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Jurisdiction by Necessity: Examining One Proposal for Unbarring the Doors of Our Courts

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I. INTRODUCTION

> So great is the ascendency of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.
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> —Sir Henry Maine[1]

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* The author thanks Professor Harold G. Maier, Vanderbilt University, without whom this Note would have been impossible.

1. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 3 (1952) (quoting H. MAINE, EARLY LAW AND CUSTOM 389 (1907)).

Although the usually proclaimed goals of the United States legal system are "fair play and justice," a person who is injured in some way, who feels that he has had his rights violated, or who seeks to enforce a business agreement, may not necessarily have a remedy in its judicial system. Often a court may claim it lacks power to hear a case because it does not have jurisdiction over the defendant or the subject matter of the suit. Another motive of a court for refusing to hear the case may be simply the necessity to clear its docket. One proposed remedy to such situations is the development of a jurisdiction by necessity doctrine. The doctrine of jurisdiction by necessity would permit assertions of jurisdiction which might be untenable under current jurisdictional standards, but in which a plaintiff has no alternative way to seek a remedy. Adoption of a necessity jurisdiction would promote fair play and justice by giving an aggrieved plaintiff a forum in which to be heard. However, it is difficult to craft the doctrine so that it helps deserving plaintiffs without imposing unfair burdens upon defendants and the court system as a whole.

A typical situation calling for necessity jurisdiction is when a United States plaintiff brings suit against a foreign defendant who has had only limited and scattered contact with the United States. Often the plaintiff is forced to go to the defendant's country even though the cause of action arose in the United States and that foreign forum could be hostile to the United States plaintiff. This Note examines the historical background of jurisdiction from the nineteenth century through the guiding principles of today. A potential basis is then set out for developing a necessity jurisdiction. In addition, this Note examines the positive and negative aspects of such a doctrine.

II. HISTORICAL DEVELOPMENT OF JURISDICTION UNTIL *Shaffer v. Heitner*[2]

In the early years of the twentieth century, United States courts asserted jurisdiction in accordance with standards enunciated in *Pennoyer v. Neff*.[3] In *Pennoyer* the United States Supreme Court held that "every

2. 433 U.S. 186 (1977).

3. 95 U.S. 714 (1878). Mitchell sued Neff, who was served by publication in a local paper, in Oregon state court to recover an unpaid fee. Mitchell won a default judgment and satisfied the judgment by sale to Pennoyer of property Neff owned in Oregon. Neff then sued Pennoyer to recover the property, claiming lack of jurisdiction. Neff eventually won on a technicality; the property was not attached from the start of the action, as required by Oregon law. *Id.* at 719-20. The case has become a familiar nightmare to first-year students of civil procedure.

state possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . and that no tribunal . . . can extend process beyond that territory to subject persons or property to its decisions."[4] The Court recognized three categories of judicial jurisdiction: in personam jurisdiction, which confers personal liability; in rem jurisdiction, which arises when the rights of all persons to a certain property are in question; and quasi in rem jurisdiction, which arises when the rendering of judgment affects the interests of particular persons in a thing.[5] This last form of jurisdiction generally involves either claims to the property upon which jurisdiction is based or claims that are unrelated to the property but that still give rise to jurisdiction and lead to binding personal judgments.[6] The theory behind *Pennoyer* was that the presence of property in a state gives the court power to proceed and exercise jurisdiction over the owner of that property.[7] Application of this territorial principle presented few problems for the majority of claims.[8]

The form of attachment jurisdiction set out in *Pennoyer* reached its pinnacle with the Supreme Court's decision in *Harris v. Balk*.[9] In *Harris* the central issue was whether an intangible debt had a situs in North Carolina, where Harris resided, or in Maryland, where he was physically present at the time suit was filed.[10] The Court held that an obligation follows the debtor wherever he travels, thus placing the situs of the intangible in Maryland.[11] Rather than confining quasi in rem jurisdiction to a strict territorial view, the Court implied that a plaintiff could apply this method of obtaining jurisdiction whenever a defendant owned property in a state, without any question as to whether the defendant

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4. *Id.* at 722.

5. *Id.* at 727-29. *See* Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 39 (1978).

6. *See* Silberman, *supra* note 5, at 39.

7. *Id.* at 46. This notion had developed in English common law which used a writ of attachment on the defendant's property to force the defendant to appear or a writ that also sought to compel the defendant to appear but could also be used to satisfy the plaintiff's claim. *Id.* at 40-41. *See also* R. MILLAR, *supra* note 1, at 74.

8. The territorial concept is not unique to the United States; English common law provided the basis for the doctrine. *See* Nygh, *The Territorial Origin of English Private International Law*, 2 U. TASMANIA L. REV. 28, 36-37 (1964-67).

9. 198 U.S. 215 (1905). A Maryland Court obtained quasi in rem jurisdiction over Balk, a defendant not present within the jurisdiction, through Harris, a North Carolina resident who was indebted to Balk. Harris was traveling through Maryland when served with a writ of attachment by Epstein, a creditor of Balk's. *Id.* at 216-17.

10. *Id.* at 221-22.

11. *Id.* at 222. By their nature, intangibles are susceptible to a large array of possible legal siti, complicating any jurisdictional analysis.

had any other contacts with the forum.[12] This decision considerably expanded a plaintiff's ability to bring suit against a defendant not present within the jurisdiction.[13] The territorial considerations of jurisdiction in *Harris* and *Pennoyer* governed until the 1940s, when power concepts gave way to more qualitative evaluations of jurisdiction.[14]

A major shift in the focus of judicial inquiry occurred with the Supreme Court's decision in *International Shoe Co. v. Washington.*[15] *International Shoe* supplemented the traditional power theory by providing a further basis for in personam jurisdiction over nonresident defendants.[16] Jurisdiction determinations moved from examinations of the limits of state sovereignty to inquiries into the nature and quality of a defendant's activities within the forum.[17] In *International Shoe* the state of Washington attempted to collect unpaid taxes for unemployment compensation from a Delaware corporation with a principal place of business in Missouri.[18] The corporation hired eleven to thirteen salesmen to work within Washington and filled orders received from them.[19] The Court held that a state could exercise personal jurisdiction over a nonresident defendant when that defendant has "such contacts . . . with the state of the forum as make it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there."[20] The Court concluded that such a "minimum contacts" standard did not violate due process because it "does not offend 'traditional notions of fair play and substantial justice.' "[21]

The minimum contacts standard required a court to evaluate the relationship among the plaintiff, the defendant, the forum state, and the events surrounding the litigation.[22] The practical result of *International*

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12. *See* Silberman, *supra* note 5, at 48.

13. *See, e.g.*, Ownbey v. Morgan, 256 U.S. 94 (1921) (permitting the attachment of stock in the state of incorporation); Siro v. American Express Co., 99 Conn. 95, 121 A. 280 (1923) (plaintiff's purchase of traveler's checks from defendant created an attachable debt).

14. *See* Silberman, *supra* note 5, at 52-53.

15. 326 U.S. 310 (1945).

16. Silberman, *supra* note 5, at 51.

17. Case Comment, Helicopteros Nacionales de Colombia, S.A. v. Hall*: Foreign Defendants and Minimum Contacts in the Real World*, 37 RUT. L. REV. 609, 612 (1985). Such an inquiry is required by the limit due process places on the power of a state to assert personal jurisdiction over a nonresident defendant. *Id.* at 611.

18. 326 U.S. at 311-13.

19. *Id.* at 313-14.

20. *Id.* at 317.

21. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

22. Silberman, *supra* note 5, at 52-53.

Shoe was that states expanded their jurisdiction through long-arm statutes, with the minimum contacts test serving as the constitutional limit on assertions of jurisdiction.[23] This standard requires a case-by-case analysis to determine whether the exercise of jurisdiction meets the due process requirement of minimum contracts, rather than the mechanistic application of a rule such as those set out in *Pennoyer* and *Harris*, and provides an outer limit to state action.[24]

In the aftermath of *International Shoe*, states used the minimum contacts analysis to expand their exercise of jurisdiction. This exercise of permissible jurisdiction grew to its broadest in *McGee v. International Life Ins. Co.*[25] In *McGee* a California resident purchased life insurance from a Texas corporation, paying premiums to the insurance corporation by mail from California.[26] The Texas corporation maintained no office or agents within California and conducted no other business there.[27] The company refused to pay when the insured made a claim under the policy, and the beneficiary brought suit in a California state court in accordance with a California statute.[28] The United States Supreme Court ruled that California could properly assert jurisdiction based upon a single isolated contact with the forum state, provided that the contact bore a substantial connection to the asserted claim.[29] Such a view established a flexible constitutional standard regarding personal jurisdiction that fo-

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23. *See id.* at 52. *International Shoe* substitutes the presence of person or property for minimum contacts under an overriding notion of fair play. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 88-89 (1983).

24. Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 873 (1980). In addition to the due process clause, the full faith and credit clause also presents a limit to jurisdiction. *Id.* at 873-74.

25. 355 U.S. 220 (1957).

26. *Id.* at 221-22. The Texas corporation had assumed the insurance obligations of an Arizona corporation which originally issued the policy. *Id.* at 221.

27. *Id.* at 222.

28. The company claimed that the covered party committed suicide, thus relieving the company of its obligation to pay on the policy. *Id.* at 222. The plaintiff had sued under California Insurance Code of 1953, §§ 1610-20, which permitted jurisdiction over foreign corporations that had insurance contracts with residents even if service of process could not be made within the state. *Id.* at 221.

29. *Id.* at 223. The Court further found that the contract had a substantial connection with California, and that it was not impaired by the effects of the jurisdictional statute, which did not take effect until the Texas corporation assumed the obligation. *Id.* at 223-24. *See also* Silberman, *supra* note 5, at 53 n.88; Note, *The Applicability of* Shaffer *to the* Quasi-In-Rem *Attachment of Foreigners' Assets*, 12 VAND. J. TRANSNAT'L L. 393, 396 (1979) (California may assert jurisdiction over the insurer because of substantial connections with the state and a legitimate interest of the state in regulating solicitation of business by insurers).

cuses more on the interests of the plaintiff than on fairness to the defendant.[30] Under this concept, the quality and extent of contacts are basically irrelevant to the constitutionality of an assertion of jurisdiction.[31]

The Supreme Court withdrew somewhat from this extremely expansive view of jurisdiction less than a year after *McGee*. In *Hanson v. Denckla*[32] a revocable trust was established in Delaware by a woman living in Pennsylvania, who subsequently moved to Florida.[33] While living in Florida, she executed both an inter vivos instrument that was to give beneficiaries $400,000 of trust property, and a will with a residuary clause purporting to give to the beneficiaries all property over which she retained an unexercised power of appointment at her death.[34] Upon her death, the Florida Supreme Court declared the trust instrument invalid and enforced the residuary clause of the will.[35] The *Hanson* Court, in reversing the decision, held that Florida lacked in rem jurisdiction over the trust and lacked personal jurisdiction over the trust company, leaving the state's courts with power to assert jurisdiction only over the will.[36] Because none of the trust assets were administered in Florida, and because the cause of action did not result from any act within that state, the trust agreement lacked any connection whatsoever with the forum.[37] The message of *Hanson* was not that a defendant must have minimum contacts for a forum validly to assert jurisdiction, but that there must "be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[38]

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30. *See* Lilly, *supra* note 23, at 90. *McGee* is distinguishable from other jurisdiction cases because of the substantive nature of the claim involved. Claims on insurance contracts involve strong public policy elements that may override some jurisdictional interests.

31. *See* Silberman, *supra* note 5, at 52 n.87.

32. 357 U.S. 235 (1958).

33. *Id.* at 238-39.

34. *Id.* at 238.

35. *Id.* at 242-43. In invalidating the trust, the Florida Supreme Court asserted jurisdiction over the absent defendant based on the premise that the court had jurisdiction to construe the will. *Id.* at 243.

36. *Id.* at 248-52. In addition, the court judged immaterial the fact that the settlor and a majority of the beneficiaries were domiciled in Florida. *Id.* at 254.

37. *Id.* at 251.

38. *Id.* at 253. This divergence from the minimum contacts standard suggested the possibility of a different jurisdictional standard—the requirement of acts by the defendant purposely availing himself of the forum. Note, *supra* note 29, at 396; Case Comment, *supra* note 17, at 614. The problem of such a standard is defining what will constitute purposeful availment. Lilly, *supra* note 23, at 91-93.

The cases above form a framework for analyzing the Supreme Court's more recent decisions on the topic of jurisdiction: *Shaffer v. Heitner*, *Rush v. Savchuk*,[39] and *Helicopteros Nacionales de Colombia, S.A. v. Hall*.[40] By keeping in mind the various principles, propositions, and phrasing of these jurisdictional decisions, it is easier to understand just what the constitutional standards for jurisdiction are at present, and to recognize any inconsistencies that detract from the force of those standards.

III. THE MODERN ERA: JURISDICTIONAL ANALYSIS BEGINNING WITH *Shaffer v. Heitner*

A. *What Footnote 37 in* Shaffer *Says*

Shaffer v. Heitner marked a dramatic change in jurisdiction analysis. Suddenly, the inquiry focused not on form, but on substance.[41] The plaintiff in *Shaffer*, who was not a resident of Delaware, filed a shareholder's derivative suit in a court in that state. The complaint named a corporation, a subsidiary, and twenty-eight current or past corporate officers as defendants.[42] In this complaint, the plaintiff alleged that the defendants violated corporate duties by engaging the corporation in activities in Oregon that resulted in corporate liability.[43] The trial court entered an order sequestering Delaware property belonging to the defendants, all of whom were nonresidents.[44] Twenty-one defendants then made a special appearance to ask that the service of process upon them be quashed and that the sequestration order be vacated. These defendants argued that the sequestration procedure did not afford them due process and that they did not have sufficient contacts with the state of Delaware for that forum to exercise jurisdiction over them under *International Shoe*.[45] The Delaware Supreme Court held that the sequestra-

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39. 444 U.S. 320 (1980).

40. 466 U.S. 408 (1984).

41. Note, *Jurisdiction Over Alien Corporations After* Shaffer v. Heitner, 10 LOY. U. CHI. L.J. 739, 746 (1979).

42. 433 U.S. at 189-90.

43. *Id.* at 190. The Oregon activities resulted in the corporation being held liable for damages in an antitrust action and also led to further actions against the corporation for criminal contempt. *Id.*

44. *Id.* at 191. A sequestration order, as used in Delaware, was a process to compel personal appearance of nonresident defendants to defend suits brought against them; it could further provide for seizure of defendant's property to pay the plaintiff's demands if the defendant failed to appear. *Id.* at 190 n.4 (quoting DEL. CODE ANN. tit. 10, § 366 (1975)).

45. *Id.* at 192-93.

tion procedure did meet the requirements of due process.[46] The court held that jurisdiction was permissible because the plaintiff's cause of action was quasi in rem and was not based upon the contacts of any defendants with the forum.[47]

The Supreme Court of the United States reversed in an opinion by Justice Marshall, stating that the ability of a state to assert jurisdiction over a nonresident must be evaluated according to the minimum-contacts standard of *International Shoe*.[48] To exercise in rem jurisdiction, a court must find sufficient contacts to permit "jurisdiction over the interests of persons in a thing."[49] For a quasi in rem action, the presence in a state of property unrelated to a plaintiff's cause of action will not be sufficient in and of itself to support that state's assertion of jurisdiction.[50] Exercising jurisdiction grounded only on the physical location of property violates due process if the property is unrelated to the subject matter or substance of the cause of action.[51] The Court reconciled its decision with *Hanson*, finding that the defendants had not "purposely avail[ed themselves] of the privilege of conducting activities within the forum state," inasmuch as the corporate officers were not obligated to purchase interests in the corporation in order to occupy their offices.[52] However, the Court firmly established that in evaluating the sufficiency of a defendant's contacts with a forum state for the purposes of determining if juris-

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46. *Id.* at 194. The lower courts determined that seizure of a nonresident's property in Delaware pursuant to a court order, with the release of that property upon entry of general appearance by the defendant provided an adequate basis for quasi in rem jurisdiction. *Id.* at 193-94.

47. *Id.* at 196.

48. *Id.* at 207.

49. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, introduction note (1977)). Presence of property in a state is a consideration in the exercise of jurisdiction, but it is not conclusive. *Id.* at 208.

50. *Id.* at 208-09. The Court rejected the argument that permitting the presence of property alone to suffice for the assertion of jurisdiction is necessary in order to prevent persons from avoiding obligations by removing assets to a place where they are not subject to in personam actions. The full faith and credit clause guards against such a actions. *Id.* at 209-10.

51. *Id.* at 213. Also, jurisdiction could not be jusitfied by the state's interest in regulating the management of Delaware corporations, because the jurisdiction was based not upon the defendant's status as a corporate fiduciary, but on the presence of defendants' property within the state. *Id.* at 213-14.

52. *Id.* at 216 (quoting *Hanson*, 357 U.S. at 253). In other words, defendants otherwise without minimum contacts did not surrender their constitutional right to avoid jurisdiction by accepting their positions with the corporation. *Id.* Apparently, the *International Shoe* minimum-contacts test and the *Hanson* purposeful availment test co-exist as independent valid jurisdictional standards.

diction over him is proper, the correct test to apply is the minimum-contacts test from *International Shoe*.[53]

The foundation of the proposed doctrine of jurisdiction by necessity is contained in footnote 37 and the text that surrounds it. In the text just prior to the footnote, the Court supported its choice of jurisdictional standards by stating that "allowing *in rem* jurisdiction avoids the uncertainty inherent in the *International Shoe* standard and assures a plaintiff of a forum."[54] The Court believed the "fairness . . . of [the] *International Shoe* standard can be easily applied in the vast majority of cases."[55] Addressing the notion that the plaintiff is assured a forum, the Court observed in footnote 37:

> This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff.[56]

While the Court does not officially recognize a jurisdiction by necessity doctrine, the fact that the issue was raised at all, especially as it seems sua sponte, implies that the Court might well be receptive to a judicially created jurisdiction open to deserving plaintiffs with no alternative. Subsequent language by the Court has further suggested a potential opening for the development and application of such a doctrine.

The concept of jurisdiction by necessity requires a relaxation of the minimum contacts test of *International Shoe* under certain circumstances.[57] Under a necessity analysis, the relationship of defendant to forum is still relevant, but rather than a determination of sufficiency of the defendant's contacts with the forum, the standard is one of "reasonableness."[58] A reasonableness analysis takes into account the interests of all

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53. *Id.* at 211-12. *See* Note, *supra* note 29, at 398-99. A minimum contacts analysis includes the following factors: the defendant's benefit from state protection of the property, the state interest in resolution of disputes, and the likelihood that records and documents are within the state. Case Comment, *Exercise of In Rem and Quasi In Rem Jurisdiction Justified Only Where* International Shoe *Minimum Contacts Standard is Satisfied*, 11 VAND. J. TRANSNAT'L L. 159, 164-65 n.33 (1978).

54. 433 U.S. at 211. For a detailed discussion of sequestration, see Folk & Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 COLUM. L. REV. 749 (1973).

55. 433 U.S. at 211.

56. *Id.* at 211 n.37.

57. Footnote 37 implies, if there is to be a jurisdiction by necessity, that the Court should require fewer contacts in the jurisdiction analysis when another forum is lacking, perhaps giving a more generous recognition to constructive acts in a state. Note, *supra* note 29, at 402.

58. Lilly, *supra* note 23, at 98-99.

the litigants,[59] not merely the fairness to potential defendants considering their actions and connections with the forum.[60]

B. *How* Rush v. Savchuk *Modifies* Shaffer

Rush v. Savchuk stands for the proposition that a court must find minimum contacts under *International Shoe* in order to exercise quasi in rem jurisdiction over a defendant.[61] Savchuk was injured as a passenger in an automobile driven by Rush.[62] Both were Indiana residents and the accident occurred in Indiana.[63] Savchuk later moved to Minnesota and brought suit there against Rush by attaching the duty of Rush's insurer to defend and indemnify him in a suit.[64] Savchuk asserted that Minnesota courts had power to exercise quasi in rem jurisdiction since the insurer did business in Minnesota, even though Rush himself had no contacts with the state of Minnesota.[65] The Minnesota Supreme Court held that such an exercise of quasi in rem jurisdiction was valid under *Shaffer*.[66]

The United States Supreme Court ruled to the contrary. Under the Court's decision, a state may not properly exercise quasi in rem jurisdiction over a defendant who lacks forum contacts by garnishing the responsibility of an insurer to defend and indemnify, even when the insurer is entitled to do, and actually does, business in the state.[67] Instead, the Court held, a court can exercise jurisdiction over a defendant only when that defendant has minimum contacts with the state under the *International Shoe* standard and when such an exercise comports with due process considering "the relationship among the defendant, the forum, and the litigation."[68] In *Rush* the presence of property did not establish

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59. Id. at 100.

60. Martin, *supra* note 24, at 879. Traditionally, the defendant's position has been favored in court decisions governing jurisdiction, with authorities citing considerations such as the burden of inconvenience and equal sovereignty of parties as justifications for favoritism. Von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279, 309-10 (1983).

61. 444 U.S. at 327.

62. *Id.* at 322.

63. *Id.*

64. *Id.* Savchuk was unable to bring a cause of action in Indiana because of a "guest statute" which prohibited claims of passengers against the driver. *Id.*

65. *Id.* at 322-23.

66. *Id.* at 324. The court found the policy to be garnishable because, although the cause of action arose outside Minnesota the plaintiff was a Minnesota resident at the time suit was filed, and the interests of fairness supported exercise of jurisdiction. *Id.*

67. *Id.* at 320.

68. *Id.* at 327 (quoting *Shaffer*, 433 U.S. at 204).

a relationship of sufficient strength to permit the Minnesota court to assert jurisdiction over an unrelated cause of action, especially since Rush himself did not engage in any purposeful activity related to the forum.[69] Jurisdiction over an individual cannot be achieved by jurisdiction over his insurer and attachment of any policy proceeds—the "functional equivalent" of a direct action. If the Constitution forbids jurisdiction over the insured, then there is no basis for bringing the insurer into the action.[70] In the Court's words, a defendant must have "certain judicially cognizable ties with a State" for that state's courts to exercise jurisdiction over him.[71]

This decision brought to an end the doctrine of *Seider v. Roth*, a case from the New York state courts.[72] The *Seider* court considered contractual obligations of an insurance company to an insured to be a debt subject to attachment if the insurer did business within the state, and concluded that such attachments could provide a basis for jurisdiction over the insured.[73] A subsequent New York case, *Simpson v. Loehmann,* reaffirmed *Seider*, holding that such a procedure complied with the due process interests of defendants because it was the insurer, not the insured, who controlled the litigation.[74] *Rush* ended this practice, which had served as an exception to the *Shaffer* standard, stressing that such a contractual obligation fails to demonstrate any contact of the defendant insured with the forum and relates only to the conduct of litigation, not to the inherent ability of a court to decide the issues in a lawsuit.[75]

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69. Rush's only contact with Minnesota was an insurance policy with a company doing business in the state, a contact the court considered insufficient and "adventitious." *Id.* at 328-29. *See, e.g.*, Kulko v. California Super. Ct., 436 U.S. 84, 93-94 (1978); *Hanson*, 357 U.S. at 253.

70. 444 U.S. at 330-31.

71. *Id.* at 332. Admittedly, the reasoning of the Court at this point is somewhat circular. *See also* Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. REV. 429, 471 (1981) (judicially cognizable ties to the state are necessary before other factors may be considered).

72. 17 N.Y.2d 111, 216 N.E.2d 312 (1966).

73. *Id.* at 114, 216 N.E.2d at 315. This concept relates back to Harris v. Balk and the idea that presence of a debt within a state is sufficient for quasi in rem jurisdiction over a defendant not present in the state. 444 U.S. at 325-26. *See also* Simpson v. Loehmann 21 N.Y.2d 305, 310, 234 N.E.2d 669, 671 (1967).

74. *Simpson*, 21 N.Y.2d at 311, 234 N.E.2d at 672 (1967). "[W]here the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy." Id. (quoted in Rush, 444 U.S. at 326).

75. 444 U.S. at 329. *Rush* further held that this type of jurisdiction is unconstitutional. *Id.* at 332-33. *See also supra* note 68 and accompanying text.

The impact of *Rush* upon footnote 37 of *Shaffer* is ambiguous and not easy to measure. At first *Rush* appears to back away from any idea of a jurisdiction by necessity, since it denies plaintiff a forum and restricts assertion of jurisdiction to situations when there are "judicially cognizable ties with a state."[76] However, the *Rush* Court restricted its decision to actions in which the defendant has "never had any contacts with Minnesota."[77] The Court did not state whether an assertion of jurisdiction would be permissible when there are some contacts, or when it cannot be said that there are no contacts whatsoever. The only guideline set by the Court is the "fair play and substantial justice" standard of *International Shoe*. What exact factors satisfy the requirements of due process when a court claims personal jurisdiction over a defendant remains an open question, but it appears that jurisdiction by necessity can coexist with the rule of *Rush*, provided that some contact with the forum exists.[78]

C. *The Status of Footnote 37 After the* Helicopteros *Decision*

Helicopteros Nacionales de Colombia, S.A. v. Hall represents a further movement toward the more restrictive end of the continuum of allowable jurisdiction. The lawsuit involved a wrongful death action filed in a Texas state court against a Colombian corporation (Helicol).[79] A helicopter owned by the corporation crashed in Peru, killing some United States citizens who were employed by a Peruvian business at the time. The Peruvian business was part of a joint venture with Williams-Sedco-Horn, headquartered in Texas.[80] The joint venture had contracted in Peru with Helicol for helicopter services.[81]

Crucial to the Court's decision is its analysis of Helicol's contacts with the United States, particularly Texas. Those contacts included:

> [S]ending its chief executive officer to Houston for a contract-negotiation-session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services

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76. *Id.* at 332. *See also supra* note 71.

77. *Id.* at 327.

78. The majority in *Rush* presupposes a method of determining the factors. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. CT. REV. 77, 80.

79. 466 U.S. at 412.

80. *Id.* at 410. The Peruvian company was formed to permit the venturers to submit a bid on and build a pipeline for the state-owned oil company of Peru. Peruvian law required that the construction of the pipeline be done by a Peruvian company. *Id.*

81. *Id.* at 410-11. The contract provided that any disputes which arose would be subject to jurisdiction of the courts of Peru. *Id.*

> from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training.[82]

The Texas Supreme Court held these contacts sufficient for jurisdiction,[83] but the United States Supreme Court reversed, stating that "Helicol's contacts with the State of Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment."[84] In making this decision, the Court examined the various contacts individually. It held that the trip to Texas by executive personnel was not so continuous or systematic a contact as to meet the requirements of *International Shoe*.[85] The checks drawn from the Texas bank were seen as a unilateral act at the discretion of the drawer and thus irrelevant for determining sufficiency of contacts with the forum.[86] The purchases of helicopters and the training sessions were similarly discounted as too weak to permit a Texas court to acquire in personam jurisdiction over the defendant for a cause of action unrelated to those contacts.[87]

In addition to its analysis of specific contacts, the Court directly addressed the possibility of jurisdiction by necessity and footnote 37 of *Shaffer*. In a footnote to its opinion,[88] the Court stated:

> As an alternative to traditional minimum-contacts analysis, respondents suggest that the Court hold that the State of Texas had personal jurisdiction over Helicol under a doctrine of "jurisdiction by necessity." We conclude, however, that respondents failed to carry their burden of showing that all three defendants could not be sued together in a single forum. It is not clear from the record, for example, whether suit could have been brought against all three defendants in either Colombia or Peru. We decline to consider adoption of a doctrine of jurisdiction by necessity—a potentially far-reaching modification of existing law—in the absence of a

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82. *Id.* at 416.

83. Hall v. Helicopteros Nacionales de Colombia, S.A., 638 S.W.2d 870 (Tex. 1982); 466 U.S. at 413.

84. 466 U.S. at 418-19.

85. *Id.* at 416. *See also* Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 445 (1952) (contacts must be of a "continuous and systematic" nature).

86. 466 U.S. at 416-17. *See also Hanson*, 357 U.S. at 253; Lilly, *supra* note 23, at 99.

87. 466 U.S. at 417. The Court relied on Rosenberg Bros. v. Curtis Brown Co., 260 U.S. 516 (1923) (cited in *International Shoe*, 326 U.S. at 318), which stands for the position that some single or occasional acts in a state that may be sufficient to impose liability do not necessarily give a court authority to enforce a judgment. Similarly, purchases by a defendant are not a sufficient basis for jurisdiction. 466 U.S. at 417-18 & n.12.

88. 466 U.S. at 419 n.13.

more complete record.[89]

There are several possible implications of this footnote. The Court seems to be considering necessity jurisdiction in this case as an alternative to the minimum-contacts analysis, instead of as a type of minimum contacts.[90] The Court also states that while the plaintiff failed to meet its burden of justifying jurisdiction in *Helicopteros*, the Court might be willing to adopt a different jurisdictional test in situations in which a plaintiff could not sue all defendants in a single forum.[91] However, because of the potential scope and impact of such a doctrine, the Court evaded the question by choosing to wait until some future case to decide whether to recognize a jurisdiction by necessity.

While *Helicopteros* moved closer to confronting jurisdiction by necessity, there are many open questions surrounding the concept. The Court did not intimate what factors might influence it to adopt such a doctrine other than the unavailability of a single forum in which all defendants could be joined. Also, it is unclear whether a necessity analysis would proceed under the traditional framework of *International Shoe* and its progeny, or whether the Court would establish a separate standard to assure that potential defendants' due process rights are observed and honored.

IV. THE OPPOSING VIEWS OF JURISDICTION BY NECESSITY

The doctrine of jurisdiction by necessity is designed to address the problem that arises when a cause of action does not have a relationship with a forum sufficient to permit an assertion of jurisdiction under *International Shoe*, but the interests of justice would best be served by allowing the action to proceed in that forum. When this situation arises, a necessity doctrine would permit the court to assert jurisdiction and provide an arena for resolution of the dispute between the parties. A premise of this concept is that there is not, or it is unlikely that there is, another forum available which could properly handle the claim. A proper assertion of necessity jurisdiction also requires that it not be unreasonable to require the defendant to defend himself in the forum. Last, even though contacts are not totally sufficient under the traditional standard, there must be some logical connection between the cause of action

89. *Id.* at 419 n.13 (citation omitted).

90. *Id.*

91. The Court stated that it was unclear from the record whether the plaintiff could bring the action anywhere else. The Court suggested that it would address the concept if a more complete record were established in some future case. *Id.*

and the forum. These premises raise questions: Why should a plaintiff not be allowed to bring suit when otherwise he may be denied a remedy entirely? Do "fair play and substantial justice" apply only to defendants?

A. *The Case For Assertion of Necessity Jurisdiction*

Proponents of necessity jurisdiction assert as the base of their theory the notion that a plaintiff should not be denied his day in court. The traditional rule requires a plaintiff to pursue a defendant in the defendant's forum, *actor forum rei sequitur*.[92] Historically, courts have favored the defendant in matters of forum selection, citing the burdens of inconvenience, travel, cost, and the equal sovereignty of the plaintiff and defendant.[93] An equally convincing argument may be advanced for favoring the plaintiff, however, because he is the party that is injured.[94] Justice Brennan has even suggested that the concept of forcing a plaintiff to seek out the defendant is outmoded in our modern economy, in which business people and others are constantly on the move and travel is easy and frequently relatively inexpensive.[95]

In determining a plaintiff's real ability to receive his day in court, it is essential to recognize that a delineation of plaintiffs and defendants into classes is not only helpful, but strikes close to the heart of the issue. A major factor in establishing such classes is the relative economic position

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92. *See, e.g.*, von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 n.13 (1966) (the plaintiff must pursue the defendant in this forum); von Mehren, *supra* note 60, at 310 (courts tend to favor a defendant when determining jurisdiction).

93. Von Mehren, *supra* note 60, at 310. Technological advances do tend to nullify arguments advanced by either side that the economic costs favor compelling the other party to travel, because those advances aid each side equally. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* World Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C.L. REV. 407, 429-30 (1980).

94. Von Mehren & Trautman, *supra* note 92, at 1167. Favoring the plaintiff is logical and advantageous as a matter of social welfare. *See* Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1186. This is especially true of tort actions. Under a foreseeability analysis, the defendant can reasonably expect lawsuits as a business matter, while the plaintiff has no similar expectation of injury. *See* von Mehren & Trautman, *supra* note 92, at 1167.

95. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 308 (1980) (Brennan, J. dissenting to *World-Wide Volkswagen* and *Rush*). Justice Brennan in *Helicopteros* would have asserted jurisdiction over nonresident defendants on the basis of fairness and reasonableness to the defendant. 166 U.S. at 149 (Brennan, J., dissenting). *See also* von Mehren, *supra* note 60, at 309.

of the parties, or the ability of each to bear the financial burden of the lawsuit.[96] This sort of analysis is of considerable import when the plaintiff is an individual and the defendant is a large corporation, especially when the action is brought in the plaintiff's own forum.[97] In this situation it seems appropriate to reverse the traditional preference. Conversely, when the plaintiff is a large diverse entity but the defendant is an individual, there is no compelling reason for the plaintiff's home state to assert jurisdiction.[98]

The presence of multiple parties and parties of diverse nationality is an additional relevant consideration. In international litigation it may be impossible to gain jurisdiction over all the defendants in one forum.[99] One jurisdiction should be able to adjudicate the cause of action in its entirety; aside from logic, this serves both judicial economy and the individual economies of those parties who would have to make appearances in more than one lawsuit, were the dispute to be tried in sundry forums.[100] United States courts making such an analysis should consider distinctions between a United States citizen as plaintiff and a foreign plaintiff. This is not to encourage or applaud prejudice in favor of United States citizens, but to deny jurisdiction where many or all defendants are foreign nationals may leave the domestic plaintiff with neither relief nor an alternative forum to enter, serving neither justice nor the national interest.[101] These considerations require a movement away from a minimum contacts standard to a "minimal contacts" analysis in cases in which a defendant purposely avails himself of privileges within the forum.[102] In this scenario, an isolated transaction will be sufficient to support the assertion of jurisdiction.[103]

The doctrine of forum non conveniens supports jurisdiction by neces-

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96. Von Mehren, *supra* note 60, at 311.

97. Von Mehren & Trautman, *supra* note 92, at 1167-68. This Note addresses only this narrow situation and does not suggest a reversal of the traditional bias in favor of the defendant for all situations.

98. *Id.* at 1168. The traditional bias in favor of the defendant should be reversed only for compelling considerations. *Id.* at 1169.

99. *Id.* at 1153. The complexity of the problem is further frustrated when the litigation involves both corporations and persons. *Id.*

100. *See id.* at 1154. In cases involving multiple parties, jurisdiction should lie with the forum providing the most appropriate focus to give a unified decision. *Id.* at 1162-63.

101. *See generally id.* at 1163. The differences in plaintiffs' rights from country to country are numerous and intricate. In some countries animosity toward the United States could render fair and just adjudication impossible, even if the United States citizen were to procure professional services.

102. Kalo, *supra* note 94, at 1192.

103. Von Mehren & Trautman, *supra* note 92, at 1148-49.

sity by providing a safeguard against potential abuses or misapplication of that jurisdiction. Forum non conveniens allows a court properly to dismiss suits that are otherwise within its jurisdiction.[104] When another forum is available to adjudicate the suit and the plaintiff's choice of jurisdiction is somewhere between inappropriate and oppressive, the court has the option of dismissing the action.[105] A court has the power to utilize administrative considerations in accepting or denying jurisdiction.[106] Any decision on forum non conveniens grounds is entirely discretionary in nature and the court may balance a multitude of factors in making its decision.[107]

Factors that a court considers in a forum non conveniens analysis include convenience to both the parties and the court, the ability of the court to enforce its remedies, and the capacity of the court to give a fair and just trial of the matter.[108] The convenience consideration addresses general fairness to the parties in requiring them to litigate in the particular forum, with citizenship as a particularly important consideration.[109] Whether the parties are domestic or foreign will, of course, weigh heavily in this analysis.[110] Considering the court's ability to enforce remedies confronts practical problems of collecting a judgment or policing an injunction.[111] Obtaining a judgment and recovering it from the losing party

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104. *See* Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 373 (1980) [hereinafter Note, *Forum Non Conveniens*]; Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 755 (1977) [hereinafter Note, *The Convenient Forum Abroad Revisited*].

105. Note, *Forum Non Conveniens, supra* note 104, at 373. *See* Note, *The Convenient Forum Abroad Revisited, supra* note 104, at 756.

106. *See* Note, *Forum Non Conveniens, supra* note 104, at 376. Because of the amorphous standards used in exercising the doctrine, any attempt to catalogue all factors is virtually impossible. *Id.*

107. *Id.*

108. Note, *Forum Non Conveniens, supra* note 104, at 381-84. *See generally* Case Comment, *Alien Defendants in Federal Question Actions - Federal District Courts May Look at Alien Defendant's Aggregate Contacts with the United States in Deciding Whether to Exercise In Personam Jurisdiction*, 9 VAND. J. TRANSNAT'L L. 435 (1976).

109. *See* Note, *Forum Non Conveniens, supra* note 104, at 381.

110. Note, *The Convenient Forum Abroad Revisited, supra* note 104, at 778. Under this concept, if an alien sues a defendant of the United States, the defendant's request will be accorded greater deference than would the request of an alien defendant being sued by an American plaintiff. In the latter situation, a forum non conveniens decision could be the equivalent of a decision on the merits against the plaintiff. *Id.* at 778-79. *See also supra* note 101.

111. *See* Note, *Forum Non Conveniens, supra* note 104, at 376. It is questionable

are distinct concepts with different standards and divergent rates of success.[112] Determining the adequacy of a foreign court involves examining both the availability and the capability of that court to handle the case.[113] While these interests are usually balanced, the plaintiff's choice of forum is generally accorded a great deal of deference by the court.[114]

The use of forum non conveniens would complement any broadening of the traditional scope of assertion of jurisdiction, so that jurisdiction is permitted only when "notions of fair play and substantial justice" dictate, and courts are kept within the defined bounds of due process.[115] The Supreme Court has not addressed the doctrine of forum non conveniens, but the weight of authority holds that federal law, not state law, governs the decision.[116] The doctrine allows a case-by-case analysis, with decisions made on the merits of each suit.[117] Although using forum non conveniens as a part of the jurisdiction by necessity analysis blurs the distinction between jurisdiction and forum non conveniens (which is, technically, a "venue" consideration), the approach allows courts to make an equitable inquiry into the matter of which court is best qualified to adjudicate the controversy.[118]

Recognition of jurisdiction by necessity also has the potential for a positive impact on international transactions. A pattern of more aggressive assertion of jurisdiction would promote the practice of inserting forum-selection clauses in contracts to designate where any disputes that arise will be resolved. If such clauses have been fairly bargained for and they do not violate United States public policy, they will be enforced provided that the forum designated in the contract has jurisdiction over the matter.[119] If courts uphold these clauses by accepting jurisdiction

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whether enforcement of judgment should even enter a jurisdiction analysis.

112. *See generally id.*

113. *Id.* at 383. The court must determine whether the foreign tribunal is competent to find the facts, to apply the law, to comply with contemporary United States notions of procedural and substantive fairness, and to provide a mechanism to give the plaintiff a recovery should he deserve one. *Id.* at 384.

114. *Id.* at 376. Unless the balance weighs very heavily in favor of the defendant, the plaintiff's choice of forum should not be disturbed. *See* Note, *The Convenient Forum Abroad Revisited, supra* note 104, at 756 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).

115. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 658 (1959).

116. *See* Note, *Forum Non Conveniens, supra* note 104, at 380 n.50.

117. *Id.* at 393.

118. Traynor, *supra* note 115, at 663-64. In applying this type of analysis the traditional labels of in personam, in rem, and quasi in rem jurisdiction become irrelevant. *See id.* at 663.

119. Note, *The Convenient Forum Abroad Revisited, supra* note 104, at 763.

otherwise lacking if necessity so requires, the selection of forum will become an important issue in international agreements, allowing parties to resolve jurisdictional matters at their discretion.[120] Courts will retain the power to deny effect to these clauses if the forum does not "serve the convenience of parties and the ends of justice."[121]

In *The Bremen v. Zapata Off-Shore Co.* the Supreme Court recognized the enforceability of forum-selection clauses in international agreements. Such clauses are binding unless an attacking party can prove that enforcement would be unfair.[122] In *Bremen* a German corporation contracted with a United States corporation to tow a drilling rig from Louisiana to Italy.[123] The contract offered by the German company contained clauses requiring all disputes to be settled before the London Court of Justice and exculpating the company from liability for any damages in towing. The United States company accepted the contract, making several alterations in it, but not changing the forum-selection and exculpatory provisions.[124] Early in the journey, when the ship had not yet cleared the international waters of the Gulf of Mexico, a storm caused serious damage to the rig, and the ship was forced to port at Tampa.[125] The United States corporation brought suit in the United States against the German corporation for negligent towage in violation of the contract clauses.[126] Both the District Court and the Court of Appeals found jurisdiction proper in the United States, stating that choice of forum clauses will not be enforced unless the selected forum is more convenient.[127]

The Supreme Court reversed, holding that forum-selection clauses are valid and that they should be enforced unless unreasonable.[128] The traditional hostility to such clauses was rejected, and the Court enunciated

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120. *See, e.g., id.* at 762. However, there are constraints upon the freedom of parties to select a forum, so the court is not absolutely bound by the contract. For instance, the selection of a forum completely unrelated to the entire transaction is not worthy of automatic court approval. *Id.* at 763.

121. *Id.* at 765 (quoting Hoffman v. Goberman, 420 F.2d 423, 426 (3d Cir. 1970) (footnote omitted)).

122. 407 U.S. 1, 10 (1972).

123. *Id.* at 2. The domestic company accepted bids on the job and the German corporation's was lowest. *Id.*

124. *Id.* at 2-3.

125. *Id.* at 3.

126. *Id.* at 3-4. The German corporation moved to dismiss for lack of jurisdiction and filed its own suit with the London Court. *Id.* at 4.

127. *Id.* at 7. Although the rig was in international waters when it was damaged, the United States courts were found to be most convenient under the circumstances. *Id.*

128. *Id.* at 10.

several factors relevant in deciding whether to enforce such clauses.[129] The *Bremen* Court then went on to find that the balance of factors was not so heavily against the forum-selection clause as to render it unenforceable. Such clauses are advantageous because "[t]he elimination of . . . uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element [of] international trade."[130] It is clear that the use of forum-selection clauses promotes international transactions, since parties can now (after *Bremen)* agree in advance just where the consequences of their actions will be determined, and, in addition, stand an enhanced chance of knowing what law and scheme of interpretation will be applied to their contract.

The use of necessity jurisdiction as a backup to forum-selection clauses is critical to protect the expectations of parties to an agreement. With a forum-selection clause, the plaintiff should be assured of a day in court in a forum to which he consented. But the passage of time or a change in governmental regime can make the chosen forum entirely unreasonable. The Court, in *Bremen*, protected United States parties by observing that a forum-selection clause would be unenforceable in such an instance.[131] Necessity jurisdiction would thus promote world trade without upsetting the planning of either a plaintiff or a defendant and without allowing one party to take advantage of some radical shift in a forum's judicial philosophy. Parties to a contract who become entangled in a dispute must find a forum if the free flow of commerce, goods, and currency is to be maintained.

The type and nature of the available forum are also factors in a plaintiff's ability to truly receive a fair day in court. Although a forum may be in some sense open and available, as a matter of procedural and substantive reality a party may still be unable to rest assured of a fair determination of his cause of action. Foreign tribunals may lack the capability to deal with complex or esoteric litigation, and from a political standpoint they may be so antagonistic toward the United States and its citizens as to effectively deny a remedy to a United States plaintiff.[132] While

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129. *Id.* at 10-11. Those factors include a determination as to whether the forum choice in the contract was the result of an arm's length negotiation and whether enforcing the clause would contravene public policy. *Id.* at 12, 15.

130. *Id.* at 13. The Court found that the clause was vital to the formation of the contract, as it reflected the parties' arm's-length negotiations. *Id.* at 14.

131. *See supra* note 128 and accompanying text.

132. *See, e.g.*, Mobile Tankers Co. v. Mene Grande Oil Co., 363 F.2d 611, 614-15 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966) (forum non conveniens denied because of inadequate foreign procedures). *Cf.* Note, *Forum Non Conveniens, supra* note 104, at 387.

each country's legal system has various attributes conducive to fact-finding, there are a variety of social and political influences which can act against the unwary or inexperienced United States litigant.[133] For example, the court system in a socialist country may be more concerned with protecting the state structure than with fairness to the commercial interests of a capitalist plaintiff. Similarly, the jurisprudence of Third World nations may be heavily and noticeably influenced by extra-judicial considerations—such as ritual and religion—which have become submerged in Western legal culture.[134]

B. *The Case Against Assertion of Necessity Jurisdiction*

Those who oppose the emergence of a jurisdiction by necessity doctrine assert that plaintiffs are not being denied their day in court under the present jurisdictional methodology, if indeed they are entitled to a day in court at all. The Constitution does not give plaintiffs a right of access to the federal courts.[135] Article IV of the Constitution, which provides for privileges of citizenship, does not list as one of those privileges an absolute right to file a lawsuit.[136] As Justice Holmes stated: "[I]t should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the place that established and would enforce their rights."[137]

Many of the arguments suggested by proponents of the development of a necessity jurisdiction as reasons to compel the defendant to go to the plaintiff's chosen forum may be turned on their heads and used as arguments for maintaining the current standards. Technological advancements that have decreased the burdens of travel and increased the convenience of appearing before a court and have simplified communication apply equally to plaintiffs and defendants. Traditionalists argue that it would be illogical to assume that it is more convenient for the defendant

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133. While fairness and equity may be achieved through any number of different legal systems, language may prove a formidable barrier. Interpretation of law and agreements can be extremely difficult when various languages are involved. R. SCHLESINGER, H. BAAD, M. DAMASKA, & P. HERZOG, COMPARATIVE LAW 868-72 (1988).

134. *See generally* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, THE LEGAL SYSTEMS OF THE WORLD: THEIR COMPARISON AND UNIFICATION (1975); LAW AND JUDICIAL SYSTEMS OF NATIONS (C. Rhyne 3d rev. ed. 1978).

135. Federal courts were not established to benefit a United States citizen in every situation; rather, they were established to protect foreign parties from the bias of state courts. Note, *Forum Non Conveniens, supra* note 104, at 390-91.

136. *Id.* at 389 n.80, 390.

137. *Id.* at 390 (quoting Cuba R.R. v. Crosby, 222 U.S. 473, 480 (1912)).

to come to the plaintiff than for the plaintiff to seek out the defendant.[138] The costs of out-of-town litigation should be substantially the same for either party, regardless of who does the travelling.[139] The basic premise that the defendant should come to the injured party's forum ignores the fact that there must be a judicial determination of the defendant's liability before the plaintiff's claim is legally recognized.[140] In other words, the equities of jurisdiction cannot be placed categorically on the side of plaintiffs. Additionally, considerations such as these should be given only minimal attention so long as a forum is available to adjudicate the plaintiff's claim, whether or not the plaintiff is comfortable with the courthouse and local law. It is the availability of this forum that is the important test.

Opponents also assert that confusion over jurisdiction will increase greatly under a necessity doctrine, which requires courts to engage in a balancing and weighing of the particular interests of the parties instead of a determination of minimum contacts.[141] A balancing approach places all jurisdiction questions upon a continuum, complicates the review of each case, and establishes a long list of decisions without much precedential value.[142] The current approach, which sets a threshold of contacts for the assertion of jurisdiction that clearly complies with due process and which provides a test that is readily applicable, does not do any constitutional injustice to the plaintiff.[143] Should courts begin to use a balancing approach, it is a distinct possibility that the state courts would tend to resolve doubts in favor of the assertion of jurisdiction, instead of maintaining an impartial position.[144] Since the majority of plaintiffs and interests are served under the present minimum contacts analysis, it is better to maintain a standard that meets the fundamental fairness requirement of the fifth amendment, rather than institute a standard that could throw the orderly determination of jurisdiction into disarray.[145]

Further problems arise when courts attempt to divide plaintiffs and

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138. Louis, *supra* note 93, at 429.

139. *Id.* Further, in many instances, making the defendant come to the plaintiff could force the defendant to appear in unlimited fora.

140. *See generally* Brilmayer, *supra* note 78.

141. Louis, *supra* note 93, at 432 (judical review complicated because of the multitude of relevant factors).

142. *Id.* It is questionable, though, whether the current system in the United States produces much precedent of value.

143. *See* Louis, *supra* note 93, at 430-32 (justice is usually served by a mechanical test).

144. *Id.*

145. *See* Brilmayer, *supra* note 78, at 105-06.

defendants into various categories, and then use the categories to determine the results of the jurisdictional analysis. One type of distinction—whether the plaintiff is domestic or foreign—results in a direct prejudice against defendants sued by United States plaintiffs.[146] Instead of providing an arena equally protective of all, courts in the United States are more inclined to accept jurisdiction for a domestic plaintiff than for a foreign one.[147] If courts employ this provincial approach, defendants may be prejudiced not by their nationality, but by that of their accusers.

Another distinction—whether the plaintiff or defendant is a corporation or an individual—can result in misguided advantages to parties.[148] Simply because a defendant is a corporation does not mean it is better able to defend itself in the plaintiff's forum, even if the plaintiff is an individual.[149] To properly use this "means-test" type of distinction, courts would have to make an economic and personal evaluation of each plaintiff and defendant to assure an accurate analysis. It is unclear how courts would be guided in choosing which factors should fit within this type of analysis. The process can only become more complicated when there are multiple parties to the action.[150] In support of the current approach is the argument that since the plaintiff wants to upset the status quo, he should be required to seek out the defendant to gain a remedy.

The necessity-jurisdiction proponent's analysis includes examining the adequacy of the foreign tribunal and casting a general doubt upon the ability of foreign courts to handle complex issues. However, any assumption that foreign courts are deficient in their ability to handle a situation or to remain impartial is incorrect.[151] A simple difference in rules and procedures without some additional evidence suggesting an inherent unfairness should not be sufficient to permit a United States court to assert its jurisdiction.[152] In fact, there are many instances when a foreign tribunal will be better suited to handle a particular claim. The foreign tribunal may be more convenient for handling the litigation because of the

146. Note, *Forum Non Conveniens, supra* note 104, at 393.

147. *See* Louis, *supra* note 93, at 430.

148. *See supra* note 99.

149. *Id.*

150. *See supra* note 99 and accompanying text. To assert jurisdiction in some of the multiple-party cases would leave nothing of the protections of due process. *See generally* Louis, *supra* note 93.

151. Note, *Forum Non Conveniens, supra* note 104, at 385.

152. As long as a foreign court has jurisdiction without a showing of fraud, prejudice, or discriminatory procedures, the jurisdiction should not be questioned. However, this does not mean that some countries should not be above suspicion. *Id.* at 385-87.

location of the parties and the evidence, or because of its familiarity with the applicable law.[153]

The doctrine of forum non conveniens is, at best, an uncertain factor within any necessity analysis. The doctrine of forum non conveniens can apply only when there are at least two appropriate fora and the court making the analysis has jurisdiction over the cause of action.[154] The United States Supreme Court has recognized that the availability of a second forum does not guarantee the application of law favorable to one party.[155] Forum non conveniens, if utilized, further limits the ability of a plaintiff to forum-shop and negates any argument that the characteristics of the substantive law of the foreign tribunal should enter into the jurisdictional analysis.[156]

The requirements of forum non conveniens cannot be reconciled with the necessity-jurisdiction proponent's position. If a necessity analysis is to apply, there cannot be more than one appropriate forum available, and the danger that allowing permissive jurisdiction will promote forum shopping must be present. The doctrine of forum non conveniens safeguards against the problems presented by inappropriate fora and forum shopping.[157] One effect of the "necessity" approach is a substitution of jurisdictional analysis for the forum non conveniens analysis.[158] Within a forum non conveniens analysis, an almost automatic acceptance of jurisdiction over the action occurs. Thus, the plaintiff is encouraged to attempt suit in the forum with the most favorable law, instead of in the most appropriate court.

The seminal decision providing guidance in the forum non conveniens doctrine is *Gulf Oil Corp. v. Gilbert.*[159] The Court in *Gulf Oil* held that transfer of causes through forum non conveniens is entirely at the discretion of the trial court, and provided a list of private and public interest

153. *Id.* at 387.

154. *See* Note, *Forum Non Conveniens in the Absence of an Alternative Forum*, 86 COLUM L. REV. 1000, 1008 (1986).

155. Piper Aircraft v. Reyno, 454 U.S. 235, 247 (1981). In other words, if another court takes jurisdiction, one cannot assume it will be partisan toward the defendant.

156. *See* Note, *supra* note 154, at 1006.

157. *Id.*

158. And if parties previously selected a forum through use of a forum-selection clause, a forum non conveniens analysis would substitute its decision for what the parties negotiated. This would encourage parties to disregard their contractual obligations and seek the most advantageous forum. *See* Note, *The Convenient Forum Abroad Revisited*, *supra* note 104, at 763.

159. 330 U.S. 501. Plaintiff brought suit in New York over an explosion and fire to a warehouse in Virginia. He alleged the defendant was negligent in the delivery of gasoline, resulting in the fire. *Id.* at 502-03.

factors for use in a balancing test.[160] The precedential force of this decision, however, is uncertain because an alternative forum was, in fact, present.[161] Any discussion about the need of a second available forum for the application of the doctrine was merely dicta. In a situation in which two forums are open to the plaintiff, the question becomes at what point such a balancing test is applicable. The basis for the balancing test is not clear, since no constitutional source was given by the Court. Following the issuance of *Gulf Oil*, lower courts have steadily approved its theory of forum non conveniens. Some courts have given the doctrine a constitutional basis through the due process clauses of the fifth and fourteenth amendments.[162]

Using forum non conveniens to deal with international lawsuits is an application of the doctrine for a purpose opposite to that for which it was intended. Such an application protects United States plaintiffs from the potential bias of courts of other nations, rather than protecting foreign parties from the bias of state courts.[163] No party coming into court is ever guaranteed the fullest possible extension of due process. Instead, "[t]here may only be a denial of due process when that process which should be accorded, under those circumstances, is denied."[164]

The argument that expanding the range of cases where jurisdiction is accepted will enhance international transactions by increasing the use of forum-selection clauses lacks merit. It is only logical that foreign individuals or corporations facing a greater chance of being hauled into a United States court, perhaps regarding an isolated action involving facts not entirely within their control, might well decrease their rate of investment here. Foreign parties will likely be reluctant to involve themselves

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160. *Id.* at 508. These factors include:

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

Id.

161. Virginia was an alternative forum. The plaintiff resided there, the defendant was qualified to do business there, and the cause of action arose there. *Id.* at 502-03; Note, *supra* note 154, at 1004.

162. *See, e.g.*, Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 915 (S.D.N.Y. 1977), *aff'd*, 588 F.2d 880 (2d Cir. 1978); Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 483, 467 N.E.2d 245, 250, 478 N.Y.S.2d 597, 602 (1984), *cert. denied*, 469 U.S. 1108 (1985).

163. *See* Note, *Forum Non Conveniens, supra* note 104, at 390.

164. Note, *supra* note 41, at 760 n.124 (emphasis omitted) (construing Board of Curators v. Horowitz, 435 U.S. 78 (1978)).

in the United States economy without a sufficient indication of what repercussions their actions will have. Unpredictable jurisdiction might well prove discouraging enough to slow the rate of foreign investment.

Necessity jurisdiction could reduce forum-selection clauses to meaningless words. Parties will not be able to rely on the clauses, and will be deterred from using forum-selection clauses. In a tight quid pro quo negotiation, a party will not make concessions in return for a choice of forum unless confident that the clause is enforceable. Furthermore, businesses engaging in international trade should accept the risks inherent in dealing with volatile governments. A business can protect itself against potentially unfavorable forum-selection clauses by choosing a forum located in a nation with a stable government.

V. THE ELEMENTS OF A JURISDICTION BY NECESSITY ANALYSIS

If the Supreme Court were to recognize jurisdiction by necessity, what considerations would be taken into account in the standard of review it promulgates? Part III of this Note explored the pros and cons of necessity jurisdiction, and the factors discussed there could be aspects of such a standard of review, particularly the forum non conveniens consideration. There are several crucial elements that a court must consider in determining a standard for jurisdiction by necessity.

The following is a typical situation in which the prospect of jurisdiction by necessity may arise. Assume a United States citizen brings suit on a contract with a foreign corporation for services to be provided in the foreign country. The parties negotiated the contract in the United States without a clause stating what the applicable law would be, and there is a failure to perform under the contract in that country. The defendant makes occasional purchases in and visits to the United States, and owns property scattered about the country. This is basically the *Helicopteros* situation except that the plaintiff's case in *Helicopteros* was based in tort and foreign law was held applicable. In addition, assume the available foreign forum is in a country openly antagonistic toward the United States, and whose judicial system lacks the procedural and substantive protections generally afforded by United States courts, such that, in effect, there is no available alternative forum. Further, assume the properly applicable law is that of the United States, and, should the court render a judgment, the plaintiff may be able to secure at least part of the judgment from property located within the United States. This property is wholly unrelated to the cause of action. Finally, the record is fully developed to reflect all these facts.

A. *Aggregate Contacts Instead of Minimum Contacts*

Since *Shaffer*, all courts must use the standard set out in *International Shoe* and its progeny for determining whether to assert jurisdiction.[165] These cases established a boundary that maintained due process while maximizing a court's opportunity to take and hold jurisdiction. Examining a defendant's contacts with a particular forum poses no problems for actions between citizens of the United States. The contacts of a foreign defendant, however, may be so widely and thinly scattered that it would be almost impossible for him to have established sufficient minimum contacts with one state to allow any court to assert jurisdiction.[166] Thus, a necessary element of any jurisdiction by necessity analysis is an aggregation of contacts: an examination of the contacts of a foreign defendant to the United States as a whole, instead of contacts to one particular forum state.[167] Aggregation does not offend the Constitution. A court's power to aggregate emanates from the power of Congress to assert jurisdiction over persons within the United States.[168] Even with aggregation, the defendant is guaranteed any fifth amendment due process rights to which he may be entitled, while the plaintiff is afforded a better chance to have his cause of action recognized, evaluated, and tried.[169]

A federal court officially recognized aggregation of contacts in *Cryomedics Inc. v. Spembly, Ltd.*[170] In *Cryomedics* a foreign corporation manufactured and sold products to distributors in the United States, who then sold those products to individual parties.[171] The plaintiff, a United States company, brought a patent infringement suit against a foreign corporation in federal court in Connecticut. The defendant corporation moved to dismiss, claiming its contacts with the forum were insufficient for the court to exercise jurisdiction under the prevalent analysis.[172] The court denied the motion to dismiss, holding that in personam jurisdiction over a foreign defendant is appropriate when an aggregation of his con-

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165. 433 U.S. at 186.

166. Lilly, *supra* note 23, at 116-17.

167. *Id.* at 117.

168. *See id.* at 129. This concept harkens back to the territory or power principle of jurisdiction where a sovereign had control over all persons or property within its borders. *See supra* note 7 and accompanying text.

169. *See* Note, *supra* note 29, at 415-16.

170. 397 F. Supp. 287 (D. Conn. 1975). *See also* Case Comment, *supra* note 108, at 436-38 (analysis of *Cyromedics* and development of aggregate contracts).

171. 397 F. Supp. at 287-88.

172. *Id.* at 288. Plaintiff advanced the argument that the defendant's aggregate contacts to the United States could be evaluated. *Id.* at 289.

tacts reveals a sufficient basis to accord with the requirements of fifth amendment due process.[173] Basing its decision on the notion that the territorial limits of the arm of government which is asserting jurisdiction should determine the extent of that jurisdiction rather than the geographical extent of the state where the court is located, the court stated that in federal question suits the United States is the entity with which a defendant must have sufficient contacts.[174] Here, of course, the "arm" of reference is the judicial branch of the United States government, so it is contacts with the United States as a whole which the court ought to consider in determining the propriety of asserting jurisdiction. The court, however, distinguished federal question actions from diversity actions, concluding that federal question actions are unique to United States jurisdiction and particularly appropriate for utilizing an aggregation of contacts.[175]

In some areas, Congress has prescribed when a foreign sovereign may be sued and when an aggregation of contacts is mandated.[176] For example, the heavy increase in foreign and domestic involvement in international trade has caused Congress to shift the protection for other nations in United States courts from an absolute sovereign immunity to a restrictive immunity by passage of the Foreign Sovereign Immunities Act (FSIA).[177] The FSIA contains procedural and substantive rules governing suits against foreign governments.[178] When a foreign sovereign is sued under the FSIA, the court must evaluate that sovereign's contacts with the entire United States to determine the general fairness and constitutionality of accepting jurisdiction under due process.[179]

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173. *Id.* at 290. Along with a sufficient quantity of contacts, there must be adequate service of process under the Federal Rules of Civil Procedure. But beyond this, the only limit to accepting jurisdiction is the looming threat of forum non conveniens. *Id. See also* von Mehren and Trautman, *supra* note 92, at 1123-25 n.6.

174. *See* 397 F. Supp. at 291; Case Comment, *supra* note 108, at 442-43. Important to the court's analysis was the foreseeability of defendant's contacts to the forum, which included a non-manufacturing license the defendant had in the state of Connecticut. 397 F. Supp. at 291; Case Comment, *supra* note 108, at 442 n.33.

175. 397 F. Supp. at 291-92. Logically, whether or not it is a federal question action, as long as there is a foreign defendant, the defendant's contacts should be aggregated.

176. *See* 28 U.S.C. §§ 1330, 1602-11 (1982).

177. Lilly, *supra* note 23, at 119-21.

178. *Id.* at 120-21. For a detailed discussion of the FSIA and its development, see *Special Issue: The Foreign Sovereign Immunities Act Ten Years Later*, 19 VAND. J. TRANSNAT'L L. 1 (1986) (compilation of articles addressing interpretations and implementations of the FSIA).

179. Lilly, *supra* note 23, at 121-22.

While *Cryomedics* and the FSIA are the only two times that an aggregation of contacts approach has been recognized as appropriate, these two efforts suggest an increased willingness of United States courts and the United States Congress to expand the scope of permissible jurisdiction. Aggregation is a positive way to expand jurisdiction without offending the dictates of due process. But given the potential sensitivity of any situation involving foreign parties, legislative investigation and research fully exploring the implications of all actions involving international parties would be preferable to any substantial expansion of jurisdiction by judicial tribunals lacking the benefit of Congressional data-gathering resources. Following such investigation and research, Congress can intelligently limit a court's ability to assert jurisdiction and address issues such as service of process, which are particularly important when a court seeks to assert jurisdiction. Foreign parties are thus protected from a state's overreaching and given meaningful due process protection under the fifth amendment. Any new legislation should not contravene *International Shoe*, as long as it is developed with full respect for fourteenth amendment due process rights.[180]

B. *Choice of Law*

The interplay between jurisdiction and choice of law is quite relevant to a consideration of jurisdiction by necessity. The two concepts are not, and should not be mistaken as, interchangeable. Jurisdiction concerns the ability of a court to exercise its power to adjudicate a case, while choice of law governs the substantive law that will apply to resolve the issues of the case.[181] In most cases, the proper jurisdiction and chosen law will be of the same forum. Situations exist, however, in which a court may properly assert jurisdiction, while not applying its own law. This may occur when personal jurisdiction is based on a defendant's individual contacts with the forum, while the cause of action is based on an incident or occurrence not taking place within the forum.[182] In this situation, some state long-arm statutes allow the forum with jurisdiction to apply its own law automatically.[183]

The United States Supreme Court drew a distinction between an as-

180. 326 U.S. at 313, 316. *See* Lilly, *supra* note 23, at 148. *See generally* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW (K. Nadelmann, A. von Mehren & J. Hazard 1961).

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

182. *Id.* at 1031-32.

183. *Id.* at 1032.

sertion of jurisdiction and the application of a forum's own law in *Hanson*.[184] As Chief Justice Warren stated:

> [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 trustee. As we have indicated, they are insufficient to sustain the jurisdiction.[185]

In the Court's logic, while a forum may properly exercise personal jurisdiction over a person, it does not automatically have the right to apply its own law.[186]

In practice, jurisdiction and choice of law are so aligned that the majority of forums do apply their own law once they have accepted jurisdiction.[187] This suggests that courts may generally decide jurisdiction cases by first deciding which substantive law should apply to yield a desirable result, then interpreting procedural law so as to allow the application of the chosen substantive law.[188] However, such matters of convenience and good intentions should not govern a court's choice of law or determination of jurisdiction.[189] As declared in *Fuentes v. Shevin*:[190]

> Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were

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184. 357 U.S. 235. *See supra* notes 32-38 and accompanying text; Silberman, *supra* note 5, at 82-84. *But see* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction Of State Courts, From* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569, 621-23 (1958) (criticizing *Hanson* as still applying territorial limits to state power).

185. 357 U.S. at 254 (footnote omitted).

186. *Id. See* Sedler, *supra* note 181, at 1032.

187. Sedler, *supra* note 181, at 1031. *See generally* Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformation*, 25 UCLA L. REV. 181, 227-33 (1977). Courts apply their own law as a matter of policy, to reflect the concerns and objectives underlying that law.

188. Sedler, *supra* note 181, at 1034.

189. An "interests analysis" approach to choice of law moves away from the territorial concepts that historically governed to a balancing of the objectives of the plaintiff and defendant. Silberman, *supra* note 5, at 85-86.

190. 407 U.S. 67 (1972).

> designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[191]

Under this decision, even if a court denied a plaintiff recovery due to a fundamental difference in the laws of two nations, a properly sympathetic court still should not improperly apply its own law to achieve an equitable result. Jurisdiction by necessity should only provide a plaintiff with an opportunity to have a day in court, not ensure him a recovery.[192] Given the great, substantial impact that choice of law has upon the rights of individuals, courts should maintain a choice of law analysis separate from the jurisdictional analysis. In any event, the considerations necessary for a proper choice of law must not be subordinate to the jurisdictional analysis.[193]

C. *Enforcement of Judgments*

Enforcement of judgments bears a similar relationship to jurisdiction. The enforcement of judgments is closely connected to the jurisdictional analysis, while having its own distinct place in the adjudication process.[194] "Enforcement" is the ability of a court to implement its holdings or to render its judgments effective. Within the boundaries of the United States, enforcement of sister-state judgments causes little problem because article IV of the Constitution provides that "Full Faith and Credit shall be given in each State to public Acts, Records, and judicial Proceedings of every other State."[195] In the international setting, neither the United States nor foreign countries can give similar assurance. A country cannot assert jurisdiction over a party and enforce a judgment merely because it believes that judgment to be accurate and just. Some other nation may choose to assert jurisdiction over the same cause of action and then seek to enforce a judgment of different terms within its own borders.[196] If the forum country is to receive the cooperation of other

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191. *Id.* at 90 n.22 (quoting in part Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

192. *Compare supra* notes 93-95 and accompanying text (promoting the plaintiff's right to a day in court) *with supra* notes 135-40 and accompanying text (suggesting a plaintiff has no automatic right to a day in court).

193. Silberman, *supra* note 5, at 82. As Silberman states, "if a court has the power to apply its own law, it should have the power to exercise jurisdiction over the action." *Id.* at 88 (emphasis omitted).

194. *See* von Mehren and Trautman, *supra* note 92, at 1126.

195. U.S. CONST. art. IV, § 1.

196. Von Mehren and Trautman, *supra* note 92, at 1126-27.

sovereigns in gaining enforcement of judgments and remedies, its courts must consider what other judicial systems are likely to consider appropriate and reasonable.[197]

The guiding principle for United States courts, and courts of other countries concerned with the proper enforcement of foreign judgments, is known as "international comity." Justice Gray stated in *Hilton v. Guyot* that:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[198]

This ambiguous standard is subject to a multitude of interpretations, and has been best paraphrased as "recognition will be given when it will be given."[199] United States courts have followed a practice of enforcing foreign judgments when they find that the foreign court accorded the parties justice and fair treatment.[200]

Practical considerations, such as the likelihood of enforcement, are a major part of a necessity jurisdiction analysis, but they alone should not determine whether a court asserts jurisdiction. Jurisdictional rules presuppose that potential forums will not take offense at any particular court's assertion of jurisdiction in an action, and that other potential forums similarly will not seek to frustrate or deny enforcement of any results of the proceedings.[201] Thus, before a United States court asserts jurisdiction in a lawsuit with international ramifications, that court should consider whether a foreign country would recognize or enforce the judgment of the United States court. However, where no foreign forum is available as an alternative for the action, no real reason not to assert jurisdiction exists, even though enforcement may present problems. It is entirely possible that the foreign country could be persuaded to recognize any United States court judgment, or that the domestic court may

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197. *Id.* at 1127.

198. 159 U.S. 113, 163-64 (1895). *See generally* Recent Development, 20 TEX. INT'L L.J. 217, 219 (1985).

199. Recent Development, *supra* note 198, at 220 (quoting Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 54 (1962)).

200. 159 U.S. at 202. The Court requires fairness in proceedings if they are to conform with due process guarantees.

201. Von Mehren and Trautman, *supra* note 92, at 1127.

be able partially to fulfill the judgment within its own borders.[202] It is not only theoretically preferable, but eminently practical, that all actions should be governed under the overriding protection of international comity.

VI. CONCLUSION

The hypothetical situation presented at the outset of Part IV of this Note offers an ideal situation for the application of jurisdiction by necessity under the guidelines suggested in this Note. The traditional analysis would produce a ruling that the defendant has insufficient contacts with the forum for an assertion of jurisdiction. However, the plaintiff is a citizen, presumably injured, who can only be made whole if his suit is heard in the United States. First, under the aggregation of contacts approach, even though the defendant may only have one contact with the forum, he has substantial contacts throughout the United States in business, and reasonably can expect to become involved in lawsuits arising from his business activities. Furthermore, no alternative providing the plaintiff with any opportunity to have his claim fairly determined appears to exist—the plaintiff might be able to get a determination, but he would not have an impartial hearing. The foreign forum (where a res for payment of any damages verdict for the plaintiff is located) may choose not to recognize any action taken by the court, but the property located in the United States may give a partial satisfaction to any judgment. The defendant suffers no harm, since he still receives those constitutional protections. In addition, if the defendant legitimately rebuts the plaintiff's claim that the United States is the only available forum, then the defendant should probably receive a declaration of forum non conveniens and get the case dismissed. Admittedly, the United States court may not be thoroughly comfortable applying foreign law where appropriate. However, this problem pales next to the service of justice which accepting jurisdiction may accomplish. Assuming no overriding international considerations, United States courts, through jurisdiction by necessity, can fill a void that presently exists in the law.

While jurisdiction by necessity may appear to fill a void in the range of remedies available to plaintiffs, the area it addresses is not at all devoid of guidance. The theoretical motivation behind support for the doctrine of jurisdiction by necessity is fairness, but in practice the doctrine reverts to the territorial concepts of *Pennoyer*. By continually expanding jurisdiction in the interest of justice, the theory amounts to a ruling that

202. Von Mehren and Trautman, *supra* note 92, at 1126-27.

any time a foreign defendant has contact with the United States, even if its effect is in the foreign country, that defendant risks being hauled into a United States court. While a defendant should be expected to answer for his actions, the common concept of fairness does not hold that such a defendant could and should foresee many of those actions. In theory, constitutional due process protects against any noxious overreaching. In reality, parochial attitudes in the courts obscure those protections. Using forum non conveniens as a means of protecting defendants courts can twist a well-defined legal doctrine into a catch-all bar to actions they feel are improper. To allow courts to proceed using such an individualistic analysis—as an adoption of jurisdiction by necessity would dictate—would subordinate general, predictable legal principles to situational decision-making.[203] The potential impact on international transactions and legal harmony reaches far beyond the plaintiff and defendant of a particular case and even broaches separation of powers considerations. The Congress and the Executive are the appropriate bodies to address international matters. If Congress legislates to provide power to the courts to assert jurisdiction over certain international situations, this legislation would take into account important political and foreign affairs concerns and knowledge of international political realities, not simply one court's sympathy for one plaintiff.

The above argument appears to strike a balance between the interests of plaintiff and defendant. However, in the end, a plaintiff will receive his opportunity to obtain justice *most* of the time. At other times—those situations with which this Note is concerned—jurisdiction, an element of procedure, in effect serves as judge and jury over the plaintiff. Those rules which the court system has developed to regulate the flow of its business are allowed to interpose themselves into real-life disputes, becoming outcome-determinative. The substance of a lawsuit, the true essence of matters which should come before the court, becomes obscured by the "envelope of . . . technical forms."[204] As Justice Brennan declared:

> [C]ases [may] approach the outer limits of International Shoe's jurisdictional principle. But that principle . . . may be outdated. . . . ['J]ustice' can be as readily offended by the perpetuation of ancient forms that are no longer justified. . . .
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> . . . Though [*International Shoe*] . . . represented a major advance, the structure of our society has changed. . . . [And] "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over for-

203. As the old legal saw has it, "hard facts make bad law."

204. R. MILLAR, *supra* note 1, at 3.

eign corporations and other nonresidents."[205]

Jurisdiction by necessity does not expand or introduce any startling new concepts; it merely allows a specific type of plaintiff his chance for a fair day in court. Under a traditional jurisdictional analysis, plaintiffs who have been injured or wronged but whose causes of action lack certain judicially defined elements are left without a remedy. The philosophy is, it would seem, that "it is expedient . . . that one man should die for the people, and that the whole nation should not perish."[206] At some point, however, the courts must decide whether they are more interested in expedience or justice.

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205. *World-Wide Volkswagen*, 444 U.S. at 307-08 (Brennan, J., dissenting) (quoting in part *McGee*, 355 U.S. at 222).

206. *John* 11:50 (New American Standard).