The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion

By HAYWARD D. REYNOLDS*

Introduction

Justice Scalia's opinion in *Burnham v. Superior Court*[1] reveals the conservative formalist[2] agenda of the Burger-Rehnquist Court[3] in regard to jurisdictional issues under the Due Process Clause of the Fourteenth Amendment. In *Burnham*, the Court upheld an assertion of transient jurisdiction[4] over a nonresident husband in a California divorce action.

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* Professor of Law, Capital University Law School; B.A., Indiana University, 1953; J.D., Indiana University Law School, 1965.

1. 110 S.Ct. 2105 (1990). In *Burnham*, Justice Scalia argues that the long-standing acceptance of transient jurisdiction is sufficient basis to withstand a due process attack under *International Shoe* standards. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). This is clearly a conservative-formalist approach that clings to the past and eschews a social-functional conception of jurisdiction and due process.

2. By the term "formalism," I mean the ideology of legal rules, concepts, and doctrines as concrete entities determined by neutral logic, standardized word meanings, specific definitions, and objective criteria. Despite salient attacks on formalism by the sociological jurisprudence movement, legal realism movement, natural law movement, and the critical legal studies movement, formalism remains a dominant force in legal culture. In recent years formalism has been injected with new vigor by the conservative Justices on the U.S. Supreme Court during the Burger-Rehnquist era. For further reference see G. GILMORE, THE AGES OF AMERICAN LAW 1-18 (1977); KELSO & KELSO, STUDYING LAW: AN INTRODUCTION (1984); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 169-70, 193-98 (1985).

3. I have treated the Burger Court and the Rehnquist Court as a single entity because the primary impetus behind the Nixon and Reagan appointments to the Court was the desire to restructure the Court along conservative formalistic lines in order to recapture older notions of federalism and to curb the development of fundamental rights.

4. 110 S.Ct. at 2119. Transient jurisdiction refers to the notion that a state may exercise jurisdiction over a nonresident who is served with process inside the state. Under this territorial power doctrine, the resident need not have any connection or relationship to the state other than the fact that he was in the state at the time he was served with process. After *International Shoe*, many scholars felt that transient jurisdiction violated due process. *See* Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction*, 25 VILL. L. REV. 38 (1980); Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729 (1981).

This decision put to rest the social-functionalist argument[5] that the territorially inspired concept of transient jurisdiction was inconsistent with the minimum contacts/fair-play standard of *International Shoe.*[6] *Burnham*, along with *Kulko v. Superior Court*,[7] *World-Wide Volkswagen Corp. v. Woodson*,[8] *Rush v. Savchuk*,[9] *Heliocopteros Nacionales de Colombia, S.A. v. Hall*,[10] and *Asahi Metal Industry Co. v. Superior Court*,[11] gives startling and disheartening evidence of a reactionary formalism much like that of the Courts during the late 19th Century and the first third of the 20th Century.[12]

In the 1930s and 1940s this formalism gave way to a social-functional approach to constitutional interpretation, which was prompted by severe social and economic upheaval and by the emergence of the new legal thinking advocated by the legal realists.[13] Under the sway of legal realism, legal concepts became functional tools to meet perceived social needs and objectives. This approach shifted concern from the development of neat, neutral, antiseptic legal concepts to the development of

5. By the term social-functionalism, I refer to the sociological jurisprudence movement and the legal realism movement which emphasize that law must always be in step with actual social practices, social needs, and social values. These movements take the position that legal concepts, rules, and doctrines are functional creations governed by social policy considerations and not by logic. Under this view, there is a necessary and dynamic relationship between law and social need, practices, and values. Law simply cannot be separated from its social ethos. This stands in sharp contrast to the formalist view that law is a separate and distinct entity with it's own logic, history and methodology.

6. 326 U.S. 310 (1945).

7. 436 U.S. 84 (1978).

8. 444 U.S. 286 (1980).

9. 444 U.S. 320 (1980).

10. 466 U.S. 408 (1983).

11. 480 U.S. 102 (1987).

12. During this era the dominant legal philosophy of the U.S. Supreme Court was legal formalism. The Court interpreted and applied the Constitution in a mechanical fashion without regard for social need and social value. Constitutional provisions were given dictionary type meanings that served to preserve the states quo and thwart social change. *See* G. GILMORE, *supra* note 2; White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

13. The legal realists savagely attacked the formalist legal philosophy in which constitutional law emphasized original intent and conservative values. The realists took the position that legal rules were merely a verbal facade that inhibited change. The realists argued that to understand law legal actors must look at the actual practices of people and institutions in everyday life. Legal concepts were to be socially sensitive creations to facilitate change and to achieve socially desired consequences. The first step, according to the realists, would be to cast off the shackles of legal formalism. The next step would be to create socially functional legal concepts responsive to social needs and values as well as the dynamic nature of human interaction. Interpretation of the Due Process Clause and the Commerce Clause had to be geared to current social needs and values and capable of change as society changed.

legal concepts that could facilitate social change. Social fact,[14] social needs, and social values were to be the dominant features of constitutional and legal exegesis. Constitutional and legal concepts were perceived as fluid, dynamic, and pragmatic. Due process, the Commerce Clause, and federalism took new forms. The interpretation of constitutional provisions depended more on perceived social needs and values than on fixed, historical meanings mysteriously, authoritatively, and succinctly enshrined in the words of the Constitution by omniscient drafters.

With the appointment of a conservative Justice to replace liberal Justice Brennan and a substantial likelihood that liberal Justice Marshall will also be replaced by a conservative Bush appointee, it seems that the Burger-Rehnquist conservative reactionary agenda in the law of jurisdiction will be fully realized.

Even though the Court in the 1970s and 1980s has enunciated a formalist approach to jurisdiction that has discouraged a fully social-functional concept of jurisdiction, a realistic appraisal of the Burger-Rehnquist Court's actions as opposed to its verbal formulations and rationalizations reveals certain basic notions that may be of use to legislators, practitioners, and scholars in forming strategies for legislation, litigation, and theory. This Article will present a social-functional reformulation and organization of jurisdictional theory from *Pennoyer v. Neff*[15] to *International Shoe Co. v. Washington*[16] to *Burnham v. Superior Court*,[17] which will pierce the veil of obfuscation and rhetoric of the Burger-Rehnquist Court's opinions and reach to the social-functional core of the Court's actions.[18]

In Part I of this Article, I argue that *International Shoe* and *Mullane v. Central Hanover Bank and Trust Co.*[19] should be understood as the creation of a revolutionary concept of jurisdiction that would supplant *Pennoyer* territorialism with a social-functional approach. *International Shoe* and *Mullane* constructed a new paradigm of jurisdiction

14. The term "social fact" refers to actual social practices and problems. It involves perception of social problems and their effects. It involves "looking out the window" rather than looking in the hermetically sealed confines of the law library. It is an empirical and experiential outlook.

15. 95 U.S. 714 (1878), *rev'd* 433 U.S. 180 (1977). *Pennoyer* established the notion that a state's power to affect the lives and property of people is limited to things and people inside its territorial boundaries (state lines). *Id.* at 730-31. This is the territorial notion of jurisdiction to which I continually refer in this Article.

16. 326 U.S. 310 (1945).

17. 110 S.Ct. 2105 (1990).

18. The term "social-functional core" refers to the social policy factors that lie at the heart of the Court's decisions and which are not made explicit.

19. 339 U.S. 306 (1950).

based on contemporary social needs and values and were an integral part of the constitutional revolution of the 1930s and 1940s. *International Shoe* was not the incremental evolution that lawyers tend to view it as; rather, it was revolutionary. It opened the way, consistent with other constitutional developments, to new ways of seeing, thinking about, and granting jurisdiction.

Part II elucidates the methodology the Burger-Rehnquist Court used to subvert the social-functional approach of *International Shoe* and *Mullane* and subtly reinstate much of *Pennoyer*'s territorialism. The cases beginning with *Shaffer v. Heitner*[20] and *Kulko v. Superior Court*[21] and ending with *Burnham*,[22] which are presented as the inexorable working out of *International Shoe* standards via the minimum contacts/fair-play doctrine actually subvert *International Shoe*'s vision.

Part III presents and discusses the position that despite formalist protest, the proper interpretation and application of the Due Process Clause and *International Shoe* would allow a state with legitimate interest or need to exercise jurisdiction over a nonresident defendant to effectuate that interest or need. This portion of the paper argues that under the social-functional standards of due process and federalism established in the 1930s and 1940s, the legal limits on state power are either fundamental individual interests or federal interests protected under various federal constitutional provisions such as the Commerce Clause and the foreign affairs powers.

Part IV of this Article presents the social-functional argument that the Court since *Hanson v. Denckla*[23] has used jurisdiction primarily as a method of policing and forestalling state court choices of law. The Court has chosen to characterize jurisdiction as a *procedural* due process concept in order to prevent undesired choices of law by state courts under *substantive* due process choice of law cases which grant state courts almost unfettered power to apply their law, given a legitimate interest or need to do so.

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20. 433 U.S. 186 (1977). *Shaffer* was the first major jurisdiction case decided by the Burger Court that invalidated a state court's exercise of jurisdiction under the Due Process Clause. In it the Court applied the *International Shoe* doctrine to the in rem concept and indicated that in rem and in personam jurisdictional actions were subject to the same due process standards. *Id.* at 211-12. While on the surface, the case seemed to be a social-functional decision, it was in reality an attack on quasi in rem actions like Harris v. Balk, 198 U.S. 215 (1905), *rev'd* 433 U.S. 186 (1977), which the Court felt were contrary to territorial notions of jurisdiction.

21. 436 U.S. 84 (1978).

22. 110 S.Ct. 2105 (1990).

23. 357 U.S. 235 (1958). *See infra* sections II and IV for discussion of the case.

Part V presents the argument that regardless of formalist rhetoric, jurisdiction has always been a matter of social need and social policy—that is, a social-functional concept. *Pennoyer v. Neff*'s dogmatic statement of the territorial limits of jurisdiction was contradicted by the extra-territorial reality of the in rem concept and prior judicial decisions.[24] When "realistically" analyzed, the *Pennoyer*-inspired fictions of quasi in rem, transient jurisdiction, presence, and implied consent, support the social policy character of jurisdiction, and the proposition that a state's legitimate need or interest is the primary operative factor justifying extra-territorial jurisdiction under due process analysis.

Part VI summarizes the basic social-functional propositions presented and discussed in the prior sections of this paper.

In a very basic sense the controversy over the appropriate way to understand and implement *International Shoe*'s[25] vision reduces to the familiar dispute between formalists and social-functionalists over the nature and function of law and legal concepts. In this controversy, the formalist perspective is in the ascendancy and has progressively dominated the Burger-Rehnquist Court's development of the minimum contacts/fair-play doctrine. The Burger-Rehnquist Court has taken the essentially social-functional conception of *International Shoe* and recast it in formalist territorial terms by the procedural due process characterization of jurisdiction; the bifurcation of contacts and fairness; and the artificial separation of choice of law and jurisdictional questions. The Burger-Rehnquist Court has shown its formalist territorial preferences in its rhetoric of rules and tests that deny a policy-making role for the Court and by its rejection of the pragmatic, social-functional approach proffered by *International Shoe* and due process theory. The dispute is a classic example of the clash of jurisprudential perspectives and demonstrates the practical significance of legal theorizing. Although jurisprudential theories and perspectives are normally thought of as ivory tower matters, the choices one makes about the way to view law and society are of critical practical importance in the everyday conduct of legal business. Jurisprudential conceptions, avowed or unconscious, form the framework for the meaning and application of legal concepts and provide the contours of the field of choices open to judicial actors.

24. 95 U.S. 714, 722-24 (1878).
25. 326 U.S. 310.

I. International Shoe as Revolutionary Paradigm

In 1945, during an era in which there was a radical change in the Court's interpretation of the Due Process Clause of the Fourteenth Amendment, the Commerce Clause, and the concept of federalism, the Court in *International Shoe* announced a revolutionary decision under the Due Process Clause that had the same far-reaching effects for jurisdictional theory as *West Coast Hotel Co. v. Parrish*[26] had for due process theory, and *National Labor Relations Board v. Jones & Laughlin Steel Co.*[27] had for the Commerce Clause and traditional notions of federalism.

In order to fully understand *International Shoe*, one must consider it in the social, economic, and constitutional context that produced this radical change in constitutional jurisprudence. *International Shoe* and *Mullane v. Central Hanover Bank and Trust Co.*[28] were products of social changes in the 20th Century and of legal realist thinking. American society had moved from a localized, agrarian society where state lines constituted important social and economic boundaries, to an urban industrialized society where modes of living and conducting business transcended state boundaries and made them much less significant.[29] The United States moved inexorably toward social, economic, and political unity. The legal realist's social-functional conception of law and legal institutions provided the Court with a theoretical framework for inter-

26. 300 U.S. 379 (1937). This case is typically regarded as the pivotal case in the change from the formalist approach to substantive due process in the era of Lochner v. New York, 198 U.S. 45 (1905), to the modern approach which allows states to regulate economic interests. The Court, in light of social needs in the new regulatory state, began a new era of due process under a social-functional approach. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *Constitutional Law*, 350-60 (3d ed. 1986).

27. 301 U.S. 1 (1937). In this case the Court upheld the constitutionality of the National Labor Relations Act and overruled a long line of cases which had held that Congress could not regulate production, mining, and agricultural activities under the Commerce Clause. This case marked a revolutionary change in federalism notions. Essentially what developed was a social-functional concept of federalism in which the lines between state and federal power were dynamic and functional. Under the new federalism federal power was not limited by the existence of states and states were allowed to regulate commercial and social matters so long as they did not interfere unduly with federal interests and policies. *See generally* Stern, *The Commerce Clause and The National Economy*, 1933-1946, 59 HARV. L. REV. 645 (1946) (tracing the history of the Commerce Clause and its relation to the national economy).

28. 339 U.S. 306 (1950).

29. This change is evidenced by the expansive interpretation of the commerce clause rendered in the 1930's which ceded to Congress the power to meet and unify the social and economic needs of the people of the United States. State powers were no longer a legal limit on the reach of the commerce clause. The new commerce clause also prevented states from interfering with interstate commerce. State lines were not to be barriers to social or economic intercourse. The change is also evidenced by the development and adoption, by all states, of the Uniform Commercial Code and the proliferation of many other uniform acts to meet the social and business needs of a people striving to be sure of economic and social unity.

preting and applying constitutional provisions in a way that allowed the social change and growth that had been inhibited by rigid, conservative formalism.[30] *International Shoe* and *Mullane* were manifestations of the new legal thinking and should be seen in this context.

The dynamics of social and economic interchange, as well as dramatic changes in our ideas about social policy, required drastic alteration of anachronistic notions of territorial jurisdiction. An example of change in social policy was the change of tort theory from a liability model focused on proof of the defendant's fault or blameworthiness to a model of tort law as an efficient and effective way of allocating losses and compensating plaintiffs injured by the risks created by our industrialized society.[31] The elimination of the doctrines of contributory negligence and assumption of risk, by law or by jury nullification, is tangible evidence of the movement toward a plaintiff-oriented tort model. Change was particularly obvious in the area of products liability, where the doctrine of privity of contract was abolished in the face of perceived social need and where the liability of manufacturers moved from the traditional negligence model to a type of strict liability treating the fault of the defendant as only of secondary importance.[32] The development of the notions of implied warranties also evidences this shift in tort perspectives.[33]

These same changes in social policy and tort theory were reflected in the radical changes in the area of choice of law in tort cases. Much of the impetus for a change to a modern interest and policy analysis[34] in choice of law occurred in the tort area. The traditional, formalist rule that required the courts to apply the law of the state where the injury occurred came under heavy fire because of its insensitivity to social fact and social need. One renowned conflicts scholar, Professor Ehrenzwieg, suggested that the revolution in choice of law was prompted by, and a reflection of, the radical change in orientation in tort law toward enterprise liability

30. *See generally* White, *supra* note 12 (describing the changing modes of American Jurisprudence during the first three decades of the twentieth century).

31. *See* Ehrenzweig, *Guest Statutes in the Conflict of Laws - Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws"*: 1, 69 YALE L.J. 595, 598-99 (1960). James, *Analysis of the Origin and Development of Negligence Actions* in THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION 35 (1970).

32. James, *supra* note 31, at 36-38.

33. Implied warranties are often associated with contract law. However, in regard to personal injury claims, they are clearly tort matters with regards to damages and functional operation. By shifting to a strict liability model under the rubric of warranty, formalists were able to maintain their conservative conception of negligence. In this way formalist 19th century notions of negligence as a defendant fault oriented concept were preserved.

34. *See* Ehrenzweig, *supra* note 31. Ehrenzweig argues that the change to an interest analysis approach to choice of law from a rules approach should be seen as limited to the revolution in tort law policy. *Id.* at 602-04.

where insurance and calculability were the fundamental premises, rather than the defendant's fault.[35] Some of the important cases leading the choice of law revolution were tort cases such as *Kilberg v. Northeast Airlines, Inc.*[36] and *Babcock v. Jackson*,[37] which involved choosing the law that would allow the plaintiff to recover.

Because of the intimate interrelationship between choice of law and jurisdiction, it was inevitable that the plaintiff-oriented tort policy would also manifest itself in jurisdictional theory and practice. Forum shopping for plaintiff-oriented tort law was bound to affect jurisdictional notions as well.[38] This effect can also be seen in the development of the long-arm statutes in which tort cases were always in the forefront.[39] Two recent U.S. Supreme Court cases decided in 1984 also illustrate the effect of tort policy changes on jurisdictional law. In *Calder v. Jones*[40] and *Keeton v. Hustler*,[41] the Burger-Rehnquist Court upheld state court extraterritorial

35. *Id.* at 598-99.

36. 9 N.Y.2d 34, 172 N.E.2d 526 (1961). *Kilberg* is one of the most well known cases in which a court rejected the traditional rules approach to choice of law in tort cases. In this case the New York court rejected application of the traditional rule of the place of injury and instead applied the law of New York which provided for full compensation in a wrongful death action. *Id.* at 527-28. The application of the law of the place of injury would have limited recovery to $15,000. *Id.* at 527. The court chose the law which would give adequate compensation to the plaintiff.

37. 12 N.Y.2d 473, 191 N.E.2d 279 (1963). In *Babcock* the New York Court of Appeals again rejected the traditional choice of law rule in tort cases. *Id.* at 285. The New York court applied New York's plaintiff-oriented tort policy which allowed the passenger in an auto to sue the driver for negligently inflicting injury on the plaintiff's passenger. *Id.* at 284.

38. *See* Gray v. American Radiator & Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E. 2d 439 (1965); Frummer v. Hilton Hotels Int'l. Inc., 19 N.Y.2d 533, 227 N.E.2d 851 (1967); Scanapico v. Richmond, F. & P.R.R. Co., 439 F.2d 17 (2d Cir. 1970).

39. It was tort cases such as Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), and Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) which led the revolution in choice of law theory. Likewise, it was tort cases, particularly product liability and personal injury cases, such as Gray v. American Radiator and Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) and Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 80 Cal. Rptr. 113, 458 P.2d 57 (1959), that led the way in the development of longarm jurisdiction statutes. *See* CURRIE, CRAMPTON, & KAY, CONFLICTS OF LAW 565 (3d Ed. 1981) in which the authors note that the courts tend to construe "tortious act" provisions of long arm statutes more expansively than other provisions.

40. 465 U.S. 783 (1984). In this case the Court validated the California court's jurisdiction over two Florida newspaper reporters who had defamed a California resident. Jurisdiction was obtained under a California long-arm statute on the theory that the distribution of the article in California constituted a tort in California. *Id.* at 786 n.5. The plaintiff did not have to sue the defendants at their Florida residence, therefore, the exercise of extra-territorial jurisdiction can be characterized as plaintiff-oriented. *Id.* at 788-90.

41. 465 U.S. 770 (1984). In *Keeton*, the Court held that the regular circulation of magazines in the forum state was sufficient to support jurisdiction. *Id.* at 773-81.

jurisdictional assertions that favored plaintiffs.[42] These cases involved interstate defamation suits, and the Court validated the plaintiff's choice of forum. If tort policy was becoming plaintiff-oriented and social-functional, it would make good social-functional sense to relax or change the defendant orientation found in the traditional territorial notion that strategically favored defendants by requiring plaintiffs to sue the defendant at the defendant's domicile.

Similarly, the social-functional approach to law and legal institutions that questioned the rigid formalistic concepts in many areas of the law, prompted policy changes in which social fact and social need became the important and critical yardsticks for creating and applying legal concepts, doctrine, and rules.[43] The Uniform Commercial Code (U.C.C.), for example, was essentially a social-functional enterprise under the direction of Karl Llewellyn. The aim of the U.C.C. in Article 2 was to develop flexible contractual standards that would fit the needs and realities of commercial transactions and would also be capable of adjusting to changing needs and business practices.[44] The rigid, formalist rules of contract were relaxed. The mirror image notion of offer and acceptance was cracked by the provisions of Article 2,[45] and the formalities of the Statute of Frauds[46] and the parol evidence rule were relaxed.[47] Though Article 2 purportedly applied to sales-of-goods contracts only, its reformative changes and social-functional view of contracts are also an attack on formalist contract doctrines in general, and can be used, if only by analogy, to alleviate and change the socially unresponsive rigidity of formalist contract theory.[48] In a functional sense, contract reform has made contract law more sensitive to plaintiffs' needs by providing ways to enforce contracts where traditional contract doctrine would not

42. *See Calder*, 465 U.S. at 788-91; *Keeton*, 465 U.S. at 781.

43. For example, Gilmore's notion of the death of contract is a rejection of the formalist concept of contract created by Holmes, Langdell, and Williston. *See* G. GILMORE, THE DEATH OF CONTRACT 12-19 (1974).

44. *See* U.C.C. § 1-102(2)(a) (1990), for a statement of purposes for the Uniform Commercial Code.

45. *See Id.* §§ 2-204 to 2-208, which modify the traditional rules of contract formation.

46. *See Id.* § 2-201, which modifies the infamous Statute of Frauds for sales of goods transaction.

47. *See Id.* § 2-202, which makes the parol evidence rule more amenable to actual commercial practices.

48. Article 2 of the Uniform Commercial Code, particularly in the flexible provisions for contract formation, is a realist attack on the formalist, objective theory of contract formulated by Holmes and Williston. *See* Mooney, *Old Kontract Principles and Karl's New Code*, 11 Vill. L. Rev. 213, 253-58; G. Gilmore, *supra* note 43; FRIEDMAN, HISTORY OF AMERICAN LAW 692 (1985).

recognize plaintiffs' claims or needs.[49] The changes in contract policy have also spawned changes in choice of law in contract cases. The formalist rules of the 1934 Restatement of Conflicts of Law[50] were replaced by a social-functional approach that sought to apply the law that would validate the legitimate contractual expectations of the parties and reach results consistent with current social needs and values.[51] Forum shopping for socially responsive contract law inevitably put pressure on the outdated, antifunctional, territorial notions of jurisdiction.[52] The more plaintiff-oriented approach of contemporary contract law is manifested in long-arm statutes that give the forum jurisdiction over the nonresident defendant who transacts any business in the forum or contracts outside the forum to provide services or goods to people within the forum.[53]

49. For example, in the U.C.C. there may be an enforceable contract if the parties have intended to make a contract even though some of the terms have been left open. U.C.C. § 2-204(3). Similarly a firm offer by a merchant is not revocable for lack of consideration during the time period specified in the offer. U.C.C. § 2-205. Likewise under § 2-209 an agreement modifying a contract needs no consideration to be binding. In addition the development of an expansive conception of the doctrine of promissory estoppel has made promises enforceable without consideration in the interest of fairness. *See* G. Gilmore, *supra* note 43, at 57-73. Professors Gabel and Feiman have suggested that the dominate ideology of contract has switched from the freedom of contract notion of the 19th century to a notion of fairness in contract. GABEL & FEIMAN, THE POLITICS OF LAW (1982).

50. The RESTATEMENT OF CONFLICTS OF LAWS (1934), whose chief draftsman was Professor Beale of Harvard Law School, is the epitome of formalist ideology. It presents an exhaustive system of narrow rules which authoritatively direct specified results. There is no room for discretionary judgment by judges or lawyers. There is no room for consideration of social needs, or social values in the construction or application of rules. The emphasis is on the orderly resolution of conflicts problems without concern for their social utility. Rules such as *lex loci delicti* and *lex contractus* are to be invariably applied. The Restatement adopted this formalist approach despite social-functional opposition by conflict scholars. *See* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947) and Cavers, *A Critique of the Choice of the Law-Problem*, 47 HARV. L. REV. 173 (1933). In fact the Restatement's formalist philosophy can be seen as an attempt to halt and derail the social-functional movement for change.

51. *See, e.g.*, Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954); People v. One Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906 (1961). *See also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 386-98 (1986); LEFLAR, AMERICAN CONFLICTS OF LAW, 309-11 (1977).

52. *See, e.g.*, McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Burger King Corp v. Rudewicz, 471 U.S. 462 (1985); Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871.

53. These long-arm statutes obviously seek to reverse the strategic and economic advantages that the territorial notion of jurisdiction has given to defendants. Because of the narrow territorial interpretation often given to the "transacting any business" statutes, some states have enacted specific provision to cover contracts made outside the forum where services or goods are to be provided to people within the forum. A proper social-functional interpretation of "transacting any business in the forum" would make the aforementioned statutes unnecessary.

Another substantive area where changed substantive policy has caused a change in jurisdictional policy is divorce law. These changes also took place during the 1930s and 1940s.[54] Restrictive and anachronistic divorce laws of many states made divorce a very difficult and contentious process, which exacerbated the emotional trauma and the disruptive social effects associated with divorce.[55] In order to obtain a divorce and to avoid the hostile, contentious process, plaintiffs went to other states where divorce laws were less restrictive and where the defendant might not choose to appear.[56] It was not unusual for a spouse living in New York to travel to Nevada to obtain the benefit of Nevada's lenient divorce law and short residence or domicile requirement. The defendant-spouse who remained in New York would be given notice of the divorce action and an opportunity to appear. Usually the defendant did not appear, and under the jurisdictional doctrines no support order or property settlement could be effective against the nonappearing defendant.[57]

In order for this type of social arrangement to be effective, it was necessary to relax the due process jurisdictional requirements to allow the forum to obtain jurisdiction over the defendant. To accomplish this social policy objective the Court analogized to the fiction of in rem jurisdiction.[58] The res or thing before the forum court was the marriage personified in the plaintiff's presence in the forum state. Apparently the plaintiff-spouse brought part of the marriage with her or him to the forum while part of the marriage remained with the defendant-spouse in the other state. Here jurisdiction in the forum state is based primarily on substantive policy considerations that again favor the plaintiff.[59] Despite this social-functional basis, the Court used the formalist in rem doctrine in the language of its opinion in order to preserve the illusion that it was following established formalist doctrine.

54. *See generally* Williams v. North Carolina, 317 U.S. 287 (1942).

55. FRIEDMAN, *supra* note 48, at 498-04.

56. *Id.*

57. WEINTRAUB, *supra* note 51, at 248.

58. *Williams*, 317 U.S. at 297-99.

59. Jurisdiction to grant a divorce in the plaintiff-chosen forum flows from the change from a divorce policy discouraging divorce to a policy of freely allowing divorce. *See* FRIEDMAN, *supra* note 59. It is my contention that the substantive policy concerns play a critical role in the determination of the forum's jurisdiction over the non resident defendant. Likewise the determination not to allow a property settlement or a support order without personal jurisdiction over the defendant is essentially a substantive policy choice rather than a technical procedural due process question. Conceptions of social policy and social policy concerns turn out to be important considerations in the due process calculus.

Particularly relevant to the radical change in jurisdiction wrought by *International Shoe* is the change in due process as applied to choice of law decisions by state courts. Prior to the revolutionary change in due process, the Court, under the authority of the Due Process Clause and the formalist approach championed by Professor Beale, had virtually required state courts to adhere to established rules of choice of law.[60] In such cases as *Allgeyer v. Louisiana*,[61] *Mutual Life Insurance Co. v. Lieb-ing*,[62] *Home Insurance Co. v. Dick*,[63] and *Hartford Accident and Indemnity Co. v. Dick*,[64] the Court invalidated state court choices of law as violative of the Due Process Clause. Such decisions were consistent with the Court's conservative-formalist approach to due process during that era. However, when the Court's approach to due process radically changed in the 1930s to the social-functional mode, the Court's approach to choice of law issues under the Due Process Clause accordingly changed to a social-functional mode. In *Alaska Packers Association v. Industrial Accident Commission*,[65] *Hoopeston Canning Co. v. Cullen*,[66] *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[67] *Osborn v. Ozlin*,[68] and *Watson v. Employers Assurance Corp.*,[69] all of which involved state court choices of law, the Court did what it had done in other due process cases under the new approach. It empowered the state courts to choose the law to apply in conflicts of law cases in which the forum had a legitimate interest in the case and its outcome. Thus, choice of law issues were treated like other due process cases in which the court essentially deferred to state actions exercising regulatory power over nonfundamental rights—that is, economic and property rights.

The choice of law cases under due process are important to the contextual understanding of *International Shoe Co. v. Washington*[70] and *Mullane v. Central Hanover Bank and Trust Co.*[71] because of the inextricable relationship between choice of law and jurisdictional issues.

International Shoe and *Mullane* should be seen as establishing a revolutionary social-functional paradigm of jurisdiction to supplant the for-

60. *See* R. WEINTRAUB, *supra* note 51, at 511-36.
61. 165 U.S. 578 (1897).
62. 259 U.S. 209 (1922).
63. 281 U.S. 397 (1930).
64. 292 U.S. 143 (1934).
65. 294 U.S. 532, 547 (1935).
66. 318 U.S. 313, 316-17 (1943).
67. 306 U.S. 493, 501-03 (1939).
68. 310 U.S. 53, 62-66 (1940).
69. 348 U.S. 66, 73-74 (1954).
70. 326 U.S. 310 (1945).
71. 339 U.S. 306 (1950).

malist-territorial paradigm of *Pennoyer v. Neff*[72] along with its fictitious territorial offspring: in rem, quasi in rem, transient jurisdiction, presence, and doing business. Viewed this way, *International Shoe* and *Mullane* cannot be conveniently and comfortably understood as part of a gradual, incremental evolutionary process that left room for the fictional, territorial trappings of *Pennoyer*. *International Shoe* provided a new paradigm, a revolutionary one, for jurisdictional theory.[73]

International Shoe and *Mullane* represented a break with the past comparable to the Code Napoleon's attempts to free French law from the socially restrictive pre-code law of France. *International Shoe* was a new way of seeing, thinking about, and granting jurisdiction. Just as *West Coast Hotel v. Parrish* threw off the fetters of the old formalist due process methodology and allowed the states to implement their economic and social objectives free of the formalist due process restraints of the *Lochner* era,[74] *International Shoe Co. v. Washington* empowered states to effectuate their legitimate needs and interests through extraterritorial jurisdiction.[75] Under this new paradigm, territorial limitations in the form of state lines would be relatively insignificant and give way to the exigencies of modern modes of living and doing business.

Mullane v. Central Hanover Bank and Trust Co.[76] is significant from a social-functional perspective in two respects. First, *Mullane* made it clear that notice and opportunity to be heard are questions separate from jurisdiction.[77] This opened the way for service of process outside state territorial boundaries. Service of process is primarily notice-giving not jurisdiction-conferring. Second, *Mullane* implicitly authorized the forum to effectuate its needs and interests by exercising jurisdiction over nonresidents who have not purposely availed themselves of the benefits or protection of the forum.[78] In *Mullane*, New York's need to finalize the trust

72. 95 U.S. 714 (1878).

73. *See generally* Lipkin, *The Anatomy of Constitutional Revolutions*, 68 NEB. L. REV. 703 (1984).

74. 300 U.S. 379, 391-92 (1937).

75. 326 U.S. 310, 316-18 (1945).

76. 339 U.S. 306 (1950).

77. *Id.* at 312-13. Notice and opportunity to be heard is a separate due process category. In prior cases notice and opportunity to be heard were tied together with jurisdiction since service of process was often viewed as a jurisdiction-conferring event.

78. *Id.* In *Mullane* the holders of beneficial interests in the common trust being administered in New York included beneficiaries who themselves, or through their agents, had directly availed themselves of the benefits of the New York Common Trust statute and persons who had succeeded to interests in the common trust by operation of law or by will. This latter group can be characterized as having done nothing to avail themselves of the benefits of the common trust. It might be said that they would not have contacts with New York. Yet the Court implicitly allowed the New York courts to exercise jurisdiction over them in order that

accounting process justified the exercise of extraterritorial jurisdiction over nonresident beneficiaries of the common trust who had purposely chosen to use the New York common trust arrangement and nonresident holders of trust fund benefits who had not purposely chosen to participate in the New York common trust.[79] The Court also allowed New York to cut off the rights of nonresident beneficiaries whose whereabouts were unknown and to whom actual notice could not be given.[80] This is a prime example of jurisdiction being based on forum need or interest. *Mullane* was decided in 1950, just five years after *International Shoe*, and together they plainly establish a social-functional standard where the forum's needs are the primary factor to be measured against any defendant's interests under due process.

Even though the language of *International Shoe* was ambiguous and could be interpreted as within the territorial paradigm, it is significant that the Court went out of its way to announce the new social-functional approach.[81] The Court could have reached the same result by validating the Washington state court's exercise of jurisdiction under the *Pennoyer*-oriented doctrines of presence or doing business. Instead, the Court deliberately chose to formulate a new standard and a new analytical framework evaluating the constitutionality of extraterritorial jurisdiction. The new standard, consistent with the new standards of due process and federalism, empowered states to exercise jurisdiction over nonresidents as long as there were minimum contacts with the forum such that maintenance of the suit did not "offend traditional notions of fair play and substantial justice."[82] In the majority opinion, the Court indicated that the

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the New York court could effectively finalize the trust accounting process. This can be seen as jurisdiction based on the forum need or interest and not on contacts initiated by the beneficiaries.

79. It is my contention that the exercise of jurisdiction over those beneficiaries who had not purposefully availed themselves of the benefits or protections of New York can only be explained on the theory that such jurisdiction would be necessary to allow New York to be able to expeditiously effectuate its policy and interest. In fact in the casebook, CONFLICT OF LAWS, *supra* note 39, the *Mullane* case is presented as an example of jurisdiction by necessity. *See also* Fraser, *Jurisdiction by Necessity - An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951).

80. Cutting off the interests of those beneficiaries whose whereabouts were not known is an action which is again founded on the forum state's legitimate interest and need to expeditiously administer its common trust policy. This reinforces the notion that jurisdiction is typically influenced by the forum's legitimate interest and need.

81. 326 U.S. 310. See Justice Black's concurring opinion in *International Shoe* in which he states that he would reach the same result under current doctrines of presence or doing business without creating a new natural law concept like "fairness." In this opinion, Justice Black discloses his penchant for a formalist ideology in constitutional interpretation. *Id.* at 323-26 (Black, J., concurring).

82. *International Shoe*, 326 U.S. at 316.

test for jurisdiction was not mechanical or quantitative but depended on the quality of the defendant's activities as it correlates with the fair and orderly administration of the law.[83] The Court also stated that states cannot exercise jurisdiction over a nonresident if there are "no contacts, ties, or relations."[84]

The crucial problem in unlocking the meaning of the standard announced in *International Shoe* is determining what legal and social context should be used to implement its transformative message. Should the verbal formulations of *International Shoe* be fit into the formalist mode of interpreting, which would emphasize words, their literal meanings, and the territorial framework of *Pennoyer*, or should the verbal formulations be put into a broader social-functional framework, which would look beyond words to social fact and the new due process and federalism standards? The clash between the formalist and social-functional views of law becomes both obvious and critical.

From the formalist perspective, the law is in the words and language of the opinion.[85] The formalist perspective discounts social and value contexts. The emphasis is on legal certainty and stability. To achieve certainty and stability, formalists insist that the law exists in the tangible form of legal rules that are authoritative and forestall judicial policymaking.[86] Since legal rules are of this character, formalists must adhere to an objective theory of language and cognition and an epistemological view of society as a tangible entity that is essentially stable and homogeneous.[87] Change, and particularly radical change, is threatening, disrup-

83. *Id.* at 319.

84. *Id.*

85. The formalist perspective, which prizes authoritative rules and worships certainty, requires an authoritative theory of words and language. In order for rules to be certain, the words used in the rules must have certain and definite meanings that readers must accept as binding. *See* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958). It is necessary for the formalist to deny the contingency of language. The social-functionalist takes the view that word meaning is contingent. It varies with context and purpose. *See* Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958). Fuller disagrees with Hart's notion of word meaning and suggests that meaning is contextual and not standardized.

86. This is a statement of classic formalist ideology. Rules constrain and preempt judicial policy creation. Judges and other law interpreters merely use "logic" to follow the rules.

87. The critical legal studies movement has launched a scathing attack on legal formalism. Critical legal studies scholars have attacked the formalist conceptions of objective language, cognition, and epistemology. The critical legal studies scholars have sought to demonstrate that ideology permeates language, cognition, and epistemology. Not only is law politics but language and epistemology are also politics. Legal rules and concepts are political creatures and the result of political struggle. Language, cognition, and epistemology become historically and politically contingent. *See* R. UNGER, THE CRITICAL STUDIES MOVEMENT 1-41 (1986); HUTCHINSON, DWELLING ON THE THRESHOLD 22-55, 125-81 (1988).

tive, and subversive.[88] Changes, if they are to be tolerated, must be gradual and slight. Moreover, changes in law are primarily in the hands of the legislature, which is dominated by individuals of wealth and power who will be counted on to maintain the status quo and resist change.[89] Significant change would come about only when there is a social need strong enough for the formalist to feel that to ignore it would lead to social action that could undermine the existing system. For example, the passage of the Wagner Act[90] in 1935, giving workers the right to act collectively, organize unions, and bargain collectively, was possible because of widespread economic depression and the real possibility that a workers' rebellion led by socialist or communist organizations might succeed in overthrowing the capitalist industrial establishment.[91] The Wagner Act, from a formalist perspective, forestalled a radical change in economic institutions and maintained the basic economic structure.[92] Essentially, the concept that a business is the private property of its owner and that the shop, factory, or place of business is under the control of the owner has remained intact. Any changes were minor exceptions to this basic economic paradigm.

Thus, *International Shoe* from the formalist perspective would be seen as making some exceptions to the still viable territorial paradigm of *Pennoyer*. Established jurisdictional concepts and doctrines would change as little as possible. Examining the cases between *Pennoyer* and *International Shoe* from the formalist perspective leads to the conclusion that the cases that did expand state court jurisdiction under such doctrines as in rem, quasi in rem, transient jurisdiction, implied consent, doing business, and presence were rationalized as consistent with the *Pennoyer* territorial paradigm.[93] Tensions between these doctrines and

88. *See* Klare, *Judicial De-radicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINN. L. REV. 265 (1978).

89. It is well known that legislatures are made up of lawyers, businessmen, and professional persons who are generally well-to-do and who act to preserve their wealth, influence, and economic advantages.

90. The Wagner Act was officially known as the National Labor Relations Act and was amended in 1947 by the Taft-Hartley Act and in 1959 by the Landrum-Griffin Act. The Wagner Act was basically a bill of rights for employees and reversed the anti-labor bias of labor law and the courts. It also outlawed certain unfair labor practices by employers and set up the National Labor Relations Board to interpret and enforce the Act.

91. *See* ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 314-49 (1980).

92. *See* Klare, *supra* note 88, at 266-67, 281-84 (1978). *See also* Leonard, *Foucault: Genealogy, Law Praxis*, 14 LEGAL STUD. F. 3, 14-15 (1990).

93. *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (implied consent); Harris v. Balk, 198 U.S. 215 (1908) (quasi-in-rem); Pennsylvania Fire Ins. Co. v. Gold Issue Milling and Mining Co., 243 U.S. 93 (1917) (consent); Mutual Reserve Fund Life Ins. Ass'n v. Phelps, 190 U.S. 147 (1903) (doing business); Bowman v. Flint, 37 Tex. Civ. App. 28, 82 S.W. 1049 (1904)

Pennoyer were ignored. The illusion of stability and certainty flowing from the *Pennoyer* paradigm was preserved and the territorial paradigm remained intact despite the need for changes based on social fact and need.

From the realist or social-functional perspective, however, *International Shoe* constructed a new paradigm that would better serve the social needs and values of contemporary life and business. Under this view, the meaning of *International Shoe* is to be determined by looking beyond words and their dictionary meanings to social, legal, and value contexts. Therefore, the formulations of *International Shoe*'s minimum contacts/fair-play standard, and "contacts, ties, or relations" should not be burdened by territorially loaded concepts or terms. Instead, the Court should develop this social-functional standard to serve the needs of our modern federal system and allow the states to effectuate their needs through extraterritorial jurisdictional actions. The phrase "contacts, ties, or relations" should be given a functional interpretation not limited to activities within the forum or actions outside the forum intentionally causing effects in the forum. For example, in a case like *Atkinson v. Superior Court*,[94] in which California had a legitimate need to exercise jurisdiction over a trustee in New York who was receiving monies withheld from California musicians but had no direct contacts with California, the social-functional interpretation of *International Shoe* would allow California to exercise extraterritorial jurisdiction over the New York trustee. Likewise, in multiparty actions where one of the parties is beyond the reach of the territorially biased long-arm statutes or in interpleader situations, the forum with a legitimate need or interest in trying the case would be able to do so under a social-functional rendition of *International Shoe*. Under this approach, social policy and state interest would be of prime importance. Minimum contacts would not be artificially separated from fair play. Instead, under the social-functional approach, the forum's interest, the plaintiff's interest, and substantive policy concerns would be most significant. Only when the Court determined that the defendant's interest should be characterized as a fundamental right would the Court be likely to invalidate the forum's assertion of jurisdiction under the Due Process Clause. Neither actions within the forum nor tangible effects in the forum would be limiting factors under the Due

(transient jurisdiction); Tyler v. Judges of the Court of Registration, 175 Mass. 71 (1908) (in rem); McDonald v. Mabee, 243 U.S. 90 (1917) (presence).

94. 49 Cal.2d 338, 316 P.2d 960 (1957). Under a "contacts" dominated notion of jurisdiction there is considerable doubt about the California Court exercising jurisdiction over the New York trustee. Under a social-functional conception of jurisdiction, however, there is little doubt that California could exercise such jurisdiction over the New York trustee.

Process Clause under the social-functional approach, as they seem to be under the formalist application of the contacts standard. Under the social-functional approach, the state's extraterritorial reach would be limited only by individual fundamental rights of the defendant or by federal interests of the type normally protected by the Commerce Clause.

II. Formalist Subversion of *International Shoe*

This portion of the Article deals with the method by which the Burger-Rehnquist Court has stealthily and insistently reinstated much of the territorial formalism of jurisdiction in the language and rhetoric of a series of opinions that overruled state court assertions of extraterritorial jurisdiction. As suggested earlier in this Article, the Court's reinstatement of territorial formalism must be seen as part of a comprehensive scheme to return neutral formalism to its formerly dominant position in constitutional discourse. At the same time, however, the Court continues to make social policy decisions based on its conservative notions of social facts and values. The Court is not neutral, despite the appearance of neutrality in its rhetoric. Even though the Court's jurisdictional opinions seem technical, arcane, and without much social impact, these opinions provide important insights into the Court's methodology and ideology and evidence its larger movement toward formalism and away from social-functionalism.

A subversion of the social-functional approach to jurisdiction enunciated in *International Shoe Co. v. Washington*[95] and *Mullane v. Central Hanover Bank and Trust Co.*[96] subtly and almost inevitably takes place by operation of a phenomenon I call the "tyranny of concepts." By the "tyranny of concepts" I mean the manner in which the traditional and everyday ways of characterizing, seeing, and thinking about people, things, and their interactions become so ingrained in us, so much a part of us, that we tend to substitute our concepts for the actual people, things, and events: in other words, the concepts become the reality.[97] The concepts we hold color and structure our perceptions of the real world of people, things, and events to such an extent that we cannot escape their dominance.[98] We have great difficulty seeing the world in

95. 326 U.S. 310 (1945).

96. 339 U.S. 306 (1950).

97. For the view that human reality is constituted and created by culturally induced concepts and language, *see* HALL, BEYOND CULTURE 1-24 (1977); MCLUHAN, UNDERSTANDING MEDIA (1964); SAPIR, LANGUAGE, CULTURE, AND PERSONALITY (1949); WHORF, LANGUAGE, THOUGHT, AND REALITY (1956).

98. *See* Wasserstrom, *Postscript, Lawyers, and Revolutions*, 39 U. PITT. L. REV. 125 (1968); PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE 272-79 (1974).

fresh ways.

Pennoyer v. Neff's[99] territorial jurisdiction concept completely colors our understanding and application of jurisdictional doctrines in such a way that we cannot see the social needs of our system and cannot accept the new jurisdictional vision of *International Shoe*. Change, in a society such as ours where the formalist notion of security and safety are built into our very mode of existence,[100] is very threatening. We are taught that safety and security require control over the things and people around us. One method of controlling the world is to create neatly defined concepts about the world and then rigidly hold on to them. Our society's penchant for neat crisp definitions and our inflated notion of the practical utility of such definitions in the processes of living and deciding is the tyranny of concepts. Thus, the tyranny of concepts is that in a very real sense we tend to be captives or prisoners of our conceptual perspectives. Instead of concepts being social-functional tools we create to serve us as needed, we tend to become the servants of our concepts. This role reversal is dangerous if we as individuals and as a society are unable or unwilling to adjust to changing social and economic conditions.[101] More particularly, should we cling to a formalist territorial concept of jurisdiction when it ceases to fit our social and economic modes of living?

Because of the tyranny of concepts and the conservative orientation of our law and legal institutions,[102] new legal paradigms have a difficult time gaining acceptance, depending in part on the degree to which the old paradigm is recognized as causing serious social dislocation and disruption.[103] Since jurisdiction seems to be regarded as a dry, technical,

99. 95 U.S. 714 (1878).

100. Security means keeping the appearance of order while masking the reality of change. For example, we like to think that freedom of speech "means" the same thing that it did in 1792. We like to think that the "concept of negligence" means and operates the same way it did in the nineteenth century. The formalist places his faith in neat, orderly concepts undisturbed by social change and reality.

101. For example, the formalist conception of contract developed by Holmes, Langdell, and Williston still dominates our notions of contract even though it is out of step with the way we behave in contractual relations. The hard-bargained-for notion of contract where parties sit down and freely negotiate all the contractual terms and then reduce the contract to an objective writing is our model. This remains so even though experience and empirical investigation indicates that most "contracts" are not accomplished in this pristine fashion.

102. *See* Wasserstrom, *supra* note 98, at 125, 129. Wasserstrom argues that law is a conservative institution (like language) that attempts to push our experience into past conceptual frameworks or categories.

103. An example of this notion can be seen in the establishment of a new paradigm in Brown v. Board of Education 347 U.S. 483 (1954) where the old equal protection paradigm of "separate but equal" was discarded and replaced with the new equal protection paradigm that outlawed official racial segregation. One may potentially argue that even though there had been repeated attempts to invalidate state imposed segregation, it was not until there was the

legal matter, the movement toward the new paradigm of *International Shoe* does not enjoy widespread social support. Thus, one could expect that judicial change would be difficult.

The new jurisdictional paradigm of *International Shoe* was destined to encounter resistance. Conservative formalist forces could interpret the open texture[104] of its language and format in a way that gave effect to territorial notions. The same language can be interpreted by others to give effect to the social-functional vision of *International Shoe*.[105]

In the years following *International Shoe* and *Mullane*, there was a proliferation of long-arm statutes across the nation. The early Illinois long-arm statute became a prototype.[106] This statute provided for jurisdiction in Illinois state courts where a nonresident transacted any business in Illinois, committed a tortious act in Illinois, owned, used, or possessed property in Illinois, or contracted to insure persons or property in Illinois.[107] Under this statute, jurisdiction was limited to causes of action that arose out of the above enumerated acts.[108] It also provided for service of process outside Illinois.[109] A critical look at this statute and statutes patterned after it shows that they bear the indelible imprint of the pre-*International Shoe* territorial concept. All of the provisions require acts done physically within the territorial limits of the forum

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threat of serious widespread racial violence and agitation for change that the old paradigm was replaced by the new one. Likewise, in the labor law area, it was a combination of labor unrest caused by the Great Depression and the socialists clamoring for a revolutionary change in the institutions of industrial ownership that prompted a change in labor law that recognized the employees right to combine their economic power by organizing, striking and bargaining collectively. Up until 1935, when the Wagner Act was passed, these rights and been denied to workers by the legal regime.

104. The term "open texture" of legal language has been used by H.L.A. Hart, a moderate formalist, to suggest that language does have inherent ambiguities which must be resolved in difficult cases by resort to social fact and social values. Nevertheless in typical formalist fashion, he insists that in most cases standardized meanings are apparent. *See* H. HART, CONCEPT OF LAW 121-50 (1961); Hart, *supra* note 85, at 606-08 (1958) in which he discusses the notion of core and penumbra meanings.

105. Social-functionalists look beyond "literal" meaning to the social context out of which *International Shoe* came. *International Shoe*'s social purpose was to allow state courts to have jurisdiction over nonresidents where there would be a legitimate need. The formalist notion of state lines as barriers are not of primary concern. For a discussion of a social-functional view of interpretation see Fuller, *supra* note 85, at 661-69 (1958), in which Fuller criticizes Hart's idea of core and penumbra meanings and suggests the proper approach to meaning is through the notion of social purpose.

106. *See* Currie, *The Growth of the Long-Arm Statute* 1963 ILL. L. FORM 533. *See also* The UNIF. INTERSTATE AND INT'L PROCEDURE ACT, 9B U.L.A 307 (1966) which was based upon the Illinois Act. For a discussion of different types of long-arm statutes see Welkowitz, *Going to the Limits of Due Process: Myth, Mystique and Meaning*, 28 DUQ. L. REV. 233 (1990).

107. ILL. REV. STAT. ch. 110, § 17.

108. *Id.* at § 17(1).

109. *Id.* at § 17(2).

state. Though these statutes moved somewhat beyond the pre-*International Shoe* doctrines, such as doing business, implied consent, and presence, they did not approach the due process limits that a fully social-functional approach to jurisdiction might establish.[110] A state long-arm statute pushing due process limits would provide that the forum courts would have jurisdiction over non-resident defendants where the state has a substantial interest or need to exercise such jurisdiction.

Some state legislatures, perhaps more aware of the social-functional vision of *International Shoe*, passed long-arm statutes that provided that their courts could exercise jurisdiction over nonresidents on any basis not inconsistent with the U.S. Constitution.[111] Such open-ended statutes that did not specify particular situations would be objectional to formalist jurists and scholars because of their apparent lack of certainty and authoritative direction.[112] However, it was clear that the enumerated-acts statutes left serious gaps in jurisdictional coverage and did not meet the social needs of our modern society.[113] On the other hand, social-functional jurists and scholars would approve of the use of what might be termed a standard[114] that would allow for flexibility, adjustment, and

110. A fully social-functional jurisdictional statute would be framed in terms that allow a state court to exercise extraterritorial jurisdiction when it would effectuate a legitimate state need or interest. The limits on such a statute would be in the form of fundamental rights or federal interests.

111. *See* Welkowitz, *supra* note 106, at 237-40. According to Welkowitz six states have statutes which allow jurisdiction on any basis consistent with the federal constitution or state constitution.

112. Formalist judges are not supposed to make law (or policy). They are to follow the literal meaning of statutes. Formalist judges might also object to such statues because they infer the obliteration of state lines and interfere with the alleged sovereignty of other states.

113. For example, the "tortious act within the state" was often interpreted narrowly (in a formalist mode) so that it did not apply to cases where the defendant acted outside the state but the injury occurred inside the state. *See* Feathers v. McLucas, 15 N.Y.2d 443, 209 N.E.2d 68 (1965); Singer v. Walker, 15 N.Y.2d 443, 209 N.E.2d 68 (1965).

Courts had difficulty applying the "transacting any business in the state" section to contracts made outside the state that called for delivery or performance within the state. *Feathers*, 15 N.Y.2d at 454, 209 N.E.2d at 79. The courts also had a problem with the notion that a single act in the forum was significant enough to be "transacting any business." Here, the problem was that the courts wanted to equate "transacting any business" with the territorial concept of "doing business." *See* Grobark v. Addo Machine Co., 16 Ill.2d 426, 434, 158 N.E.2d 73, 79 (1959), in which the Illinois court said it did not have jurisdiction over the Addo Machine Co., which was domiciled in New York and shipped machines to Illinois purchasers. The Illinois court said that Addo had no offices or employees in Illinois and that the sales were made in New York when Addo received and accepted orders for machines. *Id.* at 436-37, 158 N.E.2d at 79. The court was applying the old territorial notion of doing business instead of the new social-functional jurisdiction.

114. The notion that law is to be found in "standards" and not "rules" is a social-functional one. Standards are not directive in form. They merely give the court the factors or considerations that are relevant and it is up to the court to weigh, balance, or accommodate

critical social judgment by the courts. Needless to say, most states opted for the approach taken by the Illinois statute,[115] which was still an essentially formalist artifact that did allow some improvement in jurisdictional praxis. Such statutes demonstrate the shackling conservative effect of the tyranny of concepts. The new paradigm was not accepted but was adapted for use within the territorial paradigm offered by *Pennoyer*.[116] Some realignments and adjustments were made, but the territorial conception of jurisdiction remained very much intact.

Later experience exposed some of the social-functional weaknesses of the Illinois statute.[117] What was to be done when the defendant committed tortious acts or made contractual arrangements outside the forum? State courts wrestled with these problems, sometimes finding jurisdiction and sometimes not.[118] The more formalist and territorial a court's perspective, the more likely the statute would not be applied to acts outside the forum. The more social-functional the court's perspective, the more likely the statute would be construed to apply to actions outside the forum.

Some states, in order to provide a formalist territorial base, amended the long-arm statute to cover tortious acts outside the forum where the effect or injury was within the forum and contractual arrangements made outside the forum provided for performance within the forum.[119] Even in these situations the focus was on tangible physical effects within the forum. The territorial perspective of *Pennoyer* was still very much in

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the interests with these considerations in mind. For example, the Free Exercise Clause is not a rule. Rather, it provides a standard under which the court makes an evaluative judgment. Thus, if a claimant's free exercise "right" ("interest") is infringed by the state action, the state may justify such an infringement by proving a compelling interest to infringe the right. The court first makes a qualitative evaluative judgment as to whether there is an infringement. If the court determines that there is an infringement, then they must make a qualitative, evaluative judgment as to whether the state's interest is compelling enough to justify the infringement. Under the Due Process Clause and fundamental rights clauses we characteristically speak of standards not rules. *See* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987), in which he links the notion of standards to the social-functional approach to law. *See also* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1702-13 (1976) (suggesting that the choice between rules and standards requires an investigation of both the values intrinsic to form and the values we choose to achieve through them).

115. *See* Welkowitz, *supra* note 106, at 237.

116. Pennoyer v. Neff, 95 U.S. 714 (1878).

117. *See infra* note 118.

118. In *supra* note 113, I cited two cases where the Court refused a social-functional application of the long-arm statues. A case which illustrates a court finding jurisdiction under a type of social-functional approach is the much publicized Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *See also* Welkowitz, *supra* note 106, at 255-66 (discussing analyses of different long-arm statutes).

119. For example, *see* OHIO REV. CODE tit. 23, § 2307.382 (A)(3)-(A)(4) (Anderson 1981).

evidence. In fact, some of these amendments required that tortious acts or contractual arrangements outside the forum would subject the nonresidents to jurisdiction only if they regularly did or solicited business in the forum, or derived substantial revenues from goods used or services rendered in the forum.[120] Why did legislatures feel the necessity to require regular business or substantial revenues? The answer lies again in the continued existence and ubiquitous effects of the territorial paradigm. State lines remained significant barriers in jurisdictional theory and practice even though in the conduct of our social and economic affairs they were of little consequence.

In *World-Wide Volkswagen Corp. v. Woodson*,[121] rendered thirty-five years after *International Shoe*'s social-functional paradigm was proffered, the formalist territorial perspective was revealed. The Court rejected the stream of commerce (social-functional) concept and insisted on a jurisdictional vision that reinstated state lines as formidable jurisdictional barriers and reinvigorated the old formalist federalism notions.[122] The Court stated that state lines must mean something and incorporated federalism concerns into the due process equation.[123] In *World-Wide Volkswagen*, the Oklahoma long-arm statute under which Oklahoma exercised jurisdiction over the New York retailer and the regional distributor governed tortious acts or omissions outside the forum that caused injury in the forum, but the statute also required regular business or solicitation in the forum or substantial revenues from goods used in the forum. The tortious act or omission was done in New York by the sale of a defective auto to the plaintiffs in New York. Apparently, the critical issue was whether these nonresident defendants conducted business in Oklahoma or received substantial revenues from autos used in Oklahoma.[124] The Court found no minimum contacts because the defendants did not sell autos in Oklahoma or receive substantial revenues from autos used in Oklahoma.[125] Because of the Court's bifurcation of

120. The Oklahoma long-arm statute at issue in *World-Wide Volkswagen* was such a statute. *See* OKLA. STAT. ANN. tit. 12 § 1701.03 (a)(4) (West 1961).

121. 444 U.S. 286 (1980).

122. *Id.* at 293.

123. *Id.*

124. The Court in *World-Wide Volkswagen*, 444 U.S. at 295, emphasized that the defendant, the New York retailer, made no sales in Oklahoma and performed no services in Oklahoma. Likewise the Court said the retailer solicited no business through advertising or salespersons in Oklahoma nor did they sell cars regularly to Oklahoma customers. In short, the defendant didn't do business in Oklahoma or receive profits from autos used in Oklahoma. This type of analysis is like the pre-*International Shoe* analysis under the doing business doctrine and is territorially oriented. It is not social-functional analysis under *International Shoe* and *Mullane*.

125. *Id.* at 295.

minimum contacts and fairness, the Court never really addressed the fairness issue, which involves a social-functional analysis that focuses on the forum's needs and interests. The opinion emphasized federalism concerns and the continued jurisdictional barrier significance of state lines.[126] In its attempt to reconcile *World-Wide Volkswagen* with *International Shoe*, the Court concluded that "petitioners have no contacts, ties, or relations" with Oklahoma.[127] *World-Wide* goes beyond the subtle psychological compulsion of the tyranny of concepts to an overt, intentional rejection of the social-functional *International Shoe* paradigm. The agenda of reinstatement of the formalist territorial notion of jurisdiction became conscious and avowed.

The methodology used in the formalist subversion of the *International Shoe* paradigm is the familiar ploy of separating inextricably interrelated matters into different categories so that they can be handled differently without any conscious recognition of the interrelationship of the new concepts thus separated and created. This, of course, is the same mode of operation that was followed in *Pennoyer* with the artificial separation of in personam and in rem jurisdiction.[128] Such action is typical in the linear, compartmentalized, reductionist thinking employed in the formalist model of law and legal institutions. Reductionism in jurisdictional jurisprudence results in the critical separation of the inextricably interwoven. Choice of law and jurisdiction are treated as separate categories. Procedural due process is separated and distinguished from substantive due process. Contacts, with their purposeful availment baggage, are separated from the fairness aspect of the *International Shoe* standard.

In *Hanson v. Denckla*, the Court insisted on the separation of choice

126. The Court's emphasis on federalism as an important factor under the *International Shoe* approach functions as a way to re-establish the barrier significance of state lines. Moreover, federalism is not a factor in due process standards which pit state interests against individual interests. *See* Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982) (White, J. writing for the majority).

In addition it is hard to see how the exercise of jurisdiction by the Oklahoma courts would have any deleterious effect on the interests of any other state, including New York. Under a social-functional approach, merely raising the specter of interference with another state's concerns is not sufficient. One must demonstrate the actual and real impact on the interests of the state in order for this type of argument to have any credence.

127. *World-Wide Volkswagen*, 444 U.S. at 299.

128. In *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Court denied the Oregon Court's in personam jurisdiction over the defendant because personal service could not be made on the non-resident defendant outside the territorial limits of the state of Oregon. The plaintiff could have brought an in rem action, however, by attaching defendant's real property in Oregon. The latter action was constitutional because Oregon would have jurisdictional power over things within the territorial boundaries of Oregon. The Court treated the in personam action and the in rem action as separate and distinct categories even though they were functionally inconsistent with each other.

of law issues and jurisdictional issues under due process.[129] This was necessary since the Court had adopted a rational basis, social-functional standard in regard to choice of law issues. Under this approach Florida would have had a legitimate interest in applying its law to the facts of the case. The application of Florida law, however, would have invalidated the settlor-testator's intentions under her trust and will arrangements. Such a result would have been blatantly unfair and contrary to current trends in trust law and choice of law in regard to trust matters.[130] Since the use of due process to prevent application of Florida's law was foreclosed, the Court had to distinguish jurisdictional due process issues from choice of law issues. The Court has consistently held to this fateful distinction since *Hanson*.

The Court also activated the substantive due process/procedural due process dichotomy. Choice of law is seen as involving substantive due process standards, while jurisdiction is seen as involving procedural due process standards that give the Court more room to operate and a way to invalidate state assertions of substantive policy concerns.[131] Procedural due process seemingly involves a different mode of accommodating state and individual interests. Procedural due process has its own peculiar set of considerations that clearly call for different methods and results. Thus jurisdiction becomes a part of procedural fair play with its own distinctive standards. Since jurisdiction is procedural and not substantive, the Court can more freely substitute its wisdom for that of the state court, legislature, or agency. Somehow, interfering in procedural policies of the state is on a different plane from interfering with substantive policies of the state. While the social-functionalist would assert that procedural rules are based on substantive policy notions, formalists seem to be satisfied that procedure and substance are intrinsically different. Moreover, countless examples show that the courts play characterization games with the substance/procedure dichotomy in order to reach

129. 357 U.S. 235, 258 (1958) (Black, J., dissenting).

130. The result would have been unfair because the two aunts of the beneficiary would be getting the money contrary to the settlor-testator's wishes after the settlor-testator had amply provided for the two aunts under the will.

In current choice of law policy the trend is and was to choose the law which would validate the trust and its purposes. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 270 (1971). R. LEFLAR, AMERICAN CONFLICTS OF LAW 384-86 (3d ed. 1977).

131. Under substantive due process the Court works within the fundamental/non-fundamental rights social-functional standard. Under procedural due process the Court is not burdened by the fundamental/non-fundamental analysis and is free to evaluate interests as they choose and deal with state and individual interests on an ad hoc basis. *See* discussion of the new property cases, *infra* notes 135-51 and accompanying text.

desired results.[132]

In the area of conflicts of law, one classic way the forum court could evade the strictures of the traditional choice of law rules and apply forum law was by characterizing the law of the foreign jurisdiction as procedural rather than substantive.[133] Under traditional formalist choice of law rules, the forum was not required to apply the procedural law of another jurisdiction.[134] Therefore, the forum court was free to apply forum procedural law that coincidentally allowed a different result. From a social-functional perspective it is clear that the forum courts were using the substance/procedure dichotomy to allow the court, for what it considers good social policy reasons, to treat similar and analogous situations differently.

Similarly, in the late 1960s and early 1970s, the Court played the substantive due process/procedural due process gambit in what were termed "the new property cases."[135] In the new property cases, the Court protected interests that on the surface seemed to be nonfundamental economic interests by invoking the metaphysical magic of procedural due process. The Court, cognizant of the unfairness and exploitation of the state policies in these cases, was faced with a dilemma. If it interfered with the state policies concerning these arguably nonfundamental economic interests, it would seem to be acting inconsistently with its rational basis standard. On the other hand, if the Court chose to characterize the interests asserted as fundamental interests it would be greatly expanding the fundamental interests category and would be opening the door to individuals to raise claims that would greatly hamper the states' powers to regulate economic interests. The

132. *See* the cases involving application of Erie v. Tompkins, 304 U.S. 64 (1938) in which federal courts apply state substantive law and federal procedural law. *See also* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAW 154-93 (Harvard Studies in the Conflict of Laws vol. 5, 1942).

133. *See* CRAMPTON, CURRIE & KAY, *supra* note 39, at 94-117 (1987) (describing the use of the substance/procedure dichotomy by courts to evade application of the traditional choice of law rules).

134. *Id.*

135. "The new property cases" were cases decided in the 1960s and early 1970s where the Court, primarily the Warren Court, sought to protect property and economic rights from oppressive state actions by characterizing the interest as a property interest protected by procedural due process. In most cases, the Court protected the property interests by saying that they could not be interfered with without a hearing. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970); Wisconsin v. Constantinean, 400 U.S. 433 (1971); Bell v. Burson, 402 U.S. 535 (1971); Fuentes v. Shevin, 407 U.S. 67 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Vlandis v. Kline, 412 U.S. 441 (1973). *See generally* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 401 (1977).

Court in sterling political fashion refused to take either of the above actions. Instead, it said that what was involved was procedural due process and that the Court was requiring the states to follow fair procedures, as defined by the Court, in dealing with these nonfundamental interests.[136] After all, procedural due process is a separate category that raises distinctive questions. It was not long, however, before the Court closed the door on this method of challenging state actions,[137] apparently becoming self-conscious of this mode of action and its incompatibility or tension with substantive due process standards and the problems its procedural characterization created for state regulatory concerns.[138] The Court served notice that it would not use procedural due process to undermine its policy of deference to state policy choices where nonfundamental interests were involved.[139]

An example of the use of procedural due process in the new property cases to protect economic interests is found in *Sniadach v. Family Finance Corp.*.[140] In *Sniadach*, the Court struck down Wisconsin's wage garnishment policy on the grounds that the wage earner was deprived of property—his or her paycheck—without a hearing before a judicial officer, which of course was a violation of procedural due process. Under this approach, the Court did not have to worry about how to characterize the wage earner's interest as fundamental or nonfundamental. The Court was free to judge that this method of proceeding was unfair and exploitive. The Court was free to use an open balancing approach in which it creates the interests to be balanced and their correlative values in the context of fair procedure.

Likewise, in *Goldberg v. Kelly*,[141] the welfare recipient's interest in receiving his or her benefits check, which is not adequate to buy basic necessities, might have been deemed fundamental, thereby requiring the state to justify its action or policy by a compelling state interest. Instead

136. For example, in *Sniadach*, 395 U.S. 337, the Court chose to say that the interest of the debtor being infringed was a right to a hearing (a procedural due process right) before being deprived of the use of his wages by the Wisconsin garnishment procedures. An alternate mode of characterizing the interest would be that a working man's interest in his wages is a fundamental interest that could not be interfered with except by the state demonstrating a compelling interest served by infringement upon the fundamental interest.

137. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 426 U.S. 341 (1976).

138. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Mitchell v. Grant, 416 U.S. 600 (1974); Mathews v. Eldridge, 424 U.S. 319 (1976). *See* also Van Alstyne, *supra* note 137.

139. *Id.*

140. 395 U.S. 337, 342 (1969).

141. 397 U.S. 254.

the Court chose to invalidate the New York procedural policies, which had treated welfare recipients' needs and interests in a humanistically demeaning fashion, under the rubric of procedural due process.[142] The impact on New York and other states was substantial and caused them to alter and change their attitude toward welfare recipients' interests.[143] Again the rhetoric was procedural, but the impact and effects were substantive. Procedural due process was used to mask the substantive character of the Court's action.

Similarly, during the 1970s, in *Stanley v. Illinois*,[144] *Vlandis v. Kline*,[145] and *Cleveland Board of Education v. LaFleur*,[146] the Court again used procedural due process to achieve substantive aims and to prevent states from regulating certain interests not deemed to be fundamental in unfair and oppressive ways. The mechanism used in these cases was the introduction of the irrebuttable presumption doctrine, which invalidated state policies ostensibly on the basis that they violated procedural due process notions.[147] In each of these cases the Court re-

142. In New York, as well as other states, welfare recipients' interest have always been treated shabbily, capriciously, casually, and paternalistically. New York procedures allowed welfare benefits to be terminated without notice or an opportunity for a hearing. The decision would be made by the caseworker without input by the recipient. This is some evidence of how the recipients' interest were treated in a cavalier fashion. The Court in *Goldberg* held that a welfare recipient's benefits could not be terminated without notice and an evidentiary hearing. The Court again chose to use procedural due process to protect the recipient's interest in having funds to buy the necessaries of life and existence, i.e. for shelter, and clothing. Such an interest might be deemed fundamental and such arguments were suggested. Yet, the Court preferred not to treat the case as involving a fundamental substantive interest.

For an interesting presentation of how welfare systems operate as a degrading system of social control, *see* SKOLNICK & CURRIE, CRISIS IN AMERICAN INSTITUTIONS 453-70 (7th Ed. 1988). For a discussion of how welfare recipient's interests are degradingly treated, see Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1265 (1965).

143. The decision in *Goldberg* had a great impact on welfare systems by not only requiring procedural changes but also requiring state welfare organizations to re-think their attitudes toward the welfare recipient's interest. *Goldberg* had both a procedural and substantive effect. *See* MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 32-36 (1985) for a statement about the substantial effect of Goldberg on state welfare systems. *See also* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy and Fairness in the Adjudication of Social Welfare Claims*, 59 Cornell L.Q. 772 (1974).

144. 405 U.S. 645 (1972). The Court required the state to notify an unmarried father that his child was going to be adopted and to give him an opportunity to be heard on this matter.

145. 412 U.S. 441 (1973). The Court invalidated a Connecticut statute that deprived a nonresident student at a Connecticut state college, after he had been in the school for one year, of a hearing which would allow him opportunity to prove he was now a Connecticut resident and entitled to the lower resident tuition rate.

146. 414 U.S. 632 (1974). The Court invalidated Cleveland Board of Education rules that required pregnant teachers to take leave without pay at least five months before the expected date of birth using the irrebuttable presumption doctrine.

147. The irrebuttable presumption doctrine was short-lived. It was used by the Burger Court in the early 1970s to protect certain interests from unreasonable state regulation without

fused to formally characterize the individual interests asserted as fundamental interests. Instead, for political reasons,[148] the Court chose to handle these cases under the procedural due process category, which avoided the social-functional standards of substantive due process.

The relevant point in these cases for this paper is that the Court has continually and persistently used the substantive due process/procedural due process dichotomy to avoid the social-functional due process standards developed in the 1930s and 1940s. More particularly, the Court, in jurisdictional due process cases, has used this same characterization game to avoid and derail the social-functional approach of *International Shoe*. The Court through this ploy has been able to substitute its own reactionary notions of federalism[149] under which state lines become strong, antifunctional barriers to jurisdiction under the social-functional standards of *International Shoe v. Washington*.[150] The irony here is that conservative notions of federalism, instead of protecting powers of the states, very often hamper states' attempts to effectuate their legitimate needs and interests in the modern era.[151]

An equally important characterization game is played when the Court chooses to separate minimum contacts from fair play in the *International Shoe* standard. The Court plays cavalierly with the social-functional due process standards adumbrated in *International Shoe* and in the other 1930s and 1940s cases. Under these due process standards the state's need or interest is a primary factor in all due process calculations. More particularly, the state's legitimate need or interest is always associ-

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having to expand the fundamental rights categories. The irrebuttable presumption doctrine was seen as a type of procedural due process that freed the Court from the substantive fundamental rights/nonfundamental rights standards. *See* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1544-49 (1974).

148. By political reasons, I mean the Court was moved by value and policy concerns rather than technical legal requirements. The court made substantive value choices under the pretext of procedural due process under the beguiling irrebuttable presumption.

149. Through its procedural due process characterization of jurisdiction, the Court has been able to reinstate the old territorial notions of state power and federalism. The Court merely assumes that extraterritorial jurisdiction interferes with the "sovereignty" of other states and that state lines are necessary barriers to protect state sovereignty.

150. 326 U.S. 310 (1945).

151. It was Brainerd Currie who pointed out the irony of an interested forum state applying the policy of another state, which was often disinterested, because of the socially insensitive traditional rules of choice of law. To do this was to allow the state of injury or of contracting to interfere with the forum state's legitimate concerns. Under Currie's interest analysis, an interested forum state need not defer to the real or imagined interests of the state of injury or of contracting. The underlying truth was that the traditional rules of choice of law often required an invasion of the forum's sovereignty. The same type of argument applies to jurisdiction situations. Why should the forum state subordinate its legitimate needs or interests to that of another state as required by the territorial jurisdiction paradigm?

ated with the individual interest being asserted under due process. The state and individual interests are not considered separately. By separating the notion of the defendant's contacts from the state interest and fairness consideration's the Court confounds the usual due process methodology. The critical or pivotal issue in the jurisdiction cases becomes whether or not there are minimum contacts.

In typical formalist fashion, contacts either exist or they do not exist. Contacts are seen as discrete entities with defined, inherent characteristics that can be objectively perceived. Under this view, the determination of whether or not there are minimum contacts does not involve judging substantive policy concerns. Typically when the Court invalidates the state's jurisdictional assertion it does so on the grounds that there are no contacts.[152] Thus, there is no need to even reach fairness concerns, state interests, or substantive policy. In *Hanson v. Denckla*,[153] *World-Wide Volkswagen v. Woodson*,[154] *Rush v. Savchuk*,[155] *Kulko v. Superior Court*,[156] and *Asahi Metal Industry v. Superior Court*,[157] there were no contacts, and in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[158] there were some contacts but not enough to meet the minimum contacts test. This of course is the same rhetorical method used by the Court in the choice of law cases under due process.[159] On the surface it looks neat and neutral. The Court gives the impression that it is making objective judgments and not policy judgments. The Court is merely acting out the familiar formalist version of the judicial role. A critical analysis suggests, however, that in each of the above cases the conclusion of a lack of contacts was in essence a policy decision, and that, from a social-functional perspective there were sufficient relationships between the forum's interest or need and the defendant to meet *International Shoe*'s requirement of "contacts, ties, or relations."[160]

152. The Court has adopted the same type of due process approach that it uses in the choice of law cases. In the choice of law cases the Court strikes down state court choices of law where they decide that there are no contacts with the forum state. If the Court finds that there are contacts, the forum's choice of law is usually upheld.

153. 327 U.S. 235 (1957).

154. 444 U.S. 286 (1980).

155. 444 U.S. 320 (1980).

156. 436 U.S. 84 (1978).

157. 480 U.S. 102 (1987).

158. 466 U.S. 408 (1983).

159. *See supra* note 106.

160. From a social-functional perspective the phrase "contacts, ties, or relations" is not limited to actions by the defendant to purposefully avail himself of the benefits or protections of the forum state's law. The primary focus is on the forum state's interest or need and there can be a relationship with the forum without acts of purposeful availment by the defendant.

In *Kulko*, the defendant-father allowed or acquiesced in the mother's custody of the children in her newly acquired residence in California. The support arrangements under the separation agreement were obviously inadequate now that the children would be living full-time with their mother. California had an interest in seeing that the children were properly supported by the father and had a legitimate interest in applying its substantive policy in the California courts.[161] In a social-functional sense, it is clear that there were sufficient contacts between the defendant and California to satisfy *International Shoe*'s standards. Mr. Kulko was part of a living arrangement and social institutional pattern of modern living that requires such jurisdictional assertions. State lines should not pose barriers to the enforcement of his responsibilities in this type of situation.

Likewise, in *World-Wide Volkswagen*, the Court declared that the defendant, a New York retailer of Audi automobiles, had no contacts with Oklahoma, the forum state and the site of the accident and injury.[162] Here again, the Court could have found the necessary contacts factually if it chose to implement the social-functional vision of *International Shoe*. The plaintiff-oriented substantive realities of products liability, the interstate character of the auto industry, and the injury in the forum, which involved local medical service providers, would combine to satisfy a social-functional conception of minimum contacts and fair play.

Similarly, critical analysis of *Rush*, *Helicopteros*, and *Asahi* reveals that in each of these cases the requisite minimum contacts could have been found if the Court chose to adopt a social-functional perspective. The no contacts conclusions of these cases are used to obscure the policy basis for its denial of jurisdiction and to preserve the Court's power to police choice of law decisions by state courts under the jurisdictional characterization. This tactic tends to confuse due process standards and jurisdictional theory.[163] *Rush* really involved the imposition of formalist territorial notions of federalism and a denial of the reality of plaintiff-oriented tort policy that has affected our notions of jurisdiction.[164]

161. *Kulko*, 463 U.S. at 98.

162. 444 U.S. at 289.

163. The confusion follows from such action by the Court because there is a tension between what the Court says and what it does. The Court's rhetoric of contacts and its characterization of jurisdiction as procedural due process tends to mislead practitioners and scholars. The Court's rhetoric forestalls the development of social-functional, policy effectuating jurisdiction.

164. In Rush v. Savchuk, 444 U.S. 320 (1980), the plaintiff was injured in a single car accident in Indiana. The car was driven by the defendant's son. At the time of the accident all parties resided in Indiana. Indiana had a guest statute that made the driver liable to an injured passenger only if the driver was guilty of gross negligence. The plaintiff's family moved to

Helicopteros and *Asahi* really involved policy concerns about possible interference with federal interests protected by the Foreign Commerce Clause and the foreign affairs power of the federal government through the imposition of our tort policies on defendants from foreign countries whose tort policies are likely to be different from ours.[165] In these cases, the actual bases for denial of jurisdiction are not to be found in whether contacts exist but in the policy considerations that the Court denies are part of the contacts inquiry.

From the social-functional perspective, contacts should be qualitative, but they have become quantitative territorialist constructs that are used by the Burger-Rehnquist Court to impose a territorialist perspective on jurisdictional theory. Contacts as conceived by the Burger-Rehnquist Court take on a territorialist hue in the same way that the post-*Pennoyer* concepts of doing business, implied consent, and quasi in rem did.[166] Contacts are seen primarily in terms of physical acts done by the nonresident defendant either inside the forum state or purposefully directed toward state residents in some tangible way. In accord with typical formalist thinking, contacts are thought of as concrete, with acts inside the forum state as the prototype. The Court's reification of the contacts concept subtly incorporates territorialist notions into the *International Shoe* standards. Because of the primary emphasis on contacts as a basic threshold concept, the Court is able to impose its territorial bias at the critical point in its due process analysis. This is a significant method by which the Court subverts the social-functional vision of *International Shoe* and *Mullane* and reinstates the formalist rhetoric in jurisdictional theory.

In this contacts-dominated rhetoric there is, at least on the surface, little room for social-functional considerations. The Court has taken the phrase, "contacts, ties, or relations" and converted it into a factual, territorial notion. There is no conscious recognition by the Court that the phrase might have a broader social-functional meaning tied to legitimate forum interests, social policy, and social value and that it does not require acts in the forum or acts purposely directed toward the persons or property in the forum.

Minnesota a year and a half after the accident. One year later the plaintiff filed suit in Minnesota.

165. *See Asahi, supra* note 12, at 115-16. *See also* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l and Comp. L. 1 (1987).

166. The concepts of doing business, implied consent, and quasi in rem were formally constructed as consistent with the territorial view of jurisdiction despite their obvious tension with the territorial paradigm. The contacts notion had been construed in the same territorial fashion.

A fully social-functional understanding and application of this phrase would give effect to the forum's needs and interests, current modes of living, and current ideas about social policy. Such a perspective would also do away with the "purposeful availment" notion, which has its roots in pre-*International Shoe* ideology where formalist reasons were developed to create jurisdiction over foreign corporations that were reaping profits from the forum.[167] The rhetorical posture of this approach adapted these extraterritorial assertions to the *Pennoyer* territorial paradigm. There was no conscious or explicit attempt to develop a truly social-functional paradigm.

In addition, the purposeful availment doctrine was developed in a commercial context involving foreign corporations or businesses. The doctrine as developed does not fit well in other social settings. For example, the doctrine seems out of place in cases like *Kulko v. Superior Court*[168] that involve child support and custody. It is interesting to note that in divorce actions a nonresident spouse is subject to forum jurisdiction for the purpose of divorce even though he or she has no "contacts" with the forum state where the plaintiff-spouse has unilaterally set up residence.[169] The purposeful availment doctrine also seems to be out of place in plaintiff-oriented tort cases involving personal injury, such as products liability cases and auto accident cases like *Rush v. Savchuk*,[170] where social policy concerns for proper compensation are of central importance.

167. The purposeful availment doctrine grows out of the territorial paradigm as a way of justifying a breach in or exception to the territorial paradigm. It is fair because the defendant is getting some kind of benefit, e.g., making profits from sales. However, the approach is inconsistent with a social-functional model which centers on the forum state's legitimate need and on substantive social policy concerns.

168. 436 U.S. 84 (1978). In *Kulko*, California's interest in proper support of children now living in California combined with the social reality that this is a very typical domestic situation should have been sufficient to satisfy the notion that there were "ties or relationships" present.

169. It seems paradoxical that the forum can affect the non-resident's marriage interest by severing the marriage while the forum cannot affect the non-resident's property interest with "personal" jurisdiction. Are not the defendant's interest in his/her marriage as important as his/her interest in property?

170. 444 U.S. 320. *Rush* is the type of case that comes up because of tension between a social-functional approach to tort which has become plaintiff-oriented and the regressive territorial view of jurisdiction that dominates jurisdictional thinking. The Court's refusal to see the insurance carrier, State Farm, as the real party in interest is a denial of the change to a plaintiff-oriented approach in tort law. By focusing on the defendant as the real party in interest, the Court is affirming its reactionary belief in a defendant-oriented tort law and in a defendant-oriented jurisdictional paradigm. The Court made it clear that the plaintiff-oriented jurisdictional model of Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312 (1966), would not be tolerated. 444 U.S. at 322.

III. Due Process Standards and Jurisdictional Limits

This section argues that jurisdictional due process issues and choice of law issues must be put in the context of general due process methodology and standards to understand and properly implement the changes implicit in *International Shoe* and in the due process approach of the 1930s and 1940s. The theory and methodology of due process as a limitation on choice of law decisions by state courts changed with the due process revolution of the 1930s and 1940s. Essentially a rational or reasonable basis standard was adopted since the type of individual interests affected by state courts' choice of law actions were typically nonfundamental interests[171]—property and economic rights—under the Court's dichotomous characterization of interests as either nonfundamental or fundamental. Under the rational basis standard, the Court defers to the state policy choice in the choice of law decision, and only interferes where there is no legitimate state interest or need served by the state law applied.[172] The rational basis standard places an almost insurmountable burden on the party claiming a due process violation by requiring the claimant to plead and prove that the state action is completely arbitrary—lacking any connection to a legitimate state interest. In such cases, the critical point is the characterization of the claimant's interest as fundamental or nonfundamental. If the claimant cannot convince the Court that the interest he or she is asserting is fundamental, the claimant will lose, since the burden cast under due process standards will be too hard to meet.

On the other hand, if the claimant can successfully plead and prove that the individual interest asserted is fundamental and is seriously impaired by the state's policy, the burden shifts to the state to prove either a compelling social need to interfere or a compelling state interest.[173] Once the burden shifts to the state to justify its interference with the funda-

171. The types of interest affected by extraterritorial jurisdiction typically have been economic interests. The defendant usually is complaining that exercise of jurisdictional power is going to cost him money. The money may be in the form of costs of defense, damages, taxes, etc. The exercise of extra-territorial jurisdictional power is essentially a regulatory action subjecting economic interests to reasonable regulation.

172. The reference here is to the position the Court has taken in regard to economic interests since the 1930s. The Court has applied a rational basis standard to claims of infringement of economic interests under the Due Process Clause. The claimant can be victorious only if he can convince the Court that there is no reasonable basis for the state regulatory action. This is essentially the same as proving that the state has no legitimate need or interest to be served by the assertion of extraterritorial jurisdiction.

173. A compelling interest is one which will justify an interference with a fundamental interest of an individual. It is incumbent on the state to empirically demonstrate that such an infringement is necessary to protect a vital state interest.

mental interest, the claimant is likely to prevail since the burden is very onerous, comparable in difficulty to the burden of the claimant whose asserted interest is judged to be nonfundamental. Under this due process framework, the critical factor in the disposition of the constitutional issue is the characterization of the plaintiff's interest. What attorneys and their clients must do is find ways to convince the Court that the claimant's interest should be seen as fundamental. Sometimes with ingenuity and the invocation of important social values, the claimant's interest that on the surface looks like a nonfundamental interest can be successfully characterized as fundamental.[174]

A classic example of this characterization game can be seen in *Sherbert v. Verner*,[175] in which a Seventh-Day Adventist was denied unemployment compensation because she refused to take employment that would require her to work on Saturday, which she said was against her religion. The state took the position that unemployment compensation interests are nonfundamental in nature and subject to state regulation. The claimant, of course, argued that her interest was a fundamental interest protected by the Free Exercise Clause of the First Amendment. The Court accepted the claimant's characterization and struck down the state action denying her unemployment compensation. Here the state could not prove a compelling interest in denying her the benefits.[176] The Court, in dealing with the characterization issue, indicated that the economic effects of the denial of benefits by the state action were merely the means by which her religious interests were infringed.[177] Just two years before *Sherbert v. Verner*, the Court in *Braunfeld v. Brown*[178] rejected a claim by Orthodox Jews that Pennsylvania's Sunday closing law impaired their religious beliefs by bringing economic pressure on them to be open on Saturday since they could not be open on Sunday under the law. In *Braunfeld*, the Court refused to adopt the claimants' characterization of their interest as fundamental under the First Amendment and chose

174. Despite Justice Powell's statement in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 32 (1973), to the effect that, in determining whether an interest is fundamental, the critical factor is whether it is explicitly or implicitly in the Constitution not it's social value. *See also* Bopp & Coleson, *Webster and the Future of Substantive Due Process*, 28 DUQ. L. REV. 271, 279-80 (1990) (discussing a change in the Supreme Court's analysis of substantive due process towards a less result-oriented and more objective analysis).

175. 374 U.S. 398 (1963).

176. *Id.* at 409.

177. *Id.* at 404.

178. 366 U.S. 599 (1961).

instead to view their interest as a nonfundamental economic interest.[179] This characterization essentially defeated the claimants' constitutional argument by placing the onerous burden of showing a lack of a rational basis for the statute on the claimants.

Another case that demonstrates the operation of the characterization game is *Memorial Hospital v. Maricopa County*,[180] in which the state of Arizona denied welfare benefits to persons who had lived in Arizona less than a year. The state, in accord with earlier constitutional doctrine, argued that welfare rights were not fundamental in the context of due process standards. The Court evaded this characterization by pointing out that it was the fundamental right to travel that was being infringed by the state policy.[181] The state then was not able to meet the heavy burden of proving a compelling state interest that would justify the infringement.

A similar characterization game has been played by the Court in order to protect economic non-fundamental rights in the new property cases[182] in which the Court characterized the interests asserted by the claimants as procedural due process interests, thereby allowing the Court to protect economic interests in a way denied to it by the substantive due process standards.[183] Under procedural due process requirements for fairness the Court has much greater freedom to substitute its judgment for that of the state legislature or court. This intentional separation of procedural due process and substantive due process is a familiar device to allow the Court to do under the rubric of procedural due process what it has said it cannot do under substantive due process.

Accordingly, the Court always classifies jurisdictional issues under procedural due process in order to limit state courts' power of choice of law. The role of jurisdictional limitation is to allow the Court the power to deny certain state court choices of law where in the judgment of the

179. *Id.* The claimant's interest was reduced to a nonfundamental economic interest by choice of the Court. The state statute was seen as merely a regulation of economic interests despite its special effects on Orthodox Jews.

180. 415 U.S. 250 (1974).

181. *Id.* at 269. There is an endless array of cases showing how the characterization game is played under the due process standards. A list of such cases would include those involving economic zoning, welfare benefits, state funding of public education, right of privacy, etc.

182. The new property cases were cases decided in the 1960s and early 1970s in which property and economic rights—nonfundamental rights—were protected by the Court in ways that seemed inconsistent with earlier cases. The Court gave heightened scrutiny to these interests by dealing with them under procedural due process. *See supra* notes 135-51, and accompanying text.

183. Ordinarily the standard to apply for economic rights was a rational basis standard which, in effect, allowed states to regulate these nonfundamental rights in almost any fashion. The Court typically deferred to state actions.

Court those choices might either upset the defendant's legitimate territorial expectations of what law is to be applied or result in the application of anachronistic law. From this social-functional perspective, procedural and substantive due process merge and the interrelationship of choice of law and jurisdiction issues becomes obvious. Moreover, the policy-oriented nature of jurisdictional due process methodology becomes apparent.

The purpose of this discussion is to demonstrate that the due process methodology established by the radical changes of the 1930s and 1940s is essentially an interest analysis and an accommodation approach under which the Court has developed social-functional standards[184] and that these same due process standards should be applied to both choice of law and jurisdiction issues. Under this social-functional perspective, the Court has the obligation of elucidating the nature and social significance of the constitutional interest asserted by nonresident defendants in jurisdictional issues. Is the interest a fundamental interest or a nonfundamental interest? What criteria should be applied? Is the standard to be a rational basis, under which the Court would almost always defer to the jurisdictional choice of the state? Or is the interest asserted by the defendant a fundamental one, which would require the state to show a compelling interest or need? The Court has consistently failed to satisfactorily elucidate the nature of the defendant's interest and its social value. The Court has indicated that the defendant's interest is not strictly economic. Yet the Court has not stated that it is fundamental.[185] It has not spoken of a compelling interest or its equivalent.

The Court has avoided elucidating the nature of the defendant's interest by making the question of contacts the central, threshold inquiry and denying that any consideration of the forum state's interest or substantive policy is relevant to analyzing minimum contacts. The Court has further confounded social-functional methodology by its objective, nonqualitative notion of contacts. However, it is in consideration of the contacts questions that the Court, in a self-contradictory and unavowed manner, implicitly engages in a balancing of interests. The outcome of the interest balancing process is announced in the ostensibly objective (factual) conclusion of whether the requisite minimum contacts exist.

184. By social-functional standards I mean that the rational basis and compelling interest standards involve the Court in an interest analysis and interest balancing approach.

185. The Court has not explained why the defendant's interest is one that justifies the Court's invalidation of the forum state's need or interest. What is it about the defendant's interest that calls for heightened judicial scrutiny of a type reserved for fundamental interests?

In virtually all the cases where the Burger-Rehnquist Court has invalidated jurisdictional actions by state courts, the Court has said that there were no contacts or insufficient contacts. Only in *Asahi Metal Industry Co. v. Superior Court*, has the Court arguably gone beyond the contacts question to deal with the qualitative notion of fairness.[186] The significance of *Asahi* in this regard is somewhat ambiguous, because the discussion of the qualitative factors under the fairness branch of the *International Shoe* standards seems to be dicta since the majority had already stated that there were not minimum contacts in this case.[187] The majority seems to be taking the position that even if the facts were to be construed as satisfying the minimum contacts test, the assertion of jurisdiction over Asahi would be unfair. The Court suggests that California has no legitimate interest in providing a forum for a dispute over indemnification that is between two companies from foreign countries.[188] The majority also suggest that when the defendant is a nonresident alien, federal interests in foreign affairs may militate against jurisdiction, particularly when in this case the forum's interest is slight or nonexistent.[189] This discussion does not mean that the Court has switched from a contacts-dominated approach to an interest-analysis approach, since this discussion is essentially a way of buttressing the courts no contacts conclusion. However, from a social-functional approach, the factors discussed by the Court in dicta are some evidence of what the Court really thinks about when it considers whether or not there are contacts and whether the contacts are substantial enough to meet the minimum contacts requirement. These qualitative factors such as interest of the forum, interests of the plaintiff, substantive policy concerns, interests of other states, and federal interests, are surreptitiously considered by the conservative Justices when they decide whether the required contacts are present. Thus, on an operational level but not on a formal level of discourse and doctrine, the Court acts in a fashion consistent with the social-functional policy-judging role of the judiciary. It is an example of the familiar discrepancy between what the Court says it is doing and what it is actually doing as pointed out by both the realist and the critical

186. 480 U.S. 102, 115-16 (1987).

187. *Id.* at 112. In *Asahi*, the majority discusses qualitative factors only to support its quantitative conclusion that there are not enough contacts.

188. *Id.* at 114.

189. The Court in *Asahi* also indicated that the forum had little or no interest in providing a forum for a dispute between two foreign nationals. *Id.* Its discussion of the forum's interest in the context of the due process jurisdictional issue could be construed as involving the Court in a switch to a qualitative, social-functional approach by a reader hoping for such a change.

legal studies scholars.[190]

Under the social-functional standards, most interests would probably be characterized as nonfundamental economic interests,[191] meaning that state courts' jurisdictional assertions would be valid so long as they were made to effectuate legitimate state interests. If some of the interests affected by state courts' extraterritorial assertions of jurisdiction were characterized as fundamental, then the stricter standard of scrutiny, compelling interest, would allow the court to invalidate such jurisdictional actions when the states' interests were not compelling. Under this approach, the Court would be forced to enunciate and evaluate the individual and state interests involved in the jurisdictional issues under the Due Process Clause. Only in exceptional cases, when fundamental individual interests were infringed, would the Due Process Clause be used to invalidate state court jurisdictional actions.

The Burger-Rehnquist Court seems to assume that since we have traditionally followed a defendant-oriented bias in jurisdictional theory, then the defendant's interest has become a vested fundamental right and any change in treatment of that interest is subject to strict scrutiny.[192] This is the discredited conservative vested-rights notion[193] surfacing again in jurisdictional disguise. Under a modern social-functional approach to limits on state exercises of power, including jurisdictional power, the limits are in two forms. The first is in the familiar form of *individual* rights guaranteed by various provisions of the federal Constitution. The second basic limit is that imposed on the state by *federal* interests expressly or implicitly written into the federal Constitution. The most familiar federal interest limit is that imposed on state actions by the Commerce Clause. Thus, if the Court finds that state action interferes with the free flow of commerce among the states, it will invalidate

190. Both legal realists and critical studies scholars are fond of pointing out the discrepancy between formalist rules and their actual effects on people. The realists might use the term law-in-action to contrast with the formal rules of textbook and statute. Critical legal studies scholars are quick to point out that formal legal rules which are ostensibly for the goal of the community typically are, in actual effect, protection of powerful interests at the expense of the less privileged of the community.

191. In most cases the interests affected by the extra-territorial jurisdictional exercise are pecuniary in nature. *See supra* note 181.

192. The Court makes no attempt to explain the value and social significance of the defendant bias in traditional territorial jurisdiction theory. Why is it more fair or proper for the plaintiff to go to the defendant's home state to bring suit than for the defendant to defend in the plaintiff's home state? Is there any way to deal with this matter without getting into substantive value concerns? Can jurisdiction be substantively neutral?

193. Here, I refer to the attempts under the Contract Clause and the Due Process Clause to protect property and economic interest from regulation by the state in the 19th century and the early 20th century.

the state action unless, as in very rare cases, the Court concludes that there is a very strong state interest to interfere. The same type of methodology would be applied where state jurisdictional assertions threaten other federal interests.[194] This social-functional approach under the modern Commerce Clause involves the Court in elucidating, evaluating, and balancing state and federal interests in much the same fashion the Court operates under due process standards. The burden is on the party claiming a Commerce Clause violation to plead and prove that the interest asserted for protection is within the ambit of Commerce Clause protection and that this interest is substantially impaired by the state action.[195] If the Court accepts this characterization and proof of impairment, the burden shifts to the state to justify the impairment by a very compelling state interest or need. Ordinarily the state cannot prove such a need or interest and its action will be struck down. In social-functional form, the Commerce Clause standards are like the due process standards for fundamental rights in terms of allocation of proof burdens and of the importance of the characterization of the interests asserted. Under both sets of standards, interest analysis and policy judging methodologies were worked out in the 1930s and 1940s under the influence of realist legal theory. Thus, in terms of the social-functional constitutional standards, the argument is that state extraterritorial assertions are limited by either individual fundamental rights under the Due Process Clause or by federal interests that may be found explicitly or implicitly in the various provisions of the federal Constitution of which the Commerce Clause is the prototype.

Under this social-functional approach to constitutional limitations on state powers, the Due Process Clause and the Commerce Clause protect different interests and involve the use of separate standards. Under

194. The Commerce Clause is the chief and most important example of federal interests as limits on state actions. The limits however, are not definitional or formalistic. Instead, the limits are pragmatic and functional and vary with time and circumstance. While other federal powers as limits on state action have not been as systematically elucidated as the commerce power, the same type of pragmatic, functional standards can be developed with regard to other federal powers. The federal power over foreign relations is one such power that can and has been used to limit state regulatory power. *See* Hines v. Davidowitz, 312 U.S. 52 (1941); Zschernig v. Miller, 389 U.S. 429 (1968). The foreign affairs power has obvious implications in cases such as Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) and Asahi Metal Ind. Co. v. Superior Court, 480 U.S. 102 (1987), in which the defendants are foreign nationals operating outside the United States.

195. The claimant demonstrates that his actions are in fact specific instances of the free movement of goods, services, or people among the states. The claimant's burden is not merely that he suffers because of the state regulation. His burden is to show how harm to him is harm to the protected federal interests which are in fact for the protection of all the citizens of the United States.

due process the claims raised are of individual interests that are classified as either fundamental or nonfundamental, and the state interest or need is measured against the individual interests under the appropriate standard, compelling interest or rational basis. Under the Commerce Clause, the claimant must show how the state action either interferes with the free flow of goods, services, or people among the states or how the state action discriminates against commerce among the states.[196] The interests protected by the Commerce Clause are federal interests, national interests, or interests of all the people of the United States, whereas due process claims are individual and particular. In the context of jurisdictional issues, under due process the interests most commonly affected by state action are economic or property interests, which would typically be subject to state regulation including jurisdictional regulation. Only in unusual cases would the defendant be able to demonstrate that the economic harm also involved harm to federal interests of the type protected by the Commerce Clause.

Due process claims should be treated separately from claims based on interference with important federal interests, though both claims may be brought by the same person as alternate causes of action in the same case. A state extraterritorial assertion might be valid as against a due process challenge but run afoul of the Commerce Clause or some other provision protecting federal interests. The two different claims would involve different issues, proofs, and justifications. This type of alternate claim or cause of action technique was quite common during the 1940s and 1950s where state regulatory actions were often challenged under the Due Process and Commerce Clause.[197]

If we look at *Asahi*[198] and *Helicopteros*,[199] in which the defendants

196. *See, e.g.*, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1958), in which the Court indicated that there was a presumption of the validity of the state safety regulation. By use of the notion of presumptive validity the court implicitly places the burden of rebutting the presumption of validity on the party claiming that the state regulation is inconsistent with the commerce clause. This usually means that the claimant must introduce factual evidence that demonstrates how the state regulation interferes with interstate commerce or how the state regulation discriminates against interstate commerce. In *Bibb*, the Freight Lines showed how having to change mudflaps at states lines interfered with the free and effective flow of interstate commerce. In Dean Milk Co. v. Madison, 340 U.S. 349 (1951), the Dean Milk Company of Illinois rebutted the presumption of validity of the Madison, Wisconsin health ordinance by showing how it discriminated against the introduction of Illinois milk into Madison. The Dean Milk Company met its burden of demonstrating how the state regulation discriminated against the interstate commerce in milk.

197. *See* Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1941); Norton Co. v. Dept. of Revenue, 340 U.S. 534 (1951); Braniff Airways Inc. v. Nebraska State Bd. of Equalization, 347 U.S. 590 (1954); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); .

198. 480 U.S. 102.

were from foreign countries, there was an obvious possibility that federal interests might be affected adversely if the California and Texas courts took jurisdiction and applied forum law in these situations. In *Helicopteros*, jurisdiction in Texas would contravene the contractual provision for jurisdiction in Peruvian courts and the legitimate expectations of the defendant as to what substantive law would be applied. It also might be embarrassing for our country in its relationships to the South American countries involved. In *Asahi*, jurisdiction and application of California substantive law likewise might have serious repercussions on our relations with Japan and Taiwan. In both cases, the defendant might have a basis for a claim of interference with the foreign affairs power that is protected by the federal power over foreign affairs and also by the Foreign Commerce Clause. Such a claim by the defendant would require the defendant to adduce facts that would indicate in pragmatic fashion the actual effects of the state's assertion of jurisdiction on the federal interests. Such a claim under social-functional standards always involves a pragmatic social-factual inquiry into the tangible effects on federal interests by the parties and by the Court.

In these cases, however, the interests came up under a due process framework instead of under the Commerce Clause standards or those under the foreign affairs power. It would seem more appropriate and straightforward for the Court to recognize this as a separate type of constitutional limitation on state court jurisdiction. Moreover, because of the strong and almost exclusive power of the federal government in these areas, such a recognition would provide a stronger vehicle for limitation of the state court's jurisdiction in such cases. Likewise, the Court should develop the limits on jurisdiction under the Domestic Commerce Clause in the more frequent domestic jurisdictional situations. There has been an occasional case where the Court has successfully invoked the Domestic Commerce Clause and the federal interests under it as a limit on state court jurisdiction.[200] However, the Court, and the Burger-Rehnquist Court in particular, has not been eager to use the Commerce Clause interests or other federal interests to invalidate state court jurisdiction.

Similarly, the Burger-Rehnquist Court seems to have taken the posi-

199. 466 U.S. 408.

200. *See* R. WEINTRAUB, *supra* note 51, at 201-03; Davis v. Farmers Co-Operative Equity Co., 262 U.S. 312 (1923); Denver & Rio Grande Western R.R. v. Terte, 284 U.S. 284 (1932); Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th. Cir. 1956); White v. Southern Pac. Co., 386 S.W.2d (Mo. 1965).

tion that fundamental rights are not a limit on state court jurisdiction.[201] This position in part stems from the Court's desire to keep jurisdictional issues within the procedural due process category since this gives it more leeway in dealing with jurisdiction issues. In *Calder v. Jones*, an interstate defamation case, the Burger-Rehnquist Court said that the First Amendment is not a relevant factor in jurisdictional issues.[202] The Court seemed to try to put to rest the claim asserted in earlier cases that the First Amendment, particularly where the defendant is a newspaper or magazine, is a source of limitation on the state jurisdictional power.[203] The implication of the Burger-Rehnquist Court's position seems to be that there is no room for fundamental rights due process standards in jurisdictional questions. Such a position follows logically from the Court's characterization of jurisdictional issues as exclusively falling within procedural due process with its own distinct standards. It is also consistent with the Court's reluctance to expand fundamental rights categories.[204] The Court is simply unwilling to engage in the kind of social-functional constitutional analysis involved in the due process standards and in the federal interest standards. Candidly, the Burger-Rehnquist Court is fearful of losing the control of its formalist due process characterization, and of the implications of the social-functional approach for the Court's desired return to a conservative federalism perspective, similar to that in vogue before the constitutional revolution of the 1930s and 1940s. Under the social-functional approach, the Burger-Rehnquist Court would have to explain why the traditional defendant bias under the territorial jurisdiction conception is one that is important enough to override legitimate state needs and interests, federal interests, and modern plaintiff-oriented substantive policies.

201. Despite lower court decisions which have suggested that First Amendment rights may limit extraterritorial jurisdiction, the Burger-Rehnquist Court has not been willing to allow fundamental rights jurisprudence into jurisdictional issues under procedural due process.

202. 465 U.S. 783, 790 (1984).

203. *See* New York Times v. Connors, 365 F.2d 567 (5th Cir. 1966); Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967).

204. The Burger-Rehnquist Court has refused to expand fundamental rights categories and attempted to move from a compelling interest standard toward an "intermediate standard," which gives the impression that the Court is not making policy decisions or balancing interest. The intermediate standard has the tendency to mask the policymaking activity of the Court. The intermediate standard asks whether the state regulation has a reasonable relation to an important governmental interest. This gives the appearance that what is involved is an exercise in logic and not policy and interest judging.

IV. Jurisdiction as a Choice of Law Limitation

This section argues that the Burger-Rehnquist Court, in a functional sense, has used the due process jurisdictional limits as a means of invalidating state court choice's of law that upset what the Court views as the legitimate territorial expectations of the defendant or involve the application of anachronistic substantive law. Stated in another way, the Burger-Rehnquist Court uses jurisdictional due process as a way to do what the Court has adjudged it cannot do under choice of law due process standards. The Court has taken a rational basis approach to due process issues involving state court choice of law decisions. Under this approach, the Court has essentially deferred to the forum choice of law as long as the forum has a legitimate interest or need to be effectuated by the policy chosen.[205] Having taken this approach in many cases since the 1930s and 1940s,[206] it is particularly difficult for the formalist Burger-Rehnquist Court to change this mode of institutional behavior. The conservative formalist members of the Burger-Rehnquist Court, however, are not happy with the way this social-functional standard works out, because it allows the state courts a good deal of discretion that is often used to defeat what the conservative formalists see as vested rights and to interfere with what these Justices consider to be the interests of other states.[207] In a more comprehensive sense, the conservative formalist Jus-

205. The Court's rational basis approach to state exercises of regulatory power over nonfundamental interests includes questions of state courts' choice of law actions. In Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), the Court upheld a Minnesota court's application of Minnesota law to an auto insurance contract between Allstate and an insured who lived in Wisconsin. Moreover, the accident occurred in Wisconsin and the insured died in Wisconsin. The action was brought by the decedent insured's widow, who moved to Minnesota after the death of her husband. The Court deferred to the Minnesota court's choice to apply Minnesota law to this case. Under Minnesota law, the allowable recovery was much higher that under Wisconsin law. The Minnesota Court had a rational basis for regulating the contract (nonfundamental) rights involved. *Id.* at 312-20.

206. *See* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); Carroll v. Lanza, 349 U.S. 408 (1955); Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). In these cases the Court allowed the state courts to apply their law since there were legitimate contacts of the non-resident defendants with the forum states. The Court speaks of contacts and not forum interests or needs in these cases. However, it is clear in these cases that the Court does not invalidate the forum's choice of law if the forum has a legitimate interest or need to be implemented. This is essentially a rational basis approach couched in contacts terminology.

207. In terms of the vested rights perspective, Rush v. Savchuk, 444 U.S. 320 (1980), might serve as a good example. Because an accident occurred in Indiana and the parties resided in Indiana, Indiana law should govern the cause of action against the defendant. Under Indiana's guest statute, the defendant was not liable to the plaintiff passenger since the defendant was guilty of mere negligence. *Id.* at 322. Thus, the rights were vested in Indiana at the time of the accident and should not be subject to change in another jurisdiction, that is, Minnesota. Like-

tices object to the social-functional approach to constitutional issues in general. This general aversion to social-functional methods has manifested itself in the Burger-Rehnquist Court's retreat from the compelling interest/fundamental right standard to an intermediate standard wherever possible.[208] Given this type of ideological outlook, what can be done to change the Court's position on due process choice of law issues short of wholesale overruling of the earlier cases? Obviously there are strong social factors that militate against this route. Moreover, this kind of change tends to be incompatible with formalist ideology, which idolizes stability and certainty. The alternative is to construct a category different from the one needing change; under this rubric, the Court then can do what it desires without the appearance of change. This is the sort of legal fiction that appeals to formalist minds, and the one chosen by the Burger-Rehnquist Court. Jurisdiction inextricably intertwined with choice of law is treated as a separate category coming under procedural due process.[209] With this characterization, the Court is free to operate differently and to strike down state court attempts to apply state policy in an extraterritorial fashion. Procedural due process allows the Court to control the interest analysis and accommodation process in an ad hoc manner free of substantive due process methodology. This procedural categorization of jurisdiction not only allows the subtle reinstatement of a formalist rhetoric but also provides a method to forestall certain choice of law decisions by state courts.[210]

The story begins in 1958 with the case of *Hanson v. Denckla*,[211] in which the Warren Court invalidated a Florida state court's exercise of jurisdiction over a Delaware trustee in a probate case where all the beneficiaries of the trust and takers under the will were present in Florida. The residuary legatees argued that the exercise of the power of appointment in Florida by the settlor of the trust was invalid because it did not

wise, Minnesota's application of its law providing for liability on the part of the Indiana defendant is seen as a significant interference with the sovereignty of Indiana. However, from a social-functional perspective, there is little actual effect on Indiana or its policy.

208. *See also* Bopp and Coleson, *supra* note 174, in which the authors express alarm over the Court's rejection of a social-functional approach and the Court's attempt to return to a formalist approach to due process.

209. *See* Hanson v. Denckla, 357 U.S. at 258, in which Justice Black acknowledges the intimate relationship between choice of law (i.e., substantive due process) and jurisdiction, (i.e., procedural due process) but insists that they are different for due process purposes.

210. For example, in Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408 (1984), the decision that Texas courts do not have jurisdiction over the Colombian defendant prevents the Texas courts from applying Texas tort law which undoubtedly would subject the defendant to much greater liability than the law of Colombia or Peru. *Id.* at 413-19. The real problem is not jurisdiction but choices of law.

211. 357 U.S. 235 (1957).

conform to certain formalities required by Florida law. The trust had been set up in Delaware by the settlor-testator, who at that time was domiciled in Pennsylvania and who later moved to Florida where she died after living there for several years. Apparently, the settlor had chosen to set up the trust in Delaware because the laws of Delaware were more liberal than those of Pennsylvania. The court invalidated Florida's exercise of extraterritorial jurisdiction over the trustee, which in effect validated the trust arrangement and accomplished the settlor-testator's wishes. The decision in *Hanson* allowed for an equitable sharing of the settlor-testator's assets among her heirs. She had worked out a fair method for distribution of her property, and the Court rightly enforced her intentions.

Though the Court in *Hanson* ostensibly based its decision on lack of contacts of the trustee with Florida under the rubric of *International Shoe Co. v. Washington*,[212] a social-functional analysis of the Court's decision reveals it as really a choice of law decision that sought to validate the settlor's intention. The decision, in effect, invalidated Florida's application of its law, which was anachronistic and out of line with the Court's preferred choice of law approach, which was to validate trust arrangements if they were valid in the state of administration.[213] The basic substantive policy approach in trust law and in conflicts of law was thus upheld.

In *Hanson*, the Court enunciated the position it has consistently maintained, that jurisdiction and choice of law are separate categories under due process.[214] The Court explained that even though the forum state, Florida, might very well satisfy due process in terms of choice of law—that is, choose to apply its own law because of its legitimate interest in the probate of the will of a Florida domiciliary—the jurisdictional due process question was to be measured by different standards that in effect were more stringent.[215] It was also in this case that the Court adumbrated its now infamous purposeful availment doctrine to decide what contacts count under the *International Shoe* standard. The Court found that the trustee had not purposefully availed itself of the benefits and protections of the state of Florida. The Court reached this conclusion despite the fact that the trustee had been in continuous communication with the settlor about the trust since the settlor moved to Florida. These

212. 376 U.S. 310 (1945).

213. The trend in the choice of law approach to trust arrangements is to validate the trust arrangements if they were valid (1) at the place where they were made or (2) at the situs of the res. *See* R. LEFLAR, *supra* note 130, at §§ 189, 190.

214. *Hanson*, 357 U.S. at 253.

215. *Id.*

contacts did not count, however, under *International Shoe*. Apparently, what would have been necessary were attempts to solicit business in Florida or transactions in Florida, both of which carry heavy territorial connotations from the pre-*International Shoe* era.[216]

The Court had a difficult dilemma. If it followed the interest analysis of its choice of law due process standards, it would have to validate the Florida decision, which would be unjust under these facts and upset the legitimate and reasonable expectations of the settlor-testator. This would also be a blow to the progressive substantive policy of trusts, which would allow such an arrangement, and the basic thrust of conflict of law in this area. On the other hand, if the Court denied Florida jurisdiction over the trustee, it would frustrate Florida's legitimate interest and cramp on the social-functional approach to jurisdiction adopted in *International Shoe* and *Mullane*, which it had implemented in the previous term in *McGee v. International Life Insurance Co.*.[217] In *Hanson*, the Court chose the preferred substantive policy of validating the settlor's intention and the trust arrangement by denying jurisdiction, which in a very real sense made bad jurisdictional policy and laid the groundwork for a formalist methodology by which the *International Shoe* approach would eventually be subverted by the territorial concept.[218]

There was an obvious tension between the Court's decision in *McGee*, which seemed to be effectuating the social-functional vision of *International Shoe*,[219] and its decision in *Hanson*, which seemed to give impetus to the formalist territorial perspective.[220] From a social-functional perspective, a later court might have read *Hanson* as a somewhat anomalous decision based on the equities of the situation, and thereby refused to expand on the territorial implications of the purposeful availment formulation. A later court, however, with formalist territorial bias,

216. *Id.* at 253-54.

217. It seems clear in *Hanson* that the Court was influenced by pre-*International Shoe* ideas of soliciting business or doing business which emphasizes actions done by the defendant in the forum rather than a social-functional standard which would center on the forum state's legitimate interest or need to have jurisdiction to effectuate its policies (i.e., administering the estate among Florida residents).

218. 355 U.S. 220 (1957). The Court upheld California's assertion of jurisdiction over the defendant insurance company which had its offices in Texas. The defendant apparently had one insurance contract on a California insured which was the one involved in this case. This single "contact" was sufficient to give California jurisdiction in an action by a California beneficiary. The case seems somewhat suspect viewed from a territorial perspective. However, from a social-functional perspective the case is not exceptional. California had a legitimate interest in providing a forum for the California beneficiary where the decedent was also a California resident. *See infra* Part V where *McGee* is discussed.

219. *See supra* Part II.

220. 326 U.S. 310.

might choose to expand the purposeful availment formulation into an important conceptual tool for infusing a formalist territorial perspective into jurisdictional questions.[221]

The next important United States Supreme Court case denying a state court's assertion of jurisdiction and also exemplifying how the Court uses jurisdictional questions to supervise state court applications of substantive law in cases involving nonresident defendants, *Kulko v. Superior Court*,[222] was decided almost 20 years after *Hanson*. In *Kulko*, the defendant was the former husband of the plaintiff. The parties had separated in New York, the marriage domicile. The plaintiff moved to San Francisco, and shortly thereafter a separation agreement was executed in New York. The agreement gave custody of the two children to the father during the school year and provided that the two children would spend Christmas, Easter, and summer vacations with their mother. The defendant agreed to pay three thousand dollars per year in child support for the period when the children would be in the plaintiff's care and custody. The plaintiff then procured an ex parte divorce in Haiti. In December 1973, when the daughter told her father she wanted to live with her mother in San Francisco, the defendant allowed her to do so. Three years later, the son decided he wanted to live in San Francisco with his mother and, without the father's knowledge, the son called his mother. She sent an airline ticket to him, and he went to San Francisco to live. One month later, the plaintiff began an action in California to gain custody of the children and to increase the support allowance. The defendant, who was served in New York, entered a special appearance challenging California's personal jurisdiction claim over him because of lack of minimum contacts under the *International Shoe* standard. A California trial court held it had jurisdiction over the defendant.[223] The defendant did not further challenge the custody jurisdiction finding but did appeal the determination of jurisdiction for support purposes. The defendant, after losing in the California Supreme Court,[224] petitioned the United States Supreme Court on the support jurisdiction issue.

The United States Supreme Court held that there were no contacts with California under the purposeful availment doctrine enunciated in *Hanson*.[225] The majority concluded that the defendant had not purposefully availed himself of the benefits and protections of California law.[226]

221. *See supra* Part II.
222. *Id.*
223. 436 U.S. 84 (1978).
224. Kulko v. Superior Court, 133 Cal. Rptr. 627 (1976).
225. Kulko v. Superior Court, 19 Cal. 3d 514, 564 P.2d 353, 138 Cal. Rptr. 586 (1977).
226. Kulko v. Superior Court, 436 U.S. 84, 94 (1978).

There is little doubt that the Court could have found minimum contacts in this situation since the defendant allowed the daughter to go to California and live there and he did not contest the California trial court's determination of jurisdiction for the custody aspect of the case. In reality, the defendant acquiesced to custody by the mother, therefore there would be an inevitable, legitimate need to increase the child support since the children would be living full-time in California. Moreover, under a social-functional interest analysis, California would have an interest in applying its law and policy to the support issues. The Court may have been concerned that a finding of minimum contacts and jurisdiction might have dire substantive policy effects where there were serious problems with enticing or kidnapping children and bringing them to another state ready to exercise jurisdiction over custody and support matters.[227] It seems clear that such considerations of social policy were critical in this case and though the Court clothed its opinion in the formalist rhetoric of contacts its decision was grounded in substantive, social policy concerns.[228] The Court used jurisdiction to prevent California from applying its law to the support issue and upsetting basic policy concerns in family law. Also it seems clear that there were strong territorial overtones in the case, as the Court continues its program of protecting nonresidents from property settlements and support orders in family matters where the nonresident defendant does not personally appear.[229]

Chronologically, the next important case denying state court extraterritorial jurisdiction was the celebrated case of *World-Wide Volkswagen Corp. v. Woodson*.[230] In this case, the plaintiffs, who had lived in New York when they purchased a new Audi from a New York retailer, Seaway Volkswagen, were moving to Arizona when their car was struck from the rear by another car in the state of Oklahoma. A fire resulted from the impact, and the wife and two children were severely burned. The plaintiffs filed suit in Oklahoma under the Oklahoma long-arm statute, against the manufacturer, the importer, the regional United States distributor, and the retail dealer. The manufacturer and the importer

227. *Id.* at 101.

228. *See generally* R. WEINTRAUB, *supra* note 51, at §§ 5.3C and 5.3D (discussing child snatching and forum shopping and the Uniform Custody and Jurisdiction Act). *See also* UNIF. CHILD CUSTODY AND JURISDICTION ACT Prefatory Note, 9 U.L.A. 116 (1968); Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1980).

229. Arguably, the real grounds for denying California jurisdiction were social policy concerns. There was nothing unfair or unreasonable about California exercising jurisdiction or applying its law in this case. In fact, Burnham v. Superior Court, 110 S.Ct. 2105 (1990), is functionally indistinguishable from Kulko v. Superior Court, 436 U.S. 84 (1978). There should be jurisdiction in both cases.

230. *See* WEINTRAUB, *supra* note 51, at 248-52.

consented to personal jurisdiction in the action in the Oklahoma courts, but the regional distributor, World-Wide Volkswagen, and the retailer, Seaway Volkswagen, contested the exercise of jurisdiction by the Oklahoma court under the minimum contacts/fair-play doctrine.[231] The Court struck down Oklahoma's exercise of jurisdiction over the regional distributor and the retailer, citing the purposeful availment doctrine enunciated in *Hanson v. Denckla*[232] and amplified in *Kulko*.[233] The defendants had not done anything to purposefully avail themselves of the protections and benefits of Oklahoma law. The defendants neither carried on nor solicited business in Oklahoma, but both were links in an interstate distribution system. The Court's decision also contained explicit statements enhancing the formalist territorial notion of state lines as barriers to jurisdiction.[234] Under the facts, it seems clear that defending the suit in Oklahoma would not impose much of a financial burden on the defendant companies and that Oklahoma would be as convenient a forum as could be found. The underlying reasons for this denial of jurisdiction from a social-functional viewpoint are found in an antagonistic attitude toward the plaintiff-oriented revolution in tort law[235] and jurisdictional issues. In addition, progressive tort law tends to assign liability to the manufacturer for such defects.[236] In this case, the manufacturer and U.S. importer of Audi were before the Court, and there was no functional reason for including the innocent retailer and distributor in the action. Substantive tort policy points toward the liability of the manufacturer when it is available and solvent.[237] Here again, the Court's

231. 444 U.S. 286 (1990).

232. *Id.* at 289.

233. 357 U.S. 235 (1958).

234. 436 U.S. 84.

235. The Court in *World-Wide Volkswagen*, 444 U.S. at 293-94, stated explicitly:

> Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers . . . . But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts.

The Court openly demonstrates its commitment to outdated notions of federalism and state powers.

236. As indicated *supra* Part I, the change toward a plaintiff oriented tort law was also reflected in a plaintiff-orientation in choice of law and jurisdiction in tort cases. The plaintiff's choice of the Oklahoma forum is consistent with the plaintiff-orientation in tort policy and jurisdiction policy. The Burger-Rehnquist Court rejects this social-functional view of jurisdiction in favor of a territorial view. In a sense, the Court denies the social reality of the change in tort policy and its impact on jurisdictional practice and theory.

237. It also appears obvious that the denial of jurisdiction in *World-Wide Volkswagen* was based in part on changes in tort law which now tends to put liability on the manufacturer of defective products rather than on the retailer. The manufacturer can more readily spread the

decision was rendered in the formalist territorial rhetoric of minimum contacts but based on social fact and substantive policy. Jurisdiction was used to prevent state court application of state law, which in this particular context was unnecessary and an embodiment of the social-functional revolution in tort law that makes jurisdiction plaintiff-oriented.

This brings us to the next significant case involving denial of state court jurisdiction in the Burger-Rehnquist era: *Rush v. Savchuk*.[238] *Rush* was decided about the same time as *World-Wide Volkswagen*. In *Rush*, the plaintiff was a passenger in the car driven by the defendant and owned by the defendant's father. The plaintiff was injured in a single car crash. Both plaintiff and defendant were Indiana residents at the time of the accident. Indiana had a guest statute that would have barred recovery by the plaintiff.[239] About a year and a half later the plaintiff and his parents moved to Minnesota. One year after that, the plaintiff commenced an action in the Minnesota state courts. The suit was filed more than two years after the accident and after the Indiana two year statute of limitations had run.[240] The action was brought as a quasi in rem action in which the Minnesota Supreme Court had held that defendant's right to indemnification and to a defense paid for by State Farm were grounds for jurisdiction in the Minnesota courts.[241] After the action was filed, the plaintiff moved to have State Farm added as a party to the action since State Farm as a garnishee had denied any liability to the defendant. State Farm had offices in Minnesota and did extensive business in Minnesota. The Minnesota courts upheld jurisdiction. The Minnesota Supreme Court stated that even though the defendant had no contacts with Minnesota, fairness considerations allowed jurisdiction since the insurer controls the defense and does business in Minnesota,

costs and the defects are normally caused during the manufacturing process. Here, the manufacturer and United States importer were already before the Court and were solvent. There was no need to give the plaintiff additional defendants.

238. A trend toward holding the manufacturer liable instead of the retailer makes good social sense today. First, the manufacturer is the one responsible for the defect in the product in most cases. It seems only fair to hold him liable rather than a retailer, who has not caused the defect, or concealed the defect, if the manufacturer is solvent and available. Second, the manufacture is in the best position to spread the risk of loss. Third, with the downfall of the privity of contract doctrine consumers are able to sue the manufacturer directly. Fourth, with the longarm jurisdiction revolution, manufacturers usually can be sued by consumers in the consumer's state. Fifth, by holding the manufacturer primarily responsible pressure can be maintained on manufacturers to take added precautions to insure the safety of the products they manufacture.

239. 444 U.S. 320 (1980).

240. *Id.* at 322.

241. The central problem in *Rush* was the application of Minnesota law, including its longer statute of limitations and its policy of allowing passengers to sue drivers for ordinary negligence which would upset the defendants "vested rights" and territorial expectations.

and Minnesota has an interest in protecting its residents and providing a forum for residents to litigate their claims.[242] The Court, purportedly following the rationale of *Shaffer v. Heitner*,[243] which held that the minimum contacts/fair-play standard applied to in rem as well as in personam actions, invalidated Minnesota's assertion of jurisdiction. The Court indicated that the insured is the real party in interest in such cases and that the contacts requirement must be met as to the insured. The Court found no defendant contacts whereby the defendant purposefully availed himself of the benefits or protections of the forum state.[244] The Court reaffirmed its position that contacts can not be created by the plaintiff acting unilaterally.[245]

Functionally speaking, the Court invalidated *Seider v. Roth*-type actions.[246] Again, the Court denied substantive tort policy aimed at changing the defendant orientation in tort law and its operative effects on jurisdiction theory.[247] The Court used jurisdiction to thwart the possibility that Minnesota, following an interest analysis approach as it did in *Allstate Insurance Company v. Hague*,[248] would apply its tort law that does not impose guest statute limitations on injured passengers' claims. Moreover, in *Rush*, the Court protected what it viewed as the legitimate territorial substantive expectations of the defendant.[249] In the eyes of the conservative formalist Justices on the Court, this type of case epitomizes the dangers of the social-functional approach to the vested rights of defendants and its formalist notions of federalism.

The final two cases evidencing the use of jurisdiction to limit state court choice of law are *Helicopteros Nacionales de Colombia S.A. v. Hall*,[250] decided in 1984, and *Asahi Metal Industry Co. v. Superior*

242. *Rush*, 444 U.S. at 324. This jurisdictional strategy had developed and was used in New York, per Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

243. *Rush*, 444 U.S. at 322-24. The Minnesota court, apparently following a social-functional model of jurisdiction, discarded the "contacts" doctrine with its purposeful availment corollary and addressed the due process issue by asserting its legitimate interest in providing a forum for its residents' personal injury claims and its interest in applying its plaintiff-oriented tort policies. The Minnesota court's position makes good social-functional sense as it places primary emphasis on the forum's legitimate interests and current social policy.

244. 433 U.S. 186 (1977).

245. *Rush*, 444 U.S. at 332-33.

246. *Id.* at 327.

247. *Seider*, 17 N.Y.2d 111.

248. *See supra* text Section I for discussion of the plaintiff-oriented model of tort law and its effect on jurisdictional notions.

249. 449 U.S. 302 (1981).

250. *Rush*, 444 U.S. 320. Apparently the defendant had a vested right under Indiana law that he could rely on regardless of the forum. This vested right was given constitutional protection by the Court.

Court,[251] decided in 1987. In *Helicopteros*, the Burger-Rehnquist Court invalidated an assertion of jurisdiction by Texas courts over a Colombian company whose principal place of business was Colombia. The company was providing transportation for workers at an oil construction site in Peru when one of their helicopters crashed, killing the workers aboard.[252] Four of the workers were Americans employed by an American-based company to work in Peru. The contract executed by Helicopteros and the American company stipulated that all parties were residents of Peru and provided that all controversies arising out of the contract would be submitted to the jurisdiction of Peruvian courts. These provisions suggest an attempt to protect Helicopteros from litigation in United States courts and from the substantive provisions of United States tort law, which most likely would differ in liability and amounts of compensation. Note also that Peruvian law prohibited construction of pipelines by any non-Peruvian entity. This, in part, accounts for the contractual stipulation that all parties are Peruvian and for the set-up of the Peruvian company fronting for the Texas-based American company.

The action was brought in Texas by the American survivors and representatives of the Americans who were killed in the crash. The Texas court exercised jurisdiction under a Texas long-arm statute and entered a judgment for $1,140,000 against Helicopteros. The defendant claimed no jurisdiction because of a lack of minimum contacts. The Texas Supreme Court found minimum contacts and upheld the trial court judgment.[253] The U.S. Supreme Court reversed, stating that the contacts were insufficient under the *International Shoe* standard.[254] The decision was complicated because the parties apparently waived consideration of the case as one arising out of and related to the activities of Helicopteros in Texas.[255] Instead, the Court considered the case as involving the question of whether the contacts were sufficient to support general jurisdiction, that is, a suit against the defendant on any claim related or unrelated to the forum. The Court analogized general jurisdiction to the concept of doing business that was used in the pre-*International Shoe* era and normally required a regular and continuous pattern of activities in the forum.[256] After establishing this dubious distinc-

251. 466 U.S. 408 (1984).

252. 480 U.S. 102 (1987).

253. *Helicopteros*, 466 U.S. at 418-19.

254. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870 (1982).

255. *Helicopteros*, 466 U.S. at 416, 418-19.

256. *Id.* at 415-16.

tion,[257] the Court then proceeded to analyze the contacts of Helicopteros with Texas. The Court found the contacts insufficient to meet the minimum contacts required for general jurisdiction. The contacts were: (1) defendant purchased helicopters in Texas from Bell Helicopters, (2) the helicopter pilots were trained in Texas, (3) management and maintenance personnel were also instructed about the helicopters in Texas, and (4) Heliocopteros received payments under the contract in the United States.[258] Other facts indicate that Helicopteros never had a place of business or solicited business or recruited employees in Texas. The Court concluded that the aggregate of these contacts was not sufficient to meet the minimum contacts test.[259]

A critical, social-functional analysis suggests that the Court was really concerned about the application of Texas tort law to a Columbian defendant where the injuries took place in Peru and the Columbian defendant had legitimate expectations that Peruvian law or Columbian law would be applied in the case. Here the Court effectively prevented Texas from applying its tort law, which undoubtedly would have substantially different standards of tort liability and different limits on damages.[260] The application of Texas law would be contrary to the legitimate territorial expectations of the Columbian defendant and would subject the defendant to substantive tort laws that would treat it in a very different way.

Moreover, there are implications that the federal interests in foreign affairs and foreign relations might be affected by the application of Texas law in these circumstances. Though these social-functional factors are not the announced grounds for the decision, it is hard to escape the conclusion that they were extremely important in determining whether the contacts were sufficient for due process purposes. It also seems strange for the Court not to consider the case as involving specific jurisdiction. It seems likely that the majority of the Court would have had a harder time dealing with the contacts question if the case were perceived as a specific jurisdiction case. It would have been more difficult to avoid the reality

257. *Id.* at 411. The Court emphasized the same kind of factors that were emphasized in the pre-*International Shoe* doctrine of doing business. The Court indicated that the defendant was not authorized to do business in Texas, that the defendant made no sales in Texas, that the defendant made no solicitations in Texas, that the defendant had no real estate in Texas, and that the defendant had no offices in Texas. Essentially then, the defendant was not doing business in Texas. The Court continues to use a territorial type of analysis and eschews a social-functional approach not based on power.

258. *Id.* at 419-20 (Brennan, J., dissenting) (criticizing the characterization of the question as involving "general jurisdiction").

259. *Id.* at 409-13.

260. *Id.* at 418-19.

that (1) several Americans died because of the defendant's actions, (2) decedents were hired in Texas by an American company and were working for an American company, (3) the defendant company was hired by the American company under a contract that was at least partially negotiated in Texas, and (4) American plaintiffs would be forced to go to Peru or Colombia to sue the tortfeasor and face the prospects that they might not recover under Peruvian or Colombian law. Or, if the defendant were held liable in the foreign forum, the plaintiffs probably would not receive what we would consider adequate damages. It would have been harder to conclude that defendant's activities were unrelated to the forum's legitimate interest in providing a forum for the American plaintiffs. Under a social-functional approach, Texas would probably be a proper forum for deciding the case. Under this approach, the only limit on jurisdiction might be that of federal interests under the Foreign Commerce Clause or the foreign affairs power. To impose limits based on these constitutional standards would require an up-front, pragmatic examination of the actual affect that jurisdiction in Texas would have on these federal interests.[261]

The last case in this series is *Asahi Metal Industry Co. v. Superior Court*.[262] In *Asahi*, the Court again used the concept of jurisdiction to forestall California from applying its substantive tort law to a dispute between a Japanese and a Taiwanese company over indemnification between tortfeasors. In this case, original plaintiff Gary Zurcher lost control of his motorcycle when the rear tire exploded. He was injured and his wife, a passenger, was killed. He sued Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube, claiming it was defective. Cheng Shin filed a cross-complaint against Asahi Metal Industry Co. (Asahi), the Japanese manufacturer of the valves used in the tube. Asahi sold valves to Cheng Shin who then used them in the tubes it produced. Many of the tubes found their way into the United States. Zurcher's claim against Cheng Shin was settled out of court, and the cause of action against Cheng Shin was dismissed, leaving only the indemnity action of Cheng Shin against Asahi. The Court concluded that the contacts were not sufficient to meet the minimum contacts requirement and invalidated California's assertion of jurisdiction over

261. *See e.g.*, Tramontana v. S.A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468 (1965) (applying Brazil's limitation on recoverable damages, in view of Brazil's dominant interest in the accident).

262. Using the Foreign Commerce Clause or foreign affairs powers as limits on jurisdiction would involve a factual look at the interests involved and an evaluative judgment of the effects on the national or federal interest.

Asahi.[263] Though the Court talked of contacts, it is clear that under a social-functional approach, California had no legitimate need or interest to be effectuated by exercising jurisdiction in the indemnification dispute between two foreign companies.

In addition, as in *Helicopteros*, there was the possibility of interference with federal interests in foreign commerce and foreign affairs that might serve in their own rights as limits separate from any due process claim. Here, as in *Helicopteros*, the Court's decision can be seen as preventing the application of California tort law to the foreign defendant, which law would treat the defendant more harshly and would upset his legitimate territorial expectations about what law would be applied.

These cases demonstrate through a social-functional analysis that the Burger-Rehnquist Court utilizes the jurisdictional due process limitation as a method of forestalling the choice of law decisions of state courts in situations where application of forum law would upset what the Court considers to be the legitimate substantive territorial expectations of the defendant or where the application of forum law would be anachronistic or regressive. There is a formalistic distinction in the Court's rhetoric, between choice of law and jurisdiction. A social-functional critique, however, suggests that the actual decisions, as distinct from the written opinions, are made on substantive policy grounds and that, under due process theory, jurisdictional questions should be characterized as substantive due process questions falling under social-functional standards.[264]

V. Jurisdiction as Social-Functional Policy

A social-functional analysis, not sidetracked by the formalist rhetoric and the linguistic facade of the Burger-Rehnquist Court's opinions, reveals that jurisdiction has always been a social-functional policy concept. It has always involved a consideration of the forum needs, substantive policy, and ways in which these needs and policies could be effectuated. There has always been a need for states to be able to affect persons physically located outside the territorial boundaries of the forum. Jurisdiction has essentially been a policy-effectuating and policy-judging concept. Prior to *Pennoyer*'s[265] formalist constructions, jurisdiction had not had a rigid territorial structure. States often asserted jurisdiction over nonresidents.[266] It was the *Pennoyer* decision, drawing on Justice

263. 480 U.S. 102 (1987).
264. *Id.* at 116.
265. *See supra* text Section III.
266. 95 U.S. 714 (1878).

Story's attempt to create hard, territorially structured jurisdictional rules out of Huber's theoretical political principles of state power, that first articulated the rigid territorial view of jurisdiction.[267] The practice of state courts prior to *Pennoyer* had been much more fluid, varied, and social-functional than *Pennoyer* suggests.[268]

The formalist theory enunciated in *Pennoyer* and its subsequent formalist embellishments tend to treat jurisdiction as a finite, objective entity with tangible characteristics and parameters that can be perceived free of social policy considerations. From the formalist perspective either there is jurisdiction or there is not. To determine whether there is, one simply matches the concrete, definitional characteristics against the facts of the situation in question. Here one is reminded of Justice Roberts' statement in *United States v. Butler*[269] suggesting that in order to determine the constitutionality of a statute, it is merely necessary to lay the statute alongside the appropriate constitutional provision and see if the one squares with the other.[270] It is not by accident that this formalist statement was written in Justice Roberts' majority opinion that invalidated a federal processing tax in the Agricultural Adjustment Act of 1933. The opinion, evincing the old formalist notion of federalism,[271] was decided a few short years before the revolutionary change in the mode of interpreting the Commerce Clause and federalism in *NLRB v. Jones & Laughlin Steel Corp.*[272] in which the Court moved toward modern social-functional standards of interpretation. In the formalist mode of seeing and thinking, there was no specific constitutional provision expressly delegating to Congress the power to levy this "processing tax."[273]

267. *See* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 284 (1956).

268. *See* Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 258-62; *see also* Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33 (1957) (providing a historical-analytical reappraisal of the extension of full faith and credit to judgments and public acts).

269. Hazard, *supra* note 268, at 261. *See also* Ehrenzweig, *supra* note 267 (discussing the transient role of personal jurisdiction).

270. 297 U.S. 1 (1936).

271. *Id.* at 62.

272. By a formalist notion of federalism, I am referring to the idea that the powers of government are divided between the state and federal government in a fashion which makes state powers separate and exclusive of federal powers. Powers are either federal or state and they are distinguished by definitional means. The grants of power to the federal government are important legal limits on what the federal government can do under this approach. This approach to federalism was superseded in the 1930s and 1940s by a social-functional model under which the lines drawn between federal and state powers is a pragmatic one based on current needs and values. The federal government under this view is not legally limited by state powers.

273. 301 U.S. 1 (1937).

Consequently, the statute did not "square" with the constitutional provision concerning the power to tax. Under such a view of law and words, there is no room for a policy-oriented methodology of interpreting and applying legal provisions where meaning and application are determined by notions of social fact, need, and policy.[274]

Under a social-functional concept of jurisdiction, the question is whether there should be jurisdiction in a given social situation. The inquiry involves consideration of social policy and social values. Judicial interpretation and application of jurisdictional concepts requires inquiry into the social objectives to be achieved and the social factual context of the particular situation before the court. For example, in *McGee v. International Life Ins. Co.*,[275] California had a long-arm statute authorizing its courts to exercise jurisdiction over nonresident insurance companies that insured people or property in California. The objective of the statute was to provide a local forum for California residents who had disputes with out-of-state insurance companies. Also implicit was California's substantive policy, applied to protect the expectations of California residents. The statute must be seen in its full social factual context, which includes the ways in which insurance companies behave vis-a-vis their insured. It is not unusual for insurance companies to interpret their insurance contracts in their own favor and install boilerplate provisions to disadvantage the insured. The insurance companies use every legal device to take advantage of the defendant-oriented bias built into territorial jurisdiction. Insureds with small claims or little money will automatically be disadvantaged by the territorial model of jurisdiction. All these social-functional, contextual concerns implicitly went into California's long-arm statute. In *McGee*, the Court upheld California's jurisdiction over a Texas-based insurance company that apparently was not soliciting business in California on any significant scale.

While jurists and scholars under the influence of the *Pennoyer* paradigm like to regard *McGee* as an exceptional case and the high water mark under the *International Shoe* standards,[276] from a social-functional perspective, *McGee* is neither a high nor a low water mark. It is simply a case where the Court properly applied the social-functional method in which the forum state's legitimate needs and policy concerns are of primary importance, and in which the territorialized concept of defendants'

274. *Butler*, 297 U.S. at 54-56.

275. The statements by Justice Roberts, 297 U.S. at 62-63, appear to express formalist ideology, under which the judicial role is not a creative role. The proper role of the judge is to find meaning in the words of the legal provision by an objective, non-evaluative process.

276. 355 U.S. 220 (1957).

purposeful availment of forum benefits was not the touchstone of extraterritorial jurisdiction. A social-functional critique reveals that *Pennoyer*'s progeny—in rem, quasi in rem, transient jurisdiction, implied consent, and presence—are all expressions of the forum state's perpetual need and interest in exercising extraterritorial jurisdiction to deal with matters of legitimate concern. Though these devices have been traditionally viewed as merely exceptions to, or minor deviations from the basic territorial principle of *Pennoyer*, and applied in ways that seem to make them consistent with *Pennoyer*, all these doctrines are evidence of the social infirmity of *Pennoyer*'s territorial jurisdiction notion. *Pennoyer*'s jurisdictional progeny were social-functional actions. The attempts to rationalize these exceptions with *Pennoyer* involved transparent fictions. The emphasis in these exceptions on things, people, or actions in the forum placated only formalist minds.

In regard to in rem and quasi in rem jurisdiction, the res was regarded as within the forum, but the social reality was that the forum court was exercising power over the nonresident defendant through a ruse. In most instances there were legitimate needs or interests to be effectuated by exercising extraterritorial jurisdiction.[277] In rem rhetoric involved parties and courts in specious arguments and actions that frustrated the development of socially responsive jurisdictional doctrines.

Transient jurisdiction, like in rem, as evidenced in *Burnam v. Superior Court*,[278] was ensconced under *Pennoyer* primarily because the formalist territorial notion prevented state courts from dealing with important policy goals, simply because defendants were on the other side of the mythical state-line barrier to jurisdiction. Transient jurisdiction was essentially a way to exercise needed extraterritorial jurisdiction and to effectuate legitimate forum needs and interests.

Likewise, forum needs frustrated by territorial notions prompted the development of the doctrines of implied consent and doing business. To satisfy territorial notions, they were ostensibly based on actions by the

277. In *McGee*, the Court treats the case as involving only a single contract of insurance in California and is unconcerned about the volume of business being done by the defendant, a Texas-based insurance company with no offices or salespersons in California. Moreover, there is no showing of any other solicitation of insurance business by the defendants in the state of California. In short, jurisdiction was based on a single solicitation by mail from a non-resident insurance company. Professor Weintraub, *supra* note 51, at 118, specifically states that *McGee* was the high water mark of long arm jurisdiction. *See also* REESE, CONFLICT OF LAWS 74 (1984).

278. In rem and quasi in rem jurisdiction are expressions of legitimate state needs and usually there is some connection between the defendant and the forum's interest. It is interesting to note that Shaffer v. Heitner, 433 U.S. 186 (1977), has not had much effect on in rem and quasi in rem jurisdiction.

defendants or their agents within the forum. Nevertheless, the real basis for such doctrines were to be found in social need and social fact, which called for the development of extraterritorial jurisdiction along social-functional lines.

Under all these fictitious doctrines, the territorial jurisdictional paradigm was preserved by focusing attention on acts, things, or persons within the forum state. While such doctrines did help, they also placed limits on state power, which often frustrated legitimate forum concerns. What was needed was a fully social-functional conception of jurisdiction commensurate with the extraterritorial needs and interests of states in our modern federal system and commensurate with our modes of social and economic living. Only fundamental rights or important federal interests protected by the federal Constitution should limit state court jurisdiction, instead of outdated notions of federalism and antifunctional state-line barriers.

Looking at other jurisdictional settings, we also see the basic social-functional perspective at work. Divorce jurisdiction based on the domicile of one spouse is the result of perceived social needs, interests, and policy. Admiralty jurisdiction, which allows jurisdiction in any place where the defendant's ship can be found, continues to be consistent with due process even after *Shaffer v. Heitner*,[279] primarily because of its substantive purpose of affording the historically exploited sailor a viable way to recover wages or benefits from absent and distant shipowners.[280]

Other examples of in rem type proceedings where rights of nonresidents may be cut off consistent with due process are probate claims, quiet title, escheat, and trust accounting, which the forum state needs to efficiently and effectively handle. All these situations show the imprint of the social-functional method even though shrouded in formalist linguistic garb.

In certain doctrines persons are exempted from jurisdiction even though they were found within the forum state. We can add these to the list of situations where the legitimate social needs and policy concerns of the states are the critical factors under the social-function perspective. In the following circumstances the nonresident is typically exempted from jurisdiction under the territorial paradigm: (1) a nonresident tricked into coming into the forum; (2) a nonresident kidnapped or carried into the forum against his or her will; (3) a nonresident entering the forum to be a

279. 110 S.Ct. 2105 (1990). In *Burnham*, California had a legitimate need to exercise jurisdiction over the defendant, and the defendant had sufficient relationships to justify the exercise of jurisdiction without the invocation of the transient jurisdiction concept.

280. 433 U.S. 186.

witness in a legal proceeding; (4) a nonresident entering the forum to act as a lawyer in another action; and (5) a nonresident who entered the forum as a party in another action.[281] All of these social policy exceptions furnish additional evidence of a social-functional concept of jurisdiction.

In light of all the above situations where jurisdictional decisions were based on social need and policy considerations that the formalists have treated singly as incidental exceptions to a nonfunctional concept of jurisdiction, it is hard to maintain the formalist territorial notion of jurisdiction as a finite, concrete entity. Likewise, it is difficult to accept the formalist notion that legitimate forum interests and social policy are secondary, while contacts with the forum are primary. Here we see the formalists' denial of the social-functional reality of jurisdictional concepts and a determined adherence to nonfunctional territorial concepts. Note the large, paradoxical gap between formalists' territorial rhetoric and the social-functional nature of their actions. This is the formalists' reactionary constitutional agenda at work.

VI. Conclusion

The social-functional nature of the *International Shoe* and *Mullane* standards has never been fully realized or articulated. *International Shoe* presented a revolutionary jurisdiction paradigm. This provided the opportunity and potential formula for a new era of jurisdictional thinking that promised to sweep away the formalist territorial paradigm of *Pennoyer*, which was socially regressive and inept. Viewed in its full constitutional and social context, its potential was progressive and far-reaching. The tyranny of concepts and the territorial bias strongly entrenched in political and legal thinking, subtly and insidiously subverted the new paradigm's revolutionary social-functional character. Almost instinctively it was given territorial interpretation and twisted to fit within the basic *Pennoyer* paradigm rather than to replace it. In the Burger-Rehnquist era, the subversion became intentional.

Despite the determined efforts of the Burger-Rehnquist Court to establish a reactionary return to pre-1930s formalist modes of interpreting and applying constitutional provisions, the exigencies of social values continue to thwart this formalist agenda. We can expect retrenchment in formalist rhetoric, language, and doctrine, but the actions taken under the facade of formalism will still have to pay homage to social realities.

281. *See generally* Kalo, *The Meaning of Contact and Minimum National Contacts: Reflections on Admiralty In Rem and Quasi-In-Rem Jurisdiction*, 59 TUL. L. REV. 24 (1984); Olsen, *Jurisdiction in Admiralty: Pennoyer v. Neff in Ship's Clothing?*, 84 DICK. L. REV. 395 (1980).

Because of the intransigence of social fact and social values, we must view the full social-functional dimensions of *International Shoe*. As jurisdictional theory intertwines with constitutional theory, legitimate state interests and needs are critical. Under the fully social-functional approach implicit in *International Shoe*, states would be permitted to exercise extraterritorial jurisdiction whenever they had a legitimate interest. Such extraterritorial actions would be limited only when the defendant successfully pled and proved that the state's action seriously interfered with a fundamental right protected by the Due Process Clause or seriously interfered with a federal interest protected by the federal Constitution.

The prototypical model for protecting federal interests would be found in the type of social-functional standards developed under the Commerce Clause in the 1930s and 1940s. Interests protected by the Commerce Clause, including its foreign commerce phrase, would limit state extraterritorial actions, and the Court would have to apply social-functional standards. Other federal interests implicit or explicit in other provisions of the federal Constitution, however, would also be a source of limitation on extraterritorial jurisdiction. Here the model would embrace the type of social-functional standards developed under the Commerce Clause. Only in exceptional cases, when the state would be able to convince a court that there were extremely compelling reasons why it should be allowed to interfere with fundamental rights or federal interests, would state exercises of jurisdiction be invalidated. Under such an approach, the Court would have to openly deal with social facts and values and would not be able to hide behind the facade of formalist-territorial jurisdictional concepts.