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PERSONAL JURISDICTION AND THE BEETLE IN THE BOX†

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Suppose everyone had a box with something in it: we call it a "beetle." No one can look into anyone else's box, and everyone says he knows what a beetle is only by looking at his beetle.—Here it would be quite possible for everyone to have something different in his box. One might even imagine such a thing constantly changing.—But suppose the word "beetle" had a use in these people's language?—If so it would not be used as the name of a thing. The thing in the box has no place in the language-game at all; not even as a something; for the box might even be empty.¹

INTRODUCTION

Over the past few years, the United States Supreme Court has been particularly interested in personal jurisdiction questions.² De-

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¹ L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 293 (G.E.M. Anscombe, trans. 3d ed. 1958).

² See, e.g., *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980);

spite its apparent interest in the subject, the Court has been unable to develop a coherent doctrine. The result has been that every few years, the Court's description of personal jurisdiction is inconsistent with its recent prior precedent.

In 1980 in *World-Wide Volkswagen v. Woodson*, the Supreme Court described personal jurisdiction as "an instrument of interstate federalism."³ Two years later in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, the Court back-pedaled and explained that personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."⁴ Then, in 1985 in *Phillips Petroleum v. Shutts*, the Court explained that the purpose of personal jurisdiction is "to protect a defendant from the travail of defending in a distant forum."⁵ Three years later in *Van Cauwenberghe v. Biard*, the Court stated that personal jurisdiction does not entail a right to be protected from the burdens of trial, but entails only a right not to be "subject to the binding judgments" of particular places.⁶

The Court's struggle in the area of personal jurisdiction has reached the point that the Court is now having difficulty generating majority opinions. In its two most recent personal jurisdiction cases, *Asahi Metal Industry Co. v. Superior Court*⁷ and *Burnham v. Superior Court*⁸ the Court was unanimous in its conclusion, but deeply fragmented in its rationale.

The reason for the Court's difficulty in this area appears to be that personal jurisdiction is really a solution in search of a problem. Although the Court has thought "the problem" to be sufficiently important to warrant its hearing thirteen personal jurisdiction cases

Rush v. Savchuk, 444 U.S. 320 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977). In January 1991, the Supreme Court heard oral argument in yet another personal jurisdiction case, *Carnival Cruise Lines, Inc. v. Shute*, 897 F.2d 377 (9th Cir.), cert. granted, 111 S. Ct. 39 (1990).

³ 444 U.S. 286, 294 (1980).

⁴ 456 U.S. 694, 702 (1982).

⁵ 472 U.S. 797, 807 (1985).

⁶ 486 U.S. 517, 525 (1988). *Van Cauwenberghe* highlights a collateral but revealing issue involving personal jurisdiction—the issue of whether a refusal to dismiss a case for lack of jurisdiction is immediately appealable in federal court. *Id.* at 518–19. If personal jurisdiction is a kind of personal immunity that protects citizens from the processes of unrelated sovereigns or prevents the undue burdens of litigation in distant fora, this interest could not be vindicated except by allowing an immediate appeal. Nonetheless, in *Van Cauwenberghe*, the Court suggested almost offhandedly that immediate appeals would not be allowed in such cases. *See id.* at 526–27.

⁷ 480 U.S. 102 (1987).

⁸ 110 S. Ct. 2105 (1990).

in the past fourteen years, it has never explicitly defined the problem. To use the metaphor of Ludwig Wittgenstein, the Court seems to assume that we all know the characteristics of the beetle in the box of personal jurisdiction. Yet, because the Court has never actually described the "beetle," it seems subject to infinite change.

The plurality opinions in the recent *Burnham* case highlight this problem. In *Burnham*, the Court unanimously upheld the constitutionality of "transient" jurisdiction, that is, jurisdiction based solely on the fact that the defendant was served with process while present in the forum state.⁹ Justices Brennan and Scalia, each writing for separate pluralities, agreed that personal jurisdiction is controlled by "traditional notions of fair play and substantial justice."¹⁰ Rather than defining these notions, however, they focused on the extent to which these notions are subject to change.¹¹

Justice Brennan insisted that the relevant fairness principles evolve over time.¹² Yet, he also concluded that transient jurisdiction is still valid.¹³ It is unclear whether Justice Brennan believes the principles of fairness that he used to analyze transient jurisdiction are newly evolved ones that happen to yield the same result as the old principles, or whether he believes that, although the principles generally evolve, the principles relevant to this case have not changed.

Justice Scalia's opinion is troubling for a different reason. Justice Scalia argued that Justice Brennan's approach would allow the Court to compel states to change long-established practices based on "no authority other than individual Justices' perceptions of fairness."¹⁴ In order to prevent this standardless intrusion into state autonomy, Justice Scalia argued that the Court must rely on "tradition," namely, what was accepted practice in 1868 at the time of the adoption of the fourteenth amendment.¹⁵ Yet, Justice Scalia's opinion itself acknowledges that within a few decades of 1868, the Court began expanding jurisdiction beyond its "traditional" limits.¹⁶

⁹ *Id.* at 2119 (Scalia, J.); *id.* at 2119-20 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring); *id.* (Stevens, J., concurring).

¹⁰ *See id.* at 2114 (Scalia, J.); *id.* at 2120 (Brennan, J., concurring).

¹¹ Thus, *Burnham* is largely a continuation of the Supreme Court's debate concerning the proper methodology to be used in evaluating substantive due process claims. *See, e.g.,* Michael H. v. Gerald D., 109 S. Ct. 2333, 2341-46 (1989).

¹² *Burnham*, 110 S. Ct. at 2120-22 (Brennan, J., concurring).

¹³ *Id.* at 2124-26.

¹⁴ *Id.* at 2117-19 (Scalia, J.).

¹⁵ *Id.* at 2111.

¹⁶ *Id.* at 2113-15.

Thus, according to Justice Scalia's own opinion, it seems that in the area of personal jurisdiction it is not traditional to limit personal jurisdiction to its traditional limits.¹⁷

Ultimately, the dialogue between Justices Brennan and Scalia does little to illuminate personal jurisdiction. To return to the metaphor of the beetle in the box, Justice Brennan has looked in his box and announced that his personal jurisdiction beetle is evolving, though the particular part of the beetle in question has not changed. Justice Scalia has looked in his box and announced that his beetle cannot change, though he notes that another part of the beetle, not relevant to this case, has changed in the past.

Until we finally identify the underlying problem for which personal jurisdiction is the solution, the doctrinal muddle will persist. Yet, it is not obvious what problem personal jurisdiction solves. One might argue that personal jurisdiction is simply a guaranty of immunity from the inconvenience of distant litigation.¹⁸ The doc-

¹⁷ As Justice Scalia acknowledges, *Shaffer v. Heitner*, 433 U.S. 186 (1977), presents a particularly strong counterargument to his assertion that the relevant test is tradition. In *Shaffer*, the Court struck down quasi-in-rem jurisdiction, a type of jurisdiction that had historically been permitted in the United States. *Id.* at 216-17. In order to reconcile *Shaffer* with his analysis, Justice Scalia suggested that the practice at issue in that case was "engaged in by only a very small minority of the States," 110 S. Ct. at 2116 (footnote omitted), noting that the case involved attachment of stock in Delaware and Delaware was "the only State that treated the place of incorporation as the situs of corporate stock when both the owner and custodian were elsewhere." *Id.* at 2116 n.4. This characterization of the holding in *Shaffer* is consistent with Justice Scalia's argument in *Michael H.* that in looking to tradition "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." 109 S. Ct. at 2344 n.6.

Justice Scalia's attempt to limit *Shaffer* in this way is troubling for several reasons. First, although Delaware may have been unique in its treatment of stock, it cannot be said that there was a traditional right to be free from state exercises of power on this basis. Instead, it seems more accurate to say that there was simply no tradition in this specific area. Thus, under Justice Scalia's own methodology it is necessary to consult the next more general level of tradition. *See id.* A logical next level of generality would be to inquire whether there is a traditional right to be free from jurisdiction based on the presence of intangible property. At this level of generality, there is a tradition, that is, jurisdiction was traditionally permitted on this basis. Maybe there is some interim level of generality that explains *Shaffer's* result, but Justice Scalia does not identify it.

A less theoretical objection to Scalia's characterization of *Shaffer* is that he seems to be arguing that *Shaffer* did not invalidate all or even most assertions of quasi-in-rem jurisdiction—it only invalidated the attempt to get jurisdiction based on the fictitious presence of stock. This extraordinarily narrow reading of *Shaffer* is at odds with the language of the case itself which did not discuss the situs of intangibles and drew no distinction between suits concerned by the seizure of intangible versus tangible property. *See Lowenfeld, In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U. L. Rev. 102, 110-15 (1978).

¹⁸ *See Lewis, The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-*

trine that has developed, however, does not focus on such a guaranty.¹⁹ Moreover, the Supreme Court has explicitly stated that personal jurisdiction serves some other purpose.²⁰ Limitations of personal jurisdiction could be intended to protect a defendant from the bias of states with which she is not affiliated. Again, however, the developed doctrine is not addressed to bias.²¹ Moreover, neither inconvenience nor the bias theories explains why we should be more concerned with inconvenience and bias suffered by defendants than that suffered by plaintiffs.²²

Some commentators have attempted to describe in some detail the problem for which personal jurisdiction is the solution.²³ They have suggested two related problems for which personal jurisdiction is supposedly the solution. The first of these perceived problems is derived from a central concern of political philosophy, that is, when may a state legitimately exercise coercive power?²⁴ The second per-

Court Horses Hauling Constitutional Carts, 33 MÉRCEUR L. REV. 769, 771 (1982); Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1133-34 (1981); Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 522-27 (1984).

¹⁹ See Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U.L.Q. 1291, 1303-12 (1983); Maltz, *Reflections on a Landmark: Shaffer v. Heitner Viewed from a Distance*, 1986 B.Y.U. L. REV. 1043, 1058-59; Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 509-10 (1987); Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 708 (1987).

²⁰ See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (restrictions on personal jurisdiction "more than a guarantee of immunity from inconvenient . . . litigation"), quoted in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980); Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 21-22 (1982); Redish, *supra* note 18, at 1117-18, 1137. But see Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 416 (1981) (suggesting that the minimum contacts test is a rule of thumb for estimating convenience and reasonableness); Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 709 (1983) (same).

²¹ There is no reason to believe states would be less biased against a defendant with "minimum contacts" than defendants with no contacts with the state. See Gottlieb, *supra* note 19, at 1302.

²² See Perdue, *supra* note 19, at 517-18.

²³ See Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 86-87 [hereinafter *How Contacts Count*]; Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) [hereinafter *Political Theory*]; Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U.L. REV. 389, 391 (1987) [hereinafter *Shaping & Sharing*]; Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 19 (1989); Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 884-85 (1989); Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U.L.Q. 377, 378 (1985).

²⁴ See *infra* notes 29-109 and accompanying text.

ceived problem reflects commerce clause-related concerns about burdening and discriminating against outsiders who are not represented in the state's political process.²⁵

Some of the personal jurisdiction cases do in fact suggest that these two supposed problems are the ones the Supreme Court is attempting to solve. Unfortunately, neither is a satisfactory foundation for personal jurisdiction doctrine. Indeed, the linking of personal jurisdiction to these supposed problems has compounded, not reduced, doctrinal difficulties. Moreover, proponents of this approach have generally relied on theories of political legitimacy that are both misleading and troubling.

This article analyzes and criticizes these two problems supposedly solved by personal jurisdiction. Section I describes the problem of political legitimacy²⁶ and Section II examines a commerce clause analogy as another justification for constitutional limits on state adjudicatory authority.²⁷ Section III then examines several alternative problems for which personal jurisdiction may be the solution.²⁸ These problems are practical ones and reflect the premise that personal jurisdiction may be nothing more than what actual litigants have always thought it was, namely, a doctrine to limit a plaintiff's choices of possible fora.

I. THE PROBLEM OF POLITICAL LEGITIMACY

The United States Supreme Court case of *Insurance Corporation of Ireland*²⁹ contains the clearest articulation of the supposed problem for which personal jurisdiction doctrine is the solution. In that case, the Court rejected earlier suggestions that personal jurisdiction was a doctrine designed to preserve federalism.³⁰ The Court explained that the personal jurisdiction requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."³¹ In a footnote, the Court further explained that "[t]he restriction on state sovereign power described

²⁵ See *infra* notes 110-63 and accompanying text.

²⁶ See *infra* notes 29-109 and accompanying text.

²⁷ See *infra* notes 110-63 and accompanying text.

²⁸ See *infra* notes 164-227 and accompanying text.

²⁹ 456 U.S. 694 (1982).

³⁰ *Id.* at 702-03; see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980).

³¹ *Insurance Corp. of Ireland*, 456 U.S. at 702.

in [an earlier case] . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."³²

This description of the relationship between the due process clause and personal jurisdiction suggests that personal jurisdiction is a substantive due process right.³³ Apparently, the defendant's liberty is taken when she is subjected to jurisdiction in a forum with which she lacks the requisite connection. Yet, the Court has never explained why being subject to jurisdiction is a taking of liberty, at least where the defendant has had notice and a full opportunity to defend.

Commentators have begun to provide the explanation, arguing that personal jurisdiction is a concrete manifestation of the problem of political obligation and legitimacy. The most prominent spokesperson for this view is Lea Brilmayer, who has forcefully argued that a theory of personal jurisdiction must be based on a political theory about the circumstances under which government may legitimately exercise coercive power.³⁴ Other commentators have implicitly and explicitly adopted this view.³⁵

Although the Supreme Court has never explicitly linked personal jurisdiction to the philosophical problem of political legitimacy, this theory of personal jurisdiction helps to explain the link between personal jurisdiction and the due process clause. Whenever a government acts in excess of its legitimate authority, one can view that action as a taking of liberty. Personal jurisdiction doctrine can be understood, therefore, as an attempt to delineate the scope of one aspect of legitimate state authority.³⁶

Having conceived of personal jurisdiction doctrine as concerning the scope of legitimate state power, some commentators argue that that doctrine does and should incorporate philosophical theories about the legitimate scope of governmental power.³⁷ Indeed, although the cases do not frame the discussion in terms of political

³² *Id.* at 702-03 n.10 (referring to *World-Wide Volkswagen*).

³³ See *Perdue*, *supra* note 19, at 508-09.

³⁴ See Brilmayer, *Political Theory*, *supra* note 23, at 294; Brilmayer, *Shaping & Sharing*, *supra* note 23, at 391.

³⁵ See *Stewart*, *supra* note 23, at 19; Trangsrud, *supra* note 23, at 884-85; Weisburd, *supra* note 23, at 378.

³⁶ See *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting) (arguing that personal jurisdiction concerns the relationship between the defendant and "the sovereign that created the court" and whether that sovereign has power over the defendant).

³⁷ See, e.g., Brilmayer, *Political Theory*, *supra* note 23, at 294; Brilmayer, *Shaping & Sharing*, *supra* note 23, at 391; *Stewart*, *supra* note 23, at 19; Trangsrud, *supra* note 23, at 884-85.

philosophy, the basic approach seems to fall within a well-established philosophical tradition.

This basic approach is apparent in *Asahi*.³⁸ Notwithstanding the division of the Court in that case, the Justices agreed that "the constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established "minimum contacts" in the forum State."³⁹ The Court has repeatedly stressed the requirement that the defendant have purposefully affiliated herself in some way with the forum.⁴⁰ The whole concept of "purposeful availment" seems to embody the notion of consent⁴¹ and falls squarely within the social contract philosophical tradition.⁴²

Although grounding personal jurisdiction in a social contract theory of political legitimacy has its critics, it is attracting a growing list of supporters. Linking personal jurisdiction with consent seems benign and consistent with basic democratic values and with a goal of enhancing individual autonomy. Closer examination reveals that it is seriously problematic.

A. Critique of Consent as a Justification for State Judicial Power

The concept that legitimate government power derives only from the voluntary consent of the governed is deeply rooted in our political history. This concept is reflected in the Declaration of Independence, the Preamble of the Constitution, and a number of

³⁸ The Court was divided on whether the defendant had sufficient contacts with the forum, although eight Justices agreed that jurisdiction was unreasonably burdensome under the facts of the case. See Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 DUKÉ L.J. 669, 683.

³⁹ *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 108-09 (1987) (O'Connor, J.) (quoting *Burger King Corp. v. Rudezicz*, 471 U.S. 462, 474 (1985)). See Maltz, *supra* note 19, at 1059-60, 1066; Stewart, *supra* note 23, at 6.

⁴⁰ See, e.g., *Burger King*, 471 U.S. at 474; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 294-95 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 91-94 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 203-04, 216-17 (1977); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

⁴¹ See Brilmayer, *Political Theory*, *supra* note 23, at 306; Maltz, *supra* note 19, at 1060; Stein, *supra* note 19, at 708 n.91; Stewart, *supra* note 23, at 19; Weber, *Purposeful Availment*, 39 S.C.L. REV. 815, 832 (1988). Professor Stein notes that "the current trend in jurisdictional discussions attempts to use some form of consent as the sole legitimating factor." Stein, *supra* note 19, at 708 n.91.

⁴² See Brilmayer, *Political Theory*, *supra* note 23, at 307; Brilmayer, *Shaping & Sharing*, *supra* note 34, at 411-12; Maltz, *supra* note 20, at 1060; Stewart, *supra* note 23, at 19; Trangsud, *supra* note 23, at 889.

early state constitutions.⁴³ All consent theories share a common core "which maintains that the political obligations of citizens are grounded in their personal performance of a voluntary act which is the deliberate undertaking of an obligation."⁴⁴ These theories, which are premised on a belief in individual autonomy,⁴⁵ have great intuitive appeal.

Notwithstanding their appeal, consent theories have significant flaws as a basis for political obligation. The major difficulties stem from the fact that, although explicit consent may be a relatively uncontroversial basis for establishing political legitimacy, explicit consent simply does not occur all that frequently. Thus, any reasonably inclusive consent theory of political legitimacy must rely on some form of tacit consent. Tacit consent provides the real quagmire for consent theory.

There are two categories of tacit consent.⁴⁶ First, tacit consent occurs when there is an actual knowing and voluntary acceptance of obligations, but the acceptance is communicated through conduct or even silence. A major difficulty with this type of consent is that in order to determine the scope of that consent, and whether, in fact, consent occurred, rules must be developed for interpreting or delineating the significance of the citizen's conduct.⁴⁷ This interpretation can occur only against a set of well understood background conditions.⁴⁸ The interpretation of conduct will be particularly difficult where consent includes the possibility of limited consent, that is, consent to some but not all exercises of authority. Nonetheless, some version of limited consent is essential if consent theory is to explain modern personal jurisdiction doctrine.

A central component of such doctrine is the distinction between specific and general jurisdiction.⁴⁹ Some types of conduct are con-

⁴³ See J.W. GOUGH, *THE SOCIAL CONTRACT* 230-31 (2d ed. 1957). The American version of this philosophy is most closely identified with John Locke, but variations are reflected in a wide range of modern philosophers as well as legal commentators. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* (1971); D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); P. SCHUCK & R. SMITH, *CITIZENSHIP WITHOUT CONSENT* (1985).

⁴⁴ A.J. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 57 (1979).

⁴⁵ See *id.* at 69.

⁴⁶ See generally *id.* at 88-90.

⁴⁷ See Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 6 (1989) [hereinafter *Consent & Contract*]; Gottlieb, *supra* note 19, at 1301.

⁴⁸ Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 92-94 (1981). As Professor Murphy has observed: "Thus, even in the best of tacit consent cases, the ice is thin. When the normal background conditions are lacking, there is no ice at all." *Id.* at 93.

⁴⁹ The terminology derives from von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136-45 (1966). See *Helicopteros Nacionales de*

sidered sufficient to subject a defendant to personal jurisdiction on any suit; other conduct subjects the defendant to jurisdiction on only a particular type of suit. To translate this distinction into the language of consent, some conduct indicates consent to a broad range of government authority; other conduct reflects consent to limited government authority. Given the wide range of obligations that a person might accept by her conduct, it will be very difficult to know with any confidence what was in fact intended by that conduct.

Assuming it is possible to develop rules for interpreting conduct, another problem remains. There is little reason to believe that this type of actual consent, which is merely tacitly communicated, occurs much more frequently than explicit consent.⁵⁰ Thus, it becomes necessary to resort to a different type of tacit consent.

The second type of tacit consent does not focus on whether the citizen in fact voluntarily accepted an obligation. Instead, the question is whether the citizen has engaged in some voluntary conduct that creates an obligation. The critical difference is that with this second type of "consent," legitimacy does not depend on whether the person has in fact voluntarily accepted the obligation. Instead, regardless of what a person meant or intended, when people engage in certain conduct, it is fair, appropriate, or legitimate to impose obligations on them.

Some commentators criticize this type of tacit consent as not being consent at all.⁵¹ This critique, however, is not adequate, particularly in the area of personal jurisdiction. Proponents of the tacit consent approach would argue that the name "tacit consent" is

Columbia, S.A. v. Hall, 466 U.S. 408, 414 nn.8 & 9 (1984). See generally Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988) [hereinafter *Related Contacts*]; Brilmayer, Haverkamp, Logan, Lynch, Neuwirth, & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988) [hereinafter *General Jurisdiction*]; Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

⁵⁰ See A.J. SIMMONS, *supra* note 44, at 93.

⁵¹ See D. HUME, *Of the Original Contract*, in 2 ESSAYS AND TREATISES 268, 281-82 (London 1770). Hume argues:

Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.

Id. See also A.J. SIMMONS, *supra* note 44, at 83-84; Gottlieb, *supra* note 19, at 1301; Murphy, *supra* note 48, at 92; Pitkin, *Obligation and Consent—I*, 59 AM. POL. SCI. REV. 990, 995 (1965); Stewart, *supra* note 35, at 17.

misleading. Their position is simply that a state can legitimately exercise authority only over those who have, through their conduct, manifested a willing affiliation with the state.⁵² "Consent" in the sense of some actual agreement is not necessary for legitimacy, but some form of voluntary affiliating conduct is required.⁵³ Cases and commentators suggest different versions of this type of tacit consent. As discussed below, none is satisfactory.

1. Receipt of Benefits

Under one version of tacit consent, obligations arise from the acceptance of benefits. Both Hart and Rawls have developed this concept⁵⁴ and the personal jurisdiction case law contains versions of it as well.⁵⁵

Most recently, Justice Brennan in his plurality opinion in *Burnham* appears to endorse this approach.⁵⁶ In finding that transient jurisdiction is consistent with modern notions of due process, Justice Brennan stressed the numerous benefits that a transient receives simply by entering the forum state: "[h]is health and safety are guaranteed by the State's police, fire, and emerging medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well."⁵⁷

It is not clear whether Justice Brennan believes that the acceptance of these benefits is simply evidence of actual consent, albeit tacitly communicated, or whether he is relying on a kind of quasi-contract theory⁵⁸ that regardless of intent, it is intrinsically fair to extract the price of personal jurisdiction from those who accept

⁵² See Stewart, *supra* note 23, at 18-19; Trangsrud, *supra* note 23, at 890.

⁵³ For this reason, even explicit denials of consent presumably would not be effective. Those who accept tacit consent as the foundation for jurisdiction would surely say that an Oregon citizen who sent a letter to the Secretary of State of California explicitly announcing that he was withholding his consent to jurisdiction could nonetheless be sued in California for damages that person caused when driving through California.

⁵⁴ See Hart, *Are There Any Natural Rights?* 64 PHIL. REV. 175, 185 (Apr. 1955); Rawls, *Legal Obligation and the Duty of Fair Play*, in LAW AND PHILOSOPHY, at 10 (S. Hook ed. 1964).

⁵⁵ See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); Brilmayer, *Political Theory*, *supra* note 23, at 302-25 and cases discussed therein.

⁵⁶ *Burnham v. Superior Court*, 110 S. Ct. 2105, 2124-25 (1990) (Brennan, J. concurring).

⁵⁷ *Id.* at 2125.

⁵⁸ See A. CORBIN, CORBIN ON CONTRACTS § 19, at 50 (1963); 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 3A, at 12-15 (W. Jaeger 3d ed. 1970).

benefits from the state.⁵⁹ If Justice Brennan means to use the benefits as evidence of consent, then he is relying on the first type of tacit consent described earlier, and his argument suffers from all of its difficulties.⁶⁰ In particular, it is virtually impossible to interpret meaningfully the defendant's conduct. The mere fact that the defendant entered the state offers scant evidence that he in fact voluntarily accepted the burden of personal jurisdiction for any suit that might be filed against him.

The benefits approach does not fare much better as a quasi-contract theory. On a practical level, if the approach is to be effective, some method must exist for valuing and comparing benefits and burdens. This problem is well illustrated by Justice Brennan's opinion in *Burnham*. Justice Brennan asserts that the burden to a transient of being subject to jurisdiction is "slight" and the benefits provided by the state are "significant,"⁶¹ but he offers little to demonstrate the correctness of this assertion.

In at least some cases, the benefits of roads and protections available to transients are surely not commensurate with the burdens of being subjected to jurisdiction. The voluntary presence of the transient may be very brief; the state may not in fact be the provider of many of the services listed by Justice Brennan,⁶² and, in some cases, the burden of distant litigation may be great.⁶³ I believe Justice Scalia is correct when he observes that viewing tran-

⁵⁹ See Stein, *supra* note 19, at 700 (noting that it is frequently difficult to tell whether the Court means that "jurisdiction [is] fair because the exchange of benefits is evidence of a voluntary affiliation, or because the exchange is substantively fair").

⁶⁰ See *supra* notes 46-50 and accompanying text for a discussion of this type of tacit consent and its difficulties.

⁶¹ *Burnham*, 110 S. Ct. at 2125 (Brennan, J., concurring).

⁶² For example, police, fire, and emergency services may be provided by local governments.

⁶³ See Stein, *supra* note 19, at 736. Justice Brennan enumerates a list of procedural devices that, according to him, limit the burdens of distant litigation. See *Burnham*, 110 S. Ct. at 2125 n.13 (Brennan, J., concurring). The devices he lists, however, will not always be available or helpful. For example, dismissal or summary judgment will not be available where there is a cognizable claim and a genuine dispute of fact. Similarly, although certain discovery devices such as telephone depositions may be available, these may also be less effective and, moreover, none of these devices eliminates the difficulties that may be inherent in locating and dealing with a lawyer who may be thousands of miles away. Most strikingly, the option of a change of venue to a different state is only available in federal court, and hence is irrelevant where it is a state that attempts to assert jurisdiction. Finally, the fact that some suits might be dismissed on the grounds of *forum non conveniens* is also completely irrelevant. The problem of whether a state has authority to assert personal jurisdiction only arises if the state attempts to exercise jurisdiction.

sient jurisdiction as a contractual bargain, the rule is "unconscionabl[e]." ⁶⁴

Even assuming some basis exists for concluding that the benefits to a transient are commensurate with the burdens of jurisdiction, further complications remain. First, the benefits are not dependent on the defendant having been served in the forum. Thus, if we were to take this approach seriously, anyone who has ever been present within a state should be subject to any suit in that state, regardless of whether they were served there.⁶⁵ Moreover, even people who have never visited a state may benefit in the ways listed by Justice Brennan. One need not enter a state to benefit from a state's economy or its transportation system.⁶⁶

In addition to these problems, a benefits analysis of state authority is incomplete. In the area of personal jurisdiction, situations can arise in which the defendant has received no benefits but jurisdiction is nonetheless appropriate. *Calder v. Jones*⁶⁷ is the most obvious example. In *Calder*, the Florida writer of the defamatory article about a California resident did not receive any meaningful benefits from California (at least none beyond those received by all employees of corporations doing business in California). Yet, the Supreme Court unanimously upheld personal jurisdiction.⁶⁸ Many other tort cases may similarly prove difficult to fit into the benefits model.

The benefits approach also poses theoretical difficulties. As a theory of governmental legitimacy, it is troubling. Even if we can develop a standard for assessing whether benefits and burdens are commensurate, it is deeply disturbing to suggest that as long as government provides you with something of objective value (that you may not want), it can legitimately extract something from you (that you do not want to give up).⁶⁹

⁶⁴ *Burnham*, 110 S. Ct. at 2117.

⁶⁵ *See id.*

⁶⁶ The annual fires in the West that do not respect state boundaries demonstrate that one may benefit quite significantly by the fire services provided by another state.

⁶⁷ 465 U.S. 783 (1984).

⁶⁸ *Id.* at 791.

⁶⁹ Robert Nozick makes a similar point, arguing that "[o]ne cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment." R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 95 (1974). John Simmons has noted that the Nozick argument may be unpersuasive where the individual has affirmatively sought and not merely passively received the benefits. J.J. SIMMONS, *supra* note 44, at 122-29. As Simmons has also noted, however, most of the benefits provided by governments are public goods, or what he

2. Voluntary Affiliation

Several commentators who have argued that personal jurisdiction should incorporate a consent theory of legitimacy have offered another variation on tacit consent. They have argued that, although consent in the form of actual agreement is not necessary to legitimacy, some form of voluntary "affiliating conduct" is required⁷⁰ in order to protect the "right to remain unconnected to a sovereign."⁷¹ By requiring voluntary affiliating conduct, we limit governmental power in a way that reaffirms both the principal of individual autonomy and the notion that governmental legitimacy derives from the people.

In order to use this approach to explain personal jurisdiction doctrine, rules must be developed that delineate what voluntary actions are "sufficiently affiliating" to legitimate the exercise of power. The rules for inferring consent must exist independently of the supposedly affiliating conduct and must be justified on some other basis.⁷² Thus, we need some meta theory of legitimacy, independent of consent, to justify the rules for inferring consent.⁷³

The problem of developing and justifying these meta rules is highlighted by a series of examples drawn from personal jurisdiction. First, if writing a derogatory article in Florida about someone from California is enough affiliation to sue in California for defamation,⁷⁴ could a Florida publisher who purchased that article in Florida from the writer be sued in California for failing to pay the promised royalties? Has not the publisher affiliated himself with California when he knowingly purchased an article about California? Second, it is generally accepted that a court has personal jurisdiction over the plaintiff for all counterclaims, both permissive and compulsory, filed against the plaintiff in that suit.⁷⁵ But why is it

calls "open" benefits. *Id.* at 138. "It is precisely in cases of 'open' benefits that it is least plausible to suggest that benefits are being *accepted* by most beneficiaries." *Id.* (emphasis in original).

⁷⁰ See Stewart, *supra* note 23, at 18; Trangsrud, *supra* note 23, at 890.

⁷¹ Stewart, *supra* note 23, at 7.

⁷² See Brilmayer, *Consent & Contract*, *supra* note 47, at 9.

⁷³ The problem here is similar to a problem that exists with the first type of tacit consent. See *supra* notes 47-50 and accompanying text. There are, however, important differences. With the first type of tacit consent, rules of interpretation are necessary to determine whether a person in fact meant his or her conduct or silence to constitute consent. One might argue that the development of these rules is no different than the problem of developing language. By contrast, the second type of consent requires what might be called "rules of law" that assigns consequences regardless of what was intended.

⁷⁴ See *Calder v. Jones*, 465 U.S. 783, 791 (1984).

⁷⁵ See *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938).

not the case that having once invoked the jurisdiction of a particular court a plaintiff becomes subject to personal jurisdiction for all other lawsuits that might be filed against him in that jurisdiction? By filing one suit, the plaintiff has voluntarily recognized the legitimacy of a state's judicial mechanism. Why should the plaintiff later be able to disavow that recognition of legitimacy?⁷⁶ Finally, if one has voluntarily sold one's goods in, or voluntarily traveled through, a particular state, why is that not enough to subject one to suit in that state on any matter (regardless of where one is served with process)?

In a possible response to these examples, Professor Stewart has argued that "the right to remain unconnected with a sovereign may be simultaneously waived and retained with respect to different aspects of one's activities."⁷⁷ She then asserts that claims must be "related" to the defendant's activities.⁷⁸ It is not obvious why the right to remain unconnected to a sovereign also necessarily carries the right to connect oneself less than completely. Moreover, the assertion that suits must be related to the affiliating conduct simply restates the issue, it does not explain why this must be so. The answers to these questions turn ultimately on how much the state may legitimately extract as a price for different types of conduct. The fact that there was "voluntary affiliating conduct," however, drops out of the analysis in this assessment. What becomes important is some theory about the scope of legitimate state power.

Treating the voluntary affiliating conduct of the defendant as the source of legitimacy is not merely unhelpful, it cloaks governmental power with a veil of consent in a way that is destructive of individual dignity.⁷⁹ Consider the following example. Suppose that the government passes a law that states that any woman who exposes any portion of her body is sexually provocative and shall be deemed to have consented to the sexual advances of any man, but that consent will not be imputed to any woman who does not so expose herself and the government will take efforts to protect these non-exposed women. One response to this law is that it gives women great protection and autonomy; now women have the ability to

⁷⁶ One might argue that the plaintiff may have had no choice other than that particular forum and therefore the filing of the suit could hardly be considered a voluntary acceptance of that forum. The plaintiff, however, may or may not have had alternate fora. Moreover, even if the plaintiff had no other available fora, she elected to attempt to convert her chose in action into a judgment rather than abandoning it or selling it to someone else.

⁷⁷ Stewart, *supra* note 23, at 21.

⁷⁸ *Id.* at 25.

⁷⁹ See Gottlieb, *supra* note 19, at 1301.

behave in a way that will protect them from undesired sexual advances. But many women would not view this law as enhancing their autonomy. Because the government is presenting women with a choice they do not think they should have to make, the fact that they subsequently engage in some voluntary conduct, such as exposing their ankles, does not legitimize an exercise of power against them, such as a sexual assault.⁸⁰

Rules about voluntary affiliation enhance individual autonomy only to the extent they are perceived by the individual as embodying legitimate and fair choices. Voluntary affiliation is not what legitimizes an exercise of power; what legitimizes the action is our belief that the exercised power is one that states should have.⁸¹

Another example can be drawn from the personal jurisdiction case law. In the Supreme Court case of *Kulko v. Superior Court*,⁸² a father sent his child to California to live with his ex-wife. When the ex-wife sued the father in California for increased child support, the Supreme Court held that California lacked personal jurisdiction.⁸³ Had the defendant sent a defamatory article⁸⁴ or exploding package to California, such acts surely would have been sufficient to support jurisdiction. In explaining why sending a child to California was not sufficient for jurisdiction, the Court suggested that its real concern was that a contrary conclusion might "impose an unreasonable burden on family relations."⁸⁵ Thus, the Court focused less on the defendant's voluntary affiliated conduct and focused more on whether the state could legitimately force the father to choose between accommodating his child's wishes and thereby subjecting himself to jurisdiction, or overriding those wishes to protect himself from jurisdiction.⁸⁶

⁸⁰ See Brilmayer, *Contract & Consent*, *supra* note 47, at 21 (noting that "[b]y focusing on choice, . . . consent theory discourages analysis of an unresolved and important problem: how did the individual come to have that set of choices and not another?").

⁸¹ Hanna Pitkin has made a related point about Locke. She has observed that under Locke's approach, once someone had fallen within the scope of the state's legitimate power then virtually any conduct was enough to create consent. See Pitkin, *supra* note 51, at 996. Ultimately, the fact of consent is irrelevant. According to Pitkin, "[y]ou do not consent to be obligated, but rather are obligated to consent if the government is just." *Id.* at 999. Pitkin has also noted that Locke's theory of consent was intended not only to justify occasional revolutions, it was also intended to legitimize most exercises of power. Pitkin, *Obligation and Consent—II*, 60 AM. POL. SCI. REV. 39, 49 (1966).

⁸² 436 U.S. 84 (1978).

⁸³ *Id.* at 100-01.

⁸⁴ See, e.g., *Calder v. Jones*, 465 U.S. 783 (1984); *Brown v. Flowers Indus., Inc.*, 688 F.2d 328 (5th Cir. 1982).

⁸⁵ *Kulko*, 436 U.S. at 98.

⁸⁶ As I discuss later, I do not believe the Court offered any plausible reason why

3. Brilmayer's Fairness Approach

Professor Brilmayer, who has argued that personal jurisdiction should be based upon a political philosophy of governmental legitimacy, has offered another approach.⁸⁷ She has acknowledged the inadequacy of all the currently advanced theories,⁸⁸ including those of tacit consent,⁸⁹ observing that "theories of tacit consent assume almost exactly what they set out to prove."⁹⁰ As an alternative to tacit consent, Professor Brilmayer has argued that we should abandon consent and apply a "fairness" inquiry that would consider "whether an individual's connections with a state are such as to make it fair to impose upon him or her the state's conception of substantive justice."⁹¹ A volitional act must connect a non-domiciliary with a state in order "to assure a minimal level of individual control over the legal norms to which the individual will be subjected."⁹² Although she offered this formulation of the "fairness" argument in the context of choice of law, a similar approach might be offered for personal jurisdiction.

Brilmayer's approach is a variation of the voluntary affiliation argument and shares many of the same problems. She offers little to explain what conduct should or should not be deemed an exercise of control. Consider a confused tourist visiting Washington, D.C., who gets lost and mistakenly crosses a bridge into Virginia. It is appropriate that the tourist be required to comply with Virginia traffic laws and that she be subject to suit in Virginia for any injuries that she happens to cause there. It is completely artificial, however, to suggest that by crossing the Potomac River the tourist has made a meaningful choice of legal norms.

In contrast to the confused tourist, consider a D.C. resident who regularly drives in Virginia. If the D.C. resident hits a Virginia pedestrian while driving in D.C., could she be sued in Virginia? Her regular and knowing use of Virginia roads would seem to

California should not have the power to assert jurisdiction in that case. But in analyzing this core issue, the *Kulko* Court properly treated as irrelevant the defendant's "voluntary affiliating conduct." See *infra* notes 124-27 and accompanying text.

⁸⁷ See Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1304-06 (1989) [hereinafter *Rights & Fairness*]; Brilmayer, *Consent & Contract*, *supra* note 47, at 10-14.

⁸⁸ Brilmayer, *Political Theory*, *supra* note 23, at 308-10.

⁸⁹ See Brilmayer, *Rights & Fairness*, *supra* note 87, at 1304-06; Brilmayer, *Consent & Contract*, *supra* note 47, at 10-14.

⁹⁰ Brilmayer, *Rights & Fairness*, *supra* note 87, at 1304.

⁹¹ *Id.* at 1306.

⁹² *Id.* at 1307.

demonstrate much more of an acceptance of the legal norms of Virginia than was demonstrated by the confused tourist. Suppose that in addition to regularly driving in Virginia, the D.C. resident participated in political campaigns and debate in Virginia. Would this be sufficient to make her subject to suit in Virginia?

In explaining why some applications should be considered sufficient and others not, Brilmayer has argued that a "state cannot justify predicating jurisdiction upon local conduct that is not legally wrongful."⁹³ If the goal of jurisdiction is to assure some individual control of the applicable legal norms, however, Brilmayer has no reason to differentiate between legal and illegal conduct. In fact, engaging in illegal or wrongful conduct in a state seems on its face to demonstrate a *rejection* of that state's legal norms.

B. *Problems with Linking Interstate Personal Jurisdiction and Political Philosophy*

Although an inquiry into the foundations of political legitimacy can be fascinating, treating personal jurisdiction as an outgrowth of this inquiry produces significant difficulties. At the outset, if a coherent doctrine of personal jurisdiction depends on the development and acceptance of a coherent philosophy of political legitimacy, then we are in for a long fight.⁹⁴ The problem of political legitimacy has troubled philosophers for centuries. Even if a consensus were achieved, variations within the same general philosophical approach may produce significantly different results when applied to personal jurisdiction. For example, Professor Trangsrud, who argues that personal jurisdiction ought to reflect a social contract theory of political legitimacy, describes the contours of personal jurisdiction based on such a theory.⁹⁵ Basically, he would require knowing, affiliating conduct on the part of the defendant.⁹⁶ Yet, a different version of the social contract approach, such as that of Rawls,⁹⁷ might produce a very different doctrine of personal jurisdiction. Someone designing a personal jurisdiction doctrine

⁹³ Brilmayer, *General Jurisdiction*, *supra* note 49, at 740.

⁹⁴ Brilmayer, in the same article in which she argues that any theory of jurisdiction should be based upon a philosophical theory of governmental legitimacy, acknowledges the inadequacy of all the currently advanced theories. Brilmayer, *Political Theory*, *supra* note 23, at 308-10.

⁹⁵ Trangsrud, *supra* note 23, at 898-903.

⁹⁶ *Id.* at 890.

⁹⁷ See J. RAWLS, A THEORY OF JUSTICE (1971).

behind Rawls's "veil of ignorance,"⁹⁸ with no knowledge of whether she would be a plaintiff or defendant, might design a system without the heavy defendant bias of either our existing or the Trangsrud approach.⁹⁹

More fundamentally, even if we could reach complete agreement on the philosophical theory to apply, it simply does not follow that our philosophical ideals about legitimate governmental power must necessarily be reflected in a constitutional doctrine of interstate personal jurisdiction.¹⁰⁰ It is not merely that the philosophical approach is unduly generalized or theoretical.¹⁰¹ The problem is that political philosophy cannot tell us whether our Constitution contemplates a system in which state adjudicatory authority is constitutionally limited.

With respect to interstate personal jurisdiction, the issue is not under what circumstances people must respect political authority or the authority of a wholly unrelated sovereign. We are already one nation of interdependent states, bound by shared values and one constitution. Inherent in our existence as a nation is that each state and its citizens necessarily accepts the political legitimacy of all the other states.¹⁰² Concerns about political legitimacy might appropriately underlie personal jurisdiction in the international, but not in the interstate, context.¹⁰³ The difference between Florida and

⁹⁸ See *id.* at 136-42.

⁹⁹ Applying Rawls's principle of "maximin," *id.* at 154, one would expect those behind the veil of ignorance to adopt procedural rules that allocate burdens relatively evenly between plaintiffs and defendants since that minimizes the losses suffered by anyone who ends up as a litigant.

¹⁰⁰ See Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U.L. REV. 431, 432-33 (1987) (questioning the usefulness of political philosophy in providing answers to questions about interstate relations).

¹⁰¹ See *id.* at 432.

¹⁰² See U.S. CONST. art. IV, § 1 (requiring states to recognize certain governmental acts of other states); *id.* § 4 (guaranteeing to every state "a Republican Form of Government"). The undeniable interdependence created among the states by the Constitution seems to pose a particular problem for those who would rely on a theory of tacit consent to limit state adjudicatory power. In "consenting" to a nation consisting of interdependent states and accepting the benefits that accrue from the free interstate flow of goods and people, why have not all United States residents "consented" to be sued in any state? Professor Trangsrud's response to this question appears to be that the Constitution does not specifically address the question of state jurisdiction and therefore, it is reading too much into the situation to infer consent from mere acceptance of the Constitution. Trangsrud, *supra* note 23, at 887. Yet, this seems no more of an overreading than inferring "consent" to jurisdiction from the act of driving a car in the state, see *Hess v. Pawloski*, 274 U.S. 352 (1927), or from the act of writing a defamatory article, see *Calder v. Jones*, 465 U.S. 783 (1984).

¹⁰³ As Professor Laycock has observed, "[t]he relationship among the American states is fundamentally different from the relationship among independent nations." Laycock, *supra*

California on the one hand and Florida and Iran on the other is not merely one of degree.¹⁰⁴

The Constitution clearly contemplates the existence of states that are delineated geographically. The Constitution also contemplates that citizens of the United States will have a unique relationship with one state and not the others, that is, they will be citizens of that state.¹⁰⁵ As a corollary of the unique relationship between a state and its citizens, those citizens will have unique rights, such as voting, and unique obligations, such as jury duty. But the fact that an admittedly special relationship between a state and its citizens exists does not mean that no relationship exists between a state and noncitizens. The Constitution in fact contemplates that interaction will arise between states and noncitizens and that states will be asserting power against noncitizens (hence, the privileges and immunities clause). The core question with regard to personal jurisdiction is how does the Constitution limit the exercise of state adjudicative authority.

Once one accepts that states are not wholly autonomous and separate from each other, it becomes very difficult to base personal jurisdiction doctrine on a theory of political obligation.¹⁰⁶ For example, one could accept a traditional consent theory of political legitimacy yet still conclude that states have unlimited adjudicatory authority by arguing that by participating in our interdependent nation with its free interstate flow of goods and services, we have all consented to be sued in any state. The free flow of commerce among the states has many benefits, but one of its costs is that

note 100, at 432. Professor Maltz argues that by suggesting that a defendant from another country should be treated differently than United States citizens, the Court had recognized that a citizen of one state is "already indirectly connected" to all the other states "through the structure of the federal system," whereas, "a citizen of a foreign country has no such automatic connection." Maltz, *supra* note 28, at 690.

¹⁰⁴ A comparison of *Calder v. Jones*, 465 U.S. 783 (1984), with the *Salman Rushdie* affair demonstrates how differently we view the question of the legitimacy of governmental power when it is exercised in the international rather than interstate context. In *Calder*, the Supreme Court held that a Florida writer and editor of an allegedly defamatory article concerning a Californian could properly be sued in California because California was "the focal point both of the story and of the harm suffered." *Id.* at 789. *Calder* was a unanimous decision, yet there would surely not be similar unanimity that a Florida citizen who authored a book considered by Iranians to be defamatory has likewise subjected himself to the governmental processes of Iran.

¹⁰⁵ See, e.g., U.S. CONST. art III, § 2 (giving federal courts jurisdiction over cases between "Citizens of different States").

¹⁰⁶ See Tushnet, *Community and Fairness in Democratic Theory*, 15 FLA. ST. U.L. REV. 417, 423-42 (1987).

interstate commerce sometimes produces detrimental effects on places far away from one of the participants in a transaction. Having accepted the benefits of our free flowing economy, it is fair to impose the burden of possible distant litigation.

Moreover, even if one were to accept that state adjudicatory authority turns on whether the exercise of power conforms to an underlying philosophy of what constitutes legitimate authority, this view does not explain why the federal courts need to intrude on states by striking down state exercises of authority. The Constitution provides a simple, non-intrusive solution—diversity jurisdiction. In most cases in which a state would be asserting jurisdiction over noncitizens, it is likely that diversity would exist and the case could be removed to the federal court (assuming of course Congress authorized diversity jurisdiction and removal). Whatever connection one believes is necessary to make legitimate a state's assertion of jurisdiction over a citizen of some other state, the requisite connection surely exists between a United States citizen or resident and a United States court.¹⁰⁷ The combination of the privileges and immunities clause, assuring equal treatment for those who choose to litigate before a "foreign sovereign," and the option to litigate before one's own sovereign, i.e., the United States, solves the problem.

One might complain that removing the case to federal court does not move the case out of state and thus the federal judge and jury will have local ties. This concern focuses more on local bias (an issue that has never been addressed by personal jurisdiction doctrine) than on the sovereign's identity. The more compelling response is that removal does not cause a change in venue because Congress did not choose to structure the courts that way. No constitutional requirement exists that federal districts be coextensive with the states¹⁰⁸ or that removal be to the federal district that includes the state in which the action was filed. Removal could be to federal court in the defendant's home state or to some other location. Thus, the Constitution gives the federal government a mechanism for protecting citizens from having to litigate before sovereigns with whom they do not have the requisite affiliation. Given the availability of this mechanism, no reason founded on political philosophy exists why the federal courts should create their

¹⁰⁷ See, e.g., *Milliken v. Meyer*, 311 U.S. 457 (1940); *Blackmer v. United States*, 284 U.S. 421 (1932); see also *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting).

¹⁰⁸ See *United States v. Union Pac. R.R.*, 98 U.S. 569, 602-04 (1878).

own elaborate doctrine, which directly intrudes on state autonomy and authority.¹⁰⁹

II. OTHER JUSTIFICATIONS FOR CONSTITUTIONAL LIMITS ON STATE ADJUDICATORY AUTHORITY—COMMERCE CLAUSE ANALOGY

In addition to, or as an alternative to, the political legitimacy and consent rationale, commentators have suggested that commerce clause-related concerns may justify limitations on personal jurisdiction.¹¹⁰ This approach is related in some respects to the political legitimacy rationale. Federal intervention into state regulation based on the commerce clause has been justified as a means for preventing states from imposing costs on outsiders who are not represented in the state's political processes.¹¹¹ One might characterize this justification as a matter of democratic theory¹¹² or economic efficiency.¹¹³

At first glance, personal jurisdiction seems to fit easily into a similar type of analysis. For example, assertions of jurisdiction over outsiders might be a way for states to shift litigation costs from its citizens to outsiders.¹¹⁴ In fact, in a handful of pre-*International Shoe*¹¹⁵ cases, the United States Supreme Court directly invoked the

¹⁰⁹ *Nevada v. Hall*, 440 U.S. 410 (1979), indicates that in at least some contexts the Court has been reluctant to infer constitutional limitations of state adjudicatory authority. In *Hall*, the Court held that the Constitution did not prohibit a California state court from adjudicating a claim against the state of Nevada. *Id.* at 426-27. In so holding, the Court acknowledged that the Constitution does contain some specific limitation on state sovereignty, but rejected the argument that the Constitution implicitly prohibits states from adjudicating suits against other states. *Id.* at 424-25. The Court observed:

[I]n view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.

Id. at 425 (footnote omitted). A constitutional doctrine of personal jurisdiction is likewise an inferred limit on state sovereignty and a similar caution would seem to be appropriate.

¹¹⁰ See Brilmayer, *How Contacts Count*, *supra* note 23, at 86-87; Brilmayer, *General Jurisdiction*, *supra* note 49, at 743-46; Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 226, 234 (1967); Trangsrud, *supra* note 23, at 881; Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156, 174-77 (1982).

¹¹¹ See *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945); *South Carolina State Highway Dep't v. Barnell Bros., Inc.*, 303 U.S. 177, 184 n.2 (1938).

¹¹² See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 409 (2d ed. 1988).

¹¹³ See Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WISC. L. REV. 125, 142-43.

¹¹⁴ See Brilmayer, *How Contacts Count*, *supra* note 23, at 86-87; Brilmayer, *General Jurisdiction*, *supra* note 49, at 743; Carrington & Martin, *supra* note 110, at 234; Trangsrud, *supra* note 23, at 881; Comment, *supra* note 110, at 174-77.

¹¹⁵ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

commerce clause to strike down what it viewed as overly expansive exercises of state court jurisdiction.¹¹⁶

Although some courts and commentators have viewed these cases as moribund,¹¹⁷ the Supreme Court's 1988 decision in *Bendix Autolite Corp. v. Midwesco Enterprises*¹¹⁸ may indicate a revival of the Court's direct reliance on the commerce clause to limit personal jurisdiction. In *Bendix*, the Court struck down, on commerce clause grounds, an Ohio statute that suspended the statute of limitations for all claims against foreign entities that had not designated an agent for service of process in Ohio.¹¹⁹ Noting that the presence of an agent for service of process would subject the corporation to general jurisdiction, the Court held that requiring a corporation to submit to general jurisdiction is a "significant burden" on interstate commerce.¹²⁰

Although this commerce clause approach has some intuitive appeal, it does not withstand scrutiny. This approach, like dormant commerce clause analysis, includes two separate concerns—undue burdens on interstate commerce and discrimination against out-of-staters.¹²¹ Neither concern provides a satisfactory explanation for personal jurisdiction.

A. Undue Burdens

Commentators have suggested that a state's overly aggressive assertion of personal jurisdiction may impede interstate commerce because producers, fearful that they may have to litigate in some

¹¹⁶ See *Michigan Cent. R.R. v. Mix*, 278 U.S. 492, 494–95 (1929); *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101, 103 (1924); *Davis v. Farmers Coop. Equity Co.*, 262 U.S. 312, 316 (1923). For a discussion of these cases by Judge Friendly, see *Scanapico v. Richmond*, F. & P.R.R., 439 F.2d 17, 25–27 (2d Cir. 1970) (rehearing en banc).

¹¹⁷ See *Scanapico*, 439 F.2d at 28 (Hys, J., concurring) (characterizing these cases as reflecting "a long-outmoded view of 'burden on interstate commerce'"); F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 2.29, at 103 (3d ed. 1985) (arguing that the Court's rejection in personal jurisdiction doctrine of special protection of first amendment concerns implies a similar rejection of special protection for interstate commerce); Dessem, *Personal Jurisdiction after Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 87–88 (1987) (same). Cf. Comment, *supra* note 110, at 175 ("[t]he constitutional interest in facilitating interstate commerce seems to require additional jurisdiction limitations beyond the minimum safeguards of causation, notice, and relevance provided by due process"); *Developments in the Law: State Court Jurisdiction*, 73 HARV. L. REV. 909, 983–87 (1960) (urging reliance on commerce clause as a limitation on personal jurisdiction).

¹¹⁸ 486 U.S. 888 (1988).

¹¹⁹ *Id.* at 894.

¹²⁰ *Id.* at 891–92.

¹²¹ See *id.* at 891; Tushnet, *supra* note 113, at 130–31.

distant forum, may either curtail production or increase prices.¹²² Thus, proponents of this view might argue that if the car dealer in *World-Wide Volkswagen*¹²³ could be sued anywhere that the car he sold blew up, then he would have to curtail his sales or raise the price of his cars in order to cover the costs of this additional risk. In effect, the risk of litigation in distant fora impedes interstate commerce.

This argument about burdening commerce ignores the teaching of Ronald Coase that the allocation of external effects does not affect economic efficiency.¹²⁴ Litigation necessarily involves two parties and when they are from different states, at least one of those parties will necessarily be forced to bear the cost and disadvantage of litigation away from home.¹²⁵ Personal jurisdiction doctrine simply allocates the right not to have to travel for litigation, but there is no theoretical reason why systematically giving that right to defendants rather than plaintiffs will alter the number of transactions. To return to *World-Wide Volkswagen*, a buyer of the car will value the car somewhat less if she knows she will have to return to New York for any litigation no matter where she is when her dispute with the seller arises.

The failure of the Court and commentators to perceive the two-sided nature of the jurisdiction problem extends to the non-commercial context as well. In *Kulko*, the Court held that a divorced father who, "in the interests of family harmony and his children's preferences," allowed his children to spend more time in California with their mother than the separation agreement required, could not be sued in California for increased child support.¹²⁶ The Court did not want to "discourage parents from entering into reasonable visitation agreements."¹²⁷ But this reasoning ignores that cooperation is two-sided. As a result of the Court's ruling, the parent who relies on child-support may be discouraged from accommodating the desires (and maybe best interests) of her children because of

¹²² See Brillmayer, *General Jurisdiction*, *supra* note 49, at 745; Comment, *supra* note 110, at 174.

¹²³ 444 U.S. 286 (1980).

¹²⁴ Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). See generally Demsetze, *When Does the Rule of Liability Matter?* 1 J. LEGAL STUD. 13 (1972).

¹²⁵ See Gottlieb, *supra* note 19, at 1298-99.

¹²⁶ 436 U.S. 84, 94 (1978).

¹²⁷ *Id.* at 93; see Gottlieb, *supra* note 19, at 1298. Interestingly, although Professor Gottlieb criticized the Court for its failure in commercial cases to understand that the burden to travel must rest somewhere, he praised the Court's analysis in *Kulko*. Gottlieb, *supra* note 19, at 1298.

the burdens associated with seeking the needed increases in support.

Notwithstanding the foregoing, transaction costs or information imbalances may exist so that allocating the right not to travel could have efficiency implications. For example, one could argue that the buyer should bear the cost of distant litigation because the buyer is able, at least theoretically, to ascertain in advance where a product was made or sold, whereas the seller can never be sure where its products may end up. Therefore, the buyer can calculate with greater certainty the cost of distant litigation.

This argument has a number of weaknesses. First, the requisite cost calculation requires information about the costs associated with distant litigation as well as the likelihood of litigation. The seller may be in a better position to acquire this information. Second, although it may be theoretically possible for a buyer to ascertain the place of manufacture or distribution, the costs of acquiring this information for individual products may be impractical. Finally, this argument focuses on buyers and sellers, whereas personal jurisdiction doctrine focuses on plaintiffs and defendants. Although in tort litigation buyers are typically the plaintiffs and sellers the defendants, these roles are certainly not true in contract litigation.¹²⁸

The foregoing discussion of the effects of distant litigation on buyers and sellers illustrates that a thorough assessment of the efficiency implications of allocating to one party the right not to travel may be quite complicated and require information to which the courts do not have easy access. It is also probably impossible to generalize this information into a single rule for plaintiffs and defendants. At the very least, those who argue that interstate commerce will be enhanced by allocating the right not to travel to distant fora to all defendants, or at least to defendants who have not "purposefully availed," have not yet proven their case.

Even if a state's broad assertion of jurisdiction over out-of-state defendants did impose a burden on interstate commerce, the state's conduct would not necessarily be impermissible. Under traditional commerce clause analysis, the court would balance the state's inter-

¹²⁸ See, e.g., *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 598 (7th Cir. 1979) (plaintiff was the manufacturer), *cert. denied*, 445 U.S. 907 (1980); *Mouzavires v. Baxter*, 434 A.2d 988, 988-89 (D.C. App. 1981) (plaintiff was a lawyer suing former client to recover fees for legal services), *cert. denied*, 455 U.S. 1006 (1982). Professor Gottlieb argues that distant litigation may be the most burdensome on the "one-shot" litigant involved in a relatively small case. Gottlieb, *supra* note 19, at 1322-23. There is no reason to assume that such litigants will always, or even usually, be defendants.

est in jurisdiction against the burdens imposed on the defendant.¹²⁹ The burdens imposed by more expansive personal jurisdiction may be quite modest.¹³⁰ The burden at issue is not the burden of litigation, because personal jurisdiction does not protect a defendant from suit, but rather the incremental additional cost that must be incurred by virtue of litigating in some forum other than one's home state. This additional cost may be quite small. On the other hand, the assertion of jurisdiction over an out-of-state defendant may serve a legitimate state interest. In the context of products liability, for example, a state might conclude that the burdens of distant litigation may be particularly onerous for plaintiffs who tend to be one-time players in the legal system, who may find it particularly difficult to find a lawyer in a different state, and who may lack the necessary resources for the upfront costs of distant litigation.

Would the burden imposed on the out-of-state defendant in such a case outweigh the benefit to local residents? Unfortunately, the Court has offered no coherent test to "weigh" these burdens and benefits. Just as the Court seems to have ignored the substantive policy choices inherent in its balancing approach to the commerce clause,¹³¹ it also seems not to have understood that similar substantive choices are inherent in the decision to allocate to one party rather than another the right not to litigate in a distant or unrelated forum.¹³²

B. Discrimination

Even if a state's decision to impose the burdens of distant litigation on the out-of-state defendant does not burden commerce, it could be argued that a systematic shifting of costs from in-staters to out-of-staters is exactly the type of protectionist discrimination the dormant commerce clause prohibits.¹³³ This argument has several problems. First, a protectionist motive is problematic. Allowing

¹²⁹ See *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 891-92 (1988); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); Tushnet, *supra* note 113, at 135.

¹³⁰ See Brillmayer, *General Jurisdiction*, *supra* note 49, at 776.

¹³¹ See *Bendix*, 486 U.S. at 896-97 (Scalia, J., concurring); Tushnet, *supra* note 113, at 146-47.

¹³² This is well-illustrated by *Kulko*, in which the Court apparently used personal jurisdiction doctrine to promote conciliation and the free flow of children between divorced parents. See *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978). But this goal was achieved at the expense of the parent who was dependent on child support.

¹³³ See Brillmayer, *General Jurisdiction*, *supra* note 49, at 746.

an in-state plaintiff to sue a foreign defendant at the plaintiff's home does not clearly produce any net savings for the plaintiff's home state. Court systems are expensive to run. The marginal cost of providing a forum, minus the savings to the plaintiff, may be greater than what it would have cost the plaintiff to litigate elsewhere. Thus, a protectionist rationale is not obvious from the mere fact that a state is willing to adjudicate these cases.¹³⁴

Second, even assuming a protectionist motive, it is not clear why states cannot be protectionist in this context. When a plaintiff and a defendant are from different states, at least one will unavoidably bear the burden of distant litigation. There are only two options—either the in-state plaintiff or the out-of-state defendant bears the burden. In this context, it seems odd to conclude that the Constitution requires states to choose to disadvantage their citizens.¹³⁵

It is sometimes argued that notwithstanding a state's legitimate interest in providing a forum for its local plaintiffs, a bias in favor of defendants is warranted because "society normally gives less weight to the interest of the plaintiff who disturbed the tranquility and initiated the litigation."¹³⁶ Whatever the pedigree of the view that plaintiffs generally should be regarded as troublemakers, there are several difficulties with incorporating it into personal jurisdiction doctrine. First, as an empirical description of actual attitudes of society, it is disputable that plaintiffs are generally viewed as troublemakers. Surely most plaintiffs would describe the situation differently and argue that the defendant, not the litigation, disrupted the status quo. As Marc Galanter has reminded us, disputes exist before, not because of, litigation.¹³⁷ Moreover, in at least some

¹³⁴ Moreover, not all personal jurisdiction cases involve in-state plaintiffs. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), Oklahoma was willing to open its courts to an out-of-state plaintiff to sue out-of-state defendants. Thus, it was not a case in which the forum sought expansive jurisdiction to advantage in-staters to the detriment of out-of-staters.

¹³⁵ See Maltz, *Visions of Fairness—The Relationship Between Jurisdiction and Choice-of-Law*, 30 ARIZ. L. REV. 751, 768 (1988). In the context of choice of law, the Supreme Court has recognized that when the forum has a legitimate interest in a controversy, it has no obligation to defer to the interests of another state. See *Nevada v. Hall*, 440 U.S. 410, 421–24 (1979); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502–03 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935).

¹³⁶ Smit, *Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies*, 21 INT'L & COMP. L.Q. 335, 351 (1972); see also von Mehren & Trautman, *supra* note 49, at 1148.

¹³⁷ Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 12 (1983).

contexts, society views litigation as a constructive, socially beneficial activity. Provisions for attorneys' fees¹³⁸ or treble damages¹³⁹ are designed to encourage the bringing of certain suits.¹⁴⁰

Second, even if an anti-plaintiff bias generally exists, the more fundamental question is whether the Constitution mandates that states adopt this anti-plaintiff view.¹⁴¹ This question reflects a classic problem of defining the appropriate constitutional baseline from which to evaluate state power.¹⁴² There is certainly no textual basis for concluding that states are required to treat litigation as disruptive rather than restorative of the status quo.¹⁴³ Where states have affirmatively chosen to favor one side in litigation, there is no reason why the Constitution should displace that choice.¹⁴⁴

The final problem with the discrimination explanation of personal jurisdiction is one of remedy. If a state's assertion of jurisdiction over a foreigner represents discrimination against foreigners, we would expect that it would be prohibited. But the Court has long permitted states to exercise jurisdiction over foreigners in at least some circumstances, such as when the defendant is served within the state¹⁴⁵ or, more recently, when the defendant "purposefully avails" itself of the state.¹⁴⁶

Yet neither the presence of the defendant in the state nor the purposeful availment of the defendant in any way lessens the supposed discrimination problem. If the state's assertion of jurisdiction was intended to or has the effect of unduly burdening a foreigner, it is hard to see how that problem is cured by the fact that the defendant engaged in purposeful conduct directed at the state. Even if a state can assert jurisdiction over out-of-state defendants only if they have engaged in conduct directed at the state, that state is still imposing the burdens of distant litigation on the out-of-stater to the benefit of the in-state plaintiff. In the commerce clause cases, the Court has never suggested that by voluntarily doing business in

¹³⁸ See, e.g., 42 U.S.C. § 1988 (1988).

¹³⁹ See, e.g., 15 U.S.C. § 15 (1988).

¹⁴⁰ See generally Brilmayer, *Interstate Federalism*, 1987 B.Y.U. L. REV. 949, 956-60 (describing pro-plaintiff bias of modern choice of law methodology).

¹⁴¹ See Abrams, *supra* note 20, at 24.

¹⁴² See generally Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

¹⁴³ Cf. *id.* at 912-15 (arguing that although some constitutional provisions incorporate baselines, others do not).

¹⁴⁴ See *id.* at 910-12.

¹⁴⁵ See *Burnham v. Superior Court*, 110 S. Ct. 2105, 2110-13 (1990) (Scalia, J.).

¹⁴⁶ See *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

or with a state, an out-of-state business "agreed" to the special burdens imposed on it¹⁴⁷ and therefore cannot raise a challenge to those burdens.¹⁴⁸

C. *Bendix Autolite Corp. v. Midwesco Enterprises: Combining Personal Jurisdiction with the Commerce Clause*

The commentators are not alone in linking personal jurisdiction with commerce clause-related concerns. The Supreme Court in the recent case of *Bendix Autolite Corp. v. Midwesco Enterprises*¹⁴⁹ suggested that it might be interested in such an approach.

In *Bendix*, an Ohio statute suspended its statute of limitations for all claims against entities that were not within the state and had not designated an agent for service of process.¹⁵⁰ Thus, in order for a foreign corporation to take advantage of the Ohio statute of limitations, it had to appoint an agent for service of process and subject itself to general jurisdiction in Ohio.¹⁵¹

Having assumed that the coerced appointment of an agent was an effective waiver of any minimum contacts requirement, the *Bendix* Court then considered the impact of this waiver on interstate commerce.¹⁵² In striking down the statute, the Court did not in-

¹⁴⁷ Brilmayer, *How Contacts Count*, *supra* note 23, at 96. See *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 893 (1988); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986). In addition to suggesting that the defendant's consent eliminates any concern about discrimination, Brilmayer also argues that the requirement of purposeful contacts assures that the consumers in a high cost forum will bear the costs associated with that forum's expensive legal system. Brilmayer, *How Contacts Count*, *supra* note 23, at 94-96. As I have argued elsewhere, this is true only if price discrimination is possible. See *Perdue*, *supra* note 19, at 515 n.207.

¹⁴⁸ For example, in *Hunt v. Washington State Apple Advertising Commission*, the Court struck down a North Carolina statute prohibiting the sale of apples in closed containers that displayed a grade other than the applicable U.S. Grade. 432 U.S. 333, 335, 352-53 (1977). The Court found that the statute deprived Washington State apple producers of a competitive advantage gained by their local-grading system. *Id.* at 352. The Court nowhere suggests that because Washington producers voluntarily sold their apples in North Carolina this legitimized the burdensome statute.

¹⁴⁹ 486 U.S. 888 (1988).

¹⁵⁰ *Id.* at 889.

¹⁵¹ *Id.* at 892.

¹⁵² *Id.* at 891-92. Interestingly, the Court seemed to assume that a corporation's "consent" to jurisdiction, given in exchange for the right to rely on Ohio law, was completely valid and effective. See *id.* at 892-93. Although consistent with a 1917 case, see *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917), it is nonetheless somewhat surprising that none of the Justices seemed troubled by this extorted waiver of a constitutional right. See *Bendix*, 486 U.S. at 893-94. Concern about the validity of such a waiver has led some commentators to argue that statutes similar to the Ohio statute violate due process. See, e.g., Brilmayer, *General Jurisdiction*, *supra* note 49, at 759-60. The Supreme

dictate clearly whether the problem was an undue burden on commerce or discrimination. The Court announced at the beginning of its opinion that it was analyzing the problem as an undue burden rather than as discrimination.¹⁵³ Nonetheless, in explaining why the statute constituted an undue burden, the Court pointed to the discriminatory nature of the statute, noting that "the Ohio statute impose[d] a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations."¹⁵⁴

Any supposed discrimination in the statute is more apparent than real. Although the statute forced out-of-state corporations to appoint an in-state agent for service of process, domestic corporations were already required under Ohio corporate law to have an in-state agent for service of process.¹⁵⁵ Thus, the statute in question, rather than discriminating, served to equalize treatment between domestic and foreign corporations.

The undue burden analysis adopted by the *Bendix* Court is also problematic. The Court asserted without explanation that "[r]equiring a foreign corporation . . . to defend itself with reference

Court has never directly addressed the due process issue. See *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982). The lower courts are split on the issue. Compare *In re Mid-Atlantic Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1277-78 (D. Md. 1981), *aff'd*, 704 F.2d 125 (4th Cir. 1983); *Schreider v. Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1090-91 (D. Kan. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979) (finding due process violation) with *Sternberg v. O'Neil*, 550 A.2d 1105, 1109-12 (Del. 1988) (finding no due process violation). Moreover, a year before *Bendix*, the Court had struck down a state's conditioning a rebuilding permit on the owner's granting a public easement. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37 (1987). The Court noted that unless the permit condition served the same purpose as the development ban, the condition would be "an out-and-out plan of extortion." *Id.* at 836-37; see also *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987). See generally Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73 (1988) (discussing constitutional issues involved when governments impose conditions on offers they are not obligated to extend).

It is also somewhat surprising that the Court assumed that the mere presence within the state of an agent is sufficient to subject the corporation to general jurisdiction. Two years after *Bendix*, in *Burnham v. Superior Court*, the Court reaffirmed the validity of transient jurisdiction. 110 S. Ct. 2105, 2119, 2126 (1990). At the time of *Bendix*, however, its validity was very much an open question. Most commentators had argued that after *Shaffer v. Heitner* transient jurisdiction was no longer valid. See, e.g., Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction?*, 25 VILL. L. REV. 38, 68 (1980); Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L. J. 1147, 1191; Vernon, *Single-factor Bases of In Personam Jurisdiction—A Speculation on the Impact of Shaffer v. Heitner*, 1978 WASH. U.L.Q. 273, 302-03.

¹⁵³ *Bendix*, 486 U.S. at 891.

¹⁵⁴ *Id.* at 894 (citation omitted).

¹⁵⁵ See OHIO REV. CODE ANN. § 1701.07(a) (Baldwin 1986).

to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden."¹⁵⁶ As Justice Scalia observed in his concurrence, the majority made no attempt to quantify or even describe the nature of this burden.¹⁵⁷

The *Bendix* Court next considered the benefits of the Ohio scheme. The justification for the state statute offered by the majority was that "serving foreign corporate defendants may be more arduous than serving domestic corporations or foreign corporations with a designated agent for service."¹⁵⁸ Although the Court acknowledged that this state interest was "legitimate," at least for equal protection and due process purposes,¹⁵⁹ it apparently concluded, though it never explicitly stated, that this interest was worth less than the costs imposed on out-of-state defendants. As Justice Scalia noted in his concurrence, this type of balancing is "like judging whether a particular line is longer than a particular rock is heavy."¹⁶⁰

Although the Court's explicit rationale in *Bendix* is not satisfactory, another explanation for the Court's conclusion is possible. The Court may have perceived *Bendix* as a case in which Ohio was imposing one cost on foreign defendants (the costs of being subjected to general jurisdiction) so as to reduce some other cost to

¹⁵⁶ *Bendix*, 486 U.S. at 893.

¹⁵⁷ *Id.* at 895-96 (Scalia, J., concurring). In fact, the one case that the majority cites for its assertion that this represents a significant burden is inapposite. *See id.* at 893 (citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987)). The discussion in *Asahi* to which the *Bendix* Court was apparently referring is a discussion of the particular burden of litigating in a foreign country. *See Asahi*, 480 U.S. at 114.

¹⁵⁸ *Bendix*, 486 U.S. at 893.

¹⁵⁹ *Id.* at 894.

¹⁶⁰ *Id.* at 897 (Scalia, J., concurring); *see also* Tushnet, *supra* note 113, at 144-45 (discussing problems involved with balancing incommensurables).

The Supreme Court's recent opinion in *Burnham v. Superior Court* provides an interesting counterpoint to *Bendix*. In *Burnham*, the Court held that a state may constitutionally exercise personal jurisdiction over a defendant based solely on the presence of the defendant within the state and regardless of whether his presence is related at all to the cause of action. 110 S. Ct. 2105, 2119 (1990) (Scalia, J.); *id.* at 2119-20 (White, J., concurring); *id.* at 2126 (Brennan, J., concurring); *id.* (Stevens, J., concurring). Although there were only plurality opinions, four and possibly five justices accepted Justice Brennan's assertion that "[t]he potential burdens on a transient defendant are slight." *Id.* at 2125 (Brennan, J., concurring). Justices Marshall, Blackmun, and O'Connor joined Brennan's opinion. Justice Stevens, concurring in the judgment, expressed his agreement with "the considerations of fairness identified by Justice Brennan." *Id.* at 2126 (Stevens, J., concurring). Although *Burnham* was not argued as a commerce clause case, the bold assertion that transient jurisdiction imposes few burdens stands in striking contrast to the equally bold assertion in *Bendix* that jurisdiction was a significant burden. This seeming contradiction reinforces the perception that *Bendix* was not a case of unreasonable burdens.

plaintiffs (the costs of out-of-state service of process). Fundamentally, the problem seems to be that the state's solution is far broader than necessary to cure the problem. If the problem is the cost of out-of-state service of process, then the easy solution would be to require appointment of an agent for service of process, while also providing that the presence of an agent does not constitute a waiver of the minimum contacts requirements.¹⁶¹ Thus, the fundamental problem with the Ohio statute may have been that the burdens it imposed were not sufficiently connected to its purpose and it was therefore irrational.¹⁶²

If the real problem in *Bendix* was that the statute was irrational, then that case does not illuminate what the Court should do when a state exerts expansive jurisdiction to prevent plaintiffs from having to bear the burdens of distant litigation. In such a case, the solution seems closely tailored to the problem. Confronted with the reality that someone must bear the costs of litigation in a distant forum or in a forum with which they have not or would not otherwise affiliate themselves, it does not seem irrational for a state to choose to put that cost on defendants rather than plaintiffs.¹⁶³

IV. AN ALTERNATIVE FORMULATION OF THE PROBLEM

Although the traditional understanding of the problem for which personal jurisdiction is the solution is inadequate, there may be problems for which personal jurisdiction is the solution. These problems do not involve profound or abstract issues of the nature of sovereignty or the sources of governmental legitimacy. They are much more mundane and reflect the considerations that motivate actual litigants to care about personal jurisdiction.

Litigants do care about personal jurisdiction; indeed, they care enough to litigate the issue of personal jurisdiction all the way to

¹⁶¹ See *Cutler v. Raymark Indus., Inc.*, 707 F. Supp. 168, 171-72 (D.N.J. 1989).

¹⁶² See Tushnet, *supra* note 113, at 146-47 (discussing how in burden cases, the Supreme Court will strike down state regulations when the regulations do little to advance the state interest asserted).

¹⁶³ Interestingly, in the handful of pre-*International Shoe* cases in which defendants challenged assertions of personal jurisdiction on commerce clause grounds, the Supreme Court expressly held that having the plaintiff's residence within the forum was an important factor that diminished the likelihood of a commerce clause violation. See, e.g., *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511, 519-20 (1934); *State ex rel. St. Louis B. & M. Ry. v. Taylor*, 266 U.S. 200, 207 (1924); *Davis v. Farmers Co-op. Equity Co.*, 262 U.S. 312, 316-17 (1923); see also *Scanapico v. Richmond, F. & P. R.R.*, 439 F.2d 17, 25-27 (2d Cir. 1970) (reconsideration en banc).

the United States Supreme Court. They care not because of abstract philosophical reasons, but because the place where the litigation is conducted has a number of practical consequences: choice of law;¹⁶⁴ convenience or inconvenience for one party;¹⁶⁵ and local bias¹⁶⁶ or perception that judges or juries in particular locales are more or less generous.¹⁶⁷ In short, there are numerous practical reasons why choice of forum matters.

Personal jurisdiction limits the plaintiff's choice of fora. The fundamental question is whether there are reasons why the federal courts should limit the plaintiff's choice. Although my conclusions are still somewhat tentative, I believe that it is possible to justify a personal jurisdiction doctrine, the sole purpose of which is to limit plaintiff's choice of fora.

The rationale for such a doctrine would derive from three major practical reasons why litigants care about choice of forum: convenience,¹⁶⁸ bias,¹⁶⁹ and choice of law.¹⁷⁰ All three of these considerations can be conceived of as problems for which the federal

¹⁶⁴ See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (forum state may constitutionally apply its own statute of limitations). In *Keeton v. Hustler Magazine, Inc.*, the plaintiff's choice of New Hampshire as the forum and defendant's objection to that forum seems to have been largely a function of New Hampshire's six year statute of limitations. See 465 U.S. 770, 772 n.1 (1984). Likewise, some commentators have noted that the fundamental concerns of the parties in *Hanson v. Denckla*, 357 U.S. 235 (1958), were choice of law questions. See, e.g., Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 619-23 (1958); Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695, 698-700 (1959).

¹⁶⁵ See *National Equip. Rental v. Szukhent*, 375 U.S. 311, 326-27 (1964) (Black, J., dissenting); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 224 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648-49 (1950); Gottlieb, *supra* note 19, at 1325-27.

¹⁶⁶ Although the cases do not involve personal jurisdiction, observers of both the Pete Rose suit against the Commissioner of Baseball and *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987), have suggested that local bias may have played a role. See N.Y. Times, July 4, 1989, § 1, at 37, col. 2 (Pete Rose); *id.*, June 30, 1989, at A22, col. 5 (same); NAT'L L.J., Apr. 6, 1987, at 2 (*Pennzoil*); *id.*, Mar. 16, 1987, at 8 (same).

¹⁶⁷ See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 202-03 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987). For a discussion of the *Union Carbide* case, see NAT'L L.J., July 20, 1987, at 30; *id.*, Dec. 30, 1985, at S-2; *id.*, Dec. 31, 1984, at 3.

¹⁶⁸ See Gottlieb, *supra* note 19, at 1321-27 (discussing convenience and why it matters to litigants).

¹⁶⁹ See Morris, *Enterprise Liability and the Actuarial Process—the Insignificance of Foresight*, 70 YALE L.J. 554, 601 (1961). See also *supra* notes 166 & 167 for examples of cases where choice of forum was influenced by concerns about bias.

¹⁷⁰ See Youngblood, *Constitutional Constraints on Choice of Law: The Nexus Between World-Wide Volkswagen Corp. v. Woodson and Allstate Insurance Co. v. Hayne*, 50 ALBANY L. REV. 39 (1985); see also Brilmayer, *General Jurisdiction*, *supra* note 49, at 777-78 (noting that "only when plaintiffs are able to forum shop for applicable law and not just forum location do they choose ridiculously inconvenient or disinterested forums").

courts should supply a solution. As I discuss below, however, I believe that the concern that is the most likely basis for any significant personal jurisdiction limitation is choice of law.

A. Convenience

Where litigation involves parties from different states, at least one party will suffer the inconvenience of having to litigate away from home. Although there may be legitimate reasons for a legislature to favor one side over another with respect to convenience,¹⁷¹ there is no reason why the federal courts should mandate a systematic preference for one side.

The one situation in which federal court intervention on the grounds of convenience might be appropriate is where a forum is so burdensome that a party cannot defend herself. The right to have one's day in court is a fundamental component of traditional procedural due process.¹⁷² In a few situations, a forum may be so burdensome that as a practical matter, a party is deprived of her day in court.¹⁷³

A personal jurisdiction doctrine based on this concern will likely be extremely limited in its effect because it is difficult to structure a jurisdictional rule that deals effectively with this problem. One could, for example, have a rule that suits can only be prosecuted in the defendant's place of residence. Although such a rule would virtually eliminate the likelihood that defendants would be unduly burdened, it would also mean that some plaintiffs would be denied their day in court. A more individualized inquiry would lead to uncertainty and make the defense of unreasonable inconvenience one that is expensive to raise.¹⁷⁴ Thus, although there may be cases where it is appropriate for the federal courts to intervene in order

¹⁷¹ For example, the legislature might wish to encourage or discourage particular types of suits.

¹⁷² See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'").

¹⁷³ Several commentators have argued that personal jurisdiction doctrine should be directed primarily to this problem of inconvenience. See Redish, *supra* note 18, at 1135; Weintraub, *supra* note 18, at 528; Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 846 (1981). For an argument that the location of trial will rarely interfere with a party's ability to defend her rights, see Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 95 (1990).

¹⁷⁴ See Borchers, *supra* note 173, at 102-03.

to ensure that the defendant has a meaningful opportunity to defend herself in court, a personal jurisdiction doctrine designed solely for this purpose will be of limited impact. Indeed, if the purpose of personal jurisdiction is to deal with these cases of extreme inconvenience, there seems to be little reason to have a separate personal jurisdiction doctrine. Instead, it could be addressed under traditional procedural due process doctrine.¹⁷⁵

B. Bias

Parties may also care about the choice of forum because they believe a particular forum will be biased in favor of one side. Indeed, some commentators have suggested that this is the primary factor in choosing a forum.¹⁷⁶ If there are no choice of forum limitations, then the plaintiff has the unbridled ability to select a forum biased in her favor.

The fact that a plaintiff may be able to choose a forum biased in her favor does not mean that the federal courts should intervene to prevent this choice. Of course, at some point, a particular forum may be so biased and unfair that holding the litigation there violates the traditional procedural due process principles.¹⁷⁷ As with the problem of extreme inconvenience,¹⁷⁸ there would seem to be no reason for separate personal jurisdiction doctrine to handle these occasional problems concerning the fundamental fairness of the adjudicatory process.

As for the more typical situation, there is simply no reason why the federal courts should mandate that the litigation occur in a forum likely to prefer one side rather than the other. For example, one might have a personal jurisdiction rule that requires that all suits be brought in the defendant's home state, or alternatively, that prohibits suits being brought in the plaintiff's home state. The

¹⁷⁵ This is essentially the approach that would be used in all federal question cases if the proposed changes to F.R.C.P. 4 are adopted. Those changes would provide nation-wide service of process in all federal question cases. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE AND THE FEDERAL RULES OF CIVIL PROCEDURE 15-16 (1989). The Advisory Committee notes that even with nation-wide service of process, a defendant would still be protected by the due process clause from having to litigate in a forum that was so inconvenient that the litigation violated "fair play and substantial justice." *Id.* at 31.

¹⁷⁶ See Morris, *supra* note 169, at 601.

¹⁷⁷ See *In re Murchison*, 349 U.S. 133, 136 (1955); Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1279 (1975).

¹⁷⁸ See *supra* text accompanying note 175.

justification would be that this would prevent plaintiffs from being able to sue in the state most likely to be biased in their favor. But why should the federal courts prefer defendants over plaintiffs? Indeed, if the federal courts were to intervene on grounds of limiting bias, the only justifiable rule would seem to be one that requires all suits to be brought in states having absolutely nothing to do with the controversy or either party, because those states are the most likely to be neutral.

There is an alternative justification for personal jurisdiction that is related to the question of bias. It focuses not on the forum selected, but on the process of selection. The argument would be that it is unfair for plaintiffs to have unbridled ability to choose any forum.¹⁷⁹ Our adversarial system is premised on the idea that the two litigants should be in relatively equal positions.¹⁸⁰ Thus, for example, a system that allowed the plaintiff to designate the judge, with no input from the defendant, is so unbalanced in its treatment of plaintiffs and defendants that it seems fundamentally unfair.¹⁸¹ On the other hand, a more balanced and fair judge selection system might be one that permitted the defendant to designate several judges and then permitted the plaintiff to choose a forum among that list.

Personal jurisdiction could be conceived of as a way of making the process of selecting the forum somewhat more balanced and fair by limiting the pool of places from which a plaintiff could pick. The question remains, however, as to why the federal courts should take it upon themselves to do this.

Although intervention might be justified under the due process¹⁸² or equal protection clauses,¹⁸³ I think a more promising source of authority would be the full faith and credit clause of the United States Constitution.¹⁸⁴ The Supreme Court has interpreted

¹⁷⁹ See Gottlieb, *supra* note 19, at 1327 (observing that plaintiffs, unlike defendants, have the time to consider where to file suit).

¹⁸⁰ See 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, 52 (1976).

¹⁸¹ See Stein, *supra* note 19, at 759.

¹⁸² U.S. CONST. amend. XIV, § 1; see Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 588 (1984).

¹⁸³ U.S. CONST. amend. XIV, § 1; see Leubsdorf, *supra* note 182, at 588-90.

¹⁸⁴ U.S. CONST. art. IV, § 1. Professor Trangsud has similarly argued that the federal standard for federal jurisdiction derives from the Full Faith and Credit Act. See Trangsud, *supra* note 23, at 858. He observes, and I agree, that if there were no limit on state jurisdictional authority, states might expand their jurisdictional reach. See *id.* at 863. I also agree

the full faith and credit clause and its implementing legislation¹⁸⁵ to require that a judgment from one state be given conclusive effect in all other states.¹⁸⁶

Although commentators have questioned the correctness of this interpretation,¹⁸⁷ it remains embedded in our law. If this interpretation were extended to mean that *all* judgments must be enforced, at least all judgments that were valid in the rendering forum, this would have the effect of expanding plaintiffs' choices of forum over the choices that would otherwise exist. In a system in which states are not required to and do not always enforce judgments of other

that such an expansion would not be restrained if jurisdiction were judged only by the law of the rendering jurisdiction and that allowing the enforcing state to apply its law would be unwise. However, as discussed below, I do not agree that a federal standard is necessary to prevent what Transgrud calls "exorbitant" exercises of jurisdiction, that is, jurisdiction by states that are insufficiently connected to the defendant.

The core of his argument about federal common law is the assertion that "[i]t is most unlikely that the Framers or the First Congress intended that there be no check on the assertion of exorbitant theories of jurisdiction by particular states." *See id.* at 863. There are several problems with this argument. First, he cites no evidence that anyone actually perceived "exorbitant" jurisdiction to be a problem and he even notes the "dissatisfaction with unreasonable claims of jurisdiction over noncitizens seems to have played little role in the disaffection many came to feel for the structure created by the Articles [of Confederation]." *Id.* at 858 (footnote omitted). Moreover, it is not clear that there was a consensus about what would constitute exorbitant jurisdiction. For example, Transgrud cites *Kibbe v. Kibbe*, 1 Kirby 119 (Conn. 1786), and *Phelps v. Holker*, 1 U.S. (1 Dall.) 261 (1788), as examples of situations in which one state unreasonably asserted jurisdiction and another state refused to enforce the judgment. *See Transgrud, supra* note 23, at 858 & n.50. But these cases also demonstrate disagreement about what constituted reasonable exercises of jurisdiction because the rendering states in those cases presumably considered their conduct completely legitimate. Finally, even if the Framers thought it important that the federal government limit state power to assert "exorbitant" jurisdiction, it does not necessarily follow that they envisioned direct limits on state jurisdiction. As discussed earlier, the Framers may have relied on the privileges and immunities clause and diversity jurisdiction to solve the problem of "exorbitant" jurisdiction. *See supra* notes 107–09 and accompanying text.

In contrast to Transgrud, I am arguing for federal jurisdictional standards not because it is inherently unreasonable for a state unconnected to the litigation to hear the case. Instead, I argue that a *process* which gives plaintiffs complete and unfettered control over choice of forum is unfair.

¹⁸⁵ 28 U.S.C. § 1738 (1988) (originally enacted as Act of May 26, 1790, ch. 11, 1 Stat. 122 (1790)).

¹⁸⁶ *See Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484–85 (1813). It is not clear whether this holding rests on an interpretation of the constitutional provision or of the implementing legislation. *See Whitten, The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 568–70 (1981).

¹⁸⁷ As Professor Maltz has observed, "the unity of the nation will not necessarily be threatened if state A is allowed to render and enforce a judgment within its own borders, but state B is not required to respect that judgment." Maltz, *supra* note 135, at 763; *see also Whitten, supra* note 186, at 567.

states, a plaintiff's forum options are likely, as a practical matter, to be somewhat constrained. Under such a system, the plaintiff would consider the fora in which enforcement would likely be sought and then would bring the original law suit only in a forum where the likely enforcing fora would respect the resulting judgment.¹⁸⁸ A requirement that *all* sister-state judgments be enforced would have significantly changed the situation. One might argue that such a change was the intended effect of the full faith and credit clause.¹⁸⁹ There is little reason to believe, however, that the framers intended the delphic words "full faith and credit" to have that effect.¹⁹⁰ The purpose of the full faith and credit clause was to guard against "the disintegrating influence of provincialism in jurisprudence,"¹⁹¹ but this purpose does not depend on plaintiffs having unlimited choices of forum.

One might, of course, accept that limiting plaintiffs' choices of fora is sensible and consistent with the full faith and credit clause, yet also argue that such a step is for Congress, not the courts. Indeed, Article IV explicitly gives Congress the task of implementing the full faith and credit clause. Congress has in fact passed implementing legislation, but that legislation does not explicitly address personal jurisdiction.¹⁹² Thus, the Court must decide whether the full faith and credit clause requires that all judgments be enforced, and includes no requirement concerning enforcement of

¹⁸⁸ This was in fact precisely the situation that existed in the American colonies before the Revolution. See Trangsrud, *supra* note 23, at 854-55.

¹⁸⁹ Such a holding would not be inconsistent with the long accepted principle that a state need only give effect to a judgment rendered by a court with jurisdiction. See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 8 (1945); Trangsrud, *supra* note 35, at 862-63. The enforcing state could rely entirely on the law of the rendering state to determine whether there was jurisdiction. However, once a state knew that any judgments valid under its own law would be enforced, it might expand its courts' jurisdiction and thereby expand plaintiffs' forum options.

¹⁹⁰ The clause generated little debate in the ratification process. See Sumner, *The Full-Faith-and-Credit-Clause—Its History and Purpose*, 34 OR. L. REV. 224, 230 (1955). The clause generated only brief mention in *The Federalist Papers*. Madison simply observes that the provision of the clause giving power to Congress was a "valuable improvement" over the full faith and credit clause of the Articles of Confederation because "[t]he meaning of the latter is extremely indeterminate and can be of little importance under any interpretation which it will bear." THE FEDERALIST NO. 42, at 271 (J. Madison) (C. Rossiter ed. 1961). For a history of the full faith and credit clause and implementing legislation, see Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 34-62 (1957); Sumner, *supra*, at 225-41; and Whitten, *supra* note 186, at 542-70. For a discussion of the purposes of the full faith and credit clause, see Sumner, *supra*, at 241-49.

¹⁹¹ Jackson, *supra* note 189, at 17; accord Martin, *Constitutional Limits on Choice of Law*, 61 CORNELL L. REV. 185, 193-94 (1976).

¹⁹² See 28 U.S.C. § 1738 (1988).

judgments, or something in between. Assuming that the full faith and credit clause is not absolute, some entity must delineate rules for determining when enforcement is required. In the absence of congressional specification, it is appropriate for the federal courts to elaborate the specifications.¹⁹³ These court-made rules can be conceived of as a kind of "dormant" full and credit clause doctrine or as federal common law¹⁹⁴ made pursuant to the full faith and credit statute.¹⁹⁵

Assuming the authority for federal intervention exists, what should the personal jurisdiction rules look like? Personal jurisdiction could be conceived of as a variation of the previously described judge-selecting scheme. By her conduct, the defendant chooses one or more places where the litigation can be brought and the plaintiff then gets to choose from among that list. The difficulty is that for the reasons discussed earlier,¹⁹⁶ the defendant is unlikely to have chosen anything. The defendant has not chosen the pool of possible fora; the federal court's jurisdiction doctrine has. The question then becomes whether there is any reason why some states should be on the list of possible fora and not other states. Put differently, if the goal is simply to limit the pool of possible fora from which a plaintiff can pick, why not adopt some completely arbitrary rule such as the plaintiff can sue in any state that begins with the same letter as the defendant's last name?

The reason such an arbitrary rule is not appropriate is that it does not accommodate legitimate state interests.¹⁹⁷ Any federal rule limiting where a plaintiff can sue is a federal intrusion on state

¹⁹³ Professor Sumner has noted:

As a practical matter the full faith and credit demanded by the Constitution is that which the Supreme Court specifies. There is nothing whatsoever in the history of the clause showing that this was the design of the framers. But, since the clause is self-executing . . . and since Congress has failed to carry out its task, there is little more that can be done.

Sumner, *supra* note 190, at 241.

¹⁹⁴ See *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that the jurisdictional provisions of the Taft-Hartley Act, regulating labor unions, was an invitation to the federal courts to fashion federal common law in the labor area).

¹⁹⁵ See Abrams & Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 69, 94 (1984). Another option to federal court-made rules would be to permit the enforcing state to apply its own standards of validity. However, this would sacrifice uniformity, see Trangsrud, *supra* note 23, at 864-65, something that was a concern of the full faith and credit clause, see Sumner, *supra* note 190, at 246.

¹⁹⁶ See *supra* note 50 and accompanying text.

¹⁹⁷ For arguments concerning the need for judicial restraint in the "dormant" commerce clause, see Redish & Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 592-99; Tushnet, *supra* note 113, at 150-56.

power. States have significant and legitimate reasons for providing a forum and, as a matter of federalism, any federal limit on choice of forum should accommodate these reasons.¹⁹⁸

There are two categories of states that have legitimate interests in providing a forum. The first category is states in which any significant events, omissions or effects occurred. A state has a legitimate regulatory interest in providing a forum where it is the locus of the liability-producing conduct.¹⁹⁹ But a state would seem also to have a legitimate interest in providing a forum whenever it is the place of injury.²⁰⁰ Injuries have ramifications beyond the people immediately affected. In *World-Wide Volkswagen*, for example, the plaintiff's car blew up on an Oklahoma road.²⁰¹ Such an accident may well threaten the safety of passers-by and rescue workers as well as interfere with traffic.²⁰² Local residents have a legitimate interest in knowing the cause of such an accident and likewise have an interest in providing a forum for disputes arising out of the accident.²⁰³

¹⁹⁸ Professor Smit has set forth numerous reasons why a state might be interested in providing a forum:

The State may be interested in creating a forum for its own litigants. It may be interested in creating a local forum so that its laws can be properly applied. It may be interested in controlling the actions of its nationals. It may be interested in creating a forum that is convenient for resident witnesses. It may have an interest in efficient administration of justice. And it may be interested in creating a local forum for the adjudication of disputes that have an impact on the economic and social life of the State.

Smit, *supra* note 136, at 351-52 (footnotes omitted). I think that nearly all of these interests would be accommodated under my proposed rule.

¹⁹⁹ See Brilmayer, *How Contacts Count*, *supra* note 23, at 86.

²⁰⁰ The Brussels Convention adopts a similar approach. *The Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters*, art. 3, no. 3, 15 O.J. EUR. COMM. (No. L 299) 32 (1972) (entered into force Feb. 1, 1973) [hereinafter *Brussels Convention*]. It provides that tort suits may be brought in the place of the "harmful event." "Harmful event" has been interpreted by the European Court of Justice to include both the place of the events giving rise to liability and the place where damage occurs. See *Bier v. Mines de Potasse D'Alsace S.A.* [1976-8] E.C.R. 1736, 1743 (European Court of Justice 1976), reprinted in A. LOWENFELD, *CONFLICT OF LAWS* 612 (1986).

²⁰¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980).

²⁰² Kay Robinson and her two children, the plaintiffs in *World-Wide Volkswagen*, were in fact rescued from their burning car by two local residents. *Tulsa World*, Sept. 23, 1977, at 1, col. 1. Other local residents, apparently moved by the plight of the family, established the Robinson Family Relief Fund. See *Tulsa World*, Sept. 24, 1977, at D1, col. 1.

²⁰³ Professor Brilmayer argues that states should not be permitted to assert personal jurisdiction solely on the basis of effects within the state. See Brilmayer, *How Contacts Count*, *supra* note 23, at 95-96, 105-07. Her rejection of effects as a basis for jurisdiction, however, is based entirely on a commerce clause type argument that this allowance of personal jurisdiction would allow states to impose costs on other states. See *supra* notes 122-30 and accompanying text for discussion of this argument.

I believe that a state also has a significant interest in providing a forum whenever either disputant is a citizen of that state.²⁰⁴ States may be concerned not only with how disputes are resolved,²⁰⁵ but also that disputes are resolved peacefully and expeditiously.²⁰⁶ A state may view the presence of unresolved disputes within its population as a threat to public order and happiness.²⁰⁷

²⁰⁴ See Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 WASH. U.L.Q. 671, 688 (1988); Weintraub, *supra* note 18, at 524.

²⁰⁵ Brilmayer focuses exclusively on whether states have a legitimate regulatory interest in the conduct in question. See Brilmayer, *How Contacts Count*, *supra* note 23, at 86. Thus, she addresses the question of a state's interest in how a dispute is resolved but not a state's interest in whether the dispute is resolved. See *id.*

²⁰⁶ See Twitchell, *supra* note 49, at 655 (noting that "[a] state's desire as a sovereign to provide an orderly process for the adjudication of disputes is a rational basis for providing a forum").

²⁰⁷ The nationality of the offender and the victim are accepted bases in international law for the exercise of criminal jurisdiction. See The Draft Convention on Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 519-21, 573-77 (Supp. 1935). Professor Stein has asserted that "[s]overeignty is not a generalized charter to protect a state's domiciliaries around the world," Stein, *supra* note 19, at 743, and the United States has in the past expressed hostility towards a theory of "passive personality" under which jurisdiction is based on the citizenship of the victim. See Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 603-06 (1987). Nonetheless, in 1986 Congress acted in apparent reliance on the passive personality principle in adopting legislation aimed at terrorism that makes it a crime to kill or endanger a United States national abroad. See 18 U.S.C. § 2331 (1988); Note, *supra*, at 613-16. Moreover, courts have held that the United States has authority to exercise jurisdiction on this basis, at least when specifically authorized by statute. See *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984); *United States v. Yunis*, 681 F. Supp. 896, 901-03 (D.D.C. 1988). Finally, as the United States' justifications for its invasions of Grenada and the Dominion Republic demonstrate, we have at times certainly acted as if we believed that our national sovereignty is a generalized charter to protect our domiciliaries around the world. Concerning the invasion of Grenada, see N.Y. Times, Oct. 26, 1983, § 1, at 16, col. 1 (quoting Pres. Reagan: "The United States objectives are clear—to protect our own citizens . . ."); N.Y. Times, Oct. 28, 1983, § 1, at 10, col. 5 (quoting Pres. Reagan: "I believe our government has a responsibility to go to the aid of its citizens if their right to life and liberty is threatened."). Concerning the invasion of the Dominican Republic, see N.Y. Times, May 3, 1965, at 10, col. 5 (quoting Pres. Johnson: "Our forces, American forces, were ordered in immediately to protect American lives."). See also *Yunis*, 681 F. Supp. at 902-03 (noting that the extradition to the United States of the terrorist leader responsible for the hijacking of the Achille Lauro and the murder of Leon Klinghoffer was justified solely on the basis of the citizenship of the victim).

There is no obvious reason to treat civil cases differently. In fact, commentators have noted that a number of other countries recognize the nationality of the litigants as legitimate bases of asserting jurisdiction. See, e.g., deVries & Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 317 (1959); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 797-99 (1955); Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 AM. J. COMP. L. 323, 324-27 (1961).

The Brussels Convention provides for jurisdiction at the defendant's domicile and, for certain classes of plaintiffs, i.e., consumers, policyholders, and support claimants, at the plaintiff's domicile. *Brussels Convention*, *supra* note 200, art. 2, ¶ 1 (defendant's domicile); *id.*

In sum, I believe there is a plausible argument that allowing plaintiffs an unlimited choice of forum violates the principle that litigants should be in relatively equal positions. The full faith and credit clause provides a basis for federal court intervention, but any such intervention must be sensitive to legitimate state interests in providing a forum.

C. Choice of Law

A final reason why litigants may care about choice of forum is that it may have a significant, if not dispositive, effect on choice of law.²⁰⁸ The Supreme Court has given states wide latitude in the area of choice of law²⁰⁹ and with the multitude of choice of law approaches,²¹⁰ there may be significant variations in the law that would be applied by different fora.

Numerous commentators have noted the relationship between judicial jurisdiction and choice of law.²¹¹ Several have proposed that the two doctrines should be linked so that if there is jurisdiction then the forum can apply its own law²¹² or if the forum can apply its own law, then there is jurisdiction.²¹³ However, most of the commentators who have stressed the relationship between jurisdiction and choice of law assume that jurisdiction serves some function independent of its effect on choice of law.²¹⁴ My suggestion here is

art. 14 (consumers); *id.* art. 8, ¶ 2 (policyholders); *id.* art. 5, no. 2 (support claimants). See generally Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195 (1984).

²⁰⁸ See Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. DAVIS L. REV. 869, 872 (1981). In some cases, it has been obvious that the plaintiff's choice of forum was influenced by choice of law considerations. See *Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1277-78 (1990); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773 & n.1 (1984).

²⁰⁹ See, e.g., *Allstate Ins. Co., v. Hague*, 449 U.S. 302, 313-19 (1981) (Brennan, J.); *id.* at 362 (Stevens, J., concurring); R. SEDLER, *ACROSS STATE LINES* 108 (1989).

²¹⁰ See Kay, *Theory into Practice: Choices of Law in the Courts*, 34 MERCER L. REV. 521 (1983).

²¹¹ See, e.g., Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960, 993 (1981); Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 874 (1980); Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 38-40 (1988); Silberman, Shaffer v. Heitner: *End of an Era*, 53 N.Y.U.L. REV. 33, 79-90 (1978); Weinberg, *The Place of the Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 97-99 (1988).

²¹² See Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031, 1033 (1978).

²¹³ See Silberman, *supra* note 211, at 88.

²¹⁴ See Hay, *Judicial Jurisdiction and Choice of Law: Constitutional Limitations*, 59 U. COLO. L. REV. 9, 9-10, 34 (1988); Maltz, *supra* note 204, at 700; Peterson, *supra* note 208, at 884;

that personal jurisdiction can be treated as not merely related to choice of law, but a doctrine whose sole purpose is to keep cases out of states that would not be permitted to apply their own law.

This argument is of course premised on the view that some constitutional limits of choice of law are appropriate. Although I have argued in this article that most justifications for limiting judicial jurisdiction do not withstand scrutiny, I do not believe the same is true for choice of law. It is beyond the scope of this article to analyze this proposition fully, but I would simply note that it is far more important to people structuring their conduct to know what law will apply than it is to know where they might be sued.²¹⁵

Assuming it is appropriate to impose federal limits on choice of law, why use jurisdiction to accomplish this? Why not deal with choice of law directly by permitting any state to be a forum but, where necessary, prohibiting it from applying its law? There are two reasons why it is appropriate to prohibit a state from hearing a case if it is insufficiently connected to be able to apply its own law.

The first reason derives from legal realism.²¹⁶ A court that "applies" another state's law is in fact applying its own interpretation of some other law and thereby applies its law. There is no reason why a state that is insufficiently connected to a case to apply its law should be allowed to apply its "interpretation" of law.²¹⁷

The second reason why it is sensible to limit choice of forum so as to limit choice of law stems from the Supreme Court's holding in *Sun Oil Co. v. Wortman*.²¹⁸ In *Wortman*, the Court held that a forum may constitutionally apply its own procedures, including its statute of limitations. Although some might criticize that decision as simply wrong,²¹⁹ I think it correctly embodies the concern ap-

Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 819 (1981); Rosenberg, *Foreword to the Colorado Symposium*, 59 U. COLO. L. REV. 1, 7-8 (1988); Weinberg, *supra* note 211, at 103.

²¹⁵ As Professor Silberman has aptly observed: "To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Silberman, *supra* note 211, at 88.

²¹⁶ See L. BRILMAYER, *CONFLICTS OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 31, 34-36 (1991); see also *Linkletter v. Walker*, 381 U.S. 618, 622-24 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 101-03 (1945); *Eric R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

²¹⁷ Moreover, where a state that is prohibited from applying its own laws is permitted to be the forum and "interpret" the laws of other states, the Supreme Court may then have to decide whether the interpretation is so extreme as to violate the constitution. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988).

²¹⁸ 486 U.S. 717 (1988).

²¹⁹ In an article written several years before *Wortman*, Professor Martin criticized lower

parent in the *Erie* cases²²⁰ that what it means to be a forum is to have the right to apply your own procedures. Within the federal system, the power to create the courts carries with it the authority to proscribe the rules of procedure for those courts.²²¹ The Supreme Court has held that this power to extend to all matters "rationally capable of classification" as procedural.²²² *Wortman* simply extends that same broad control to states. It is less intrusive on states for the federal courts to prohibit a state altogether from hearing a case than it is to permit it to hear the case but pick and choose among the procedures that states can apply.

If one treats jurisdiction as the handmaiden of choice of law whose function is to implement choice of law concerns, that does not necessarily mean that the test for jurisdiction should be identical to the test developed in the choice of law area. Jurisdiction is a preliminary matter and the standards for jurisdiction should be relatively clear and straightforward.²²³ Personal jurisdiction can be treated as simply a first cut at dealing with choice of law problems and an admittedly imperfect one.

With respect to choice of law, the Supreme Court has held that a state may apply its laws where it has a "significant contact or significant aggregation of contacts" with the claims creating state interests.²²⁴ Contacts that the Court has considered relevant in creating state interests are the connection of the parties to a state²²⁵ and the place where conduct or injuries occurred.²²⁶ Therefore, a possible test might be one similar to the approach suggested earlier in connection with the discussion of bias.²²⁷

If personal jurisdiction is a tool for implementing choice of law doctrine, then the goal of a personal jurisdiction test would be to

court cases that allowed the forum to apply its statute of limitations in situations similar to *Wortman*. Martin, *Statutes of Limitations and Rationality in Conflict of Laws*, 19 WASHBURN L. REV. 405, 415-21 (1980).

²²⁰ See *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring).

²²¹ See *Hanna*, 380 U.S. at 471-72; Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 706 & n.77 (1974).

²²² *Hanna*, 380 U.S. at 472.

²²³ As Professor Borchers has aptly observed, "[i]t is bad enough to tell the Robinsons and Heitners of the world that their suit cannot be brought in the the most logical and sensible forum, it is worse yet to tell them so only after three levels of appellate review, with the result flipping back and forth as each new court reviews the case." Borchers, *supra* note 173, at 102.

²²⁴ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985).

²²⁵ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313-19 (1981).

²²⁶ See *Watson v. Employees Liability Assurance Co.*, 348 U.S. 66, 70-73 (1954).

²²⁷ See *supra* notes 199-204 and accompanying text.

eliminate as possible fora any state that was obviously unconnected to the parties or the events. After the case was underway in a forum, a more refined choice of law analysis could be made. One might still conclude that a forum could not apply its law. But I am not proposing that jurisdiction be treated as a complete solution to choice of law problems, only that a well-constructed and straightforward personal jurisdiction rule can be a useful tool for reducing unnecessary choice of law problems.

IV. CONCLUSION

A coherent doctrine of personal jurisdiction requires a clear understanding of the purposes underlying the doctrine. The Supreme Court has never clearly articulated these underlying purposes, but the cases hint, and a growing chorus of commentators explicitly argue, that personal jurisdiction is best understood as a concrete manifestation of the philosophical problem of political obligation and legitimacy. This view has led some commentators to argue that personal jurisdiction should either explicitly incorporate concepts derived from political philosophy or implicitly incorporate such concepts by relying on approaches derived from the dormant commerce clause. Unfortunately, neither political philosophy nor the dormant commerce clause provides an adequate justification for personal jurisdiction doctrine.

Nonetheless, I have argued that there may be one or more problems for which personal jurisdiction is the solution. I have focused on practical problems created by a plaintiff having unlimited choices of fora and suggested that some of these may be problems of sufficient magnitude that it is appropriate to solve them through federal court-imposed limitations on choice of forum. I have attempted to describe preliminarily what a doctrine centered on these problems might look like. My goal is not to detail definitively a new test for jurisdiction but to describe the proper approach to formulating such a test. The central premise of my approach is that a coherent doctrine is not possible without first identifying the problem for which personal jurisdiction is the solution. We either have to let the beetle out of the box or stop talking about it.²²⁸

²²⁸ If we do not do this, we may find ourselves in the chaos best described by Dr. Seuss. T.S. GEISSEL, *FOX IN SOCKS* 54 (1965) ("When beetles fight these battles in a bottle with their paddles. . .").