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THE SHRINKING FORUM. THE SUPREME COURT'S
LIMITATION OF JURISDICTION—AN ARGUMENT
FOR A FEDERAL FORUM IN MULTI-PARTY,
MULTI-STATE LITIGATION

ALLEN R. KAMP*

INTRODUCTION: THE GOAL OF THE UNITARY FORUM

One of the goals of modern procedure is to provide an adequate framework for the resolution of all aspects of a controversy. The merger of law and equity, the allowance of inconsistent causes of action, and the permissive joinder of parties allow modern courts to resolve all the disputes between all the parties to a controversy.¹ Unlike older systems of procedure, which often forced the plaintiff to litigate in either a legal or equitable forum and to maintain separate actions against each defendant, modern procedure enables a plaintiff to try all of his claims against all defendants at once.² When the controversy involves many defendants located in several different states, the plaintiff must find a court that may exercise jurisdiction over each defendant. Since repetitive and fragmented litigation is expensive, societal, as well as private, interests are involved.³ Moreover, each party has a stake in avoiding inconsistent and conflicting judgments.⁴

The Supreme Court's latest decisions dealing with the jurisdiction of state and federal courts have imperiled the procedural goal of unity by limiting the courts' jurisdiction over parties either necessary or indispensable to a complete adjudication of a controversy.⁵ *Shaffer v. Heitner*,⁶ by recasting prior jurisdictional theories, adopted a restrictive view of state-court jurisdiction. *Kulko v. Superior Court*,⁷ decided in the spring of 1978, followed *Shaffer's* restric-

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1. FED. R. CIV. P. 1 (1966), 2, 8(e)(2) (1966), 18 (1966), 19 (1966), & 20 (1966).

2. F. JAMES, JR. & G. HAZARD, CIVIL PROCEDURE § 1.6, at 19 (2d ed. 1977).

3. *Id.* § 9.18, at 435-38.

4. *See, e.g.,* *Hanson v. Denckla*, 357 U.S. 235 (1958) (Florida and Delaware courts reached opposite conclusions concerning the validity of an inter vivos trust).

5. Rules governing necessary and indispensable parties are in FED. R. CIV. P. 19 (1966).

6. 433 U.S. 186 (1977).

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

tive holding. *Owen Construction and Erection Co. v. Kroger*⁸ limited the ancillary jurisdiction of federal courts, and a prior case, *Zahn v. International Paper Co.*,⁹ limited pendent jurisdiction. An explanation for these restrictive holdings is that the Burger Court is exalting states' rights by limiting the power of one state to adjudicate the rights of parties who live or do business in other states and by limiting the power of federal courts to adjudicate state controversies.¹⁰

These cases are recent examples of how the Supreme Court has hindered the goal of providing a unitary forum. This Article will discuss these cases in relation to that goal. It concludes that, in light of the Court's rulings, Congress should provide a federal forum for the adjudication of multi-state controversies.

THE RESTRICTION OF STATE COURT JURISDICTION

Jurisdictional Theory up to Shaffer v. Heitner

The focal point of the contemporary limits of state court jurisdiction is *Shaffer v. Heitner*¹¹ That case rejected prior jurisdictional theory and recast it in a contemporary mold. In order to understand the impact of *Shaffer*, a brief review of jurisdictional concepts, starting with *Pennoyer v. Neff*,¹² is necessary

A basic premise of *Pennoyer* was that the states are independent sovereigns, which interact as foreign nations do with each other.¹³ The concept of independent state sovereignty was *Pennoyer's* initial premise rather than its inductive conclusion. The fact that the national government had such sovereign powers as making war and peace, building an interstate navigational and railway system, and prohibiting the states from denying equal protection or due process

8. 437 U.S. 365 (1978).

9. 414 U.S. 291 (1973).

10. See notes 82-88 *infra* & accompanying text.

11. 433 U.S. 186 (1977).

12. 95 U.S. 714 (1877). The Supreme Court may have overruled *Pennoyer* in *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977). This Article, however, argues that to view *Shaffer* as overruling *Pennoyer* is too simplistic. See text following note 88 *infra*.

13. 95 U.S. at 722. To Justice Field, who wrote the opinion, the principles of jurisdiction were "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. The other principle follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.*

of law did not influence the opinion.¹⁴ Justice Field, who wrote the opinion, thought it impossible that the states could be other than independent adjudicatory bodies. They could not be parts of a coordinated federal whole.

Pennoyer's system was limited by the state's territory: a court could adjudicate interests only if persons or property were within its borders.¹⁵ This necessarily restricted the power of a state to adjudicate all aspects of a controversy. If two defendants' persons or property could not be found within one state, no one state could grant a judgment against both of them.

The *Pennoyer* system became inadequate in a complex, industrial society. In *International Shoe Co. v. Washington*,¹⁶ the issue was whether a state could adjudicate a corporation's liability for failure to contribute to its unemployment compensation program. The Court ruled that the defendant did not need to be physically present within the state for in personam jurisdiction to exist if it had "minimum contacts" with the forum state.¹⁷ The minimum contacts test avoided many conceptual difficulties, such as deciding the location of the corporation¹⁸ and instead, it focused on activities and relations of the defendant with the forum.¹⁹ By requiring less than actual presence, the case expanded the scope of state court jurisdiction.

The *International Shoe* standard, however, was interpreted in two different ways. Under one interpretation, the courts looked at each defendant's physical or business connections with the state. Under the other, a defendant's individual contacts were not regarded as determinative. Rather, courts weighed a complex set of

14. See Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 264.

15. See Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61, 61-63 (1977).

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

17. *Id.* at 316.

18. *Id.* at 316-17. The Court recognized the fictional nature of the corporate personality, and it stated:

To say that the corporation is so far "present" there as to satisfy due process requirements is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

Id.

19. See *id.* at 319-20.

factors: the regulatory concerns of the state, the convenience of the parties, the location of witnesses, the law to be applied, and possible alternative jurisdictions.²⁰

Under the first interpretation, a state often may not have jurisdiction over a defendant because of that defendant's lack of contacts with the state. In *Hanson v. Denckla*,²¹ for example, the Supreme Court held that the Delaware trustee never did enough in Florida to submit itself to Florida's jurisdiction. Therefore, Florida lacked in personam jurisdiction over the trustee.²²

Under the second view, the criteria may be manipulated in order to acquire jurisdiction over a nonresident defendant. A classic example of the application of the second view is *Atkinson v. Superior Court*.²³ In that case, Chief Justice Traynor of the Supreme Court of California confronted the same problem as in *Hanson*: was it possible to obtain jurisdiction over a nonresident trustee who was indispensable to an adjudication of the lawsuit? The case involved a suit by California employees who challenged the validity of an employees' benefit fund. The employees worked in California, and a portion of their paychecks was turned over to the trustee of the fund, who was located in New York. The trustee, an indispensable party, was essential to the adjudication of the lawsuit. It was important to be able to join the New York trustee and the California employers in one lawsuit.²⁴ Justice Traynor found jurisdiction over the trustee by weighing a variety of factors: the relationship of the subject matter of the lawsuit with the state; the California location of the employees and their employers; the relative convenience of the parties; the interest of California in adjudicating the lawsuit; and the importance of joining the trustee.²⁵

Justice Traynor's approach emphasized jurisdictional criteria that are similar to those involved in determining choice-of-law issues. Because of this similarity, these criteria have been called "choice-of-law" considerations.²⁶ Other names include "center-of-

20. Casad, *supra* note 15, at 64-65.

21. 357 U.S. 235 (1958). See notes 36-41 *infra* & accompanying text.

22. 357 U.S. at 254.

23. 49 Cal. 2d 338, 316 P.2d 960, *appeal dismissed*, 357 U.S. 569 (1957).

24. *Id.* at _____, 316 P.2d at 961-62.

25. *Id.* at _____, 316 P.2d at 966.

26. See *Hanson v. Denckla*, 357 U.S. 235, 253, 254 (1957).

gravity"²⁷ and "interstate venue."²⁸ When denoted as the center-of-gravity test, the appropriate question was: Where is the center-of-gravity of the transaction being litigated? In *Atkinson*, the presence of the employees, the employers, and the work made the center-of-gravity California. The interstate venue concept, unlike *Pennoyer*, contemplated the states as part of a coordinated whole, in which the system composed of all the state courts could adjudicate controversies governed by state law. It asked the question: Where is the best state in which to adjudicate the controversy?

Under the interstate venue theory, a state may reach an out-of-state defendant if he is involved in a transaction appropriate for adjudication within that state. In *Atkinson*, the transactions that formed the basis of the lawsuit—the employment in California and the formation of the benefit trust—created a relationship between the controversy and California, which in turn gave the state jurisdiction over the trustee.

Conceptually, the interstate venue theory assumed no difference between state and federal jurisdictional models. In *Atkinson*, Justice Traynor reasoned that if federal courts may have nationwide service of process, state courts may also.²⁹ Justice Traynor's failure to perceive a conceptual difference between state and federal jurisdiction was an implicit rejection of *Pennoyer's* central premise of state independent sovereignty. Thus, he viewed the state courts as subordinate units in a federal system of jurisdiction.³⁰

27. See *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978).

28. F. JAMES, JR. & G. HAZARD, *supra* note 2, § 12.30, at 661-63. Articles discussing this jurisdictional theory include Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 ORE. L. REV. 103 (1971); Hazard, *supra* note 14; Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959); Ehrenzweig, *Pennoyer is Dead—Long Live Pennoyer*, 30 ROCKY MTN. L. REV. 285 (1958); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Convenience*, 65 YALE L.J. 289 (1956).

29. 49 Cal. 2d at 338, 316 P.2d at 966. Justice Traynor stated:

It is doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise. A remedy that a federal court may provide without violating due process of law does not become unfair and unjust because it is sought in a state court instead.

Id.

30. James and Hazard described the concept:

Instead of thinking of the states as independent sovereigns, between which peaceful relations must be maintained through the Due Process Clause, the state court systems taken as a whole can be conceived as the primary mechanism for adjudicating cases domestic to the country as a whole, other than those

The Supreme Court, in the late fifties, appeared to waver between the restrictive view of minimum contacts and the more expansive interstate venue theory.³¹ In *McGee v. International Life Insurance Co.*,³² the Court held that California, the residence of an insurance beneficiary, could obtain jurisdiction over a Texas insurance company that had dealt by mail with the California insured.³³ The Court found the existence of a contract between the parties sufficient to satisfy the demands of due process.³⁴ The Court also was influenced by the location of witnesses in California and the inconvenience, if not the impossibility, of litigating the matter in Texas.³⁵ In *McGee*, the Court looked at the relationship between the controversy and the state, not the defendant and the state. In effect, it applied the interstate venue test.

In *Hanson v. Denckla*,³⁶ decided in the same term as *McGee*, the Court held that Florida did not have jurisdiction over a Delaware trustee.³⁷ *Hanson* involved a dispute over an estate by three sisters, two of whom took under their mother's will and contended that a trust executed by their mother in favor of a third sister's children was invalid.³⁸ The question was whether Florida had jurisdiction over the Delaware trustee of that trust. The Court ruled that Florida could not obtain in personam jurisdiction over the Delaware trustee and, because the trustee was an indispensable party, the Florida court could not adjudicate the controversy.³⁹ In *Hanson*, the question was not the most convenient forum, the center-of-gravity of the dispute, or the relationship of the forum to the controversy. It was, rather, the relationship of the forum to the particular defendant, the trustee. Thus, the Court relied on a more restrictive minimum con-

based on federal law. As such, they have not only the power but the duty to extend their process, in the form of notice, to all parties who should or might be joined under modern concepts of party joinder.

F JAMES, JR. & G. HAZARD, *supra* note 2, § 12.30, at 661-62.

31. See Casad, *supra* note 15, at 66.

32. 355 U.S. 220 (1957).

33. *Id.* at 221, 223.

34. *Id.* at 223.

35. *Id.*

36. 357 U.S. 235 (1958).

37. *Id.* at 254.

38. *Id.* at 238-39.

39. *Id.* at 254-55.

tacts rationale rather than the expansive interstate venue approach.⁴⁰

Hanson's restrictive approach was looked upon with disfavor, if not incredulity, by the proponents of interstate venue.⁴¹ Certainly under an *Atkinson* rationale, Florida should have had jurisdiction: the testatrix died in Florida, her will was admitted to probate in Florida, and the executrix and the main beneficiaries under the will and trust were served personally with process there.

Thus, on the eve of the Court's latest major jurisdictional pronouncement, *Shaffer v. Heitner*,⁴² two competing jurisdictional schemes existed: the *Pennoyer* system⁴³ and the *International Shoe* system.⁴⁴ The latter interpretation, in turn, was subject to the two approaches of *Hanson* and *Atkinson*. *Hanson* adopted a one-dimensional test—the particular defendant's relationship to the forum. In contrast, *Atkinson* weighed a variety of factors involving fairness and convenience to all the parties.⁴⁵

The Emerging Jurisdictional Theory

Shaffer v. Heitner

*Shaffer v. Heitner*⁴⁶ has been hailed as comparable to *Erie Railroad v. Tompkins*⁴⁷ in breaking new ground and rejecting the outmoded, century-old jurisdictional scheme of *Pennoyer v. Neff*. The outcome in *Shaffer*, however, demonstrates that the Court has restricted the scope of a state court's power to obtain jurisdiction over out-of-state defendants. In light of the prior jurisdictional systems,⁴⁸ *Shaffer* represents a retreat, not an advance, to a more re-

40. The Court stated that Florida "does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee." *Id.* at 254.

41. Professor Hazard's comment is typical: "In a 5 to 4 decision, Mr. Chief Justice Warren reached the fair result, in favor of the executrix daughter, but by a line of analysis that in all charity and after mature reflection is impossible to follow, no less to relate." Hazard, *supra* note 14, at 244.

42. 433 U.S. 186 (1977).

43. See notes 13-15 *supra* and notes 55-58, 69-71 *infra* & accompanying text.

44. See notes 16-19 *supra* & accompanying text.

45. See notes 20-41 *supra* & accompanying text. See also Casad, *supra* note 15, at 64-65.

46. 433 U.S. 186 (1977).

47. 304 U.S. 64 (1938). In *Erie*, the Supreme Court ruled that a federal district court, in diversity cases, must apply state law, not concepts of general law. *Id.* at 78-80.

48. These jurisdictional systems include the interstate venue theory of *in personam* juris-

strictive view of state court powers.

The facts of *Shaffer* have been recounted in innumerable law reviews.⁴⁹ Here, only those facts immediately relevant to our topic will be mentioned. *Shaffer* involved a stockholder's derivative action. Heitner, the owner of one share of stock in Greyhound, filed his action in Delaware's Court of Chancery against Greyhound, a Delaware corporation, its subsidiary Greyhound Lines, a California corporation, and twenty-eight past and present directors and officers of the corporation. Both corporations had their principal place of business in Phoenix, Arizona. Plaintiff Heitner alleged that the officers and directors had violated their duties to Greyhound by causing it to engage in wrongful actions, which resulted in an antitrust judgment of \$13,149,000 and criminal contempt fines of \$500,000.⁵⁰

dition, see notes 23-35 *supra* & accompanying text, and quasi in rem jurisdiction. See notes 55-58, 69-71 *infra* & accompanying text.

49. A sampling of such articles follows: Casad, *Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?*, 26 U. KAN. L. REV. 61 (1977); Fischer, "Minimum Contacts" *Shaffer's Unified Jurisdictional Test*, 12 VAL. U.L. REV. 25 (1977); Fyr, *Shaffer v. Heitner: The Supreme Court's Latest Last Words on State Court Jurisdiction*, 26 EMORY L.J. 739 (1977); Lacy, *Personal Jurisdiction and Service of Summons After Shaffer v. Heitner*, 57 ORE. L. REV. 505 (1978); Leathers, *Substantive Due Process Controls of Quasi-in-Rem Jurisdiction*, 66 KY. L.J. 1 (1977); Olsen, *Shaffer v. Heitner: A Survey of Its Effects on Washington Jurisdiction*, 13 GONZ. L. REV. 72 (1977); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. REV. 33 (1978); Young, *The Supreme Court Report*, 63 A.B.A.J. 1608, 1612 (1977); Zammit, *Reflections on Shaffer v. Heitner*, 5 HASTINGS CONST. L.Q. 15 (1978); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 152 (1977); Note, *Shaffer v. Heitner: New Constitutional Questions Concerning Seider v. Roth*, 6 HOFSTRA L. REV. 393 (1978); Note, *Civil Procedure—A Single Theory of State Court Jurisdiction: "Minimum Contacts,"* 52 TUL. L. REV. 171 (1977); Note, *Shaffer v. Heitner: A New Attitude Toward State Court Jurisdiction*, 13 TULSA L.J. 82 (1977); Note, *Shaffer v. Heitner—The Demise of Quasi in Rem Jurisdiction?*, 32 U. MIAMI L. REV. 680 (1978); Note, *Shaffer v. Heitner's Effect on Pre-Judgment Attachment, Jurisdiction Based on Property, and New York's Seider Doctrine: Have We Finally Given Up the Ghost of the Res?*, 27 BUFFALO L. REV. 323 (1978); Note, *Shaffer v. Heitner: A Single Test for State Court Jurisdiction*, 55 DEN. L.J. 365 (1978); Note, *Quasi in Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits*, 46 FORDHAM L. REV. 459 (1977); Note, *The Expanded Scope of the Sufficient Minimum Contacts Standard: Shaffer v. Heitner*, 63 IOWA L. REV. 504 (1977); Note, *Constitutionality of the Seider Practice After Shaffer v. Heitner*, 49 U. COLO. L. REV. 321 (1978); Note, *Traditional Notions of Fair Play and Substantial Justice Extended: Shaffer v. Heitner*, 1977 UTAH L. REV. 361; Note, *The Reasonableness Standard in State-Court Jurisdiction: Shaffer v. Heitner and the Uniform Minimum Contacts Theory*, 14 WAKE FOREST L. REV. 51 (1978); Note, *Shaffer v. Heitner: The Supreme Court Establishes a Uniform Approach to State Court Jurisdiction*, 35 WASH. & LEE L. REV. 131 (1978); 27 DRAKE L. REV. 553 (1978).

50. 433 U.S. at 189-90. The private antitrust action was recently vacated and remanded by the Court. *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978). The private

The lawsuit, in several respects, was typical of modern complex litigation, involving several causes of action and many defendants. The controversy itself was national in scope: Greyhound did business nationally, its headquarters was in Arizona, and the fines were levied in Illinois.⁵¹

In order to obtain jurisdiction over the nonresident defendants, plaintiff, pursuant to a Delaware statute, obtained an order of sequestration and seized the defendants' shares of stock, options, and warrants issued by the Greyhound Corporation.⁵² Under Delaware law, the situs of such intangible property was deemed to be in Delaware.⁵³ Securities of Delaware corporations could be seized by placing a "stop transfer" order or its equivalent on the books of such corporations.⁵⁴ This was an exercise of quasi in rem jurisdiction;⁵⁵ however, Delaware lacked limited appearance, which would have allowed the defendants to appear in defense but be liable only up to the value of the property seized.⁵⁶ Thus, the defendants had a choice of appearing and subjecting themselves to an in personam judgment or defaulting and forfeiting the seized property. Since the value of the seized property was so high, the latter option was not viable. Consequently, the defendants were forced to file a special appearance for the purpose of moving to quash service of process and to vacate the sequestration order.

The Supreme Court held Delaware's exercise of quasi in rem juris-

action in the lower courts is reported in 1973-2 TRADE REG. REP. (CCH) ¶ ¶ 74,824, 74,850 (D. Ore. 1973), *aff'd*, 555 F.2d 687 (9th Cir.), *vacated*, 437 U.S. 322 (1977); the governmental action against Greyhound is reported in *United States v. Greyhound Corp.*, 308 F Supp. 1033 (N.D. Ill. 1970), 363 F Supp. 525 (N.D. Ill. 1973), and 370 F Supp. 881 (N.D. Ill. 1974), which were affirmed in 508 F.2d 529 (7th Cir. 1974).

51. 433 U.S. at 189, 189 n.1, 190, 190 n.3.

52. *Id.* at 190, 190-91 n.4. The Delaware statute was DEL. CODE tit. 10, § 366 (Miche 1975).

53. 433 U.S. at 192, 192 n.9. The Delaware statute was DEL. CODE tit. 10, § 169 (Miche 1975).

54. 433 U.S. at 192.

55. Quasi in rem jurisdiction involves the seizure of defendant's property, which is located within the state. The purpose is to obtain jurisdiction indirectly over the defendant, and normally he is liable up to the value of the property seized. *Id.* at 199, 199 n.17. The classic example of quasi in rem jurisdiction by attachment of an intangible is *Harris v. Balk*, 198 U.S. 215 (1905), *overruled*, *Shaffer v. Heitner*, 433 U.S. 186 (1977). On the location of intangibles, see Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U.L. REV. 102 (1978). Professor Lowenfeld concludes that there is no "unified field theory" for judicially locating intangibles such as stock. *Id.* at 122.

56. 433 U.S. at 195 n.12.

diction to be unconstitutional.⁵⁷ It rejected the *Pennoyer* division of jurisdiction between in rem, quasi in rem, and in personam, and it recognized that the exercise of power over property is really the exercise of power over an individual's interests in that property. Thus, the minimum contacts rationale of *International Shoe*, which allowed courts to assert jurisdiction over a person's interests, was applicable.⁵⁸

Had the Court proceeded no further and remanded the case, the United States would have been well on its way to adopting the interstate venue theory of jurisdiction. The Court, however, also decided whether Delaware constitutionally could exercise jurisdiction over the defendants on a minimum contacts rationale.⁵⁹ It rejected the argument that choice-of-law and most convenient forum considerations should control the jurisdictional choice. Such factors were important only to the determination of which state's law should apply to the case.⁶⁰ Finally, finding no relationship between the defendants and the state of Delaware, the Court held that Delaware lacked jurisdiction.⁶¹ The Court thus adopted a restrictive defi-

57. *Id.* at 212.

58. *Id.* at 207. The Court notes that the presence of property within the state may provide sufficient minimum contacts with the defendant if the litigation directly concerns the property. *Id.* at 207-08. Thus, traditional in rem actions appear to be unaffected by the holding. *Id.* at 208.

59. *Id.* at 213-17.

60. The Court stated:

The interest appellee has identified may support the application of Delaware law to resolve any controversy over appellants' actions in their capacities as officers and directors. But we have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute.

"[The State] does not acquire jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [appellants]."

Id. at 215 quoting *Hanson v. Denckla*, 357 U.S. 235, 254 (1958) (footnotes omitted).

61. *Id.* at 216. Justices Powell, Stevens, and Brennan filed separate opinions. Justice Stevens's opinion was based on the principle that notice should be given to a possible defendant that he may be subject to a court's jurisdiction. Because one who purchases stock in a Delaware corporation would not expect to be under Delaware jurisdiction, to subject him to it is unfair. *Id.* at 217-19 (Stevens, J., concurring).

Justice Brennan agreed that the *International Shoe* minimum contacts test should apply to quasi in rem cases; however, he believed that the Court proceeded improperly to decide whether Delaware actually had jurisdiction over the defendants. He noted that the parties

nition of minimum contacts that concentrated on the relationship between the forum and the defendant.

Kulko v. Superior Court

Shaffer was followed one year later by the Court in *Kulko v. Superior Court*.⁶² *Kulko* involved a multi-state controversy between two divorced spouses. Plaintiff had separated from the defendant and left their New York home to move to California. After a settlement agreement was executed in New York, plaintiff flew to Haiti and obtained a divorce decree that incorporated the settlement agreement. The settlement agreement provided that the children of the marriage were to remain with the father during the school year and with the mother during vacations and that the husband was to pay \$3,000 in child support. The daughter, with her father's consent, joined her mother in California, and then the son, without consent, moved to California. The wife then sued for full custody of the children and an increase of the child support obligations. Mr. Kulko claimed that California lacked jurisdiction to hear the suit.⁶³

The Court held that there was no personal jurisdiction.⁶⁴ It again rejected the interstate venue test,⁶⁵ and, instead, it based its holding on the defendant's lack of contacts with California.⁶⁶ The Court found that defendant had not purposefully availed himself of the

had no opportunity to develop through discovery the factual basis that could have supported minimum contacts jurisdiction. *Id.* at 219-21 (Brennan, J., concurring in part & dissenting in part).

Justice Brennan disagreed with the majority's treatment of choice-of-law considerations; he objected to the Court's rigid compartmentalization of choice-of-law and jurisdiction. *Id.* at 222-28. Specifically, he maintained that Delaware had jurisdiction over the case: "[A] state forum has jurisdiction to adjudicate a stockholder derivative action centering on the conduct and policies of the directors and officers of a corporation chartered by that State." *Id.* at 222. He adopted a flexible center-of-gravity, or interstate venue, approach.

62. 436 U.S. 84 (1978). The decision of the Supreme Court of California is discussed in Fischer, *State Interests, Minimum Contacts, and In Personam Jurisdiction Under Code of Civil Procedure Section 410.10*, 12 U.S.F.L. REV. 387 (1978).

63. 436 U.S. at 86-88.

64. *Id.* at 101.

65. *See id.* at 95-96, 98-101.

66. *Id.* at 96-98. The Court noted that California's interest in ensuring support for resident children was served by the revised Uniform Reciprocal Enforcement of Support Act of 1968. *Id.* at 98. Because the plaintiff could use that Act to enforce her rights without leaving California, she was not severely disadvantaged by the Court's decision. *Id.* at 98-100. The presence of this alternative mode of litigation probably helped to defeat jurisdiction. However, the presence of the Act did not appear to be necessary to the holding.

benefits and privileges of conducting activities within California. His activities had created no effect in California. The facts that his children were in California and that he had sent one of them there were not enough to establish jurisdiction.⁶⁷

In *Kulko*, the Court reiterated its stand against an expansive view of state court jurisdiction.⁶⁸ It seemingly increased the amount or the quality of contacts necessary to establish jurisdiction and again rejected the complex, multi-factored center-of-gravity, or interstate venue, test.

The Effect of Shaffer and Kulko

The Supreme Court's rulings have limited the scope of a state's jurisdiction in three ways: by applying the minimum contacts test to quasi in rem jurisdiction; by requiring more than a minimum amount of minimum contacts; and by rejecting the interstate venue jurisdictional concept. It has hindered severely a plaintiff's ability to reach out-of-state defendants.

In general, quasi in rem jurisdiction gave plaintiffs a way to reach out-of-state defendants. Of course, the presence of defendant's property within a state might have been purely accidental, but it did give a means to obtain jurisdiction over him.

By rejecting quasi in rem as a basis for jurisdiction, *Shaffer* abolished a jurisdictional device that provided a single forum for the trial of complex litigation.⁶⁹ Prior to that case, a Delaware court

67. *Id.* at 98.

68. The Court stated: "We therefore believe that the state courts in the instant case failed to heed our admonition that 'the flexible standard of *International Shoe*' does not 'herald[d] the eventual demise of all restrictions on the personal jurisdiction of state courts.'" *Id.* at 101, quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

69. The quasi in rem procedure still exists. To utilize this procedure, however, the minimum contacts test must be satisfied. A direct relationship between the defendant's property and the litigation may be sufficient to meet this test. See *Shaffer v. Heitner*, 433 U.S. 186, 207-08 (1977).

Some quasi in rem actions remain alive in lower courts. In *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977), the court upheld jurisdiction based on the attachment of defendant's bank account and construed *Shaffer* as requiring only a voluntary placing of property within the jurisdiction. *Id.* at 1278-79. The *Seider v. Roth* attachment of insurance policies of an out-of-state tortfeasor was reaffirmed in *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.), cert. denied, 99 S. Ct. 639 (1978). Minnesota's application of *Seider*, *Savehuk v. Rush*, ___ Minn. ___, 245 N.W.2d 624 (1976), was vacated in light of *Shaffer*, *Rush v. Savchuk*, 433 U.S. 902 (1977), and reaffirmed by the Minnesota Supreme Court, ___ Minn. ___, 272 N.W.2d 888 (1978), prob. juris. noted, 99 S. Ct. 1211 (1979). See *Williams, The Validity of Assuming Jurisdiction by the Attachment of Automobile*

could, through the quasi in rem procedure of seizing the defendants' shares in a Delaware corporation, obtain jurisdiction over all or most of the directors and officers of the corporation.⁷⁰ After *Shaffer*, Delaware courts could not provide a forum to litigate the liability of all the corporate officers and directors at one time. In fact, probably no forum could have exercised jurisdiction over each of the twenty-eight defendants.⁷¹

The Court has restricted state jurisdiction by requiring a high level of activities to support a finding of minimum contacts. In answering the question of what minimum contacts means, one must know the number and quality of activities and relations within a state that are required to meet the test. If any contact that a defendant has with the forum may meet the test, then jurisdiction over him can be obtained easily. In *McGee v. International Life Insurance Co.*,⁷² for example, the solicitation of one life insurance policyholder in California was enough to support jurisdiction over the Texas insurer.

Justice Marshall in *Shaffer*, however, stated that the defendants had no relationship with the forum even though they controlled a Delaware corporation and owned property that was under the regulation and protection of Delaware law.⁷³ Certainly, the defendants purposefully were seeking the protection of Delaware law. In *Kulko*, defendant's children were in California, and he had sent one of them there. Notwithstanding these facts, the Court found virtually no connection between the defendant and the forum.⁷⁴ A "de minimus"

Liability Insurance Obligations: The Impact of Shaffer v. Heitner Upon Seider v. Roth, 9 RUT.-CAM. L.J. 241 (1978); Note, *Shaffer v. Heitner: New Constitutional Questions Concerning Seider v. Roth*, 6 HOFSTRA L. REV. 393 (1978).

70. "Delaware's scheme did provide a solution, at least prior to *Shaffer*, to a problem inherent in many shareholder derivative suits—obtaining jurisdiction over nonresident directors and the corporation, both of which are generally considered necessary party defendants in derivative actions." *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 153-54 n.9 (1977).

71. Since *Shaffer*, Delaware has passed a consent statute by which nonresident directors are amenable to service of process by a Delaware court. DEL. CODE tit. 10, § 3114 (Michie Supp. 1978). This statute is discussed in Stargatt, *The New Delaware Director-Consent-To-Service Statute*, 3 DEL. J. CORP. L. 217 (1978).

72. 355 U.S. 220 (1957).

73. 433 U.S. at 216.

74. 436 U.S. at 97. In October of 1978, the Supreme Court of Missouri held that Missouri could exercise jurisdiction over a nonresident doctor who had given advice to a Missouri doctor by telephone without charge. The advice was claimed to have harmed the plaintiff, who sued the out-of-state doctor for malpractice. *Sperandio v. Clymer*, ___ Mo. ___, 568

minimum contacts standard would have supported the jurisdiction of the Delaware and California courts. The Court's requirement of significant rather than de minimus minimum contacts in *Kulko* and *Shaffer* is reminiscent of *Hanson v. Denckla*.⁷⁵ The Court clearly disapproved of an expansive reading of the contacts test that would create jurisdiction over any defendant.

Shaffer not only abolished quasi in rem jurisdiction and required a significant amount of contacts, but it also chose the approach of *Hanson* over that of *McGee* and *Atkinson*. *Shaffer* looked only to the relationship between the defendants and the forum, and it did not weigh the convenience of the parties or the difficulty of getting them into one court. It squarely rejected the argument that Delaware's interest in regulating her corporations or applying Delaware law should satisfy the minimum contacts test. Like *Shaffer*, *Kulko* also rejected the center-of-gravity, or interstate venue, theory.⁷⁶

This rejection of choice-of-law factors in determining jurisdiction severely limits the ability of a court to adjudicate all the interests of all possible defendants. Under the interstate venue test, the best court should adjudicate all the lawsuits that arise out of one transaction. In multi-state litigation, a court may declare itself the center-of-gravity and order joinder of a defendant. In *Buckeye Boiler Co. v. Superior Court*,⁷⁷ for example, the plaintiff was able to sue both the Ohio manufacturer of the boiler that had injured him and the California physicians and hospital that had negligently treated those injuries, even though the Ohio manufacturer had very little contact with the forum. Had the *Shaffer* test been applicable to the parties in *Buckeye Boiler*, the plaintiff possibly could

S.W.2d 935 (1978). The case was vacated and remanded by the Supreme Court to be reconsidered in light of *Kulko*. *Pemberton v. Sperandio*, 99 S. Ct. 69 (1978).

75. See notes 21-22 *supra* & accompanying text. See also Casad, *supra* note 15, at 74; Note, *Shaffer v. Heitner's Effect on Pre-Judgment Attachment, Jurisdiction Based on Property and New York's Seider Doctrine: Have We Finally Given Up the Ghost of the Res?*, 27 BUFFALO L. REV. 323, 344 (1978).

76. "But while the presence of the children and one parent in California arguably might favor application of California law in a lawsuit in New York, the fact that California may be the 'center-of-gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant." 436 U.S. at 98.

77. 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). Although *Buckeye Boiler* ostensibly was decided under *Hanson*, it fits conceptually into the interstate venue line of cases. The Supreme Court will consider jurisdictional questions in the products liability area in the 1979-80 term. See *World-Wide Volkswagen Corp. v. Woodson*, 585 P.2d 351 (Okla. 1978), cert. granted, 99 S. Ct. 1212 (1979).

not have sued all defendants in one forum. Under the *Shaffer* test, as in *Hanson*, a necessary, or even an indispensable party may not have the required minimum contacts with the forum.

Many commentators on *Shaffer* have ignored or minimized its implications. Professor Leathers, for example, argued that *Shaffer's* denial of any relationship between choice-of-law and jurisdiction should not be taken at face value.⁷⁸ He considered the Court's statements concerning the relationship of choice-of-law to jurisdiction to be dicta.⁷⁹ Professor Leathers concluded by urging a reevaluation by the Supreme Court of the due process controls over state judicial and legislature power. Until that time, he recommended ignoring *Shaffer's* and *Hanson's* rejection of choice-of-law considerations in deciding jurisdiction.⁸⁰ Instead of limiting *Shaffer's* scope, the Court in *Kulko* reaffirmed the division between choice-of-law and jurisdiction: the fact that California law may have governed Mr. Kulko's support obligations did not create judicial jurisdiction in California.

Shaffer's determination that choice-of-law factors are not jurisdictional considerations was gratuitous. As Justice Brennan recognized, the only issue that was before the Court was the constitutionality of Delaware's quasi in rem statute.⁸¹ The Court could have remanded the case to determine whether Delaware had minimum contacts with the defendants. The fact that it did not emphasizes the importance of the holding. It must contain a view of jurisdiction that the Court wanted to communicate: first, that the jurisdictional question is the relation between the forum and the defendant, not that between the forum and the controversy; and second, that the states are independent entities, not coordinate parts of a federal whole. Due to these factors, a state may be unable to join all necessary defendants to a lawsuit.

78. If taken literally, this would mean that it is possible for a state to have sufficient contact to satisfy due process controls for choice of law purposes, yet lack sufficient contact to satisfy due process control over judicial jurisdiction. However, it is not necessary to take the language in either *Shaffer* or *Hanson* literally.

Leathers, *Substantive Due Process Controls of Quasi in Rem Jurisdiction*, 66 Ky. L.J. 1, 36 (1977).

79. He stated that they "can be regarded as unfortunately included. If, as has been contended, the state of Delaware did indeed have sufficient contact to exercise *in personam* jurisdiction over the defendant directors, then there would be no divergence between the choice of law limitations and the jurisdictional limitations." *Id.* at 36-37.

80. *Id.* at 37.

81. 433 U.S. at 220-22 (Brennan, J., concurring in part & dissenting in part).

Paradoxically, the Court may be protecting state sovereignty. Even though *Shaffer* has been said to diminish state sovereignty, in effect, it treats the states as separate sovereigns, which may ignore the federal whole. Under the interstate venue concept, if one state has the power to adjudicate the rights of defendants wherever they may be, the sovereignty of other states is diminished. Professor Kurland recognized this in 1958 when he argued that *Hanson* may be seen as a limitation of federalism.⁸² Like *Hanson*, the effect of *Shaffer* and *Kulko* is to reinforce state sovereignty.

This reading of *Shaffer* and *Kulko* is consistent with the Burger Court's bolstering of states' rights. This trend has been noted in several articles.⁸³ The present Court has restricted the power of Congress to pass minimum wage legislation covering state employees in *National League of Cities v. Usery*,⁸⁴ limiting the power of federal courts to enjoin state courts in *Younger v. Harris*⁸⁵ and its progeny, created a higher burden to prove a violation of civil rights by state officials in *Rizzo v. Goode*,⁸⁶ and read in an intent requirement in fourteenth amendment equal protection causes of action against state officials for racial discrimination in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁸⁷ and *Dayton Board of Education v. Brinkman*.⁸⁸ As a reaffirmation of state independence, *Shaffer* and *Kulko* are entrenched securely in this trend of cases, which establishes the states' rights ideology of the Burger

82. The result is another major step—in this instance, perhaps a desirable one—toward the limitation of the federal principle. For state lines may be as easily erased by the enhancement of state power as by the expansion of national authority. To the extent that one state's judicial control over a legal controversy is increased, the control of all other states over that controversy is diminished.

Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 569 (1958).

83. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977); Note, *Rizzo v. Goode: The Burger Court's Continuing Assault on Federal Jurisdiction*, 30 RUTGERS L. REV. 103 (1976); 15 DUQ. L. REV. 49 (1976); 48 U. COLO. L. REV. 467 (1977).

84. 426 U.S. 833 (1976).

85. 401 U.S. 37 (1971).

86. 423 U.S. 362 (1975).

87. 429 U.S. 252 (1977).

88. 433 U.S. 406 (1977).

Court. Thus, *Shaffer* is not a radical overruling of *Pennoyer*. *Shaffer*, in fact, is based on the first premise of *Pennoyer*: the individual state is an independent sovereign. *Kulko* firmly fixes the limits of that sovereignty.

The holdings of *Shaffer* and *Kulko* already have had an effect. Although many courts, in applying the *Shaffer* standard, have found the requisite minimum contacts,⁸⁹ several other courts have applied it to dismiss for lack of personal jurisdiction over a defendant.⁹⁰ One case, *Schreiber v. Allis-Chalmers Corp.*,⁹¹ used *Shaffer* to reject jurisdiction based on a Mississippi "implied consent" statute.⁹² By statute, the defendant, which had registered to do business in Mississippi, was deemed to have consented to service of process and suit within the state. The court ruled that the exercise of jurisdiction under this statute must satisfy the minimum contacts test. It held that sufficient minimum contacts were not present since the plaintiff, a Kansas resident, had received injury in Kansas and the defendant's manufacturing activities were located in another state.⁹³

THE RESTRICTION OF FEDERAL COURT JURISDICTION

As we have seen, *Shaffer* and *Kulko* hinder the complete resolution of many controversies at the state level. The Federal Rules of Civil Procedure, federal statutes, and Supreme Court decisions have

89. *E.g.*, *Marketing Showcase, Inc. v. Alberto-Culver Co.*, 445 F Supp. 755 (S.D.N.Y. 1978); *At Home Magazine v. District Court*, ___ Colo. ___, 572 P.2d 476 (1977); *Wier v. Fairfield Galleries, Inc.*, 377 A.2d 28 (Del. Ch. 1977); *Cox v. Long*, 143 Ga. App. 182, 237 S.E.2d 672 (1977); *Boyer v. Boyer*, 57 Ill. App. 3d 555, 373 N.E.2d 441, *modified on appeal*, ___ Ill. App. 3d ___, 383 N.E.2d 223 (1978); *St. Louis-San Francisco Ry. v. Gitchoff*, 68 Ill. 2d 38, 369 N.E.2d 52 (1977); *Braband v. Beech Aircraft Corp.*, 51 Ill. App. 2d 296, 367 N.E.2d 118 (1977). *See* note 69 *supra* & accompanying text.

90. *E.g.*, *Schreiber v. Allis-Chalmers Corp.*, 448 F Supp. 1079 (D. Kan. 1978); *Nelepovitz v. Boatwright*, 442 F Supp. 1336 (D.S.C. 1977); *Pavlo v. James*, 437 F Supp. 125 (S.D.N.Y. 1977).

91. 448 F Supp. 1079 (D. Kan. 1978). This suit originally was filed in Mississippi by the Kansas plaintiff, who had been injured in Kansas. *Id.* at 1081. Had plaintiff sued in Kansas, the Kansas statute of limitations would have barred the suit. *Id.* Plaintiff served defendant's agent in Mississippi pursuant to a statute "which provide[d] for such service upon any corporation 'found doing business' in Mississippi, 'whether the cause of action accrued in this state or not.'" *Id.* The case thereafter was transferred to the United States District Court in Kansas. *Id.* at 1081-82. Defendant then claimed that the Mississippi court lacked personal jurisdiction. *Id.* at 1082, 1085.

92. *Id.* at 1090-91.

93. *Id.*

limited the scope of federal court jurisdiction.

At present, the scope of federal jurisdiction is limited by the restrictions on federal service of process in rule 4 of the Federal Rules of Civil Procedure, by the requirements of complete diversity,⁹⁴ and by the amount in controversy rule.⁹⁵ Rules 4(e) and (f) limit the federal courts' power to serve process.⁹⁶ Each court may serve defendants within the territorial limits of the state in which it sits,⁹⁷ or it may reach nonresident defendants if the jurisdictional statutes of such state so authorize.⁹⁸ Third-party defendants may be served within 100 miles of the court.⁹⁹ Some federal statutes, such as interpleader, provide for nationwide service of process in some instances, but not in all.¹⁰⁰ Thus, although federal courts theoretically have nationwide jurisdiction, their powers are limited practically by the federal rules.

In *America Eutetic Welding Alloys Sales Co. v. Dytron Alloys Corp.*,¹⁰¹ for example, a federal court in New York was unable to obtain jurisdiction over a defendant corporation and defendant employees in an unfair competition suit that alleged an illegal hiring away of the employees by the defendant corporation. The scope of the federal court's service of process was limited to that of courts of the state in which the district court was located, which was New York. That state's statute provided for jurisdiction only if the harm occurred in New York. Since the defendant corporation's unfair competition had occurred not in New York, but in Kentucky, the court could not obtain jurisdiction over the corporate defendants.¹⁰²

94. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); 28 U.S.C.A. § 1332(a) (West Supp. 1979).

95. 28 U.S.C.A. § 1332(a) (West Supp. 1979). The Judicial Panel on Multi-District Litigation is an attempt to allow consolidation of federal suits into one lawsuit. This consolidation device, however, only merges the pretrial motion and discovery procedures. It is unable, without the consent of the parties, to consolidate the trials themselves. *Id.* § 1407 (1976 & Supp. 1979). See, e.g., *In re Aviation Prod. Liab. Litigation*, 347 F. Supp. 1401 (J.P.M.D.L. 1972).

96. FED. R. CIV. P. 4(e) & (f) (1966).

97. *Id.* 4(f).

98. *Id.* 4(e).

99. *Id.* 4(f).

100. 28 U.S.C.A. § 1335 (West 1976). See *Georgia Sav. Bank & Trust Co. v. Sims*, 321 F. Supp. 307, 309 (N.D. Ga. 1971).

101. 439 F.2d 428 (2d Cir. 1971).

102. *Id.* at 432-35.

The Supreme Court's Limitations on Federal Court Jurisdiction

Federal courts have used the doctrines of pendent and ancillary jurisdiction to obtain jurisdiction over parties and causes of action tangential to the lawsuit. *United Mine Workers v. Gibbs*,¹⁰³ for example, held that if a federal court has jurisdiction over a federal question claim, then the court has judicial power, called pendent jurisdiction, to consider a non-federal claim where both claims are derived from "a common nucleus of operative fact."¹⁰⁴ Ancillary jurisdiction gives federal courts the power to hear cases involving multi-party practice, such as compulsory counterclaims and impleader.¹⁰⁵

Two recent Supreme Court cases, *Zahn v. International Paper Co.*¹⁰⁶ and *Owen Equipment and Erection Co. v. Kroger*,¹⁰⁷ have limited these powers of federal courts. In both cases, the Court, as it did in *Shaffer*, rejected the policy arguments for unitary adjudication.

Zahn was brought as a class action on behalf of some 200 lakefront property owners against a paper mill that was polluting their lake. Some of the property owners could claim the \$10,000 amount in controversy while others could not.¹⁰⁸ Plaintiffs argued that either they should be able to aggregate their claims to meet the \$10,000 requirement or the ancillary jurisdiction of the court should extend over those claims that were under \$10,000. The Court rejected these arguments and ruled that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount [or] be dismissed from the case¹⁰⁹

Justice Brennan dissented¹¹⁰ noting that the use of ancillary jurisdiction avoids fragmented and redundant litigation of common issues.¹¹¹ He noted the intolerable expense of "extensive use of expert testimony on difficult scientific issues" for the 240 claimants.¹¹² He

103. 383 U.S. 715 (1966).

104. *Id.* at 725.

105. *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978).

106. 414 U.S. 291 (1973).

107. 437 U.S. 365 (1978).

108. 414 U.S. at 292-93. *See Currie, Pendent Parties*, 45 U. CHI. L. REV. 753 (1978).

109. *Id.* at 301.

110. *Id.* at 305 (Brennan, J., dissenting).

111. *Id.* at 305-12.

112. *Id.* at 307.

emphasized the burden, caused by the Court's decision, of having to maintain separate lawsuits in federal and state courts.¹¹³

Although *Zahn* might have been brought in a state court, in which the amount in controversy requirement does not apply, several states have not adopted simple class action procedures similar to rule 23 of the Federal Rules of Civil Procedure.¹¹⁴ Therefore, the result in *Zahn* encourages fragmented litigation.

The Court in *Owen* similarly refused to recognize arguments of convenience or judicial economy. In *Owen*, plaintiff filed a wrongful death action in federal court seeking damages for her husband's electrocution. At the time of his death, her husband was walking next to a steel crane. The boom of the crane came close to an electric power line, and he was electrocuted. She sued the Omaha Public Power District (OPPD), basing jurisdiction on diversity of citizenship. The widow was a citizen of Iowa and OPPD was a Nebraska corporation. OPPD impleaded the owner and operator of the crane, Owen Equipment and Erection Company, pursuant to rule 14(a) of the Federal Rules of Civil Procedure. Plaintiff then filed an amended complaint naming Owen as an additional defendant. Subsequently, OPPD's motion for summary judgment against plaintiff was granted.¹¹⁵

On the third day of trial, the court became aware that Owen's principal place of business was in Iowa, not Nebraska, and therefore there was a lack of diversity. The district court refused to dismiss the complaint, and the court of appeals affirmed. The court of appeals held that no independent basis of federal jurisdiction supporting the widow's state tort action against Owen was needed.¹¹⁶

The Supreme Court reversed, holding that the requirement of

113. *Id.* at 308 (Brennan, J., dissenting). Justice Brennan consistently votes to uphold jurisdiction. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377-84 (1978); *Kulko v. Superior Court*, 436 U.S. 84, 101-02 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 222-28 (1977).

114. For example, due to the complexity of Illinois class action practice, counsel for plaintiff in *Mink v. University of Chicago*, 460 F. Supp. 713 (N.D. Ill. 1978), stated that the action would not have been brought in state court. *Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389 & H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, United States Senate, 95th Cong., 2d Sess.* 180 (1978) [hereinafter cited as *Hearings*].

115. 437 U.S. at 368.

116. *Id.* at 369. For a discussion of the decision of the court of appeals, see Note, *Jurisdictional Requirements for Plaintiff's Claim Against Impleaded Third-Party Defendant*, 26 U. KAN. L. REV. 493 (1978). See also *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 241-53 (1978).

complete diversity between each plaintiff and each defendant mandated dismissal of the third-party defendant.¹¹⁷ The Court held that ancillary jurisdiction could not be expanded to cover the case. In doing so, the Court rejected the arguments that the jurisdiction of federal courts should be flexible so that the entire lawsuit might be decided in one action.¹¹⁸

Once again the Supreme Court rejected arguments of convenience or economy in determining jurisdiction. In *Owen*, of course, the question was subject matter and not personal jurisdiction, but the result was the same. The Court stated that plaintiffs, in cases such as *Owen*, had recourse in state courts.¹¹⁹ The Court may have exaggerated, because in some instances no court has jurisdiction over the diverse parties. For example, joint and several tortfeasors may not have minimum contacts with any one state. One might be injured in one state and negligently treated for the injuries in another. Following *Shaffer's* requirement of minimum contacts for each defendant, no court could hear the claims against the diverse tortfeasors at once.¹²⁰ As recognized by Justices White and Brennan who dissented in *Owen*, this rule does not serve considerations of judicial economy.¹²¹

The Proposed Abolition of Diversity Jurisdiction

There is a move in Congress to abolish federal diversity jurisdiction altogether.¹²² The Senate hearings on the bills to abolish diversity jurisdiction concentrate on the expense in money and man-

117. 437 U.S. at 377.

118. *Id.* at 376-77. The Court stated:

It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same state in a diversity case.

Id. at 377.

119. *Id.*

120. *See, e.g.,* Saalfrank v. O'Daniel, 533 F.2d 325 (6th Cir.), *cert. denied*, 429 U.S. 922 (1976).

121. 437 U.S. at 377-84 (White & Brennan, JJ., dissenting).

122. *See Hearings, supra* note 114, at 3, 5, 10 (reproductions of S. 2094, S. 2389 & H.R. 9622).

power that diversity jurisdiction creates.¹²³ Chief Justice Burger has written and spoken for its abolition.¹²⁴ Only a few speakers, such as representatives of the American Trial Lawyers' Association, have made sporadic references to the need for diversity jurisdiction to handle mass tort cases, to avoid multiple filings, and to permit consolidations among various districts.¹²⁵

The common thread running through *Shaffer*, *Owen*, *Zahn*, and the move to abolish diversity jurisdiction is a desire to return to an older vision of America where the states were seen as independent entities, capable of adjudicating matters within their own domain, and free of federal interference or takeover of their judicial function. Kurland's proposition—that the restrictions of state jurisdiction in *Hanson* were an affirmation of state sovereignty—also applies to the *Shaffer* decision. The diminution of federal jurisdiction over state parties in *Zahn* and *Owen* is consistent with this line of reasoning. The abolition of diversity would be an ultimate solution to the "problem" of the federal courts' adjudication of state issues.

A PROPOSED FEDERAL SOLUTION—THE ALI PROPOSAL

The problem the litigant and the judicial system face is to resolve the many controversies which are not localized in one state. Modern transportation and communication have broken the barriers of state lines. Some mechanism should be found to permit jurisdiction over all the defendants at once. Since *Shaffer* and *Kulko*, the states have been prevented from providing such a mechanism. Justice Traynor's concept of nationwide state service of process has been rejected. A federal solution therefore must be found.

An expansion of federal jurisdiction in multi-party diversity litigation that would solve such problems has been proposed by the American Law Institute (ALI)¹²⁶ The proposal, as set out in chapter

123. See *Hearings*, *supra* note 114.

124. 1977 Report of Chief Justice Warren E. Burger to the American Bar Association, reported in 45 U.S.L.W. 2408 (March 1, 1977); Letter from Chief Justice Burger to Senator Hruska (May 29, 1975), reprinted in Commission on the Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 394-99 (1975).

125. *Hearings*, *supra* note 114, at 135-36, 141, 167, 180-81.

126. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969) [hereinafter cited as ALI Study].

160 of the *American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts*, is described below:

The proposals for revision of general diversity jurisdiction are accompanied by a projected new head of diversity jurisdiction, to provide a federal forum for actions in which the state courts cannot do adequate justice because parties are dispersed beyond the reach of any single state. Under the proposed new Chapter 160 of Title 28, there would be original federal jurisdiction over any action in which the defendants necessary for a just adjudication of a plaintiff's claim are not all amenable to the process of any one state court, and in which (as should almost invariably be the case) there is some diversity of citizenship between adverse parties. Removal jurisdiction would be provided, on the basis of similar diversity, when a defendant in a state court action cannot bring into that court all parties whose presence is necessary for a just adjudication as to him. In either event, process in actions under this head of jurisdiction would be authorized to bring in all necessary parties from wherever they might be, without regard to state boundaries.¹²⁷

127. *Id.* at 3-4. The proposed chapter 160 follows:

§ 2371. *Dispersed necessary parties; original diversity of citizenship jurisdiction*

(a) The district courts shall have original jurisdiction of any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction, and one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

(b) A defendant is necessary for a just adjudication of the plaintiff's claim, within the meaning of this chapter, if complete relief cannot be accorded the plaintiff in his absence, or if it appears that, under federal law or relevant State law, an action on the claim would have to be dismissed if he could not be joined as a party. Persons against whom several liability is asserted shall not be deemed necessary for a just adjudication of the plaintiff's claim because liability is asserted against them jointly or alternatively as well.

(c) A person is amenable to process of a territorial jurisdiction, for the purposes of this section, if, and only if, that person—

(1) being an individual, has his domicile or an established residence or his principal place of employment or business activity in that jurisdiction; or

(2) being a corporation or other entity sued as such, is incorporated or has its principal office in that jurisdiction; or

(3) has an agent in that jurisdiction authorized by appointment to receive service of process; or

(4) may, under the laws of that jurisdiction, be subjected to a fully effective judgment of its courts without delivery of process within the territorial jurisdiction to such person or the agent of such person authorized by appointment to receive it.

§ 2372. *Venue in original actions under dispersed parties diversity of citizenship jurisdiction*

(a) A civil action wherein jurisdiction is founded solely on section 2371 of this title may be brought only in a district where a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of property that is the subject of the action is situated, except that if there is no such district within the United States, the action may be brought in any district where any party resides.

(b) For purposes of this section, a corporation shall be regarded as a resident of the district where it has its principal place of business and also of each district in every State by which it has been incorporated if its principal place of business is not in that State, and a partnership or other unincorporated association shall be regarded as a resident of the district where it has its principal place of business.

§ 2373. *Dispersed parties diversity of citizenship jurisdiction; removal of actions brought in State courts*

(a) A civil action commenced in a State court in which one of (sic) more additional parties necessary for a just adjudication as to a defendant cannot be joined or with the exercise of reasonable diligence served with process or otherwise made subject to a fully effective judgment of the courts of that State, may be removed by any adversely affected defendant to the district court for the district embracing the place where such action is pending if one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

In actions wherein jurisdiction is founded on this section, the word "parties" as used in this chapter includes all persons named in the petition for removal as necessary for a just adjudication as to the defendant, whether or not such persons were named or joined as parties in the action in the State court.

(b) A person is necessary for a just adjudication as to a defendant, within the meaning of this chapter, if he claims or may claim an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action in his absence may leave the defendant subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. A person is not thus necessary for a just adjudication simply because he is or may be liable to a defendant for all or part of the plaintiff's claim against the defendant.

(c) A counterclaim asserted in a State court arising out of the same transaction or occurrence as the plaintiff's claim shall be deemed an action for purposes of this section, and if the requirements hereof are met, the entire State court action may be removed. For the purpose of determining whether absent persons are necessary for a just adjudication of such a counterclaim, a plaintiff in the State court shall be considered as a defendant under sub-section (b) of this section, and a defendant therein as a plaintiff under subsection (b) of section 2371 of this title; for all other purposes of removing such action, including the procedural steps therefor, original plaintiffs or defendants may be deemed defendants.

A counterclaim asserted in a State court that does not arise out of the same transaction or occurrence as the plaintiff's claim shall be deemed an action for the purposes of this section and may be removed by a plaintiff in the State court action if as a defendant he would have been able to remove under sub-sections (a) and (b) of this section.

(d) A petition for removal under this section shall contain a statement that every reasonable effort has been made by or on behalf of the removing party to have each absent person who is necessary for a just adjudication as to him made a party and served with process of otherwise made subject to a fully effective judgment in the State court.

(e) In an action where jurisdiction is founded solely on this section, if there is a State court in which an action on the claim may be maintained and to whose process all parties necessary for a just adjudication are answerable or agree to submit, the district court on motion of any party or on its own motion may stay proceedings before it pending prosecution of an action on the claim in the courts of that State. In determining whether to stay proceedings for this purpose, the district court shall take into account, in addition to the convenience of parties and witnesses, whether the rules for decision of the action of any substantial part thereof are the laws of the State in whose courts the action would be prosecuted during pendency of the stay and the reasons why the action was not commenced in that State court originally. The decision of a district court staying proceedings or refusing to dissolve a stay under this subsection shall not be reviewable on appeal or otherwise except as provided in section 1292(c) of this title.

§ 2374. *Process and procedure in actions under
dispersed parties diversity of
citizenship jurisdiction*

In any action within this chapter—

(a) The district court shall, except as otherwise provided in this section, on motion issue its process for all parties necessary for a just adjudication and shall have power to restrain them until further order of the court from instituting or prosecuting any proceeding in any State or United States court relating to the property or transaction that is the subject of the action. Such process may run anywhere within the territorial limits of the United States and anywhere outside those territorial limits that process of the United States may reach, and shall be returnable at such time as the court directs.

(b) For the convenience of parties and witnesses or otherwise in the interest of justice, a district court may, on motion of any party or on its own motion, transfer the action to any other district. The exercise of discretion by the district court on such a motion is not reviewable on appeal or otherwise. If the action is transferred at the same time that process is issued under this section, such process shall be made returnable in the district court for the district to which the action is transferred.

(c) Whenever State law supplies the rule of decision on an issue, the district court may make its own determination as to which State rule of decision is applicable.

(d) If one or more absent parties cannot be effectively served with process issuing under this section, the district court shall order that the action proceed without such parties unless it is satisfied that greater injustice would be caused by proceeding without them than by total failure of the action.

(e) If the application of this section would lead to undue burden on distant parties, and the adverse effect of such disposition does not exceed the sum or value of \$5,000 for any party, the district court may in its discretion:

(1) dismiss without prejudice as to any party or parties upon whom process has been or would have to be served outside the State where the action is to be litigated, and order that the action proceed without such parties; or

(2) if it is satisfied that, in view of the small amounts involved, greater injustice would be caused by any continuation of the proceedings than by total

Briefly, proposed section 2371 would grant federal jurisdiction where defendants necessary for just adjudication are dispersed be-

failure of the action, dismiss the entire action without prejudice.

(f) An order that the action proceed without one or more parties necessary for a just adjudication may be conditioned upon the taking of appropriate measures, including the shaping of relief or other provisions in the judgment, for the protection of interests that may be affected thereby. Such an order may be entered under subsection (d) or (e) of this section even though under federal law or any relevant State law an action on the claim could not otherwise be maintained without joining the absent parties.

§ 2375. *Definitions in actions under dispersed parties and interpleader diversity of citizenship jurisdiction*

For the purposes only of this chapter and of chapter 159 of this title—

(a) a corporation incorporated by more than one territorial jurisdiction shall be deemed to be a citizen only of one of those jurisdictions that will establish diversity of citizenship between the corporation and a party adverse to it; a partnership or other unincorporated association shall be deemed to be a citizen of the territorial jurisdiction where it has its principal place of business;

(b) the term "territorial jurisdiction" means any State or any foreign state;

(c) the word "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any Territory or Possession of the United States;

(d) the word "citizen" includes a State or other territorial jurisdiction or a sub-division thereof, but nothing herein shall be construed to affect sovereign immunity;

(e) a judgment is "fully effective" if it binds a party personally or operates on property within the jurisdiction of the court to an extent sufficient fully to satisfy the claim.

§ 2376. *Dispersed necessary parties in actions in district court under other jurisdictional statutes*

(a) In a civil action instituted in the district court originally under section 1301 of this title, if one or more additional parties necessary for a just adjudication as to a defendant (as defined in section 2373 of this title) cannot otherwise be joined, section 2374 of this title shall be applicable to such action; such parties may be joined under the provisions of that section without regard to their citizenship; and venue otherwise proper shall be unaffected by, and shall be proper as to, any such parties.

(b) In a civil action wherein jurisdiction is founded solely on diversity of citizenship under section 1301 of this title, if a counter-claim compulsory under the applicable rule is asserted and one or more additional parties necessary for a just adjudication of that claim as to any present party cannot otherwise be joined, section 2374 of this title shall be applicable to such action; such parties may be joined under the provisions of that section without regard to their citizenship; and venue otherwise proper shall be unaffected by, and shall be proper as to, any such parties. A party is necessary for a just adjudication of a counter-claim as to a present party, for purposes of this subsection, if he would be thus necessary, under section 2371 or 2373 of this title, in an original action on the same claim.

yond the reach of any one state and where minimal diversity exists. Under the ALI plan, these defendants would have to be necessary parties, not merely joint-and-several tortfeasors.¹²⁸ Perhaps the ALI proposal could be liberalized to cover "permissive parties," those who bear a logical relationship to the lawsuit. Section 2372 locates venue only in districts that have sufficient contacts with the subject matter of the suits.¹²⁹ Section 2373 allows certain plaintiffs and defendants to remove a suit in state court to a federal district court.¹³⁰ Section 2374(a) provides for worldwide service of process and for orders restraining conflicting lawsuits. Section 2374(b) provides for a transfer to a more convenient forum. If the amount in controversy is less than \$5,000, section 2374(e) gives the district court the discretion to dismiss part or all of the action.¹³¹

Some questions might arise concerning the constitutionality of nationwide service of process. Yet, Congress has provided for nationwide service of process in several instances,¹³² and commentators and cases almost uniformly assume their constitutionality.¹³³ An ALI memorandum¹³⁴ in support of the proposal for multi-state, multi-party litigation argued that "most existing authority declares with absolute certainty that Congress has general power to make the process of a federal court run throughout the nation."¹³⁵

128. See note 127 *supra*.

129. *Id.*

130. *Id.*

131. *Id.*

132. Congress has provided for service of process, regardless of contacts with the state in which a district court is located, by the 100-mile bulge provision for service on third-party defendants, FED. R. CIV. P. 4(e) (1966). Nationwide service of process is provided for additional parties in actions in antitrust, 15 U.S.C.A. § 5 (West 1973), and to enjoin antitrust violations. *Id.* § 25. All parties claiming an interest under veteran's insurance benefits may be joined in one lawsuit. 38 U.S.C.A. § 784(a) (West 1979). Process may be served anywhere to enforce a lien or remove a lien or cloud upon title. 28 U.S.C.A. § 1655 (West 1966). District courts have nationwide service of process in actions to enforce orders of the Interstate Commerce Commission. 28 U.S.C.A. § 2321 (West 1978 & Supp. 1979). Nationwide service of process also exists in interpleader actions. *Id.* § 2361 (1978). Service in securities cases may be had wherever the defendant is an inhabitant or may be found, and the suit may be brought where the offer or sale took place. 15 U.S.C.A. §§ 77 (a), 78aa (West 1971).

133. See, e.g., C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 64, at 304-05 (3d ed. 1976); Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 95 HARV. L. REV. 963, 1004-06 (1979). But see Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963).

134. Memorandum B, ALI STUDY, *supra* note 126, at 437.

135. *Id.*

It cited several statements to that effect by the Supreme Court, lower federal courts, and commentators,¹³⁶ and it disagreed with a statement by Justice Black that federal courts in diversity exercise only the judicial power of the several states.¹³⁷ It noted that the framers of the Constitution proposed the creation of a judicial district which crossed state lines and that during 1801 such a federal district actually existed.¹³⁸ The memorandum ended:

[T]he purpose [of] the diversity of citizenship clause of Article III was most likely that of enabling Congress to assure the availability of adequate and effective judicial relief to those who entered into transactions outside their home state. It seems clear that in present day context the greatest need for federal courts in this regard is precisely to handle cases beyond the effective reach of state courts. From this aspect, Congressional power to authorize nationwide service of process in diversity cases is necessary to carry out presently the essential purposes of the original constitutional grant.¹³⁹

The desirability of the ALI proposal has been questioned in several articles.¹⁴⁰ Yet, each of these, in stating that there is no real need for enactment of the proposed statute, based its conclusion on a jurisdictional model of expanding state jurisdiction. The Supreme Court recently has restricted the reach of the state courts. In a concurrent development, by limiting pendent and ancillary jurisdiction, it has limited the relief available to plaintiffs in multi-party situations. Presently, there is a need for a statute such as that proposed by the ALI.

CONCLUSION

The Supreme Court has rejected the quasi in rem and the interstate venue theories of state jurisdiction. It also has required more than a minimal amount of contacts to support jurisdiction. The holdings of *Shaffer* and *Kulko* are fascinating theoretically, but they

136. *Id.* at 438, nn.4-6.

137. *Id.* at 438-40, citing *National Equip. Co. v. Szukhent*, 375 U.S. 311, 331 (1964) (Black, J., dissenting).

138. *Id.* at 440.

139. *Id.* at 441.

140. *E.g.*, H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 4-5 (1973); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968); Seeburger, *The Federal Long-Arm: The Uses of Diversity, or 'Tain't So, McGee*, 10 IND. L. REV. 480 (1977).

have a practical import affecting modern procedure. Prior to these cases, unitary adjudication was possible. Now in many circumstances lawsuits must be fragmented into several suits against groups of individual defendants. Certainly *Shaffer* itself is an example of the type of case that might not be adjudicated in one place. By limiting ancillary and pendent jurisdiction, the Supreme Court has impaired further the concept of unitary adjudication.

Now that the Supreme Court has contracted the limits of state and federal jurisdiction, there is a demonstrable need for the unitary federal forum. The ALI proposal, or a similar federal statute, should be adopted in order to provide a forum for the resolution of multi-party, multi-state issues.