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SUBSTANTIVE INTERESTS AND THE JURISDICTION OF STATE COURTS

Paul D. Carrington* and James A. Martin**

PENNOYER¹ indeed is dead.² The primitive ritual of service of process could not survive as a general solution to the problem of state power over individuals. Committed as we are to the idea that the judicial power should be exercised in a manner that is responsive to the common welfare, we could not suffer the limits of power to be determined irrationally by the random success of process servers. Offering only the virtues of simplicity and economy, the ritualistic method had to yield in order to make the judicial power a sharper and more effective tool with which to pursue our common goals. Although it is therefore desirable to put the ghost to rest, a word of caution seems to be timely.

I. SUBSTANTIVE POLICY AND THE DEMISE OF PENNOYER V. NEFF

The vice of the nineteenth century method of limiting the power of state courts is familiar, but a simple illustration may be helpful. In the lore of conflict of laws, there is a shopworn hypothetical of an evil defendant who fires a gun across a state line at the plaintiff.³ The purpose of the hypothetical is to demonstrate the wisdom of the classical choice of law analysis, which would apply the law of the place where the plaintiff was wounded because the wound was the last act necessary to liability. This is an appealing choice because we would not like the defendant to be sheltered by a savage, exculpating rule of the place in which he pulled the trigger.⁴ The same reasons which make it appealing to apply the protective law of the plaintiff's

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

2. Cf. Ehrenzweig, *Pennoyer Is Dead—Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285 (1958).

3. RESTATEMENT OF CONFLICT OF LAWS § 377, Illustration 1 (1934).

4. The argument encounters some embarrassment when a rule more favorable to the plaintiff prevails in the place from which the defendant shot. Under such a circumstance, the proper choice of law is less clear. Cf. *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957) (dram shop act case; plaintiff, injured in state A by act of intoxicated driver who became intoxicated in state B may sue under dram shop act of state B). *Contra*, *Eldridge v. Don Beachcomber, Inc.*, 342 Ill. App. 151, 95 N.E.2d 512 (1950).

state, in accordance with the old *Restatement* rule,⁵ also make it reasonable to select the courts of that state as a proper forum in which to resolve the issues of liability. The plaintiff's state has a legitimate and important interest in protecting persons within its borders from such events and in assuring adequate compensation to victims. Furthermore, the defendant has consciously offended the law and the tranquillity of the plaintiff's state. While he has not actually consented to adjudication of his liability there, such consent can be fabricated by reliance on the same sort of moral claim that frequently gives rise to fictional contracts.⁶ The civil law of battery is sufficiently important to the common welfare that its application should not be frustrated by the skill of the defendant in evading the process server.

Compelling as this conclusion may be, it would have been dubious at the beginning of the century. Conventional analysis would have limited the power of the state to the reach of its process servers.⁷ The ritual could not be performed in the absence of the defendant,⁸ and it would deprive him of due process of law to proceed without such a demonstration of power. While the result was unsatisfactory in its application to the hypothetical, such frustrations were borne. Partly, this was because they were infrequent.⁹ As interstate activity increased to a level that made such irritations noticeable, exceptions to the requirement of the ritual increased.

Perhaps the first challenge came with the emergence of the corporate form, which was not easily assimilated to the needs of a physical ritual. Accommodations were made which tended generally to favor the exercise of power to protect local citizens from the transgressions of foreign corporations.¹⁰ It was, however, the development of the public interest in compensation of automobile accident victims which brought the simple ritualism to bay.¹¹ In the early years of

5. RESTATEMENT OF CONFLICT OF LAWS §§ 377-90 (1934).

6. See J. DAWSON, UNJUST ENRICHMENT 10-26 (1951).

7. Dull v. Blackman, 169 U.S. 243, 247 (1898).

8. There are some minor exceptions to this, most notably if the absent defendant was domiciled in the forum [*Hurlbut v. Thomas*, 55 Conn. 181, 10 A. 556 (1887); *Huntley v. Baker*, 40 N.Y. Sup. Ct. (33 Hun.) 578 (1884)], or if the case in which jurisdiction was contested was some form of continuation of another proceeding in which the forum had jurisdiction [*Nations v. Johnson*, 65 U.S. (24 How.) 195 (1860); *Michigan Trust Co. v. Ferry*, 228 U.S. 346 (1913)].

9. In 1951, Professor Ehrenzweig reported that the case of a person firing across a state border had never arisen in an American court. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1, 31 (1951).

10. The leading case is *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855).

11. Cf. *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 341 (1953) ("The [jurisdic-

interstate automobile litigation, an effort was made to base jurisdiction on the consent of the non-resident motorist.¹² But soon it was recognized that the consent was fictional¹³ and that jurisdiction rested on the moral claims of the state to the power to protect the common welfare of its people.¹⁴

Similar substantive policies produced similar results when the interstate sale of investment securities¹⁵ and life insurance policies¹⁶ created special needs which could be met only by the assertion of power over persons beyond the reach of conventional service of process. There followed a flood of cases in which suppliers of goods were subjected to the power of the states in which defects in their merchandise took harmful effect.¹⁷ By stages, these substantive exceptions have consumed the better part of the old rule,¹⁸ so that it now

tional] liability rests on the inroad which the automobile has made on the decision of *Pennoyer v. Neff*.”).

12. The leading case to enunciate this principle was *Hess v. Pawloski*, 274 U.S. 352 (1927).

13. Scott, *Jurisdiction Over Nonresident Motorists*, 39 HARV. L. REV. 563 (1926) [commenting on the state court decision, *Pawloski v. Hess*, 253 Mass. 478, 149 N.E. 112 (1925)].

14. Cf. *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 341 (1953) (“The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him . . .”); see Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 ILL. L.F. 533, 540.

15. *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

16. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). See also *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950) (dictum).

17. Among the leading cases are *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664, 25 A.L.R.2d 1193 (1951). *Contra*, *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956); *Johns v. Bay State Abrasive Prods. Co.*, 89 F. Supp. 654 (D. Md. 1950).

18. Cf. *Buckley v. New York Post Corp.*, 373 F.2d 175, 180-81 (2d Cir. 1967) (“The past fifty years have seen such a widespread adoption of statutes asserting personal jurisdiction over nonresidents and so many decisions upholding their constitutionality as to constitute a veritable *bouleversement* of the magisterial pronouncement in *Pennoyer v. Neff*.”); A. EHRENZWEIG, *CONFLICT OF LAWS* 78 (1962) (“In this country, too, fairness to the parties has increasingly become the determining factor in the development of the law of jurisdiction.”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 74(1) (Tent. Draft No. 3, 1956) (“A state has judicial jurisdiction over a person if the person's relationship to the state is such as to make the exercise of judicial jurisdiction reasonable.”); Ehrenzweig, *supra* note 2, at 292 (1958) (“[N]on-resident, absent individuals not transacting business in the state will have to remain exempt from jurisdiction with specific exceptions to be established from case to case. *Pennoyer* will continue to haunt *McGee*.”); von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128 (1966) (noting the “movement away from the bias favoring the defendant toward permitting the plaintiff to insist that the defendant come to him”). But cf. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 S. CR. REV. 241 (“Its rules of jurisdiction have been gradually abandoned in detail But the conceptual structure established by *Pennoyer* remains substantially intact.”).

seems more accurate to describe the present rule as one favoring the constitutionality of the exercise of state judicial power so long as "minimum contacts"¹⁹ with the defendant or the case can be demonstrated. Today, there seems to be no doubt that the state of injury could assert its power over the foreign gunman to the extent necessary to fix his civil liability.²⁰

II. SUBSTANTIVE POLICY AND "MINIMUM CONTACTS":

A VARIABLE TEST

The Supreme Court has provided the slogan of "fair play for the defendant" to help work out the limits of state power in cases less easily resolved than that of the interstate gunman.²¹ This slogan is said to mean that the state may exercise judicial power only over defendants with whom it has at least "minimum contacts."²² It is the thesis of this article that the requisite minimum quantum of "contact" between the defendant and the forum does and should vary with the measure of the values affected and the costs inflicted by the attempted exercise of power. In other words, the test, however phrased, must be adapted to the needs of each of the environments in which it must operate. In light of the history of state judicial power just described, with its marked emphasis on special exceptions for special substantive needs, and in light of all that has been said about the need for balanced judgment in the application of the due process requirement to a variety of problems,²³ it is perhaps surprising to find a need to make this observation. But courts engaged in the daily occupation of deciding cases one at a time, when con-

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

20. *Roy v. North Am. Newspaper Alliance*, 106 N.H. 92, 97, 205 A.2d 844, 847 (1964) ("If a defendant . . . negligently shoots a bullet from state X into state Y . . . we do not seriously question the right of the injured person to seek redress in state Y and exercise judicial jurisdiction over the defendant in state Y."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84, Illustration 3 (Tent. Draft No. 3 1956):

A is engaged in blasting operations in a part of state X which is close to the border of state Y. A stone, hurled into the air by an explosion, falls upon B's house in Y. If a Y statute so provides at the time of this occurrence, Y can exercise judicial jurisdiction over A and entertain in its courts B's action against him.

21. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (quoted in *International Shoe Co. v. Washington*, 326 U.S. 310, 316).

22. For a fuller elaboration of the "minimum contacts" rule in practice, see generally Currie, *supra* note 14, Hazard, *supra* note 18, and von Mehren & Trautman, *supra* note 18.

23. Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A.L. REV. 1 (1965), discusses balancing, the constitutional protection of free speech, and reviews some of the recent literature. In advocating a clearer understanding of the technique, he feels moved to apologize that we have undoubtedly learned more about balancing than we wanted to know. *Id.* at 22, n.92.

fronted with factual settings that vary as greatly as the differing legal principles they are asked to enforce, seldom find occasion to make the kind of comparisons which would reveal the plasticity of the constitutional test being applied. As a consequence, there is a danger that the "minimum contacts" formulation may take on a rigid aspect that will induce some courts to disguise or secrete some of the factors influencing their decisions, and may induce others to make decisions as unreasonably burdensome to defendants as the old *Pennoyer* principle was to plaintiffs.

A. *The Hierarchy of Interests*

It is perhaps unnecessary to assert that there is a discernible hierarchy among the many interests and values which may be asserted in favor of a decision to exercise, or to refrain from exercising, the judicial power. It would require an author of more than ordinary pride of opinion to undertake a complete description of that hierarchy, and the complete picture is not necessary to an understanding that some rights are more important than others. A few examples may nevertheless be helpful. Thus, some years ago, Lon Fuller and William Perdue undertook to describe one aspect of the structure in Aristotelian terms:

It is obvious that the three "interests" we have distinguished do not present equal claims to judicial intervention. It may be assumed that ordinary standards of justice would regard the need for judicial intervention as decreasing in the order in which we have listed the three interests. The "restitution interest," involving a combination of unjust impoverishment with unjust gain, presents the strongest case for relief. If, following Aristotle, we regard the purpose of justice as the maintenance of an equilibrium of goods among the members of society, the restitution interest presents twice as strong a claim to judicial intervention as the reliance interest, since if A not only causes B to lose one unit but appropriates that unit to himself, the resulting discrepancy between A and B is not one unit but two.

On the other hand, the promisee who has actually relied on the promise, even though he may not thereby have enriched the promisor, certainly presents a more pressing case for relief than the promisee who merely demands satisfaction for his disappointment in not getting what was promised him. In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle's terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restoratively, and assumes a more

active role. With the transition, the justification for legal relief loses its self-evident quality.²⁴

If this is sound analysis, and accurately reflects the values which our judges bring to their work, we must expect that somewhat less contact with the forum state will generally be necessary to trigger a response favorable to the exercise of power in a restitution case than in a reliance case, while less will generally be required in a reliance case than in an expectation case. At least, this will be so to the extent that we are able to identify these substantive differences at the preliminary stages of litigation.

Similarly, we might suggest that, within the sphere of compensatory tort litigation, plaintiffs who appear to have suffered bodily injury are generally somewhat more likely to succeed in invoking the jurisdictional long-arm than those whose interests are wholly economic, and that within these categories the tangibility of the alleged harms may be a factor in influencing the judgment. Significant, too, is the extent to which the moral values of the forum state are threatened by the alleged conduct of the defendant; this may involve an appraisal not merely of the blameworthiness of particular acts, but also of the moral responsibility assumed by the defendant through a course of conduct.²⁵ As Robert Keeton has taught us,²⁶ the imposition of liability without fault is not an amoral economic decision; to some extent, it may reflect simply a broader moral judgment than is usually made. Thus, the supplier of potentially harmful goods may be viewed as undertaking a special responsibility for the welfare of the consumers which makes it peculiarly inappropriate for him to resist the moral claim of the state when it seeks to assert power over him. This undertaking is less relevant when the same supplier is engaged in a warranty dispute over the quality of delivered goods with a commercial buyer who was in a position to bargain for a local forum if he regarded the risk of distant litigation as a significant aspect of his contract relation; in such a dispute, the supplier is in a stronger position to resist the use of the long-arm on the basis of attenuated contacts.

24. Fuller & Perdue, *Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 56-57 (1936).

25. The Indiana defendant in *Keckler v. Brookwood Country Club*, 248 F. Supp. 645 (N.D. Ill. 1965) sought to quash service on one count against it, based on strict liability, but not on the other, based on negligence. The court found that the Illinois long-arm statute was intended to cover strict liability cases as well as negligence cases and that such coverage was constitutional, but it quashed service because of insufficient allegations concerning the nature of the defendant's business.

26. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

Also, it seems useful to suggest that claims seeking to impose sanctions which are primarily punitive may be ranked toward the lower end of the spectrum, generally requiring greater contact between the defendant and the forum that proposes to punish him. Stated another way, the fact that a plaintiff has suffered a wrong in his state of residence, from acts occurring elsewhere, may sometimes be considered a "contact" between his state and the defendant alleged to have caused the harm. But this same contact is less substantial in an action to exact a penalty for improper conduct than in an action to recover for injury actually suffered by the plaintiff.²⁷ A state court seeking to exercise the power to make a moral judgment about events occurring elsewhere, when that judgment is not apparently supported by a need to compensate loss, is in the position of a busybody. The defendant who resists its power is in a very strong position to invoke the restraint of due process.

B. *The Competition of Interests*

In addition to the hierarchical aspect of the interests that may be served by the exercise of power, it is relevant to weigh in the balance the apparent costs. If some classes of cases seem to bear a higher price than others, this may indicate the wisdom of caution or restraint in the exercise of power. It might thus be suggested that actions arising from relations which have a recognizable center outside the forum state and which may involve persons other than the litigants may require a higher measure of contact with the forum than those in which such factors are absent. There are, of course, many well-defined restraints of this sort, which have served as due process limitations on the power of the state courts from the beginnings of the fourteenth amendment. Generally, these constitutional restraints have been expressed in the form of a requirement of jurisdiction over a res which is the object of the relationship. This kind of conceptualism has served to supply restrictions on the power of state courts to litigate matters concerning the ownership of foreign lands and chattels.²⁸ By extension, it has served to restrict

27. The local quality of such "penal" (yet civil, not criminal) actions has long been recognized. *E.g.*, *Richardson v. New York Cent. R.R.*, 98 Mass. 85 (1867); *McGrath v. Tobin*, 81 R.I. 415, 103 A.2d 795 (1954). *See generally* EHRENZWEIG, *supra* note 18, at 134 (1962). At the time of *Pennoyer v. Neff* it was even possible to argue that a judgment fixing liability for violation of the penal statutes of a state would not be entitled to full faith and credit elsewhere, though such is no longer the case. *Huntington v. Atrill*, 146 U.S. 657 (1892).

28. *Fall v. Eastin*, 215 U.S. 1 (1909); *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895); *Livingston v. Jefferson*, F. Cas. No. 8411 (D. Va. 1811). *But see* *Reasor-Hill Corp.*

power over foreign family relations.²⁹ With respect to such matters, even service of process has been deemed an inadequate basis for the exercise of jurisdiction.

While most constitutional restrictions on jurisdiction can be traced to the fourteenth amendment, the commerce clause has also been invoked to restrain assertions of state jurisdiction which might place an undue burden upon interstate commerce.³⁰ Though the commerce doctrine developed before the emergence of a "minimum contacts" test, concern with the effects on commerce of too loose a standard of jurisdiction has not abated. Citing, by way of example, the economic effects of long-arm jurisdiction over such modest entrepreneurs as the California tire dealer selling to Pennsylvania tourists, Judge Sobeloff has warned that "[i]t is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states."³¹

Many restraints on state jurisdiction have been self-imposed, so that the full development of constitutional doctrine has been obviated. Thus, the historic incapacity of foreign administrators and

v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952); Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

29. A state court may not dissolve a marriage unless at least one of the partners is a resident of the state. This is true even when both parties are, by their casual presence, subject to service of process within the state. The rationale for this rule is the unique interest of the state of domicile in the res of the marriage relation. A divorce decree may be attacked collaterally in the courts of a sister state if the attacking party can show that neither party was domiciled in the forum state and that one of the parties neither argued nor consented to jurisdiction. For the development of the jurisdictional question in the Supreme Court, see *Williams v. North Carolina*, 325 U.S. 226 (1945); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 421-23 (1957) (history of development in the dissent). Similar restrictions exist in cases involving other family relations.

30. The doctrine was announced in *Davis v. Farmers Co-operative Equity Co.*, 262 U.S. 312 (1923), and developed in *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924); *St. Louis B. & M. Ry. v. Taylor*, 266 U.S. 200 (1924); *Hoffman v. Foraker*, 274 U.S. 21 (1927); *Michigan Cent. R.R. v. Mix*, 278 U.S. 492 (1929); *Denver & Rio Grande R.R. v. Terte*, 284 U.S. 284 (1932); *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934). From 1923 until 1951, the number of cases considering the *Davis* principle averaged about 3.2 per year. Since 1951, the average has been just under 1.2 per year. During both periods the principle was applied in approximately one-third of the cases in which it was considered. For some recent cases applying the principle, see *White v. Southern Pac. Co.*, 386 S.W.2d 6 (Mo. Sup. Ct. 1965); *Glaser v. Pennsylvania R.R.*, 82 N.J. Super. 16, 196 A.2d 539 (Super. Ct. 1963); *Ceravit Corp. AG v. Black Diamond S.S. Corp.*, 44 Misc. 2d 484, 254 N.Y.S.2d 253 (N.Y. Civ. Ct. City N.Y. 1964).

31. *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956). At least two other courts have expressed recent concern about the effects of overly liberal long-arm rules on commerce. See *Fourth N.W. Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 117, 117 N.W.2d 732, 736 (1961); *Conn v. Whitmore*, 9 Utah 2d 250, 255, 324 P.2d 871, 874 (1959).

trustees³² is partly explained by a reluctance to intervene in the administration of foreign trusts and estates. While this incapacity has been partly overcome,³³ so that a more sophisticated reaction to cases involving foreign trusts and estates has become possible, there is still an evident reluctance to exercise state power in a manner that would be disruptive of such relationships.³⁴ It seems quite likely that this reluctance has some basis in a due process restraint; indeed, the existence of such a restraint is a possible explanation for the decision in *Hanson v. Denckla*.³⁵ Likewise, the widely recognized "internal affairs" doctrine, which is applied to corporate shareholder litigation,³⁶ probably contains a core of constitutional force. "Minimum contacts" and "fair play" have not developed in their application to these classes of cases, for the reason that state practice has generally been well within the constitutional limits.

Properly included, also, as a means of self-restraint which may disguise a constitutional requirement in some of its applications, is the doctrine pertaining to indispensable parties.³⁷ Again, this is a means of recognizing the importance of foreign relationships which ought not be disrupted by the application of the local judicial power over parties who may be disabled from meeting obligations to others not subject to the court's power, or who may be subjected to overlapping and conflicting claims or obligations. There seems to be little question that some parties are constitutionally indispensable because of the unreasonable disruption of their affairs likely to result from the proceeding placed under restraint.³⁸

This brief catalogue of exceptions to the general presumption

32. See discussion and cases cited in EHRENZWEIG, *supra* note 18, at 44-48, 60-64 (1962).

33. *Id.* at 48-54, 64.

34. Witness especially the exceptions to the capacity-giving statutes discussed in *id.* at 62-63.

35. 357 U.S. 235 (1958). The Court's own rationale was obscure. Cf. Hazard, *supra* note 18, at 244 (describing the *Hanson* decision as "fair" but obtained "by an analysis that in all charity and after mature reflection is impossible to follow").

36. The courts are reluctant to entertain suits dealing with the internal affairs of foreign corporations even when, by ordinary standards, "contacts" are sufficient to support a suit. The question is generally treated as discretionary. *Williams v. Green Bay & W.R.R.*, 326 U.S. 549 (1946); *Dudley v. Jack Waite Mining Co.*, 49 Wash. 2d 867, 307 P.2d 281 (1957). The rule is not discretionary in Pennsylvania, though the state supreme court still claims that the state courts have the power to try such cases. *Plum v. Tampax*, 399 Pa. 553, 160 A.2d 549 (1960). See EHRENZWEIG, *supra* note 18, at 135-36 (1962).

37. *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854); FED. R. CIV. P. 19; see Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403, 419-21 (1965).

38. Cf. *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961) (discussed in text accompanying note 49 *infra*).

favoring the constitutionality of the exercise of state power whenever "minimum contacts" can be found is probably not exhaustive. But it seems sufficient to serve as the basis for the suggestion that the due process appraisal embodies an analysis not only of the interests served, but also of those disserved, by the proposed exercise of power. Undoubtedly, some of the exceptions listed do not in practice take the form of litmus paper tests which invoke total restraints on the state power or none at all. It seems likely, in fact, that many may involve shaded applications: the greater the "contacts," the smaller the inhibition. Rule 19 of the Federal Rules of Civil Procedure is now quite explicit in requiring the exercise of this kind of balanced discretion in the application of the indispensable parties doctrine,³⁹ and it is difficult to imagine that the constitutional doctrine contained within it could take on a very different contour.

Indeed, it may be that these interests favoring restraint are often inescapably compelling to the court making the due process decision. Others have pointed out in a different context that a judicial judgment as to the presence or absence of substantive policies necessitates a relative evaluation.⁴⁰ To put the matter figuratively, the closing of one eye does not often significantly alter the range of vision.⁴¹ So visible are the needs for restraint that they will impel a

39. Rule 19 provides that: "[T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Balancing and discretion are clearly directed by these words. See FED. R. CIV. P. 19 (Advisory Committee's Note on 1966 amendment). See generally Fink, *supra* note 37, at 403; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

40. E.g., Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757 (1963):

[T]he mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose.

41. The concept of a unilateral weighing of interests also seems to appear in the recent decision of the Third Circuit in *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 365 F.2d 802 (3rd Cir. 1966), *cert. granted*, 386 U.S. 940 (1967). The court held that it was inappropriate to consider the interests of the plaintiff in making a determination as to whether an absent party is indispensable; to the extent that the new Rule 19 requires a relative balancing of interest, it was deemed invalid as beyond the authorization conferred by the Rules Enabling Act, 28 U.S.C. § 2072 (1964). The decision rests on a misunderstanding of *Shields v. Barrow*,

response, whether or not the court is conscious or articulate in evaluating the competition between interests.

Even if it might be possible in some instances to ignore competing values, it would hardly be wise to do so if healthy federal relations are to be preserved. It is often true that the countervailing policies which favor restraint will have no political outlet in the forum state. The interests are embodied in the litigating apparel of nonresident defendants, who are unlikely to have any leverage in the law-making processes of the state. The favorable presumption with which state law is ordinarily viewed when challenged under the due process clause is based in part on an assumption that the state law reflects a balanced political evaluation; with respect to laws pertaining to jurisdiction over non-residents, such an assumption is unfounded.⁴² Long-arm legislation applies only to those who are not constituents, and usually favors those who are. If the kinds of considerations which have served to support the historic restraints pertaining to foreign property, foreign relationships and statutes, and to indispensable parties are to be maintained, it must be through the exercise of a balanced judgment in which proper weight is assigned to competing values which would be served by the restraint of state judicial power.

Thus, it may be concluded that the test required by the due process limitation on the power of state courts involves the appraisal of interests disfavoring, as well as of interests favoring, the exercise of state power. The Supreme Court of Illinois has recently put the matter thus:

[P]rocedural rules must be designed and appraised in light of what is fair and just to both sides in the dispute. Interpretations of basic rights which consider only those of a claimant are not consonant with fundamental requisites of due process.⁴³

We are unlikely to develop a knowing instinct about the limits of state judicial power without an awareness of this. "Minimum contacts" alone is an inadequate doctrinal tool, for in this respect it reveals too little about the factors which must influence judgment.⁴⁴

58 U.S. (17 How.) 130 (1854), and long-standing practice in the use of the indispensability principle. See Hazard, *supra* note 39; Reed, *supra* note 39. For a more realistic decision by the same court see *Kroese v. General Steel Castings Corp.*, 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950).

42. See the Rhode Island statute discussed in note 54 *infra*.

43. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 441, 176 N.E.2d 761, 766 (1961).

44. The consequences of this inadequacy are perhaps illustrated in the opinions in

III. THE VARIABLE MINIMUM IN PRACTICE

The Supreme Court has never articulated the principle just tendered, at least in the form in which it is expressed here. Only once in modern times, however, has the Court undertaken to give expression to a general principle governing the application of the due process clause to the power of state courts;⁴⁵ the "fair play" formulation which emerged from that opinion is hardly inconsistent with what has been said here, if, indeed, it is not a limited statement of the need for interest analysis.⁴⁶ Otherwise, the Court has been careful to circumscribe its decisions. In *McGee v. International Life Insurance Co.*,⁴⁷ the Court upheld the power of the California court with an explicit reference to the substantive importance of insurance regulation. In *Hanson v. Denckla*, the power of the Florida court was denied, for reasons that were narrowly applicable, perhaps only to Florida estates.⁴⁸ In *Western Union Telegraph Co. v. Pennsylvania*,⁴⁹ the power of the Pennsylvania court was circumscribed for reasons that were largely peculiar to the circumstances of escheat litigation. This was followed, in *Texas v. New Jersey*,⁵⁰ by the Court's effort to formulate rather specific rules for escheat. In this latter case, the Court observed that "the 'contacts' test as applied in this field is not really any workable test at all."⁵¹ Finally, in *United States v. First National City Bank*,⁵² the Court upheld the jurisdiction of the United States over foreign subsidiaries of American banks, for the purpose of freezing assets to secure the payment of

Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966). The majority ruled that, despite the publication in Alabama of an alleged libel by the defendant against the plaintiff (the former a Pennsylvania corporation, the latter commander of the Mississippi Highway Patrol), Alabama had insufficient interest in the case to allow it to long-arm the defendant without a violation of due process. The existence of minimum contacts, while discussed, was not decided. Judge Rives, specially concurring (at 348), found that there were sufficient minimum contacts between Alabama and the defendant, but agreed that Alabama interest in the case was insufficient to support jurisdiction consonant with due process.

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

46. For example, the Court's discussion of those cases in which single torts have and have not given rise to jurisdiction distinguishes them not only by the "quality and circumstances" of the commission of the tort, but also by their "nature." 326 U.S. at 318. Von Mehren and Trautman note that the case can be explained as one in which jurisdiction is asserted "in order to vindicate substantive-law policies." Von Mehren and Trautman, *supra* note 18, at 1176-77.

47. 355 U.S. 220 (1957).

48. See von Mehren and Trautman, *supra* note 18, at 1174-75.

49. 368 U.S. 71 (1961).

50. 379 U.S. 674 (1965).

51. *Id.* at 679.

52. 379 U.S. 378 (1965).

American taxes by foreign corporations. The Court carefully noted that jurisdiction would not be sustained on the basis of the same contacts with respect to all the affairs of the branch bank;⁵³ but the importance of protecting the national revenue outweighed the contention of the taxpayer, which was based on the thinness of the contacts.

To some extent, the stolid reluctance of the Court to be drawn into overgeneralization has been mirrored by others. Some of the state legislatures seeking to exploit the new range of judicial power opened up by the demise of *Pennoyer v. Neff* have been wise enough to perceive that the long-arm approach was more appropriate to some kinds of cases than to others.⁵⁴ To some extent, state law has been interpreted to allow discretion in applying differing standards to different classes of cases.⁵⁵ This has perhaps been more true in deed than in word. For example, one might infer on the basis of reported results that somewhat more contact is required to support jurisdiction in a commercial warranty case than in a personal injury case,⁵⁶ but it is a vain search for an explicit statement that this is so.⁵⁷

To the contrary, there has been some impetus to build the minimum contacts test into a rigid test, good for all occasions. This has been associated in some cases, and in some of the secondary litera-

53. *Id.* at 384.

54. The Maine statute, ME. REV. STAT. ANN. tit. 14 § 704(B) (1965) restricts long-arm jurisdiction in tort cases to those involving physical injury to person or property. The New York statute, N.Y. CIV. PRAC. LAW § 302 (McKinney 1963) specifically excludes defamation as a basis for long-arm jurisdiction. Rhode Island has gone as far as possible in the other direction, asserting jurisdiction "in every case not contrary to the provisions of the constitution or laws of the United States." R.I. GEN. LAWS ANN. § 9-5-33 (Supp. 1966).

55. See *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964) (in which the court expressed its belief that Mississippi requires more than merely minimum contacts to assert jurisdiction over publishers, the rule being in deference to freedom of the press). In dramatic contrast to the selective self-restraint attributed to Mississippi in *Walker v. Savell* is *St. Clair v. Richter*, 250 F. Supp. 148 (W.D. Va. 1966). There a federal district judge ruled that state court jurisdiction extended to the limits of due process unless specifically limited by the state legislature.

56. No attempt has been made at a statistical study. A comparison of *Grobark v. Addo Mach. Co.*, 16 Ill. 2d 426, 158 N.E.2d 73 (1959), with *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), or of *Fourth N.W. Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962), with *Adamek v. Michigan Door Co.*, 260 Minn. 54, 108 N.W.2d 607 (1961), however, illustrates the general principle.

57. *But cf.* *Fourth N.W. Nat'l Bank v. Hilson Indus., Inc.*, 264 Minn. 110, 114-16, 117 N.W.2d 732, 734-36 (1961) in which a distinction between suits involving *individuals* and those involving only corporations is made; and *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502, 507 (4th Cir. 1956) where Judge Sobeloff expresses reservations about long-arm jurisdiction whether invoked to redress personal injuries or breach of warranty.

ture, with an effort to focus attention exclusively on the activity of the defendant with a view to determining whether he had reason to foresee the application of power by the forum state.⁵⁸ Such inquiries have even led to rather specific factual inquiries about the character of the defendant's business and its expectations.⁵⁹ The tendency has been in the direction of requiring a trial of the jurisdictional facts as a preliminary warm-up for the main event. This general "refinement" of the minimum contacts test has occurred most frequently in the setting of products liability cases.

Against this background the Fifth Circuit was recently required to decide two cases in which the *New York Times* was defending itself against defamation claims arising from its reports on race relations in the South. One action was brought in Louisiana,⁶⁰ the other in Alabama.⁶¹ The plaintiffs pointed to the presence of "stringers" who reported to the *Times* on a random basis, to the occasional presence of full-time reporters, and to the fact that their local reputations had suffered. They also pointed to circulation and advertising revenues received by the *Times*. In the second case it was also emphasized that information for the allegedly defamatory article was gathered in Alabama by a full-time reporter sent there by the *Times*. These contacts surely exceeded those ordinarily required in products liability cases; if "minimum contacts" were a phrase of constant meaning, jurisdiction should have been sustained in both cases. The Fifth Circuit declined, however, to make such wooden applications of the "minimum contacts" rule. In the second case the court observed that "[f]irst amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."⁶² It then held that the contacts between Alabama and the *New York Times* were insufficient to support jurisdiction. Perhaps this holding can be questioned, but the propriety of applying a different standard than that applied in products liability cases cannot be soundly challenged. A realistic appraisal of the issue could not blink several important facts. First, the

58. *E.g.*, *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 442, 176 N.E.2d 761, 766 (1961) ("products presumably sold in contemplation of use here"); *Currie*, *supra* note 14, at 540.

59. *See* *Unicon Management Corp. v. Koppers Co.*, 38 F.R.D. 474 (S.D.N.Y. 1965); *United States v. Montreal Trust Co.*, 35 F.R.D. 216 (S.D.N.Y. 1964). In the former case, jurisdictional facts were ordered resolved by affidavits; in the latter a full and separate hearing was ordered to determine such facts.

60. *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964).

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

62. *Id.* at 572.

plaintiffs were unable to point to any tangible injury; their claims were largely punitive, or retaliatory, in purpose. Second, the defamations alleged were closely related to matters of public discourse, with respect to which the law of defamation has only very marginal application, and with respect to which the choice of forum is an extraordinarily critical matter. In short, the rights asserted by the plaintiffs were most fragile. Third, the activities of the *New York Times* appear to have a vortex in the New York metropolitan area; as a semipublic institution of that community, the *Times* embodies the interests of many to whom a southern court and jury are likely to be somewhat indifferent. In reciprocal terms, if Alabamians are to judge the motives of New York journalists, and New Yorkers are to judge the motives of Alabama journalists, there is a real likelihood of repression of speech of the kind most highly valued in each community. While the *Times* could take the unlikely step of avoiding future liabilities and regaining most of its freedom by cutting off its marginal southern subscriptions, this consolation is meager: the consequences of the act would still be felt strongly, and unfavorably, in the South. When all is considered, it was not unreasonable for the federal court to stay the state power, adjudging that a reasonable balance of the interests required that the plaintiffs present their claims in a forum closer to the center of the *Times'* activities.

Nevertheless, the Fifth Circuit advanced its thesis with great diffidence.⁶³ And, most recently, it has taken occasion to distinguish the *Saturday Evening Post* from the *New York Times*, holding the former amenable to suit in Louisiana.⁶⁴ The court pointed out that the *Saturday Evening Post* was a national publication, and that the location of its headquarters in Philadelphia was incidental. Accordingly, Louisiana was as proper a forum as any. That the alleged defamation pertained to a charge of gangsterism may also have influenced the court somewhat. The issue is quite different from the issue of seditious libel which made the choice of forum so critical in the two Fifth Circuit *New York Times* cases.⁶⁵ One reason for re-

63. "Nevertheless, since *Buckley* [on which *Connor* relied] has been subjected to criticism, and since these parties are now before this Court for the third time on matters involving the same piece of litigation, we deem it proper from the standpoint of judicial administration to consider the merits of this case." *Id.* at 573.

64. *Curtis Publishing Co. v. Golino*, 383 F.2d 586 (5th Cir. 1967).

65. *Cf. Curtis Pub. Co. v. Butts*, 388 U.S. 130, 153 (1967) (Harlan, J.: "In [*New York Times Co. v. Sullivan*] we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability"); *Garrison v. Louisiana*, 379 U.S. 64, 72 n.8 (1964) ("We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned").

straint that had been present in the former cases was therefore absent.

Meanwhile, the Fifth Circuit decision in the first of the *Times* cases had been followed by a federal court in Connecticut,⁶⁶ which dismissed an action brought against the *New York Post*. This was reversed by the Second Circuit,⁶⁷ which rightly observed that the contacts between Connecticut and the *New York Post* were very substantial. Even by relatively antique standards, the *New York Post* might have been deemed to be "doing business" in Connecticut. Judge Medina, concurring in the result, expressed obvious approval of the principle announced by the Fifth Circuit, but he did not find it applicable to the case before him.⁶⁸ Judge Friendly, however, was less clear in his position. He offered the thought that the first amendment interests might be more appropriately assimilated to the doctrine of forum non conveniens than to minimum contacts; the former doctrine, he suggested, may perhaps attain "special dimensions and constitutional stature."⁶⁹ With respect to this latter innovation, it is difficult to know precisely what Judge Friendly had in mind. It is surely true that the same considerations which are appraised for the purpose of the due process decision bear as well on the issue raised by a motion to transfer or dismiss because of the inconvenience of the forum. But the discretion vested in the trial judge⁷⁰ and the limited appellate review available on rulings which deny such transfers or dismissals⁷¹ are features which seem inconsistent with "constitutional stature." Inasmuch as the outcome would seem the same regardless of the doctrinal association made, it would seem that Judge Friendly has expressed substantial approval of the Fifth Circuit's willingness to distinguish defamation cases from products liability cases.

IV. THE FLEXIBLE MINIMUM IN THE LITERATURE

As the Fifth Circuit observed in its second *Times* decision, its expressions of a flexible constitutional standard have not been

66. *Buckley v. New York Post Corp.*, 260 F. Supp. 282 (D. Conn. 1966).

67. *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967).

68. *Id.* at 184-85.

69. *Id.* at 183-84.

70. *Cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) ("The doctrine [of forum non conveniens] leaves much to the discretion of the court to which plaintiff resorts . . .").

71. *See Lansverk v. Studebaker-Packard Corp.*, 54 Wash. 2d 124, 132, 338 P.2d 747, 751 (1959); W. BARRON & A. HOLTZOFF, 1 FEDERAL PRACTICE AND PROCEDURE 433-40 (Wright ed. 1960).

warmly received.⁷² Apparently distressed by the threat to the pat formulation of the minimum contacts doctrine that had emerged from products liability litigation, a *Columbia Law Review* Comment accused the court of "tampering with due process" in the second case.⁷³ Others have joined a chorus of comments chiding the court for its offense to the principle of neutral principles.⁷⁴ The untidy mixing of substance and procedure has been deplored as an almost unnatural complication. All of this appears to reflect a misconception of the decisional process. The Fifth Circuit could hardly have considered the *Times* cases without recognizing what was really at stake. An attempt to fit the case into the existing rubric could only have produced a papering-over of the real considerations influencing the decision. Criticism of the kind described is unlikely to serve its intended purpose of promoting more "principled" decision-making; it is more likely to have quite the opposite effect. Failure to give explicit recognition to the impact of a decision on substantive interests tends to hinder our understanding, to promote the use of fiction, and to complicate the task of the advocate seeking to assist the court in making direct confrontation with the issues. This may result in more confusion and greater intellectual dishonesty than can possibly result from the efforts of the court to state candidly the respects in which the *Times* cases differed from others it had decided. The criticism of the Fifth Circuit seems, therefore, to be quite misguided.

Somewhat different reactions may be garnered from an examination of the scholarly efforts which seek to synthesize the emerging law of jurisdiction of state courts. On the whole, these have been much less inhospitable to the particularized approach advocated here than are the acerbic comments on the *New York Times* cases. The first work to be considered is the intensive study of the development of long-arm jurisdiction in Illinois by David Currie.⁷⁵ Professor Currie repeatedly advances substantive values as reasons favoring

72. See note 63 *infra*.

73. Comment, *Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word*, 67 COLUM. L. REV. 342, 361 (1967).

74. E.g., Note, 35 FORDHAM L. REV. 726 (1967); Comment, 52 IOWA L. REV. 1034 (1967); Comment, 34 U. CHI. L. REV. 436 (1967). In *Buckley v. New York Post Corp.*, 373 F.2d 175, 182 (2d Cir. 1967) Judge Friendly said:

We cannot but wonder whether the Connor court would have felt the same way if the *dramatis personae*, instead of being "Bull" Connor and a newspaper internationally known for its high standards, had been an esteemed local educator or clergyman and an out-of-state journal with a taste for scandal which had circulated 395 copies of a libel stating he had corrupted the morals of the young.

75. See Currie, *supra* note 58.

the exercise of power by Illinois,⁷⁶ and he concedes that the long-arm should not be invoked in the absence of compelling policy reasons favoring use.⁷⁷ There is, however, some imbalance in the presentation. Substantive policies disfavoring the exercise of power are brushed aside.⁷⁸ For example, in disapproving of an early defamation case, which may well have applied a variable standard without explicit recognition of it, Professor Currie expresses readiness to provide the defamation plaintiff with the same access to his state's courts as may be provided to the plaintiff alleged to have been personally harmed by defective goods.⁷⁹ He does not, however, explicitly reject the relevance of all countervailing policies. It would surely be very difficult to do so, while maintaining any claim to the balanced judgment required by the due process clause.

It may well be that Professor Currie's work is simply dated in its failure to recognize the occasional force of countervailing policy. Just a few years ago, at the time of his writing, there was still a general obsession with the constitutional perspective established by *Pennoyer v. Neff*. As long as the constitutional presumption favored the restraint of state power, our attention was directed to those substantive values which were prejudiced by excessive restraint. Only in very recent years have we achieved a recognition that the presumption has been reversed. Hence, it is only now that we are challenged to seek out and identify the interests that are prejudiced by excessive use of judicial power.

A second important work is that of Geoffrey Hazard,⁸⁰ which advances the thesis that due process appraisal should require careful attention to the relation between the forum and the transaction or activity at which the litigation is directed. Professor Hazard wisely acknowledges that his formulation of the minimum contacts test is not a universal solvent, and may be subjected to "arbitrary particularization,"⁸¹ such as that employed in *Texas v. New Jersey* and *United States v. First National City Bank*. One may quarrel only

76. *Id.* at 539 (discussing *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957)), 540 (discussing nonresident motorist cases), 556-58 (discussing defective tires purchased out of state), 565 (discussing tort and contract cases), 571 (discussing employment contracts).

77. *Id.* at 543-44.

78. Such policies are sometimes specifically rejected. *Id.* at 553 [discussing *Insull v. New York World-Telegram Corp.*, 273 F.2d 166 (7th Cir. 1959)], 570 [discussing *Morgan v. Heckle*, 171 F. Supp. 482 (E.D. (1959))]. Most often, however, they are simply ignored.

79. *Id.* at 553.

80. See Hazard, *supra* note 18.

81. *Id.* at 283.

with Professor Hazard's modifier, "arbitrary." He does not elaborate its meaning, but it seems unlikely that he meant to condemn the recognition of differences between cases which require that his insights be adapted to differing uses.⁸²

Most troubling in its seeming disregard of the need for substantive interest analysis is the work of Arthur von Mehren and Donald Trautman.⁸³ In a very skillful and elaborate treatment, they develop the concepts of "general" jurisdiction,⁸⁴ or the power to adjudicate any controversy involving the persons whose rights are to be affected, and "specific" jurisdiction,⁸⁵ which is jurisdiction to adjudicate only those matters consequentially related to the forum state. The authors find little need to consider substantive differences among cases. They concede that substantive concerns may explain an occasional exercise of power which was exceptional to the old *Pennoyer* principle; indeed, they suggest this explanation for the seminal case of *International Shoe*.⁸⁶ They also concede that the "true conflicts" case, in which the forum cannot rely on other courts to defer to a controlling substantive policy of the forum state, is a special situation calling for the exercise of power.⁸⁷ But their chief concern (in advancing the concept of specific jurisdiction) is directed toward the relative geographical extents of the parties' activities, and in particular to the litigational convenience or inconvenience implied by the defendant's relevant activities.⁸⁸

Von Mehren and Trautman have assuredly performed excellent service in identifying the issues of greatest concern to the proceduralist. Furthermore, "specific" and "general" jurisdiction are in all respects superior to the opaque concepts of "in personam," "in rem," and "quasi in rem" jurisdiction which they would displace. The vocabulary is more precise and the theory more useful. Nevertheless, such an approach may suffer from a failure to illuminate the role of substantive policy considerations. One trained in the method of von Mehren and Trautman might well encounter serious difficulty in coming to grips with the real issues in cases like the defamation cases confronted by the Fifth Circuit. On the basis of litigational

82. Indeed, Professor Hazard indicates that the participation or "arbitrary categorial subsystem" need not remain arbitrary but "can be criticized and corrected intelligently." *Id.* at 283 n.149.

83. Von Mehren & Trautman, *supra* note 18.

84. *Id.* at 1136.

85. *Id.* at 1145.

86. *Id.* at 1177.

87. *Id.* at 1176-77.

88. *Id.* at 1167-69.

convenience, or the relative breadth of the parties' activities, the balance surely seems to favor the exercise of power. Are the authors really bound to that result regardless of the extent to which it might chill the free exchange of ideas and information? One seeks in vain for a doctrinal basis upon which to distinguish seditious libel cases from personal injury products liability cases.

V. FLEXIBILITY AND COMPLEXITY

The most substantial reason that can be assigned for reluctance to recognize the need for making substantive distinctions is the fear that the jurisdictional issue may become so intolerably complex that our judicial operations will become overburdened, or top-heavy, with preliminary issues. This is a legitimate concern, especially in the light of recent developments in the use of the minimum contacts test, for it is already bidding to become unworkable. "Single-act" long-arm statutes,⁸⁹ for example, reveal the possibility of a merger between the jurisdictional issue and the merits, rendering it impossible to decide the issue of the proper forum without deciding the outcome of the dispute. The more thoroughly we press the analysis of contacts between the individual defendant and his transaction with the forum state, the more cumbersome the decision becomes. Many extraneous issues of fact may be raised, pertaining to the precise nature and extent of the defendant's operations and to his individual expectations.⁹⁰ In addition, the von Mehren and Trautman approach would seem to indicate a need to support the jurisdictional decision with fairly precise knowledge of the nature and extent of the evidence that will emerge at trial, for only with such knowledge can one make a sensible decision about litigational convenience and geographical contacts.

These developments raise a serious question about the proportion of our judicial resources we wish to invest in a preliminary issue that is tangential to the merits. We ought not to forget the experience of nineteenth century equity, which seemed to asphyxiate the rights of litigants with prolixity. Edson Sunderland⁹¹ and, later, Carleton Crick⁹² have reminded us of this risk in its application to overloading the appeal with preliminary jurisdictional issues. Re-

89. *E.g.*, ILL. REV. STAT. ch. 110 § 17(1)(b) (Supp. 1966) (providing for jurisdiction by reason of "[t]he commission of a tortious act within this State").

90. See notes 58 & 59 *supra*.

91. *The Problem of Appellate Review*, 5 TEXAS L. REV. 126 (1927).

92. *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 557-63 (1932).

cently, and more relevantly, Robert Kitch has suggested that the federal transfer practice is in danger of becoming more trouble than it is worth in the coin of interests protected by its use.⁹³ All rights must be discounted by the cost of enforcing them; on this basis, many interests that might be marginally affected by the jurisdictional decision must be ignored because of the excessive cost of accounting for them.

But there is no reason to apply such a sweeping discount to all substantive values, even if this were possible. We have known since the time of the first ruling on a demurrer that it is possible to make substantive legal decisions without a sure knowledge of the facts in issue. The thesis advocated here is not intended to extend the lines of factual inquiry at all. Rather it is intended that sensitive and candid use be made of the information which is already available before any trial is held. A litigant can be, and is, recognized as a member of a class, and the embodiment of its interests, without knowing whether he is a winner or a loser. No more than that sort of rough assessment is necessary or desirable in order to make a wiser preliminary decision on the issue of jurisdiction.

Indeed, it may even be suggested that a recognition of the differences between classes of cases may serve to simplify some jurisdictional disputes. Consider, for example, the use of long-arm legislation in products liability disputes. If we could but recognize that the use of the long-arm is an addendum to the substantive moral judgment we have made about the almost fiduciary obligation of manufacturers to make safe goods, we might dispel much of the uncertainty about the jurisdictional issue. Perhaps we could then recognize the irrelevance of some of the arid statistical analysis which has been made to serve in place of thoughtful consideration of the issues. We might then treat the small manufacturer of risky goods, much as Robert Keeton would treat his insolvent dynamiter,⁹⁴ as one who is less entitled to urge restraint in the use of judicial power. Data about his gross receipts and profits could be ignored. Similarly, in an analogous contract dispute over the quality of goods, the issue might in fact be simplified if we could regard the question as a very special aspect of contract interpretation. Also, in the seditious libel cases, we might spare ourselves the need to appraise a lot of dubious data about percentages of advertising receipts, circulation, and reportage,

93. *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice*, 40 IND. L.J. 99 (1965).

94. *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 419 (1959).

simply on the basis of a superficial examination of the character of the harm and the activity under attack.⁹⁵

We must be careful, to be sure, not to expect too much of this advantage to emerge from substantive interest analysis. Many hard cases will remain so. In the setting of the *New York Times* cases, for example, the question whether the *Times* is too much a national institution to urge an immunizing New York center of gravity remains a question of possible difficulty. To the extent that the techniques of judicial notice are inadequate to supply answers to that sort of question, there is danger that some erroneous decisions will be made with respect to jurisdictional questions. But that, of course, is nothing new, and suggests no reason for refraining from analysis of the substantive values obviously at stake in such cases.

VI. CONCLUSION

Surely, on balance, it seems reasonable to suppose that the jurisdictional decision will be much more clarified than complicated by unmasking the fact that the substantive consequences of the decision are an appropriate, if not an inevitable, concern. The due process requirement, like all other principles of procedure, is the servant of substance and must accommodate a variety of conflicting social needs.

95. For example, in *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966); the question was one of long-arm jurisdiction in a copyright infringement case. As the court noted in upholding jurisdiction: "Here of course, no First Amendment considerations make this a special case." *Id.* at 695.