dealer's duty of care.<sup>42</sup> Open ended forum shopping is not a problem because the accident was local. One is tempted, however, to treat the decision as a derivative of the commerce clause.<sup>43</sup> Because most long arm statutes provide narrower bases of jurisdiction against foreigners than residents, outright discrimination against interstate commerce is not the issue.<sup>44</sup> Nevertheless, there may be an effect on interstate commerce. The Audi dealer in New York might refuse to deal with people headed for other states. Presumably knowledgeable customers under a contrary rule would be equally motivated to restrict their dealings with dealers beyond the borders of their intended or expected home state.

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42. Conflicts principles function independently of jurisdiction in an effort to reflect the intent of the parties, A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 493-97 (1962), or otherwise to apply the most appropriate law. R. WEINTRAUB, *supra* note 37, at 335-41 (interest analysis applied to products liability). There may be valid reasons for applying either Oklahoma or New York law in either forum and under either modern law, A. EHRENZWEIG, *supra*, at 497 (the existence of implied warranties treated as a matter of construction of the contract) or traditional law, R. WEINTRAUB, *supra* note 37, at 336-37. *But see* *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (constitutional principles leave wide discretion in state choice of law); U.C.C. § 1-105(1) (forum rule may predominate).

43. *Cf.* *White v. Southern Pac. Co.*, 386 S.W.2d 6 (Mo. 1965) (injury to passenger-plaintiff, held plaintiff's forum burden on commerce); *Hayman v. Southern Pac. Co.*, 278 S.W.2d 749 (Mo. 1955) (same; injury to employee); *Glaser v. Pennsylvania R.R. Co.*, 82 N.J. Super. 16, 196 A.2d 539 (1963) (passenger plaintiff's forum burdened commerce).

44. *See, e.g.*, *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (state job discrimination voided on the basis of the privileges and immunities clause of article IV); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (commerce clause barred restriction of area of supply). *But see* *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371 (1978) (rate discrimination in favor of resident hunters upheld against privileges and immunities and equal protection challenges).



Plainly economic constraints would limit this aversive behavior of both parties. The burden, however, must rest somewhere and if there are good reasons to locate trials in distant forums, a commerce clause analysis would not prove as firm a barrier as *World-Wide Volkswagen*.<sup>45</sup> Indeed, it might be better for the Court to defer to Congress rather than interpose its own judgment.<sup>46</sup>

Although there are legitimate state and federal concerns, the parties' behavior is a relatively poor test of sovereign interests. This approach entirely sidesteps evaluation of the impact on acts of Congress and sister-state legislation. By making behavior the test of jurisdiction, the impact on commerce is aggravated. Although substituting purpose for underlying policies is typical of the Court's treatment of large areas of constitutional law,<sup>47</sup> it is out of line with the substance of commerce clause doctrine which accords considerable latitude to the states where legitimate interests are pursued in a nondiscriminatory manner.<sup>48</sup> It is also out of line with the structure of the due process clause. Sovereignty does not have a place in the original design of the due process clause.<sup>49</sup> The Court has become very restrained in its use of the idea of sovereignty.<sup>50</sup> It is difficult to argue that sovereignty, as employed by *World-Wide Volkswagen* and *Hanson*, serves some essential function in the constitutional scheme.<sup>51</sup>

Moreover, concern with the impact on federal and sister-state interests has a very problematic relationship to the right of collateral attack.

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45. The issue under the commerce clause will be the reasonableness of the burden; it will not be enough to show that a burden exists. *Kassel v. Consolidated Freight Ways Corp.*, 450 U.S. 662 (1981).

46. *Id.* at 688-91 (Rehnquist, J., dissenting).

47. See *Washington v. Davis*, 426 U.S. 229 (1976). Cf. Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473, 486-87 n.53, 488-89 n.60 (1978) (substituting categories for standards).

48. See *American Can Co. v. Oregon Liquor Control Comm'n*, 15 Or. App. 618, 517 P.2d 691 (1973) (summarizing the negative commerce clause cases).

49. See generally Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981).

50. See *New York v. United States*, 326 U.S. 572 (1946) (state sovereignty no barrier to federal taxation of state enterprise); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (state sovereignty no barrier to federal regulation of "local" activities). *But see* *National League of Cities v. Usery*, 426 U.S. 833 (1976) (state sovereignty a barrier to federal regulation of hours and wages of state employees).

51. Cf. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) (arguing that it is appropriate to interpret the Constitution on the basis of its federal structure).

A party defendant may ignore a proceeding having an inadequate jurisdictional basis and seek to nullify it in later litigation.<sup>52</sup> This privilege is one of the major distinctions between jurisdictional disputes under the Constitution and venue disputes pursuant to statute. Theoretically, the right of collateral attack may help to protect state interests. Practically, however, this is a hazardous course for defendants and few employ it. The rights protected via collateral attack are not state rights, which the parties can waive in any case, but are economic rights to a cheaper though riskier forum in smaller cases.<sup>53</sup>

Protecting state and federal policies from behavior induced by jurisdictional rules is poorly accomplished by the existing volitional rules. Much more effective in protecting federal and state policies would be precisely what the Court feared—a rule which makes it impossible for a party to predict the jurisdictional consequences of its behavior and thus to avoid subjection to unwanted legislation or judicial construction.

### B. *Self-determination*

If sovereignty or federalism does not explain current jurisdictional rules, then other approaches may. Stone's formulation of the preferred freedoms doctrine in the famous *Carolene Products* footnote<sup>54</sup> may provide some support for the standards of purposeful avilment of the protections of a state as a requisite of jurisdiction. The notion of preferred freedoms is shorthand for the concept that the Constitution should be interpreted to protect citizens' right to a voice in government. It is no trick to show that the right of representation was foremost in the minds of those who wrote and ratified the constitutional provisions from 1787 through 1791.<sup>55</sup> The quintessential example of the voiceless person is the alien.<sup>56</sup> There must be special justification for a government to assume dominion over a person not voting for representatives. Indeed, diversity jurisdiction is aimed precisely at this problem.<sup>57</sup> The alien's

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52. 1 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.146[6] (1976).

53. See *infra* Appendix II.

54. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

55. J. ELY, *supra* note 15, at 73-104.

56. *Id.* at 161-62. See *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966) (first amendment considerations require greater contacts to subject out of state defendant to jurisdiction in libel cases).

57. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 99 (1969); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 4-8 (1968).

problem in turn is composed of two difficulties: the right to regulate personal conduct so that he does not submit himself to the processes of a distant or unfriendly jurisdiction, and fairness when submitting to jurisdiction.

Some maintain that the right to regulate one's own conduct, or personal autonomy, is at the root of due process.<sup>58</sup> If so, it would explain the development before *International Shoe* of consent as a basis for jurisdiction.<sup>59</sup> The Court in *World-Wide Volkswagen*<sup>60</sup> and *Shaffer*<sup>61</sup> seems to have adopted the language of autonomy when it focused on affirmative acts signifying willingness to undertake burdens that would predictably subject the defendant to jurisdiction.<sup>62</sup>

Although self-determination is attractive as a basis for jurisdiction and could be firmly grounded in constitutional jurisprudence, it has not proven very satisfying in practice. Autonomy rarely has been accepted by the Court in other contexts.<sup>63</sup> Moreover, one cannot protect autonomy by reading into complex behavior an acquiescence in jurisdiction. In interstate contracts, jurisdiction frequently is a by-product of the contracting parties' conduct rather than an intentional result.<sup>64</sup> Where acquiescence in jurisdiction is not an accident, it may be an unacceptable result of overreaching.<sup>65</sup> In cases where jurisdiction is based on accidental contact, fiction is elevated above reality if jurisdiction is based on self-determination.<sup>66</sup>

More fundamentally, however, while express consent follows directly from self-determination, implied consent, on which the modern cases rest, is inherently circular. The underlying law must be referred to before consent can be implied. Persons rarely, if ever, willingly consent to distant jurisdiction. A person consents if, but only if, the law sub-

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58. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 501-06, 559-93 (1978); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-50 (1976). See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Lochner v. New York*, 198 U.S. 45 (1905).

59. Kurland, *supra* note 1, at 576-90.

60. 444 U.S. at 297.

61. 433 U.S. at 216.

62. 444 U.S. at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

63. See L. TRIBE, *supra* note 58, at 504-06.

64. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974); *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374 (6th Cir. 1968).

65. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 326-29 (1964) (Black, J., dissenting).

66. See Kurland, *supra* note 1, at 578-82.

jects to liability his property as in *Balk*, or person as defined in *Pennoyer*, or business as in *World-Wide Volkswagen*.<sup>67</sup> It would be more realistic to find an independently defined expectation of fairness than to infer a specific acceptance of jurisdiction. Moreover, it is not clear why due process would compel an asymmetrical focus on defendant's but not plaintiff's consent. Theories of self-determination do not seem to support the Court's use of constructive purpose.

### C. Fairness

The minimum contacts test announced in *International Shoe* may also be designed to prevent prejudice to a party by avoiding states in which there may be bias against the defendant without a discussion of the likelihood of local prejudice against out-of-state persons. The issue of prejudice against the defendant has been important in the defamation cases<sup>68</sup> and can be equally important where a dispute spans international borders.<sup>69</sup> By requiring that defendant have minimum contact with a forum state before jurisdiction may be asserted, the Court gives some warning to individuals that a certain amount of contact with a specific state will subject them to that state's jurisdiction. A policy of preventing prejudice, however, would push the Court in the direction of preferring disinterested jurisdictions rather than interested ones.<sup>70</sup> Moreover, the availability of federal courts in diversity cases should have some impact on the fairness question. Far from preferring disinterested jurisdictions, some courts have given greater deference to state power in those cases where prejudice in the forum might be greater—suits by the forum state itself.<sup>71</sup> No doctrine which repeatedly confines jurisdiction to the residence of either party can consistently achieve fair results.

Because neither self-determination nor disinterested decisionmaking

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67. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Harris v. Balk*, 198 U.S. 215 (1905); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

68. *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964). See also P. CARRINGTON & B. BABCOCK, *CIVIL PROCEDURE* 936-41 (2d ed. 1977).

69. See, e.g., *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483 (5th Cir. 1974).

70. Cf. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (such forums would generally lack sufficient contact with the parties or event to assert jurisdiction). Perhaps even some form of elimination or random selection as in arbitrator or jury selection would be a better example.

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

give strong support to the current rules, it is difficult to base purposeful availment on the preferred freedoms approach. A final though unarticulated possibility is that the minimum contacts test focuses on a different conception of fairness—one which assumes the responsibility of the defendant for the tort or breach.<sup>72</sup> The idea is that the defendant should return to the same place where he did the harm. That rationale, however, assumes that the defendant did the harm before providing him the opportunity to prove otherwise.

#### *D. A Summary on Purpose*

Of the rationales discussed thus far—sovereignty, self-determination, and fairness—concern with that aspect of fairness which involves the risk of prejudice against the defendant alone would support the right of collateral attack and the excuse from contesting jurisdiction in the other party's forum.<sup>73</sup> If a party cannot get a fair hearing on the merits then there is reason for concern that the party cannot get a fair hearing on the jurisdictional issue either. As pointed out above, however, the rules do not prescribe a search for neutrality.<sup>74</sup>

With respect to each of the rationales, there is a poor match between the operation of jurisdictional rules and the purposes for which they are invoked. Whatever value may remain in these theories of federal relations and individual choices, due process clearly involves much more. Most basic to due process is the reliability, accuracy, and equality of the decisionmaking process.<sup>75</sup>

## II. CONVENIENCE AND RELATED JUSTIFICATIONS

### *A. The Meaning of International Shoe*

Before the decision in *International Shoe*, a defendant corporation could be required to defend itself in states where it had been "doing business." Doing business had become the test for the much older con-

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72. The Supreme Court in *Hess v. Pawloski*, 274 U.S. 352, 356 (1927), approved a state statute which "require[d] a nonresident to answer for his conduct." The Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 442, 176 N.E.2d 761, 766 (1961), said that "it is not unjust to hold it answerable there for any damage caused by defect in those products." But neither case seems to rest on this moralistic ground.

73. See *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966).

74. See *supra* notes 70-71.

75. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

cepts of corporate presence and consent.<sup>76</sup> *International Shoe* gave the doing business test a new rationale but did not change the law.<sup>77</sup> Justice Stone's discussion of the convenience of the parties in *International Shoe* made sense in the domain of the doing business test. A corporation, or individual, doing regular and systematic business in a state would presumably find little difficulty in defending litigation there. A corporation only sporadically involved in the state, however, might find many burdens in addition to the ordinary burden of litigation.

Although entirely by dicta, *International Shoe* wrought major changes in other areas of jurisdiction. *International Shoe* has now been understood to limit the use of in rem jurisdiction.<sup>78</sup> *International Shoe* also expanded jurisdiction based on single transactional contacts, the so-called minimum contacts with a state. This greatly expanded long arm jurisdiction.

The main rationale of the minimum contacts test was fairness.<sup>79</sup> Judge Hand made this connection in 1930, by suggesting "an estimate of the inconveniences" to the defendant in defending where he has been sued, as a test for jurisdiction.<sup>80</sup> Justice Stone, writing for the Court in *International Shoe*, borrowed Judge Hand's language and held that "[a]n 'estimate of the inconvenience' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant" to determining what contacts satisfy the demands of due process.<sup>81</sup>

In *Traveler's Health Association v. Virginia*<sup>82</sup> the Court, in dictum, gave a hint of what it had intended by that language in *International Shoe*:

Moreover, if Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the

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76. 326 U.S. at 317-18. See Kurland, *supra* note 1, at 584.

77. 326 U.S. at 317-19. See Kurland, *supra* note 1, at 586.

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

79. 326 U.S. at 316-20.

80. *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930). Judge Hand stated: "[T]he controlling consideration, expressed shortly by the word 'presence,' but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued." *Id.* at 141.

81. 326 U.S. at 317.

82. 339 U.S. 643, 648-49 (1950). See Kurland, *supra* note 1, at 593-98.

expense and trouble of a Nebraska law suit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would most likely live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of *forum non conveniens*. . . . And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state. . . .

The Court amplified these themes and gave considerable stimulus to long-arm jurisdiction in *McGee v. International Life Insurance Co.*<sup>83</sup> Mrs. McGee, a California resident, claimed to be the beneficiary of an insurance policy issued by International Life, whose company offices were in Texas. Mrs. McGee sued in California. The United States Supreme Court found that International Life had minimum contacts in California and that the California courts could therefore assert jurisdiction. The Supreme Court's decision might be seen merely as an extension of *Traveler's Health* except that the language of contacts appears to apply equally to either party: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."<sup>84</sup> International Life might have beaten Mrs. McGee to the courthouse and sued for declaratory judgment.<sup>85</sup> The question arises whether the company could have sued Mrs. McGee in Texas. One can argue about who initiated the insurance contract<sup>86</sup> but it is not difficult to assume symmetrical relationships or a very different sequence of events between the parties. Thus, a minimum contacts analysis yields the conclusion that the suit could have been brought in either jurisdiction.<sup>87</sup> The Court's discussion of the hardship to claimants who cannot afford suits in foreign jurisdictions is, however, reminiscent of the dicta in *Traveler's Health* and appears to deny the reversibility of *McGee*:<sup>88</sup> "When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judg-

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83. 355 U.S. 220 (1957).

84. *Id.* at 223.

85. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

86. 355 U.S. at 221.

87. Professor Ehrenzweig reached a similar conclusion. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 104 (1971). See also Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 230-42 (1967).

88. 355 U.S. at 223.

ment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality."

It is not clear to what extent this discussion might have been illustrative or crucial to the holding of the Court. *McGee* has not been easy for the lower courts to interpret. Many courts have developed a twin test for jurisdiction: convenience and contacts.<sup>89</sup> One court may have modified its reading of the minimum contacts test as a result of inconvenience.<sup>90</sup> This view of *McGee* implies that there would be no jurisdiction in Texas if the company had sought to sue Mrs. McGee there. But the bifurcation of contacts and convenience leaves the source of the minimum contacts test unclear. Other courts have read *McGee* as broadening jurisdiction rather than as restricting jurisdiction on a procrustean bed of convenience.<sup>91</sup> This view displaces contacts with convenience. Presumably then, Mrs. McGee could be sued in Texas, even though she lived in California.

Whichever interpretation of *McGee* is used, however, the Court's attempt to ground minimum contacts on social justice has proven as sterile as its oblations to territorial sovereignty. The two simply are no longer treated as related ideas. *Hansen*,<sup>92</sup> *Shaffer*,<sup>93</sup> and *World-Wide*

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89. *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 494 (5th Cir. 1974). See *Vencedor Mfg. Co. v. Gougler Indus., Inc.*, 557 F.2d 886, 893 (1st Cir. 1977) ("Trial convenience is not the ruling consideration in jurisdiction cases . . . but it is always helpful"); *First Nat'l Bank v. White*, 420 F. Supp. 1331, 1336-37 (D. Minn. 1976) (sufficient contacts to satisfy jurisdiction but forum inconvenient and case transferred).

Courts have declined to find jurisdiction in districts which would have provided a comparatively convenient trial location. *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 504 (4th Cir. 1956) (involving defects which appeared in plaintiff's forum); *Chemical Separations Corp. v. Trevor Boyce Assocs. Inc.*, 305 F. Supp. 427 (D. Alaska 1969) (defect appeared in forum); *Marival, Inc. v. Planes, Inc.*, 302 F. Supp. 201 (N.D. Ga. 1969) (accident in third-party plaintiff's forum). Courts have found jurisdiction despite the absence of convenient witnesses. *Ceravit Corp. AG v. Black Diamond S.S. Corp.*, 46 Misc. 2d 979, 260 N.Y.S.2d 848 (App. Term. 1965) (concerning damaged goods shipped from Philadelphia to Europe). But see *Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962) (no jurisdiction in inconvenient forum despite possible contacts).

90. See *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745 (4th Cir.), cert. denied, 404 U.S. 948 (1971).

91. The Supreme Court has referred to *McGee* to explain the relaxation of due process as a guarantee against inconvenience, see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292-93, and as broadening plaintiff's choice of forum on the basis of consideration of the interests of forum and plaintiff, see *id.* at 292; *Kulko v. Superior Court*, 436 U.S. 86, 92 (1978). See, e.g., *Spiegel, Inc. v. FTC*, 540 F.2d 287, 292 n.5 (7th Cir. 1976). See also cases cited *supra* note 89 (finding jurisdiction in inconvenient locations).

92. 357 U.S. 235 (1958).

93. 433 U.S. 186 (1977).



*Volkswagen*<sup>94</sup> made it clear that convenience without contacts does not support jurisdiction. The Court in those cases sought some purposeful availment of the states' facilities. Also present were some glimmerings of a resource oriented inquiry. In *World-Wide Volkswagen*, Justice Marshall stated in his dissent that the defendant could pay litigation costs out of profits or by self-insurance.<sup>95</sup> In *Rush*, however, Marshall changed his position in speaking for the Court and stated that insurance was inadequate and the availability of defendant insurance companies in all fifty states and the District of Columbia contradicts the existence of jurisdictional contacts with any of those states by illustrating the insignificance of those contacts with the subject matter of the litigation.<sup>96</sup> On convenience grounds the availability of the insurance company defendants would be a reason to allow individual plaintiffs an advantage. Marshall then explained *Shaffer*<sup>97</sup> as requiring a showing of purposefulness by the defendants and not as requiring that the property seized as a basis for jurisdiction bear any relationship to the suit or ordinarily suggest a convenient place of trial.

Justice Brennan, dissenting in both *World-Wide Volkswagen* and *Rush*, rejected the focus on the defendant. Quoting Justice Black, who had written both *Travelers Health* and *McGee*, Justice Brennan urged the Court in *World-Wide Volkswagen* to let the state entertain the suit unless the burden were too great.<sup>98</sup> He argued that contacts was not the sole message of *International Shoe*: "Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable."<sup>99</sup> He then analyzed the defendant's actual burden<sup>100</sup> and concluded that the insurer's presence minimizes that burden.<sup>101</sup>

These resource questions may fit more comfortably in traditional venue doctrine.<sup>102</sup> It is worth noting in this connection the Court's de-

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94. 444 U.S. 286 (1980).

95. *Id.* at 317 (Marshall, J., dissenting).

96. 444 U.S. 320, 330 (1980).

97. 433 U.S. 186 (1977).

98. 444 U.S. at 310 (Brennan, J., dissenting).

99. *Id.* at 300.

100. *Id.* at 300-01.

101. *Id.* at 303.

102. *See infra* text accompanying notes 108-13.

cision in *Stafford v. Briggs*.<sup>103</sup> Writing for the Court, Justice Burger focused on the availability of government counsel in all fifty states to protect federal defendants and travel at government expense, both of which are available to federal defendants during, but not always after, government service.<sup>104</sup> The doctrinal result of *Volkswagen* and *Rush*, however, was not convenience but intent.

Applying the teaching of those cases to Mrs. McGee and her insurance company could yield the conclusion that neither had taken such purposeful action toward the other party's jurisdiction. Perhaps it does not matter where the suit is brought. Jurisdiction may just depend on the identity of who becomes the defendant. Some lower courts have explicitly labelled the burden of defense as a secondary consideration.<sup>105</sup>

Underlining the fact that jurisdictional doctrine is not based on fairness, the search for convenience, which is important in achieving a fair result, is often carried out under other provisions. California, for example, accounts for differences among litigants,<sup>106</sup> while New York provides for special forums in consumer cases.<sup>107</sup> One group of states has included within its jurisdictional statutes authority to dismiss cases on the ground that the forum is inconvenient.<sup>108</sup> Courts in a number of

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103. 444 U.S. 527 (1980).

104. *Id.* at 544.

105. *Toro Co. v. Ballas Liquidating Co.*, 572 F.2d 1267, 1270 (8th Cir. 1978) (five factors, contacts primary, relationship essential, convenience secondary); *Gardner Eng'g Corp. v. Page Eng'g Co.*, 484 F.2d 27, 32 (8th Cir. 1973) (secondary factor and not all factors need to be present); *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 191 (8th Cir. 1965) (one of two secondary factors).

106. *See* CAL. CIV. PROC. CODE § 483.010 (Deering 1982) (restrictions on availability of attachment against noncommercial defendants and on goods for personal use).

107. N.Y. CIV. PRAC. LAW § 503(f) (McKinney 1976); N.Y. CITY CIV. CT. ACT § 301 (McKinney 1963 & Supp. 1981-82). *See also* *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817, 821-22, 833-35, 101 Cal. Rptr. 745, 749-50, 761-63 (1972) (en banc).

108. *See* ARK. STAT. ANN. § 27-2502E (1979); CAL. CIV. PROC. CODE § 410.30 (Deering 1972 & Supp. 1982); DEL. CODE ANN. tit. 10, § 3104 (Supp. 1980); D.C. CODE ANN. § 13.425 (1981 & Supp. 1982); IND. R. TRIAL ACC. 4.4(c); MD. CTS. & JUD. PROC. CODE ANN. § 6-104 (1980 & Supp. 1981); MASS. ANN. LAWS ch. 223A, § 5 (Michie/Law. Co-op. 1974 & Supp. 1982); NEB. REV. STAT. § 25-538 (1979); N.Y. CIV. PRAC. LAWS § 327 (McKinney 1972 & Supp. 1981); N.C. GEN. STAT. § 1-75.12 (1969 & Supp. 1981); OKLA. STAT. ANN. tit. 12, § 1701.05 (West 1980 & Supp. 1981); PA. CONS. STAT. ANN. § 5322 (Purdon 1980); and WIS. STAT. ANN. § 801.63 (West 1977 & Supp. 1982).

In addition several states make special provisions for defendants in long-arm jurisdiction cases. Michigan requires plaintiff to post a bond for costs on defendant's motion in cases of long-arm jurisdiction. *See* MICH. STAT. ANN. § 27A.741 (1976 & Supp. 1982). New Hampshire includes a special provision for continuance in long-arm cases. *See* N.H. REV. STAT. ANN. § 510.4 (1968 &

other states have, without express statutory authority, assumed that power.<sup>109</sup> The considerations involved are well stated in the federal transfer of venue statute, though the latter was intended to be used far more frequently than dismissal for lack of a convenient forum: “(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”<sup>110</sup>

It has not been clear what significance is to be accorded the resources available to the parties for venue purposes. Some courts have overridden asserted inequalities<sup>111</sup> while others have focused on the different resources available to the parties.<sup>112</sup> Both conceptions of conven-

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Supp. 1981). Washington provides attorneys fees for successful defendants in long-arm cases. *See* WASH. REV. CODE ANN. § 4.28.185 (1969 & Supp. 1981).

109. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.29 (2d ed. 1977). The doctrine was adopted by the federal courts in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 44 (3d ed. 1976).

110. 28 U.S.C. § 1404(a) (1976 & Supp. IV 1980) This section was enacted to build on the emerging doctrine of forum non conveniens. *See* 1 J. MOORE, *supra* note 52, at ¶ 0.145[5].

111. In a number of cases courts have overruled claims based on hardship. In *Klepper Krop, Inc. v. Hanford*, 411 F. Supp. 276 (D. Neb. 1976), the court was unwilling to consider a mere difference in the income and resources of the parties. In several cases the court overruled claims of hardship on the stated ground of lack of proof. In *First Nat'l Bank v. Ward*, 380 F. Supp. 782 (W.D. Mo. 1974), the bank sued the defendant on a note. A suit on a note often requires little of the plaintiff's time and money in the absence of significant defenses. The court said that the defendant had not presented any specific factual data regarding his financial condition or identified witnesses or documents located in Oklahoma that he believed necessary. On those grounds the court refused the transfer. In contrast, *see First Nat'l Bank v. White*, 420 F. Supp. 1331 (D. Minn. 1976), another promissory note case in which the court granted the defendant debtor's motion for a transfer of venue where the defendant showed facts proving hardship. In another field, *see Vaughn v. American Basketball Ass'n*, 419 F. Supp. 1274 (S.D.N.Y. 1976), in which a professional basketball player sued his team and his league. In *Vaughn*, the court refused to credit plaintiff's hardship claim and granted that defendant's motion for a transfer when the defendant showed that all the acts complained of occurred.

Finally, there are several shareholder suits in which, despite apparently sizable differences in the resources of the parties, the court honored the venue wishes of the defendant corporation. *See Abramson v. INA Capital Management Corp.*, 459 F. Supp. 917 (E.D.N.Y. 1978); *Blanning v. Tisch*, 378 F. Supp. 1058 (E.D. Pa. 1974); *Scheinbart v. Certain-Teed Prods. Corp.*, 367 F. Supp. 707 (S.D.N.Y. 1973). As noted before, plaintiffs do not finance their own shareholder litigation. Hence, these cases do not conflict with the objective of giving priority to the resource issue. This partly reflects the distinction drawn between factors which demand an initial choice of forum which respects the parties' resources and subsequent decisions respecting the place of trial.

*See generally Comment, Factors of Choice for Venue Transfer Under 28 U.S.C. § 1404(a)*, 41 CALIF. L. REV. 507 (1953).

112. *See General Portland Cement Co. v. Perry*, 204 F.2d 316, 320 (7th Cir. 1953) (“Such a denial of the plaintiff's cause of action could not be ‘in the interest of justice.’”); *Aamco Automatic Transmissions, Inc. v. Bosemer*, 374 F. Supp. 754, 757 (E.D. Pa. 1974) (“[I]n the interests of

ience—overall economy and resources—embodied in the transfer statute and forum non conveniens doctrine are once again subordinated to the independent requirements of jurisdiction. Though the plaintiff can request a transfer,<sup>113</sup> neither venue nor forum non conveniens expands his choices by overriding the restrictions of jurisdiction. When convenience is assessed in the context of determination of motions to transfer or dismiss on the ground of forum non conveniens, relief is discretionary.<sup>114</sup> New York courts have refused motions to deny jurisdiction where one party is a resident of the state.<sup>115</sup> Others simply place a heavy burden on defendants seeking to have jurisdiction denied.<sup>116</sup> Thus, there is tension not only among convenience factors but between the volitional rules of jurisdictional doctrine and the economic considerations of a policy based on convenience.<sup>117</sup>

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justice the relative bargaining power and financial status of the parties must also be considered.”); *Goldstein v. Rusco Indus. Inc.*, 351 F. Supp. 1314, 1318 (E.D.N.Y. 1972) (denying transfer despite possibly higher costs since “the court cannot overlook the relative means of the parties.”); *Hyde Constr. Co. v. Koehring Co.*, 321 F. Supp. 1193, 1212 (S.D. Miss. 1969) (courts should consider “[t]he parties’ relative financial ability to bear expenses of a trial in a particular forum”); *Leopard Roofing Co. v. Asphalt Roofing Indus. Bureau*, 190 F. Supp. 726, 732 (E.D. Tenn. 1960) (“plaintiff’s financial plight may prevent it from continuing the case in this Court if the motion to transfer is denied. . . . Whatever inconvenience that may be caused to defendants because of the distance factor would not outweigh the injustice that would result to plaintiff. . . .”); *Grubs v. Consolidated Freightways, Inc.*, 189 F. Supp. 404, 410 (D. Mont. 1960) (“The ability of the respective litigants to bear the expenses of trial in a particular forum may be considered.”); *Miller v. NBC Inc.*, 143 F. Supp. 78, 81 (D. Del. 1956) (“This balance could not help but favor transfer to New York if it were not necessary to consider the circumstances apart from convenience of parties and witnesses which have a direct bearing on the interest of justice. . . . [I]t must be assumed plaintiff will be deprived of counsel and thus unable to prosecute his action if this matter were transferred to New York.” [transfer denied]); *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.*, 88 F. Supp. 863, 866 (S.D.N.Y. 1949) (“While this does not mean that Kodak should be subjected to suit in any forum simply to vex or harass it into settlement of an unfounded and unjust claim . . . the relative ability of the litigants to bear the expenses of trial in any particular forum must be considered in weighing what the interests of justice require. . . . [Transfer denied because the cost] will be so prohibitive and so beyond its [plaintiff’s] capacity that it will, in effect, be denied an opportunity to adequately present its proof”); *Cinema Amusements, Inc. v. Loew’s, Inc.*, 85 F. Supp. 319, 327 (D. Del. 1949) (“no court would ever find transfer to a forum which is financially out of reach of an impecunious plaintiff to be in the ‘interest of justice’”).

Some courts have also considered the specific litigation history of the parties. *See, e.g., Henry v. First Nat’l Bank*, 50 F.R.D. 251, 269 (N.D. Miss. 1970) (“Counsel for all parties in the case participate frequently in litigation before this court at all division points.”).

113. 1 J. MOORE, *supra* note 52, at ¶ 0.145[4.-2].

114. *See supra* note 52.

115. New York followed this principle until 1972. *See* D. SIEGEL, *HANDBOOK ON NEW YORK PRACTICES* § 28 (1978). *See also* F. JAMES & G. HAZARD, *supra* note 109, at 659.

116. *See generally* 1 J. MOORE, *supra* note 52, at ¶ 0.145[5].

117. *See infra* Appendices I & II.

The Restatement (Second) of Conflicts embodies these difficulties.<sup>118</sup> The Restatement begins by explaining that “a state will lack jurisdiction to try a case in its courts if the advantages which trial in the state would afford one party are greatly outweighed by the hardship and inconvenience which would be suffered by the other.”<sup>119</sup> But the relationships which are defined as “sufficient to support an exercise of judicial jurisdiction”<sup>120</sup> fail to mention these factors. The solution adopted by the Restatement is illustrated in the first category listed as sufficient to support jurisdiction—defendant’s presence in the state. The authors of the Restatement concede possible unreasonableness in application but conclude that “the rule’s potentialities for hardship, are mitigated by the fact that the court may refuse to exercise its jurisdiction under the rules of §§ 82-83.”<sup>121</sup> Sections 82 through 84 deal with fraud, force, immunity, privilege, and forum non conveniens. The latter most closely approximates the issues of hardship with which the Restatement began. The authors assert, however, that the forum non conveniens doctrine is not jurisdictional and that a judgment rendered in an inconvenient forum is valid and must be recognized in other states under the full faith and credit clause.<sup>122</sup> Thus, in their view, hardship and inconvenience have been largely reduced to such transactional relationships as presence and the situs of the acts. The typical long-arm statute refers to the situs of the transaction without regard to the presence of witnesses or the posture of the parties with respect to the resources for a lawsuit.<sup>123</sup>

Treating these issues as subject only to the discretionary doctrine of forum non conveniens and its parallel federal transfer of venue statute confounds the assumption that *International Shoe* is based on convenience. This treatment also has several practical disadvantages. First, it leaves entirely untouched those cases in which the additional burden of out-of-state defense will encourage default, because these judgments are not subject to later collateral attack. *International Shoe*, *Travelers Health*, and *McGee* should be read as curbing the application of juris-

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118. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

119. *Id.* at § 24.

120. *Id.* at §§ 24(2), 27-52, 105. These sections were incorporated in large part by reference in RESTATEMENT (SECOND) OF JUDGMENTS § 8 (1982).

121. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 28 comment a (1971).

122. *Id.* at § 84 comment g.

123. *See, e.g.*, ALA. R. CIV. P. 4.2(a) (1975); N.Y. CIV. PRAC. LAW § 302 (McKinney 1972 & Supp. 1981).

dictional rules to small cases in a way which encourages default. Second, in an area of interstate conflict, a discretionary doctrine is plainly weaker than a constitutional doctrine.

Aside from those vague and apparently sterile references to fairness and convenience, however, *International Shoe* contributed little to the exploration of why and how due process should be interpreted and what values should be implied in the due process clause. Justice Black refused to join the majority in *International Shoe* on the ground that the rule was too amorphous and would invite significant encroachment on the power of the states.<sup>124</sup> He also objected that the rule was not well grounded in the fourteenth amendment.<sup>125</sup> Black's opinions in *Traveler's Health* and *McGee* do not appear to supply the missing links unless they can be derived from Black's emphasis on the convenience of litigants. Plainly, the due process values of accuracy and equality<sup>126</sup> are poorly served to the extent that jurisdictional rules may insulate some parties from suit, encourage default, and undermine the presentation of the lawsuit.<sup>127</sup> The preliminary question is how well grounded in fundamental principles are those values or any of the asserted justifications for jurisdiction.

### B. *The Broader World of Due Process*

There exist several ways of relating convenience to the broader world of due process. Most current discussion now centers on the preferred freedoms doctrine referred to above and on the historic relevance of natural rights legal philosophy. Before we deal with those areas, it is well to refer briefly to two closely related approaches.

#### 1. *Fundamental and Vested Rights*

Much of the development of the due process clause has taken place in criminal contexts. One strand of this development has been a focus on the equal protection component of due process. Under the fifth and fourteenth amendments the courts have provided such protections as

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124. 326 U.S. at 324 (Black, J., dissenting).

125. *Id.* at 325.

126. L. TRIBE, *supra* note 58, at 501-06, 559-93; Mashaw, *supra* note 58, at 48, 52.

127. See, e.g., *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 326-29 (1964) (Black, J., dissenting); *Chicago, R. I. & Pac. R. R. v. Sturm*, 174 U.S. 710 (1899). See generally D. CAPLOVITZ, *CONSUMERS IN TROUBLE, A STUDY OF DEBTORS IN DEFAULT* 204 (1974); Chase, *supra* note 3, at 623-25; Special Committee on Consumer Affairs, *A New York Consumer Law Center*, 29 REC. A.B. CITY N.Y. 213, 216 (1974). The problem plainly has not disappeared.

counsel and transcripts for impoverished criminal defendants.<sup>128</sup> Because due process also protects property,<sup>129</sup> judicial recognition of the inequality of the litigants may not be limited to criminal defendants but could extend to such matters as providing counsel in civil cases.<sup>130</sup> Jurisdictional rules, by parity of reasoning, might have to accommodate the inequalities of civil litigants.

In criminal cases, however, the defendant's fundamental right to liberty is threatened. One commentator<sup>131</sup> argues that due process has meaning as a limitation on Congress only in defense of fundamental substantive rights; otherwise Congress could change the rules.<sup>132</sup> The Court has not accepted this approach for private litigation. The Court requires no more<sup>133</sup> and possibly less<sup>134</sup> than vested rights to trigger the procedural rights of due process. Vested rights, however, have not led the Court to compensate for the inequalities of the economic system. The analogy to the criminal and right-to-counsel cases is not sufficient to carry the weight of jurisdictional doctrine. Apart from the requirements of a hearing<sup>135</sup> and a fair forum,<sup>136</sup> the Court has seldom been willing to require the state to equalize the parties' resources.<sup>137</sup> The Court has not been convinced that the government need take responsibility for a party's lack of resources<sup>138</sup> so long as the government has

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128. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

129. See U.S. CONST. amend. V.

130. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 548 (1967).

131. Grey, *Procedural Fairness and Substantive Rights*, in 18 NOMOS: DUE PROCESS 182, 197-202 (J. Pennock & J. Chapman eds. 1977).

132. *Id.* at 191.

133. *Weaver v. Graham*, 450 U.S. 24, 29-30 (1981); *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975).

134. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process required in suit for divorce). See also *Board of Regents v. Roth*, 408 U.S. 564 (1972) (no right to predissmissal hearing for nontenured teacher but right to judicial review if reasons for dismissal infringe freedom of speech).

135. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

136. Fairness is central to due process, see, e.g., *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937); requires an impartial decisionmaker in both civil and criminal cases, *Marshall v. Jerricho, Inc.*, 446 U.S. 238, 242-43 (1980); and underlies other procedural guarantees, *Ballew v. Georgia*, 435 U.S. 223, 229-45 (1978) (six member jury required for fairness).

137. *Little v. Streater*, 452 U.S. 1 (1981) (state required to provide indigent defendant a blood grouping test in paternity suit).

138. *United States v. Kras*, 409 U.S. 434 (1973) (government need not waive bankruptcy fee).

not created the problem,<sup>139</sup> no fundamental rights are infringed,<sup>140</sup> and there is a rational explanation for the government's policy or rule. These conditions are satisfied in the criminal context but it is unclear whether they are satisfied in civil contexts.

## 2. Governmental Power

Cutting across the major areas of due process are several significant objectives. One of these objectives is to limit the enormity of governmental power. Government must thus act reasonably even where the interests protected are neither fundamental nor vested.<sup>141</sup> Government must choose means which appropriately further a legitimate end.<sup>142</sup> Anything less is an arbitrary and unprincipled use of naked power.<sup>143</sup> In addition, there are risks that public officials may subject others to biased or self-serving behavior.<sup>144</sup> It is hardly fair, however, to level the charge of unrestrained use of governmental power at the judiciary over the issue of jurisdiction. It is plainly useful to have rules and the courts can hardly be accused of standardless behavior. The question is whether the rules are fair. To comprehend that issue of fairness there are two additional ways of considering due process which may prove more fruitful: democratic philosophy and equal rights.

## 3. Democratic Philosophy

In the broader world of due process a great deal of interest is now focused on the implications of Justice Stone's famous footnote in

139. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (filing fee must be waived for indigent plaintiffs seeking divorce because state permits no alternative).

140. *Harper v. Virginia Board*, 383 U.S. 663 (1966) (no poll tax for voting permitted because right to vote fundamental).

141. The Supreme Court has come close to legal positivism—what is required is what is enacted—without quite embracing it. L. TRIBE, *supra* note 58, at 505-06; Van Alstyne, *Cracks in "The 'New Property'": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Grey, *supra* note 131, at 197-202. See J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 198 (1956).

142. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980).

143. Thus, for Stevens the "impartial method" behind the classification was crucial. *Id.* at 182 (Stevens, J., concurring).

144. L. TRIBE, *supra* note 58, at 503-04. At this level the due process and attainder clauses are closely related. See Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962). See also THE FEDERALIST NOS. 44, 47, 48 (J. Madison) & 78 (A. Hamilton); Blasi, *The Checking Value in First Amendment Theory*, 1977 A. B. FOUND. RESEARCH J. 521.



*United States v. Carolene Products Co.*,<sup>145</sup> which outlined the preferred freedoms doctrine discussed above. It has become an important part of the Court's equal protection analysis<sup>146</sup> and is further reflected in the Court's incorporation of equal protection into the due process clause of the fourteenth amendment.<sup>147</sup> Procedural rules are somewhat removed from problems of insularity and malfunctions of democracy. Nonetheless, Stone's concern with fulfilling the promise of representative democracy has implications here as well.<sup>148</sup> In this context an argument derived from Stone's hypothesis would begin with a courts' role as providing a check and balance and the necessity of access to courts to protect all rights.<sup>149</sup> The democrat would be concerned, on the one hand, that procedural rules which effectively denied any group access to the courts on reasonably even terms would so disadvantage that group as to undermine its ability to participate in the political process and, on the other hand, that such discrimination is the result of political isolation.<sup>150</sup> Thus, among other things the democrat would want to know whether the departure from truth is patterned or random and whether it compromises the ability of a group to pursue its life, liberty, and happiness and hold its rulers accountable.<sup>151</sup>

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145. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

146. See *Parham v. Hughes*, 441 U.S. 347, 351-52 (1979); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357-58 (1978) (Brennan, J., concurring in part); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 626-33 (1969). See *Gottlieb, Strife in the Carolene Garden*, 57 U. DET. J. URB. L. 919 (1980).

147. "[D]iscrimination may be so unjustifiable as to be a violative of due process." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). See *Schweiker v. Wilson*, 450 U.S. 221, 226 n.6 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 173 n.8 (1981).

148. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). See R. COVER, *JUSTICE ACCUSED* 166-67 (1975).

149. *United States v. Kras*, 409 U.S. 434, 462-63 (1973) (Marshall, J., dissenting).

150. See J. ELY, *supra* note 15, at 105-25, 162. See also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 316 (1977); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 675-79. Cf. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980) (arguing that Ely's proposal is hopelessly vague). Tushnet's critique of Ely's theory reveals the essential ambiguity of language. There is no escape from this critique; yet, there is no living with it either. A more significant critique may be inferred from J. FISHKIN, *TYRANNY AND LEGITIMACY* (1979), arguing that no single principle can produce just results.

151. Ely's data seems to be as consistent with the checking value, see Blasi, *supra* note 144, as with a representation reinforcing model. See J. ELY, *supra* note 15. The representation model looks at the republican's concern for isolating groups through an electoral prism. But there is considerable evidence that the concern of the founding generation was more direct—what the government itself could do. For example, Madison was most concerned that governmental tyr-

These are high thresholds for concern but the potential for abuse of the litigation process is systematic.<sup>152</sup> Justice Black protested the same pattern in a contractual consent case that he had avoided in *McGee* and *Traveler's Health*: "The company . . . doubtless hoped, by easing into its contract this innocent-looking provision for service of process in New York, to succeed in making it as burdensome, disadvantageous, and expensive as possible for lessees to contest actions brought against them."<sup>153</sup>

The founding fathers would not have been surprised to find insecurity of property resulting in disenfranchisement.<sup>154</sup> The inability to protect personal and property rights has at times made both the time and risks of independence in politics unacceptable for those involved.<sup>155</sup> Disadvantages in the courtroom, plainly, are not random but economically patterned.<sup>156</sup> The pattern can sometimes permit a group to be stripped of its goods and left in fear of retribution if protest is attempted. The founding fathers left a clear record of concern for the

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any might flow from an accurate reflection of majority sentiment. His persistent question was how to keep majority rule from being unfair. If government action were the only problem, we might find jurisdictional doctrine reasonable on economic grounds. In this respect, the Constitution is hardly neutral between debtors and creditors. See U.S. CONST. art. I, § 10, cl. 1.

A representative model, as opposed to a checking model, is a fair, though not exclusive, inference from the data. The two theories are largely consistent and the founders' words suggest emphasis on both themes concurrently.

152. See D. CAPLOVITZ, *supra* note 127, at 191-224.

153. *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 326-27 (Black, J., dissenting).

154. For example, Gouverneur Morris of Pennsylvania, in the federal convention of 1787, stated:

Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them. . . . The time is not distant when this Country will abound with mechanics and manufacturers who will receive their bread from their employers . . . . The man who does not give his vote freely is not represented. It is the man who dictates the vote.

2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 202-03 (1937) (remarks of Mr. Gouverneur Morris on August 7, 1787).

155. For a description of the political control over the mining states by the coal companies, see H. CAUDILL, *NIGHT COMES TO THE CUMBERLANDS* 112-37 (1963).

156. It was also better than half a century from Cardozo's opinion in *Altv v. Leiberson*, 233 N.Y. 16, 134 N.E. 703 (1922), that the landlord was responsible for injuries resulting from violations of the multiple dwelling law to the time of the implication of the warranty of habitability. *Tonetti v. Penati*, 48 A.D.2d 25, 367 N.Y.S.2d 804 (1975). This gap reflects the enormous litigation disadvantages of tenants prior to the creation of the Legal Services Program in the 1960s. The effect of disproportionate representation of clients can be traced through consumer, employment, and numerous other claims as well as tenant claims. See generally D. CAPLOVITZ, *supra* note 127, at 14-25, 35-36, 42-46; Galanter, *Why the Haves Come Out Ahead*, 3 L. & SOC. REV. 95 (1974).

fair resolution of public issues and due weight to the needs of whatever minorities the future might single out.<sup>157</sup> Thus, it is perfectly appropriate to interpret ambiguous provisions of the Constitution in a way that will protect those groups which may be or may have been disenfranchised by arbitrary law enforcement.<sup>158</sup>

This approach to due process would elevate concern for inconvenience but only to the extent that the disadvantages are patterned and result in or from significant group disabilities impinging on political self-expression. There is another way of looking at due process, however, which eliminates this threshold entirely.

#### 4. *Equal Rights*

Even if there is no risk of government singling out an individual for improper motives or fouling up the representative capacity of any group, there is still a requirement of justice that is not satisfied by deci-

157. THE FEDERALIST NO. 10 (J. Madison) (division, however, would have resulted among those who thought that the rich or the poor were more threatened by legal institutions).

158. A. MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 150-51, 171-78 (1962), describes the birth of the representation reinforcing theory recently revived by Ely. Michelman suggests another avenue to this result—a right to an economic floor. Michelman, *supra* note 150. Michelman admits “[t]he features of nonreciprocity and potential boundlessness, which make positive rights seem problematic when considered as a priori claims that *condition* the workings of institutions, are not especially troubling when rights are considered as the end *results* of institutional deliberation and specification.” *Id.* at 681 (emphasis in original). He urges, nevertheless, that some floor under personal resources—food, clothing, shelter—is necessary in order for an individual to partake of the political society.

But it is not so clear that welfare rights can be separated in this way if the objective is the political process and participation in it. It would be difficult to establish that there is some plateau below which one is powerless, and above which one is empowered, to deal with the system. With regard to the cost of speech, see *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976). Participatory rights must therefore be considered in relation to legislative bargaining—that is, can one group buy the votes of another or can the less well off afford to express their principle preferences? This may in fact make Michelman's point stronger—once welfare was provided by the state the political parties were deprived of their clients and the poor were empowered to choose among potential representatives. More may not be necessary under a representative model. Indeed, perfect equality of political power implies babble rather than decision.

The subjugation which denies political choice may result from economic coercion or overreaching as much as from abject poverty. A contractualist model of human relationships, G. CALABRESI, COSTS OF ACCIDENTS 55-64 (1970), is consistent with individual choice but models of behavior which subject the individual to unrestrained power imply and invite a loyalty-dependence model of political behavior. See 2 M. FARRAND, *supra* note 154 (statement of Gouverneur Morris). In various forms, of course, that has happened both here and abroad.

To allow the courts to be the engine for systematically stripping any group of its property is to consign that group to permanent powerlessness. It turns out that due process is very much at the core of the political as well as the economic system.

sionmaking processes (including procedural and jurisdictional rules) unless the processes are dedicated to the establishment of truth and accurate fact finding.<sup>159</sup>

One of the most persistent themes in due process analysis is the reliability of decisionmaking. The desire for accurate results is at the root of the Court's cautious protections against erroneous out-of-court identification,<sup>160</sup> its consideration of the broadcast of criminal trials,<sup>161</sup> and its notice and hearing requirements.<sup>162</sup> In *Mathews v. Eldridge*, the Supreme Court settled on a comparison of the costs of more reliable procedures with the improvement and benefits of reliability.<sup>163</sup> This comparison may have profound effects on jurisdiction. This Article will proceed by briefly examining the historic and philosophical underpinnings of the Court's conclusion that the Constitution requires a commitment to accurate decisionmaking and then will explore the effects of that conclusion on the role of convenience.

#### a. The Constitutional Requirement of Accuracy

The reasons for the requirement of accurate decisionmaking are probably best understood in terms of the founders' philosophy of law and their notions of equality.<sup>164</sup> The Supreme Court has given equal protection an important place in due process.<sup>165</sup> The founders were well versed in natural law, in which the inherent equality of man played a central role.<sup>166</sup> The early republic made a considerable at-

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159. In a dramatic analogy, Professors Cover and Fiss observe that while a lottery may be acceptable for the draft, it is unacceptable for deciding who will hang for murder, though the right to life may be involved in both instances. R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* 103 (1979). Professor Ann K. McConnell was kind enough to discuss with me at great length the Lockean approach to law and this section of this paper has benefitted enormously from her assistance.

160. *See* *Watkins v. Sowders*, 449 U.S. 341, 350-53 (1981) (Brennan, J., dissenting).

161. *Chandler v. Florida*, 449 U.S. 560, 574-83 (1981).

162. *Parratt v. Taylor*, 451 U.S. 527, 537-39 (1981); *Goldberg v. Kelly*, 397 U.S. 254, 264, 266-71 (1970).

163. *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See also* *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (risk of error in cases involving termination of parental rights); *Little v. Streater*, 452 U.S. 1 (1981) (risk of error reduced by blood grouping test in paternity proceedings). *But cf.* *Mashaw*, *supra* note 58 (arguing that reliability ought to be only one factor among several).

164. *Mashaw*, *supra* note 58, at 48-49.

165. *See supra* note 147.

166. The Declaration of Independence proclaimed: "We hold these truths to be self-evident: that all men are created equal." R. COVER, *supra* note 148, at 8-28; L. TRIBE, *supra* note 58, at 539 n.5.

The significance of the free and equal and inalienable right to liberty clauses of the Declaration

tempt to democratize the litigation process, setting low attorney fees and court costs.<sup>167</sup> Lawyers were often denounced for imparting unequal justice.<sup>168</sup> The country was limited by resources and technique but not by desire to equalize the litigation process among litigants.

The meaning of equal protection and due process has developed during the course of current interest in the natural law philosophy imbibed by the founding generation.<sup>169</sup> While natural law has been extensively criticized as indeterminate,<sup>170</sup> it is firmly grounded in equality which yields leverage. Equality is fundamental to natural law in the sense that the edifice of natural law is built upon the assumption of equality.<sup>171</sup> This notion of equality, however, is not the class difference notion we have become most accustomed to in the context of the fourteenth amendment. In its historic context, shaped by the belief in natural and universal law, equality turned on the notion of exploitation.<sup>172</sup>

To illustrate, if controversies were resolved by merely flipping a coin, it could be anticipated that the decisions would be wrong fifty percent of the time. This mechanism is very cheap. Presumably, improving reliability is costly and the cost would deplete the sum available for the award. Thus, more accurate procedures may not be a

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of Independence and several state constitutions was a subject of disagreement in the early republic. Generally, these clauses were read in light of the intentions involved in their adoptions but the contradiction between slavery and natural law was clearly felt. Vermont joined the free and equal clause with emancipation in its Constitution. R. COVER, *supra* note 148, at 43. Massachusetts interpreted its clause to require emancipation. *Id.* at 47-48. In Virginia, George Wythe construed the clause as establishing a presumption of freedom. His reasoning, but not his result—freeing a family of Indians—was overturned on appeal on the ground that Virginia had not intended to free blacks under this clause. But the judge who wrote the opinion construed natural law as doing just that! *Id.* at 38, 51-55. New Jersey, several decades later, read its free and equal clause as “but a preamble.” *Id.* at 57 (Randolph, J., concurring, but expressing well the sense of the majority view). The reading of natural law proposed here elevates the principles over the specific intent of the founding generation.

167. Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie*, 20 VAND. L. REV. 1216, 1218-21 (1967).

168. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 82-84, 265-66 (1973).

169. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. RAWLS, *A THEORY OF JUSTICE* (1971).

170. See J. ELY, *supra* note 15, at 48-54.

171. See The Declaration of Independence para. 2 (U.S. 1776) (“We hold these truths to be self-evident: that all men are created equal. . . .”). See also R. DWORKIN, *supra* note 169, at 177-83, 223-39; J. LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 4-6 (Peardon ed. 1952); J. RAWLS, *supra* note 169, at 60-65, 504-12.

172. See B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 73 (1977).

utilitarian solution since the total available to the parties would be decreased.<sup>173</sup> The rightful owner, however, may be able to trade the costs of a fairer procedure to improve his chances—any gambler will confirm that an eighty percent chance of an eighty dollar purse is worth more to the bettor than a fifty percent chance at a hundred dollar purse. To gamble with one's property is cheaper but exploitive—one party stands to gain without justification. This result contradicts the equality of mankind as natural lawyers, past and present, would have understood it because it devalues the rights of one party and exaggerates the claims of the other.<sup>174</sup> In other words, exploitation exists if the misallocation as a result of wrong judgments is greater than the cost of procedures which would correct it.

If the cost of fairer procedures is greater than the misallocation of resources then it is impossible to eliminate the improper loss. To increase the procedural costs beyond the size of the misallocation imposes a cost on someone which cannot be balanced against an appropriate award. It is an unjustified cost.

There may of course be litigants who are frequently involved in the courts and for whom the odds "balance out." The odds, however, only balance if we assume that the odds of being right equal the odds of winning. More likely, for reasons discussed below, litigants frequently involved in the judicial process will have better odds of winning. This magnifies the problem to the extent that the risk of error does not fall evenly, particularly if the beneficiaries of an uneven risk can be identified. In that instance the unequal treatment of the parties is much more glaring.<sup>175</sup>

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173. Accurate though expensive proceedings may prove utilitarian if feelings of dissatisfaction or the prospect of discouraging fraudulent claims are taken into account.

174. That is of course the point at which natural-law philosophy becomes open-ended; it depends, for its content, on independently created rights. But that corresponds perfectly with the functions of a procedural system.

175. See *infra* text accompanying notes 178-83. Caution is necessary to the extent that this approach is deceptive in its apparent precision. Comparing procedural costs with misallocations to be avoided is difficult even when we confine ourselves to things that can be measured in dollars. But dollars and dignity cannot be converted into each other. Lawyers generally do not have the capacity to obtain precise results from multifactorial analysis.

Lawyers resort to generalized balancing to prioritization, or to precedent and analogy. Thus, if there are competing due process values involved, no standard can yield a determinate result. Lawyers can hope to be persuasive but not conclusive. This is true, however, of all approaches to due process and most theories of law.

### b. Convenience and Accuracy

If jurisdictional rules encourage default, discourage suit, or imbalance the presentation of issues, the probability of exploitation rather than accurate—let alone evenhanded—decisionmaking is great.<sup>176</sup> From the perspective of accurate decisionmaking the questions arise whether the inconveniences of litigation resulting from jurisdictional rules affect the results, whether the increase in the risk of error is large, and whether the costs of improving the judicial process are commensurate with the misallocation.

### III. DOES CONVENIENCE MATTER?

To understand the significance of rules of jurisdiction under the constitutional standards we have been exploring, it is necessary to explore how rules of jurisdiction interact with litigation practices.<sup>177</sup> This is not

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176. Some argue, however, that default yields considerable judicial economy and everybody is better off with a cheaper system. If everyone is better off then there is no exploitation—we would all choose the system if we could. The argument takes the form that it is better for *you* if *we* decide and implies disproportionate process costs because allowing plaintiff to make a largely unreviewable decision is cheaper. This argument, however, can generally be rejected. For example, in the consumer area creditors might argue that they can and will offer credit at lower rates if they can collect more easily. First, this is a question of fact and it is not at all plain that if a group is protected from judicial scrutiny it will not act like a monopolist, raking in larger profits rather than passing along any favors. Many firms that regularly resort to the courts to collect from their customers may have engaged in various forms of deception to sell to otherwise unwilling buyers. D. CAPLOVITZ, *supra* note 127, at 37-46, 92-125. Second, such a rule permits systematic abuse. There are substantial costs associated with permitting such a system to develop. *See supra* note 156 (discussion of *Altz v. Lieberman*, 233 N.Y. 16, 134 N.E. 703 (1922)). Third, a policy restricting access through general procedural rules applies both to cases where such an argument might be made and where it might not. Each of these three arguments suggests that the position “it’s better for you if I decide” should usually be rejected as too self-serving and untrustworthy. *See J. ELY, supra* note 15, at 158-61. There may be exceptions where knowledge is widely disseminated and where, with penalties heavy, some checks on unfairness of unilateral deliberate decisionmaking are available. Generally, however, there is no reason to expect unilateral decisions to be accurate or decisions insulated from review to be fair. But from the natural-law perspective there is a more fundamental reason. Why should any one person bear the burden of that general advantage for all debtors or others who are denied access to the courts? This turns out then to be a corollary of our general position. If the risk can be equalized or reduced without burdens disproportionate to the misallocation then the risk should be equalized.

177. Identifying these fundamental strands of due process does not solve the problem of rationalizing jurisdictional doctrine—it only poses it. These strands of interpretation may conflict with as well as support one another. The political freedom and equal rights perspectives do converge in their emphasis on the accuracy of decisions and on substantive justice to the parties. They focus our attention on the relationship between jurisdictional rules and the outcome of litigation. Nevertheless, they can conflict. Where a pattern of victimization develops the argument from democratic principles requires relief. The equal rights perspective may accord with the demo-

the same inquiry as that undertaken by the Court under current standards. This Article will illustrate the implications of the views of the Court in earlier cases, the Court's acceptance of the preferred freedoms theory in some circumstances, and the work of recent scholars exploring the impact of the founders' understanding of the natural equality of mankind on constitutional provisions.

In cases in which the sums at issue are much larger than the cost of litigation, the parties and counsel find it worthwhile to make considerable efforts to foot the bill. It is less likely that even the extra problems of defense in a distant jurisdiction will significantly affect the results to the extent that suits involve increasingly substantial sums. Counsel place more emphasis on considerations of choice of law and the largesse of juries than they do on considerations of expense in major litigation. Concomitantly, convenience is less significant in these cases as a basis for jurisdiction than conflicts principles and the legitimacy of submission of the dispute to the standards of particular communities.

As the sums at issue decline, jurisdictional rules aggravate the difficulty of financing litigation.<sup>178</sup> Litigation in distant jurisdictions often requires additional expenses—additional sets of lawyers, travel, search, and management costs.

The classic statement of the relevant inequalities among parties is by Professor Marc Galanter. Galanter differentiates between repeaters and one-shotters—those who are involved in repeated litigation and those who are not.<sup>179</sup> Galanter describes a number of advantages which flow from frequent participation in litigation.<sup>180</sup> Among these,

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cratic perspective but it is impotent to deal with small claims. When process costs exceed inequities, the equal rights perspective might bar demanding greater expenditure on process at least by the erstwhile beneficiary. Thus, the two approaches may conflict. They can be harmonized either by treating the requirement of democratic participation as superior or by treating the equal rights perspective as inconclusive in the situation of high process costs by virtue of a possible stronger requirement of equality, for example, Rawls' "difference principle," or by virtue of the generation of democratic principles from equal rights principles.

178. *See* *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (class action developed in partial recognition of this problem).

179. Galanter defines these concepts briefly and inexactly: "We might divide our actors into those claimants who have only occasional recourse to the courts (one-shotters or OS) and repeat players (RP) who are engaged in many similar litigations over time." Galanter, *supra* note 156, at 97.

180.

(1) [the ability] to structure the next transaction and build a record. . . .

(2) expertise . . . ready access to specialists . . . economies of scale and . . . low start-up costs for any case.



frequent litigators can play the odds for better judgments and play for long term advantages, while infrequent litigators are often forced to minimize the possibility of substantial loss. These disadvantages are magnified by the extra expense of distant litigation and impose a substantial barrier to the initial decision to sue or defend. The difference in start-up costs, also identified by Galanter, are magnified by distance. Frequent litigators have greater opportunities to develop helpful informal relationships with experts, lawyers, judges, and others involved. These relationships are also aggravated by distance.

As Justice Black observed in *National Equipment Rental Co. v. Szukhent*, the results can be outrageous.<sup>181</sup> Black concluded that the cost of the Szukhent's litigation would "probably cripple their defense and certainly deplete what savings they may have. . . ."<sup>182</sup> He saw in these issues more than an accident, but a systematic effort by the plaintiff to take advantage of those circumstances which would prejudice the defendants' ability to contest the litigation.<sup>183</sup> It is easier, however, to state the problem of inconvenience than to correct it.

Jurisdictional rules alter the outlook at three stages. First, jurisdictional rules affect the decision to consult an attorney. The apparent need to find counsel elsewhere may encourage some parties to default or to give up either on the mistaken assumption that what is done so far

(3) opportunities to develop facilitative informal relationships with institutional incumbents.

(4) [a] bargaining reputation. . . .

(5) RPs can play the odds. The larger the matter . . . the more likely . . . [an OS will] minimize the probability of maximum loss . . . [while RPs] can maximize gain over a large series of cases. . . .

(6) it pays an RP to . . . lobby[ ]. . . .

(7) RPs can also play for rules in litigation itself. . . .

(8) RPs may be able to concentrate their resources on rule changes that are likely to make a tangible difference. . . .

(9) RPs are more likely to be able to invest the . . . resources necessary. . . .

*Id.* at 98-103.

181. 375 U.S. 311, 326 (1964). Justice Black stated:

It is hardly likely that these Michigan farmers, hiring farm equipment, were in any position to dicker over what terms went into the contract they signed. Yet holding this service effective inevitably will mean that the Szukhents must go nearly a thousand miles to a strange city, hire New York counsel, pay witnesses to travel there, pay their own and their witnesses' hotel bills, try to explain a dispute over a farm equipment lease to a New York judge or jury, and in other ways bear the burdens of litigation in a distant, and likely a strange, city.

*Id.*

182. *Id.* at 329.

183. *Id.* at 326-27.

away cannot hurt, by magnifying the reluctance to consult counsel or because of a realistic expectation of the extra expense involved.

Second, the decision to litigate is affected by rules of jurisdiction. These problems are not insurmountable for lawyers. The almost universal requirement of local counsel<sup>184</sup> precludes direct response by attorneys in the client's community. Interstate referrals are not, of course, always satisfactory but neither are they difficult or unfamiliar. The distance will, however, add to the cost.<sup>185</sup>

Finally, jurisdictional rules alter the conduct of the litigation itself. Not only may distant counsel prove less responsive, but the expense can drain funds which might be better used for other purposes. There is little reason to assume that parties are equally situated with respect to the handling of interstate legal business.<sup>186</sup>

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184. *Leis v. Flynt*, 439 U.S. 438 (1979); Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967). The barriers to multiple admissions by individual counsel may be declining. See *In re Gordon*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

185. In addition to travel, the custom among lawyers has been for the receiving attorney to forward one-third of the fee to the referring lawyer. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 51 VA. L. REV. 399, 415-17 (1951); *The Determination of Professional Fees from the Ethical Viewpoint—A Panel Discussion*, 7 U. FLA. L. REV. 433 (1954); Comment, *Division of Fees Between Attorneys*, 3 J. LEGAL PROF. 179, 184-85, 188-92 (1978) [hereinafter cited as *Division*]; Comment, *Fee Splitting—Finder's Fee—Effect of Missouri Supreme Court Rule 4.34*, 24 MO. L. REV. 557, 558 (1959) [hereinafter cited as *Fee Splitting*].

One author argues that there is no evidence that this cost is passed on to the clients in higher prices or poorer services. See *Division*, *supra*, at 194-96. Intuitively this does not make sense and the evidence appears to contradict it. See F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 180-81 (1967). Any diminution of the anticipated rate of return to the laboring attorney would be likely to reduce the result. See Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970). See also Steirett, *The Sale of a Law Practice*, 121 U. PA. L. REV. 306, 314 (1972); *Fee Splitting*, *supra*, at 560.

These expenses are now being altered by the growth of interstate, and international, corporate firms and legal clinics. See Cantor, *Managing Legal Organization in the 1980's*, 11 U. TOL. L.R. 311, 316-17 (1980). To a certain degree the bar has always been able to respond to changes in jurisdictional rules by alterations in its structure and practices but within limits and with some lag. Thus, for example, auto clubs have tried to compensate for the unavailability of counsel in small cases only to be attacked for unauthorized practice. Bulleit, *Automobile Clubs and the Courts*, 5 LAW & CONTEMP. PROBS. 22 (1938); Collins, *Automobile Club Activities: The Problem from the Standpoint of the Clubs*, 5 LAW & CONTEMP. PROBS. 3 (1938); Leviton, *Automobile Club Activities: The Problem from the Standpoint of the Bar*, 5 LAW & CONTEMP. PROBS. 11 (1938).

186. There may be additional difficulties where one party asserts a protected freedom because the costs of litigation may function as an a priori limitation on that freedom. See Schauer, *Fear, Risk and The First Amendment: Unraveling The "Chilling Effect"*, 58 B.U.L. REV. 685, 712 (1978).

### A. *Conduct of the Litigation*

When the client is located at a distance from the attorney's community, the responsiveness, effectiveness, and promptness of counsel<sup>187</sup> will often be affected because few clients will be in a position to recommend the attorney to others or to employ the attorney on other matters. Independent of the costs of working through distant counsel, there is a separate expense to bring witnesses to the place of trial. When overall expense is in issue, defendants can and do present this to the court on motions for a change of venue.

In assessing the convenience of plaintiff's choice of forum, courts focus on the difficulties of investigation, trial and relief.<sup>188</sup> Under the transfer of venue statute<sup>189</sup> the judge is empowered to consider the resources of the parties, the convenience of witnesses, and the expense of trial,<sup>190</sup> though no clear priorities among these considerations have emerged.<sup>191</sup> An important justification for minimizing expense is that the cost of suit can place the risk of error on the weaker party.<sup>192</sup> Thus,

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187. See the material collected in G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 35-123 (1978). Counsel will also be less willing to finance these extra expenses in smaller litigation. In doing so, counsel may be perfectly rational; although the Code of Professional Responsibility is not so charitable toward attorneys who accept litigation only to handle it lackadaisically. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-31, DR 2-110, DR 6-101(A)(3) (1979). The results, however, may not be economic: first, because it permits systematic effects beyond the individual cases counsel may leave stranded, and second, because the results are not merely the result of efficient resource allocations but rather result from inequalities in legal rights—what government has given it can also transfer with equal or better grace. See G. CALABRESI, *supra* note 158, at 86-88 (discussion of the theory of the second best); Schwartz & Mitchell, *supra* note 185, at 1125 (on the contingent fees).

188. The Supreme Court stated:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

There may also be questions as to the enforceability of a judgment if one is obtained.

*Gulf Oil Co. v. Gilbert*, 330 U.S. 502, 508 (1947). See also *Golconda Mining Corp. v. Herlands*, 365 F.2d 856, 857 (2d Cir. 1966) (comparing plaintiffs' witnesses with defendants' witnesses); *Popkin v. Eastern Airlines, Inc.*, 253 F. Supp. 244, 251 (E.D. Pa. 1966); 1 J. MOORE, *supra* note 52, at ¶ 0.145[5].

189. See *supra* note 110.

190. 1 J. MOORE, *supra* note 52, at ¶ 0.145[5].

191. 1 J. MOORE, *supra* note 52, at ¶ 0.145[5]; 15 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 3847 (1970).

192. See Griswold, *The Legal Profession in the 1980's*, 11 U. TOL. L. REV. 193, 198, 199 (1980); Janofsky, *The Future of the Legal Profession and the American Bar Association*, 11 U. TOL. L. REV. 201, 206, 207 (1980); Millstone, *Cruel Justice From the Consumer's Viewpoint*, in COMM'N ON A NAT'L INST. OF JUSTICE, *QUEST FOR JUSTICE* 68, 73, 74 (1973); Prendergast & Whittington, *Auto-*

if the expense of transporting witnesses is a problem, federal transfer and state common-law doctrines may be adequate.

If the expenses of trial which are appropriate to a motion for a change of venue are what the Court in *International Shoe* referred to as convenience, however, it could hardly explain the right of collateral attack which has followed jurisdictional errors and which seems unnecessary. Conversely, if convenience is related to due process, the Court's failure to constitutionalize transfer and forum non convenience doctrine is difficult to explain.

### B. Pleading

The impetus for default or for failure to litigate was the issue Justice Black raised in *Traveler's Health*<sup>193</sup> and *McGee*.<sup>194</sup> It is a special case, but not a rare one, where the sums at stake do not warrant the expense of distant litigation. Both the cost of counsel and the cost of travel to make a per se appearance may be prohibitive.<sup>195</sup> Only in this situation and in the prejudiced forum situation do the need for collateral attack and the doctrinal underpinnings of due process point toward the extensive protection now afforded by jurisdictional rules. Misuse of either jurisdiction or venue works most effectively if defendants default. One frequent abuser of venue rules admitted that it routinely dismissed actions where the defendant appeared and objected.<sup>196</sup> Ironically, though the courts and the FTC have recognized the problem,<sup>197</sup> they have refused to treat it as jurisdictional. Instead they have awarded only prospective relief, denied collateral attack, and treated inconvenience as a discretionary matter under venue rules rather than an obligatory jurisdictional matter.<sup>198</sup>

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*mated Litigation Support Systems for Evidentiary Management*, 11 U. TOL. L. REV. 255 (1980). See also Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUDIES 399, 435-37 (1973) (estimating the effects of efforts to reduce costs on the expense of litigation).

193. See *supra* note 82.

194. See *supra* note 83.

195. See *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293-94 (7th Cir. 1976); *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 105-06, 496 P.2d 817, 825, 101 Cal. Rptr. 745, 753 (1972) (en banc).

196. *Spiegel, Inc. v. FTC*, 540 F.2d 287, 290-91 (7th Cir. 1976).

197. *Id.* See *Shubach v. Household Fin. Corp.*, 376 N.E.2d 140 (Mass. 1978).

198. *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 118-19, 496 P.2d 817, 835, 101 Cal. Rptr. 745, 763 (1972) (en banc). See *Spiegel, Inc. v. FTC*, 540 F.2d 287, 292 (7th Cir. 1976) (expressing inability to determine the jurisdictional issue generically); *id.* at 294-97 (narrowing the reach of the FTC order).

It is at the pleading stage that the differences between plaintiffs and defendants are most stark. The plaintiff's decision to litigate is done within his own time frame and his knowledge of jurisdictional problems probably arises only after consulting counsel—the same moment, of course, when counsel also can explain and deal with the need to obtain local counsel elsewhere if necessary. Resources may prove difficult, but ignorance as a barrier to relief for the plaintiff should not be magnified by jurisdictional doctrine.

For the defendant, however, the time frame is shorter and the difficulty of defending in a distant forum must be apparent before counsel is consulted. Thus, one can anticipate that long-arm jurisdiction will pose particular problems for one-shot defendants, particularly in small cases.

These problems can be significant. The added costs of out-of-state litigation may make defense or prosecution uneconomical. Data which would indicate the extent of the problem, however, is not available.<sup>199</sup> Studies of parties in default are consistent with the hypothesis we have been considering but they are not conclusive.<sup>200</sup> If convenience is a factor in jurisdictional decisions it should show up in the use of collateral attack. Although our sample was small, the results are striking.<sup>201</sup> In small cases the extra cost of directly attacking jurisdiction in distant forums does not seem to justify the effort to the litigants.

### C. A Summary on Convenience

The inconvenience of jurisdiction can greatly affect the results in ways inadequately handled by venue or other rules. The contacts test first focused on inconvenience, as developed in *International Shoe* and was later amplified in *Traveler's Health* and *McGee*. By contrast, the contacts test, as understood since *Hanson* and now amplified by *World-Wide Volkswagen*, focuses on matters having nothing to do with the litigation.

## IV. IS JURISDICTIONAL JUSTICE POSSIBLE?

Convenience matters but it points in divergent directions: defendant

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199. The FTC and the Seventh Circuit have, however, concluded that the problem is serious, see *Spiegel*, 540 F.2d at 291, 294.

200. See *infra* Appendix I.

201. See *infra* Appendix II. My thanks goes to Linda Olfield, my research assistant, for completing the sample and putting together Charts III through IV.

bias at the pleading stage to avoid default; proof bias at the trial stage to reduce costs. There are three options beyond the current rules: to fashion a test based on the sums involved, the parties involved, or the type of suit.

### A. Dollars

Black's treatment of convenience in *Traveler's Health*<sup>202</sup> and *McGee*<sup>203</sup> could be interpreted to focus directly on the size of the lawsuit and to deny long-arm jurisdiction where the amount in issue is too small to justify the expense of making a defenses. In cases involving large sums of money, convenience of trial ought to be the ruling consideration on both state and federal levels. One potential problem is that the plaintiff could manipulate the complaint to obtain jurisdiction, as in federal diversity cases subject to the ten thousand dollar limitation. That limitation is partly met by a cost penalty under title 28, section 1332(b) of the United States Code. It might, however, be more effectively met by a special attorney's fees rule.<sup>204</sup> This proposal, however, does not seem to help Mrs. McGee because it does not solve the problem of determining what type of small case should be in whose jurisdiction. If a general defendant bias is preferable for the reasons outlined above, Mrs. McGee would have to sue in Texas on that ground.

### B. Parties

Alternatively Mrs. McGee could claim that she has special needs or lacks resources to litigate elsewhere. This is another interpretation of Black's development of the convenience idea.<sup>205</sup> In turn, there are several choices for accomplishing this.

Mrs. McGee could argue that the other party can afford litigation in Mrs. McGee's forum but that she cannot afford it in her opponent's forum. It is customary to assert that decisions based on wealth or resources are improper<sup>206</sup> in part because of their substantive irrele-

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202. See *supra* note 82.

203. See *supra* note 83.

204. See, e.g., WASH. REV. CODE ANN. § 4.28.185 (1962).

205. See *supra* notes 82 & 83.

206. See, e.g., *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (lack of effective redress absent class action); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, at 239 (1940) ("Of course, appeals to passion and prejudice may so poison the minds of jurors even in a strong case that an accused may be deprived of a fair trial"); *Allison v. Acton-Etheridge Coal Co.*, 268

vance,<sup>207</sup> and in part because of the possibility of abuse of the deep pocket.<sup>208</sup> By hypothesis, reducing the risk of error requires action, but the risks of overusing the deep pocket are substantial. These risks are less significant in unique litigation than in repetitive litigation, with its commensurably greater demands on the depth of the pocket.

On the other hand, Mrs. McGee could claim that she is a one-shotter facing a repeat player and it is fair to make the repeater come to her.<sup>209</sup> This course threatens the resources of the deep pocket. It might also invite significant problems of proof if this standard were uniformly required.<sup>210</sup>

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So.2d 725 (Ala. 1972) ("any reference to wealth or economic condition of a party by opposing counsel is invidious and prejudicial. . .").

207. "An appeal attempting to excite prejudice against a party because of that party's wealth or bigness, thereby attempting to draw the minds of the jury away from the matter in dispute, is improper argument." *Montgomery-Ward & Co. v. Wooley*, 121 Ind. App. 60, 94 N.E.2d 677 (1950).

208. "[J]urors have a tendency to favor the poor as against the rich, and if provoked by . . . argument, are likely to apply the 'deep pocket' theory of liability, or to adjust the size of the verdict to the financial ability of the party who is to pay it." Annot., 32 A.L.R. 2d 9, 17 (1953). On the other hand, antitrust laws and rules restricting contracts of adhesion come close to that distinction.

209. Galanter's broad definitions leave room for improvement. One approach might focus on the quantity of litigation or of similar cases, or the presence of a retainer agreement covering the kind of suit involved, or the presence of attorneys, agents or correspondents for collection, or other legal business outside of their home district. Quantitative cutoffs could be provided by legislation. It might be enough to assert jurisdiction in the forum if the defendant has ever sued or defended in the forum jurisdiction and it is essential to group parties who are responsible for the judgment or the defense and whose interest vis-a-vis the litigation are identical. Plainly, insurance companies are a prime example. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

210. It can be very difficult to determine who needs what accommodation in order to equalize the risk of error. This focus on the parties thus poses dangers stemming from problems of proof. The issue of litigation involvement necessary to determine repeater status is not well-marked in most states in centralized documents, except for the publication of appellate decisions. Captions can be camouflaged despite requirements that litigation be conducted in the name of the real party in interest. FED. R. CIV. P. 17(a). This could force county-by-county record searches in each of several courts. Efforts by repeaters to restructure the litigation or the transaction to avoid repeater status might have prohibitive costs, but two avenues are possible and both create substantial problems of proof. First, claims are generally assignable, J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* § 1004.14 (1982), though prohibitions on assignment to collection agencies complicate this ruse. N.Y. JUD. L. § 489 (McKinney 1968). Second, the original transaction might be restructured through agents or other parties. This is difficult when volumes are large, but litigation is often managed and financed by an insurer who is not named. This may present relatively few problems in ordinary traffic accident cases because of compulsory insurance. But in other areas it could generate a costly look behind the litigation. The additional threat of diverting resources from litigation to private enforcement always exists. Leff, *Injury, Ignorance and Spite: The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 5-18 (1970).

These problems generate three types of risks of error. If one-shotters were given the option of

Alternatively, Mrs. McGee could borrow an idea from Calabresi<sup>211</sup> and Justice Marshall<sup>212</sup> and claim that the defendants can spread the costs. Calabresi argues that a major focus of the law is and should be on identification of those parties who can best spread the loss (cost-spreaders), so that it is not too catastrophic for any one party or on those parties that can best avoid the problem in the first place (cost-avoiders). An example of a good cost-avoider is the workmen's compensation employer.<sup>213</sup> It is easier for the employer to plan for safety than it is for each employee to do so. Hence, placing the legal liability and entire cost of the accident on the employer without fault generates a more efficient solution to the safety problem. Cost-spreaders, on the other hand, are best exemplified by insurance companies. Justice Marshall employed this idea regarding attorney's fees. He suggested that the costs of counsel be shifted only if they could be passed on to the

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employing long-arm jurisdiction subject only to contacts and sovereignty considerations, repeaters in one-shot garb might obtain long-arm jurisdiction when they should not. This risk exists under present law. Jurisdiction is not infrequently premised on relatively slight contact. See *Wisconsin Elec. Mfg. Co. v. Pennant Prods., Inc.*, 619 F.2d 676 (7th Cir. 1980); D. SIEGEL, *NEW YORK PRACTICE* § 86 (1978). This analysis applies to parties of all descriptions, not merely to the corporate defendants for which *International Shoe* was originally fashioned. See 4 C. WRIGHT & A. MILLER, *supra* note 191, at § 1069. On the other hand, if long-arm jurisdiction were permitted only against repeaters some would evade jurisdiction. This would cut back on present plaintiff options. Because insurance companies defending tort actions are clearly repeaters, narrowing long-arm jurisdiction to repeater defendants need work no change in the availability of the long arm in accident cases. *Rush v. Savchuk*, 444 U.S. 320 (1980), restricted reliance on insurer defendants for jurisdictional purposes but direct-action statutes could plainly retake this ground. Finally, there is the risk of considerable litigation. There has been considerable litigation on the issue of doing business. Some of the information necessary to raise this issue, however, is present in the claim and therefore within plaintiff's knowledge. When it is not, plaintiffs now resort to publicly or privately maintained records that are widely available through numerous commercial services. Though the initial leads may be more difficult to come by, proof of repeated litigation may be easier to make than of the extent of business dealings. Repeaters may be expected to use their litigation advantages in this area as they doin others but their efforts may be mitigated by application of collateral estoppel and the precision of state laws. Collateral estoppel would have been prevented by the rule of mutuality of estoppel. *But see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-28 (1979); M. GREEN, *BASIC CIVIL PROCEDURE* 245-53 (2d ed. 1979). Private service agencies could centralize and simplify data collection. Litigation could be discouraged by charging the cost of attorneys' of the rule optional and eliminating the temptation to litigate the obvious by requiring a dual demonstration of the party's own lack of resources and its opponent's frequent access to the courts.

211. See G. CALABRESI, *supra* note 158, at 47-50, 60-64.

212. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 272 (1975) (Marshall, J., dissenting).

213. See G. CALABRESI, *supra* note 158, at 135-40, 175, 245-46.



ultimate beneficiaries.<sup>214</sup> In *Alyeska Pipeline* he believed the pipeline company could pass the costs of such an award through its prices to the public which presumably benefited.<sup>215</sup>

Cost-avoiders may not be easily discovered in the procedural context. First, identifying the cost-avoider requires prejudging the litigation. Second, it seems likely that many of those who are in a position to restructure the transaction in order to minimize the likelihood of a dispute will be small businesses poorly equipped to finance distant litigation. Identifying cost-spreaders might be more appropriate. If a cost-spreader is identified by position in the chain of distribution—such as employers in the workmen's compensation example—it is consistent with the existence of scant litigation resources. If cost-spreaders are identified by their resources it implies a means test with the problems of abusing the deep pocket.<sup>216</sup>

The idea of the cost-spreader works, however, if that party can actually pass the costs along. There are two possibilities. One is the case of the monopolist. The other is the case of an industry in which one type of suit is sufficiently common that the litigation reflects a cost of doing business for the industry rather than an isolated expense. In other words, a true cost-spreader in a competitive industry is likely to be a repeater with respect to one type of litigation.

This analysis suggests that in cases of unusual variety where small sums are at stake, a party without resources may argue that the burden of distant litigation be shifted to the party with greater resources. This analysis further suggests that in small cases of common variety a party may argue that the burden be shifted in the event that the other party is a repeater or cost-spreader with respect to the type of litigation involved.

A final approach to Mrs. McGee's problem is to allow her to claim that the defendant does a substantial volume of interstate business while Mrs. McGee does not. A substantial volume of interstate business may correlate highly both with sufficient resources to finance distant litigation and with the ability to spread the cost. In addition, this approach focuses on the familiarity a litigant may need to have with distant locales to defend or prosecute effectively. In the event that both

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214. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 288 (1975) (Marshall, J., dissenting).

215. *Id.*

216. *See supra* notes 206-08.

the plaintiff and the defendant do a substantial volume of interstate business, ease of trial should control. In the event that one party substantially engages in interstate business and the other does not, trial should be commenced in the jurisdiction of the party who is not substantially involved in interstate commerce. In the event that neither does a substantial volume of interstate business, the court may look at either the means or the ability to spread the cost of litigation as above.

These alternatives, singly or in combination, could rationalize the problem of jurisdiction in small cases between unequal parties. Whether the patterns are sufficiently predictable to avoid individualized litigation altogether needs further consideration.

### C. Case Patterns

The costs of investigating litigant status may be the best argument for more general rules.<sup>217</sup> While Galanter's categories<sup>218</sup> may not work well when applied directly, they may work better as a basis for statutory categorization by type of suit based on all the patterns of litigation.

In some cases a focus on convenience will yield results similar to the focus on intent required by *Hanson*<sup>219</sup> and *World-Wide Volkswagen*.<sup>220</sup> In some car accident cases, litigation is conducted between insurance companies for both sides and there is little reason to suspect significant inequalities between the litigants. Insurance companies can and do sue and defend nationally, a fact now recognized in many statutes.<sup>221</sup> Presumably, the added cost of extraterritorial litigation is tacked on to the

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217. See *supra* note 210.

218. See *supra* text accompanying note 179.

219. See *supra* note 20.

220. See *supra* note 2.

221. ALA. R. CIV. P. 4.2(a)(2)(F); ALASKA STAT. § 09.05.015 (1962); ARK. STAT. ANN. § 27-2502 (1979); COLO. REV. STAT. § 13-1-124 (1973); DEL. CODE ANN. tit. 10, § 3104 (1974 & Supp. 1980); D.C. CODE ANN. § 13.423 (1981); FLA. STAT. ANN. § 48.193 (West 1969 & Supp. II 1980); IDAHO CODE § 5-514 (1979); IND. CODE § 35-5-1-1 (1976); IOWA CODE ANN. § 617.3 (West Supp. 1982-83); KAN. STAT. ANN. § 60-308 (1979 & Supp. 1981-82); KY. REV. STAT. ANN. § 454.210 (Baldwin 1981); ME. REV. STAT. ANN. tit. 14, § 704-A (1964); MD. CTS. & JUD. PROC. CODE ANN. § 6-103 (1980); MASS. ANN. LAWS ch. 223A § 3 (Michie/Law Coop. Supp. 1982); MICH. COMP. LAWS § 600.705 (1979); MO. ANN. STAT. § 506.500 (Vernon Supp. 1981-82); MONT. CODE ANN. tit. 25, ch. 20, R.C.P. 4B (1981); NEB. REV. STAT. § 25.536 (1977); NEV. REV. STAT. § 14.065 (1979); N.M. STAT. ANN. § 38-1-16 (1978); N.C. GEN. STAT. § 1-75.4 (1969 & Supp. 1981); N.D. R. CIV. P. 46 (Supp. 1979); OHIO REV. CODE ANN. § 2307.38.1-.2 (Baldwin 1981); OKLA. STAT. ANN. tit. 12, § 1701.03 (West 1980); OR. REV. STAT. § 14.030 (1981); 42 PA. CONS. STAT. ANN. § 5322 (Purdon 1980); S.C. CODE ANN. § 15-9-270 (Law Co-op 1976); S.D. COMP. LAWS ANN. § 15-7-2 (1967 & Supp. 1982); UTAH CODE ANN. § 78-27-24 (1977); WASH. REV. CODE ANN.

rates and spread among the subscribers.<sup>222</sup> As a result of repeated litigation, insurance companies have the advantage of continuing relationships with designated attorneys who are and expect to be judged by their track record. This experience of working together simplifies the problems of communications between lawyer and client.<sup>223</sup> In these instances there is seldom a strain either on the parties or on the minimum contacts required in bringing court and witnesses together.

In cases in which the plaintiff seeks damages beyond the limits of his own first party coverage, which includes injuries to many drivers, passengers and most pedestrians, the plaintiff is what Galanter refers to as a one-shotter. Long-arm statutes give those litigants an advantage in forcing jurisdiction at plaintiff's home if the accident took place there. Witnesses, contacts, and resources may all be found in the plaintiff's forum.

In contracts cases, whether witnesses, contacts and resources mesh well depends on the nature of claims and defenses. The existence of credit agencies and collection agencies often eases the burden of distant litigation which makes it much easier for the plaintiff to sue abroad than for the defendant to defend abroad. The central advantage of the credit and collection agencies is the volume of business forwarded. The agencies identify appropriate counsel in each community.<sup>224</sup> By focusing and organizing the credit and collection business, the agencies give their clients an advantage that the one-shot plaintiff does not get from

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§ 4.28.185 (West 1962 & Supp. 1982); W. VA. CODE § 56-3-33 (1966 & Supp. 1982); WIS. STAT. ANN. § 801.05 (West 1977 & Supp. 1982-83).

222. See G. CALABRESI, *supra* note 158, at 47-50, 60-64.

223. Corporate law departments also face special costs for interstate business, including the maintenance of lists of eligible attorneys where the corporation does business and investigation of local firms prior to and in anticipation of litigation. Pollack, *Corporate Law Department Rendering Quality Services*, 51 N.Y.S. B.J. 632, 660 (1979). The cost of keeping information may be negligible. The cost of finding local counsel may require two hours' work by home office counsel, largely on the telephone seeking recommendations—a task simplified by the large network of attorneys with whom large corporations deal. The telephone charges, not large in themselves, are likely rendered even smaller by the use of microwave long distance services. More significant is the cost of initial briefing. Corporate clients prefer to meet counsel in person both to set up a personal relationship and to facilitate mutual understanding of the goals and problems of the litigation. The cost of travel at the start of litigation can be significant. (The author wishes to acknowledge a debt to Ernest Walton, an attorney with a large American corporation who explained his practices at some length in regard to handling out-of-state litigation.)

224. Schiffer, *The Collection Agency—An Economic Necessity*, 74 COMM. L.J. 119, 120 (1969); *Operative Guides for Forwarders and Receivers Adopted by the Commercial Law League of America*, 80 COMM. L.J. 487, 488 ¶ 2.1 (1975).

the structure of private litigation. Nor does the emergence of multistate firms promise much for the ordinary one-shotter because these firms usually concentrate on corporate law. Thus, in some consumer, warranty, and product liability cases, witnesses, resources, and contacts may mesh. "Purposeful availment" of state protection sometimes works well under modern conditions—perhaps because of the rules—where the active party is often more able to bear the costs of distant litigation and the burden is placed on that party, for example, mail order houses and tort defendants. The correlation easily breaks down, however, for persons such as travelers and small businessmen. In a small group of cases it has also proven possible to mesh convenience factors by requiring that a defendant requesting transfer pay the additional expenses of a plaintiff resisting transfer.<sup>225</sup>

There are other more difficult cases in which the factors of will and convenience diverge; for example, those involving victims of distant accidents<sup>226</sup> or some consumer litigants.<sup>227</sup> On occasion, courts have endeavored to distinguish individual from corporate litigants<sup>228</sup> and more active purchasers from mail order buyers.<sup>229</sup> Like *McGee*<sup>230</sup> and *Traveler's Health*,<sup>231</sup> however, these courts made their decisions in terms of contacts and have spawned no general classification of litigants. Minimizing the risk of cost-induced default and reducing the cost of trial may also conflict in these cases.

## V. THE IRRELEVANCE OF JURISDICTION

Jurisdiction has been treated as an isolated problem. One has only to contrast the jurisdictional decisions discussed in this Article with the

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225. *Morganstern v. Mariott-Hot Shoppes, Inc.*, 270 F. Supp. 75, 77 (D. Md. 1967). *But see Scaramuzzo v. American Flyers Airline Corp.*, 260 F. Supp. 746, 752 (E.D.N.Y. 1966).

226. *See supra* note 43.

227. *Bryson v. Northlake Hilton*, 407 F. Supp. 73 (M.D.N.C. 1976) (hotel guest's forum burdened commerce against franchisee of national chain). Where minimum jurisdictional contacts are predicated on the location of negotiations, as in *Wisconsin Elec. Mfg. Co. v. Pennant Prods., Inc.*, 619 F.2d 676 (7th Cir. 1980), it is not unlikely to find that breach and damages were incurred elsewhere and that the long-arm defendant has fewer resources for distant defense.

228. *Fourth Northwestern Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 114, 117 N.W.2d 732, 735 (1962).

229. *Id.* at 114-15, 117 N.W.2d at 736; *Conn. v. Whitmore*, 9 Utah 2d 250, 255-56, 342 P.2d 871, 874-75 (1959).

230. *See supra* note 83.

231. *See supra* note 82.

cases built on *Goldberg v. Kelly*<sup>232</sup> to understand the significance of this difference. In the cases involving the right to an administrative hearing, the Court has had to determine how much process was due. This necessitated a look not at single rules but at all rules in combination.<sup>233</sup> A view of due process based on the inequalities among litigants would force the Court to expand its perspective and discretion in a similar way. Whether jurisdictional rules would have much, if any, effect on reducing the risk of error would depend on the rules governing solicitation and selection of counsel, and financing of litigation. If financing is provided and the client-counsel relationship is facilitated, there may be no extra burden on the parties as a result of out-of-state litigation.<sup>234</sup> Where these conditions are not present, however, jurisdictional decisions may affect the course of the lawsuit. Increasing the size of the problem the courts face may not be an advantage. If due process does govern jurisdiction, however, jurisdictional analysis may have to be as broad as the analysis of administrative procedure has been.

If there were an adequate market in regard to the costs of litigation, it would make little difference for the fair and efficient handling of legal disputes whether the rules place the burdens initially on the plaintiff or the defendant.<sup>235</sup> Parties could bargain with each other and employ outside agents, resources, and services to manage the burdens. In the absence of such a market, jurisdictional rules may be a significant constraint.

The Legal Services Corporation, legal insurance, group plans, and ideological organizations have made some inroads against the isolation of litigants in recent years. It is, however, often illegal to assign a cause of action.<sup>236</sup> Lawyers may advance but not pay the costs of litigation<sup>237</sup> and may finance their own fees only in well-defined though important classes of plaintiff's litigation.<sup>238</sup> This is largely the result of the limitation on the assessment of attorneys' fees to the loser.<sup>239</sup> Firms differ in

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232. 397 U.S. 254 (1970).

233. L. TRIBE, *supra* note 58, at 539-57.

234. See N.Y. DOM. REL. LAW § 37 (McKinney 1977 & Supp. 1982-83).

235. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

236. N.Y. Jud. L. § 489 (McKinney 1968). Cf. 28 U.S.C. § 1359 (1976) (restricts jurisdiction over assigned causes of action even where legal).

237. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-103 (1979).

238. Torts, securities, antitrust, and class actions are major categories. See generally Schwartz & Mitchell, *supra* note 185.

239. *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Changing the attorneys' fees rules could threaten such campaigns as the NAACP's lawsuit against the school board in

their ability to finance litigation. Attorneys are usually barred from seeking economies of scale by the rules against client solicitation.<sup>240</sup> Jurisdiction is a problem because the legally regulated market handles litigation costs so poorly.

Thus, it may be better to alter the practice requirements for pleading<sup>241</sup> and let the judge set a convenient venue on the basis of small trial costs. Several writers have urged the substitution of venue provisions similar to title 28, section 1404(a) of the United States Code for jurisdictional provisions to avoid statute of limitations problems, dismissal, and the cost and inconvenience of restarting an action.<sup>242</sup> If, however, we eliminate the jurisdictional objection and dismissal for failure to file in the appropriate district, the consequences would include intentional—but difficult to prove—filing in inconvenient forums. Under current rules the defendant must first deal with the problems of defending in the inconvenient forum before he can have the case transferred or even default reopened.<sup>243</sup> The seriously inconvenient initial forum is the strongest justification for the right of collateral attack. The failure of venue doctrine to provide for collateral attack in appropriate cases is the most serious weakness of the proposal to substitute venue for jurisdiction. Venue doctrine would prove much more acceptable if practice rules made the initial problems of pleading and motions much less expensive relative to small cases.

### CONCLUSIONS

Jurisdictional rules might, of course, be based on something other

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Brown v. Board of Educ., 347 U.S. 483 (1954), by forcing a fledgling organization to foot its opponent's bills following early losses. See, e.g., R. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 155-58 (1976) (discussion of Hocutt v. Wilson, No. 1-188 Civ. (N.C. Super. Ct. Mar. 28, 1933)). See Grovey v. Townsend, 295 U.S. 45 (1936) (ruling against the civil rights plaintiffs in a voting case). It may be possible to avoid such problems but to do so would require extensive and thoughtful study. For an example of the danger of unwanted deterrence via shifting the burden of attorneys' fees, see Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) (involving costs); Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) (involving attorneys' fee in which civil rights plaintiffs were treated differently than civil rights defendants with respect to court costs).

240. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103, 104 (1979).

241. *But see* Leis v. Flynt, 439 U.S. 438 (1979).

242. See Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103 (1971); Ehrenzweig, *The Transient Rule of Personal Jurisdiction*, 65 YALE L.J. 289, 312-14 (1956). On the relation between 28 U.S.C. § 1404(a) (1976) and forum non conveniens doctrine, see 1 J. MOORE, *supra* note 52, at ¶ 0.145[5].

243. See 28 U.S.C. §§ 1404, 1406 (1976).

than due process. But if due process is the source of limitation it poorly explains the pattern of jurisdictional rules. The Court has revived sovereignty when it has become insignificant. While the Court could make good use of an interpretation of due process based on the right of self-determination, it has focused on self-determination in contexts which are far from foremost in the parties' minds.

Justice Black may have engaged in rhetorical flourishes in *McGee* and *Traveler's Health*. His discussion of the relative position of the parties, however, is at once easy to fit within fundamental approaches to due process but pregnant with difficulties of interpretation. To take his argument seriously would require considerable restructuring of our understanding of jurisdiction.

From the perspective of accuracy of decisionmaking, which is well grounded in the due process clause, it is more appropriate, instead of looking at one party, to look at both. Even if the Szukhent brothers signed their contract in New York, perhaps the rental company should be required to sue at the Szukhents' home.<sup>244</sup> Whether that would make the trial less expensive would depend on the nature of the Szukhent brothers' defenses.

Perhaps another private party should be entitled to jurisdiction in Texas regarding a contract with Mrs. McGee, who lives in California, but International Life Insurance Company should not.<sup>245</sup> Perhaps the television repairman should be entitled to jurisdiction against Grey in Ohio but American Radiator should not.<sup>246</sup> And perhaps the stockholder should have been able to get jurisdiction in Delaware against the officers of Greyhound but an institutional creditor should have been required to sue in Arizona.<sup>247</sup> To allow these decisions to control, however, would make jurisdiction both unwieldy and hard to predict.

Because convenience leads in divergent directions, jurisdictional doctrine can only serve to balance the competing interests involved or engage in categorical approximations. Given the cost of ascertaining jurisdictional facts, it may be appropriate simply to identify classes of

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244. See *supra* note 127.

245. Compare *McGee v. International Life Ins. Co.*, 335 U.S. 220 (1957) with *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 277 (1937).

246. Compare *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961) with *Fourth Northwestern Nat'l Bank v. Hilson Indus. Inc.*, 117 N.W.2d 732, 735 (Minn. 1982).

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

cases which ordinarily should be pursued in plaintiffs' or defendants' jurisdiction on the basis of the parties' typical relative resources rather than to individualize determinations based on the actual resources of litigants before the Court. Such considerations would justify the otherwise usually inapplicable right of collateral attack but would clash sharply with the Court's playing of its recent jurisdictional quartet.

The significance of such questions, however, may also depend on the provisions for handling interstate legal business, the license to practice, provision for referral, and the growth of multistate firms and legal insurance plans. The significance of those questions may similarly depend on provisions for counsel and counsel fees. Jurisdiction is not an island entire unto itself.



## APPENDIX I

The closest available data are based on the evidence of defendant's choice of direct or collateral attack and their decisions to default on merchandising and personal loan contracts in New York, Chicago, Detroit, and Philadelphia in 1967. It is difficult to base any conclusions on that data. D. CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 206-07, 210-12 (1974). A subsequent attempt to define the problems statistically ran aground on a failure to cross tabulate relevant variables including the size of the case. See Rosen, *Nearer Thy Court to Thee: A Proposal for a More Convenient Forum for Defendants in Consumer Cases*, 8 CONN. L. REV. 530, 534-47 (1976).

In the Caplovitz study, only 4% of those served in New York appeared in court in contrast to 34% and 36% in Detroit and Chicago, respectively. D. CAPLOVITZ, *supra*, at 204. Caplovitz concluded that the venue provisions in New York were a major reason for default. *Id.* at 207. New York permitted venue to be placed in either the county of the plaintiff's residence or that of defendant. See N.Y. CIV. PRAC. LAW § 503 (Consol. 1978 & Supp. 1982); N.Y. CITY CIV. CT. ACT § 301 (McKinney 1963 & Supp. 1981-82). Both sections have since been amended to narrow jurisdiction in consumer cases. N.Y. CITY CIV. CT. ACT §§ 201-212 (McKinney 1963 & Supp. 1981-82). Fully 75% of the cases examined by Caplovitz and his researchers were not in the defendant's county. D. CAPLOVITZ, *supra*, at 206-07. But Caplovitz does not reveal how residence may have correlated with default in New York City. Nearly 20% of debtors in default in New York City, but only 7% in Detroit, and 4% in Chicago, told interviewers that they did not know where they were supposed to go or that they were afraid to go to court. *Id.* at 205. Only 7% to 14% in each city told the interviewers that they failed to appear for lack of a defense. An additional 10% to 14% admitted forgetting or otherwise having no reason for failure to appear. *Id.* These figures may understate the number of defendants who had a defense by excluding those unaware of their legal rights. No effort was made to determine whether any of those respondents did in fact have a meritorious defense. A substantial proportion related information to the interviewers which suggested that they did have a defense, *id.* at 41-42, suggesting that nearly half of the debtors in a default were deceived on at least two of three standard items. A smaller percentage volunteered deception as a reason for nonpayment. *Id.* at 49-55. Caplovitz concluded:

That fully three fourths of the New York debtors did not live in the same borough in which they were being sued would appear to be a factor in the failure of all but a handful to answer the summons, although virtually none of the debtors offered as a reason for their nonappearance their not knowing where the Court was located, how to get to it, or the trip being too difficult.

*Id.* at 207. The data from each city are not strictly comparable because

Caplovitz compared the multicounty, multicourthouse New York system to a single courthouse each in Chicago and Detroit. *Id.* at 210. The differences observed may also relate to unfamiliarity with the area, *id.* at 210, or to differences in the availability of credit or the prevalence of "sewer service" (if the interviewees incorrectly identified or remembered service of the summons). *Id.* at 192-95. (The author is indebted to Professor Allen Redlich for this point). That such structural differences may be at work is evidenced by the small impact of the requirement of bilingual summonses and a narrowing of venue allegations which the clerks of the respective Courts of New York City would accept. *Id.* at 211-12. Moreover, Caplovitz did not compare the default rates within New York City in cases of home county and distant county litigation. Thus, Caplovitz was not able to put a figure even on this narrow class of the problem.

Based on the Caplovitz data the Special Committee on Consumer Affairs of the Association of the Bar of the City of New York attacked the venue provisions for consumer cases. The Special Committee on Consumer Affairs, *A New York Consumer Law Center*, 29 REC. A.B. CITY N.Y. 213, 214 (1974). See Committee on Legal Assistance, *Does a Vendee Under an Installment Sales Contract Receive Adequate Notice of a Suit Instituted By a Vendor?*, 23 REC. A.B. CITY N.Y. 263, 265 (1968). Following these attacks New York's CPLR section 503(f) was amended in 1973, Act of May 1, 1973, ch. 238, 1973 N.Y. Laws § 3, to restrict venue to the residence of the defendant in consumer cases. Similar changes were made in the New York City Civil Court Act section 301(a). *Id.* § 5. Professor Siegal's commentary on the Civil Court Act amendments noted the effort to curtail harassment by multicounty corporate defendants. Professor McLaughlin's commentary to section 503(f) notes that prior practice permitted suit hundreds of miles from defendant's home if the plaintiff chose to take advantage of a home office in New York City for venue purposes. N.Y. CIV. PROC. LAW § 503 commentary on assignees—residence (McKinney 1976). Governor Rockefeller approved the change, saying "The commencement of a suit in a place that is highly inconvenient to the debtor has the effect of discouraging and indeed, preventing many debtors from appearing in the action and asserting what would otherwise constitute a valid defense." 1973 N.Y. LAWS 2340 (1973).

Data has not been located which might show the effects of this change. Chart I traces the percentage of default judgments in the Supreme Court and Civil Court where the change was made and the County Court where no change was made. The jurisdiction of each court, however, differs substantially and the data is not comparable. Also, the reporting system for the Civil Court unfortunately changed in 1973 and the categories for all courts were broader than the change, thus masking any decrease in default judgments. It can therefore only be presumed, though the presumption seems quite reason-

able, that venue and jurisdiction provisions make a significant difference in the results of litigation, unrelated to the bona fide nature of the claims. In certain classes of cases the presumption would seem to be at least as true for interstate jurisdictional problems as for intrastate venue problems.

CHART I  
ACTIONS DISPOSED OF

	7/1/66		7/1/67		7/1/68		7/1/69		7/1/70		7/1/71		7/1/72		7/1/73		Calendar Year		
	7/1/66	6/30/67	7/1/67	6/30/68	7/1/68	6/30/69	7/1/69	6/30/70	7/1/70	6/30/71	7/1/71	6/30/72	7/1/72	6/30/73	7/1/73	6/30/74	1975	1976	1977
NYS Supreme Court																			
Total	53,684		58,406		69,706		77,988		85,246		98,326		101,620		107,180		111,193	109,049	109,767
Contract			634		475		510		669		850		700		536		865	7,935	8,601
Default	470		1.09		0.68		0.65		0.78		0.86		0.69		0.52		0.78	660	431
Default/Total (%)	0.88																	0.61	0.39
County Court Total	4,886		4,759		4,584		4,526		5,665		4,063		4,462		3,633		3,538	4,238	3,025
Contract			64		57		73		38		49		48		81		87	1,570	1,580
Default	74		1.34		1.24		1.61		0.67		1.21		1.08		2.23		2.46	4,238	1,580
Default/Total (%)	1.52																	82	130
NYC Civ. Ct.																		1.93	3.23
Total	61,208		58,677		54,820		56,417		55,263		57,214		65,012		86,173		76,759	70,090	67,243
Commercial																		22,789	24,934
Part																			
Inquest in Small Claims Part																			
Default	11,757		11,633		11,129		11,568		10,992		11,378		11,909		5,898		5,741	7,283	7,186
Default/Total (%)	19.2		19.83		20.30		20.50		19.89		19.89		18.32		6.84		7.48	10.39	10.69
Sources:																			
Tables	11,18		11,18		11,18		11,18		11,18		11,18		11,18		24,27		27,31,34	31	31,32
Annual Report of Advisory Bd.	26		26		26		26		26		26		26		30			34,35	35,36
The Jud. Conf. for the years succeeding years indicated																			
																		38,39	39,40

For jurisdictional provisions see NY Civil Court Act §§ 201-212 (NY City Civil Court) and NY Judiciary Law § 190 (County Courts).

**APPENDIX II  
COLLATERAL VERSUS DIRECT ATTACK**

Charts II through IV demonstrate the close relationship between the size of the claim and the choice of method for attacking jurisdiction. The difference between the won/lost percentage on these motions was very slight. Collateral attack was successful in 5 out of 12 of the listed cases, and 8 out of 19 where cases in which amounts were not mentioned are included. Similarly, 6 out of 15 of the direct attacks succeeded in the listed cases and 21 out of 47 succeeded if direct attack cases in which amounts were not mentioned are included.

**CHART II  
% OF CASES ATTACKING JUDGMENT  
(based on Charts III-IV below)**

<u>Under</u>	<u>Collaterally</u>	<u>Directly*</u>
\$ 5,001	18.18	7.69
10,000	63.64	23.08
15,000	72.73	38.46
31,000	90.91	46.15
100,000	90.91	61.54
	Median \$9,851.63 (11 cases)	Median \$50,000 (13 cases)

\* Excluding the support order in *Bergdoll v. Whitley*, 598 S.W.2d 932 (Tex. Civ. App. 1980).

**CHART III  
CASES PURSUING COLLATERAL ATTACK**

Based on cases appearing in 13-27 GENERAL DIGEST, FIFTH SERIES (West 1979-80), in which a dollar amount is identified, listed under West Key Numbers as follows:

JUDGMENT (COLL. ATT.: 470-523)  
(FOR JMT.: 813-832)

and

COURTS JURISDICTION OF PERSON: 10, 11, 12)

<u>AMOUNT</u>	<u>CASE</u>
\$ 2,286.01	<i>Attwell v. LaSalle Nat'l Bank</i> , 607 F.2d 1157 (5th Cir. 1979), <i>cert. denied</i> , 445 U.S. 954 (1980).
3,510.00	<i>Pinna v. Davis</i> , 67 App. Div.2d 967, 413 N.Y.S.2d 460 (1979).
7,698.06	<i>Wulf Oil Corp. v. Grebe Drilling Co.</i> , 93 Mich. App. 793, 287 N.W.2d 344 (1979).
8,000.00	<i>Liberty Leasing Co. v. Still</i> , 582 S.W.2d 255 (Tex. Civ. App. 1979).

8,456.37	First Nat'l Bank v. Collins, 372 So.2d 111 (Fla. Dist. Ct. App. 1979).
9,851.63	Bevins v. Comet Cas. Co., 71 Ill. App. 3d 758, 390 N.E.2d 500 (1979).
9,923.04	Brockman Equip. Leasing, Inc. v. Zollar, 3 Kan. App. 2d 477, 596 P.2d 827 (1979).
13,069.38	Gladding Corp. v. Balco Pedrick Parts, 429 N.Y.S.2d 940 (1980).
29,338.00	Haire v. Eide, 150 Ga. App. 52, 256 S.E.2d 658 (1979).
30,000.00	McDermond v. Siemans, 607 P.2d 108 (Nev. 1980).
250,000.00	Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404 (S.D. Tex.), <i>vacated</i> , 665 F.2d 515 (5th Cir. 1980).

#### CHART IV CASES PURSUING DIRECT ATTACK

Based on cases appearing in 13-27 GENERAL DIGEST, FIFTH SERIES (West 1979-80), in which a dollar amount is identified, listed under West Key Numbers as follows:

COURTS (JURISDICTION OF PERSON: 10, 11, 12)	
<u>AMOUNT</u>	<u>CASE</u>
\$ 5,000.00	Cook Assocs., Inc. v. Lexington United Corp., 86 Ill App.3d 909, 407 N.E.2d 944 (1980), <i>aff'd</i> , 87 Ill.2d 190, 429 N.E.2d 847 (1981).
5,825.00	Ahlers v. Ahlers, 384 So.2d 474 (La. 1980).
9,000.00	Cofinco of Seattle, Ltd. v. Weiss, 25 Wash. App. 195, 605 P.2d 794 (1980).
10,160.22	Hallibarton Co. v. Texana Oil Co., 471 F. Supp. 1017 (D. Colo. 1979) (two defendants).
14,609.24	United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979).
21,252.59	H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768 (1980).
50,000.00+	Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis.2d 683, 273 N.W.2d 285 (1979).
60,000.00	Hall, Morse, Gallagher & Andersen v. Koch & Koch, 119 N.H. 639, 406 A.2d 962 (1979).
174,074.00	Schell v. Tri-State Irrigation, 22 Wash. App. 788, 591 P.2d 1222 (1979).
327,347.42	Biltmore Moving & Storage Co. v. Shell Oil Co., 606 F.2d 202 (7th Cir. 1979).

500,000.00	Rosemont Enters., Inc. v. Lammis, 596 S.W.2d 916 (Tex. Civ. App. 1980).
522,000.00	Thomas J. Palmer, Inc. v. Tarkiye, IS Bankasi AS, 105 Cal. App.3d 135, 164 Cal. Rptr. 181 (1980).
1,260,000.00	Mead Corp. v. Allendale Mut. Ins. Co., 465 F. Supp. 355 (N.D. Ohio 1979).
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\$250/mo. (increase in support order)	Bergdell v. Whitley, 598 S.W.2d 932 (Tex. Civ. App. 1980).

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