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TERRITORIAL DUE PROCESS: ANALYSIS OF AN EMERGENT DOCTRINE

JAMES AUDLEY McLAUGHLIN*

Preface

This article is the first installment of a projected set of articles summarizing, with its historical development, modern-day due process doctrine. In fact, this article on territorial due process is only one of two parts on that particular aspect of due process. This first part is a conceptual analysis of territorial due process. The second part will be a synthesis of the analytical threads of the doctrine into constitutional "rules" and their use. That is also the projected scheme for the substantive and procedural aspects of due process: first analysis, then synthesis.

The goal of this projected set of articles is to see due process of law whole—to develop a coherent theory of due process in its various doctrinal manifestations so that the law student and the busy practitioner can make more sense of the due process issues with which they are confronted. It is based on Supreme Court articulated doctrine, but is, of course, interpretative, often critical and perhaps even a bit irreverent. But then whoever claimed that due process as now practiced is the apotheosis of judicial wisdom?

The following is an introduction to the whole set of articles on due process, collectively entitled *A Student and Practitioners' Guide to Due Process of Law*. This introduction should help put territorial due process in perspective.

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I am most grateful to Jo Walton Eaton, articles editor of Volume 80 of this review, for getting me started, for her patient persistence in keeping me going and for her editorial comments and help along the way. I also am indebted to the staff of Volume 81 for their editorial assistance, and especially to James E. Showen, whose own note on *Shaffer v. Heitner* (appearing at 80 W. VA. L. REV. 285) was most helpful to me.

INTRODUCTION

The guarantee of due process of law is in its broadest sense a guarantee to the individual of *judicial protection against arbitrary government*. Government can be arbitrary in three general ways: (1) by attempting to govern those not within its territory; (2) by making arbitrary policy manifested in rules of law; and (3) by interfering with important individual interests without procedures that assure that the general policy is being fairly applied to individual cases—"fair" here encompassing two distinct but related ideas: (a) accurate (not mistaken) application and (b) predictable application.¹

The meaning of fifth and fourteenth amendment due process most easily inferable from the constitutional language itself is that the government may not visit criminal-type sanctions on an individual without going through the ordinary legal procedures, *i. e.*, a law and notice of its breach and a hearing—"procedural due process." That this is probably not even the complete "original" meaning as used by the authors of the Constitution was pointed out by the late Roscoe Pound:

¹ The doctrines protecting against procedural arbitrariness usually travel under the rubrics "procedural due process," "void for vagueness," and "retroactivity" (including "ex post facto"). Procedural due process is concerned with the accurate translation of general policy into concrete instances. The vagueness and retroactivity doctrines are concerned primarily with the translation of policy into rules such that application of the general policy to concrete instances is predictable. Sometimes the Court will talk about an act being a forbidden bill of attainder. *United States v. Brown*, 381 U.S. 437 (1965). Bills of attainder are a particularly egregious form of procedural unfairness, being both unpredictable and inaccurate. They are forbidden in both federal, U.S. CONST. art. I, § 9, cl. 3, and state, U.S. CONST. art. I, § 10, cl. 1, governments. In its original form a bill of attainder was simply a legislative act condemning a named person to death. See C. WEDGEWOOD, THOMAS WENTWORTH, FIRST EARL OF STRAFFORD (1962), for an excellent account of its use by the long parliament to strip King Charles I of his lieutenants in the prelude to the English Civil War. After the American Civil War the bill of attainder clauses were used to nullify laws passed by Congress and the state of Missouri to disqualify from certain occupations those who had participated in the "late rebellion." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866). Bills of attainder are unpredictable because they are based on no articulated policy announced in advance of the acts which cause the condemnation. They are inaccurate because no specific proof or other truth guaranteeing safeguards of a judicial trial are used to establish the acts which cause the condemnation. But calling these retroactive acts "bills of attainder" adds nothing to analysis. See *United States v. Lovett*, 328 U.S. 303, 318 (1946) (Frankfurter, J., concurring). Except to show the deep Anglo-American commitment to procedural regularity, reference to the bill of attainder clauses is not useful. See Justice White's dissent in *United States v. Brown*, 381 U.S. at 462.

In 1642, Coke's *Second Institute*, containing his commentary on Magna Carta, was published by order of the House of Commons. This commentary was greatly relied upon in controversies between the colonies and the British government before the Revolution and furnished much of the material for our American Bill of Rights. It is a foundation document for the history of our constitutional law. The part especially noteworthy is the long commentary on chapters 39 and 40 in which he takes them up clause by clause and shows how they have been interpreted and developed by legislation of Parliament, in the law books, and by judicial decision. He considers the meaning of *lex terrae*, "law of the land," and shows that as far back as the reign of Edward II [1322-77] the phrase "due process of law" was used as its equivalent. In other words, law in that phrase meant more than an aggregate of laws, and due process of law had much more than a merely procedural meaning. As these phrases were put in our American constitutions by lawyers who took the *Second Institute* for a legal Bible, this exposition needs to be remembered. * * * He explains the word "liberties" as meaning more than freedom of the physical person from arrest or imprisonment. But he shows that it had always been construed to cover "the freedoms that men have."²

Whatever the original or most obvious meaning is, it is now clearly established that the due process clauses of the fifth and fourteenth amendments³ have substantive as well as procedural aspects, and that they are capable of being read to protect individuals from the full range of potential governmental arbitrariness. The following truncated rule may help illustrate the current range of the phrase "due process of law":

When government affects an individual "due process" guarantees that (1) the individual "is within" the jurisdictional territory of the affecting government, (2) such government is acting pursuant to a policy that is not arbitrary (*i.e.*, is "reasonable," "just" and "fair"),⁴ (3) as manifested in a law

² R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 47-48 (1957).

³ U.S. CONST. amend. V; U.S. CONST. amend. XIV. The fifth amendment has been held to include an equal protection principle subsumed in the notion of due process. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The fourteenth amendment has long been held to include a no-taking-of-property-without-just-compensation principle. *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

⁴ My use of the words "reasonable," "just," and "fair" is meant to refer to three distinct principles which deal with the arbitrariness of substantive policy, each one of which will be the subject of an extended analysis. "Reasonable" refers to the rationality principle currently analyzed as "substantive due process." "Just"

which is not (a) retroactive or (b) too vague to inform the average individual of what the policy expects of him or her and (4) the method of applying the policy-manifesting law to individual cases guarantees a level of mistaken applications low enough to be acceptable under the circumstances.

For want of a better name, let's call our "rule" the *short form version* of the doctrine of due process of law as that doctrine has been developed by the Supreme Court. As a tool in itself for deciding concrete cases, the short form version is almost as unusable as quoting the amendments in pure form. But hopefully it will help the reader see due process whole and will serve as the touchstone for further explication.

An outline of the projected set of articles follows:

- A. Territorial Overreaching
- B. Arbitrary Policy
 - 1. The Rationality Principle
 - 2. The Equality Principle
 - 3. The Expectation Principle
- C. Arbitrary Implementation
 - 1. Predictability
 - a. Retroactivity
 - b. Vagueness
 - 2. Accuracy

This article will begin the elaboration of due process doctrine with a conceptual analysis of territorial overreaching.

refers to the equality principle which has given rise to the elaborate doctrine of equal protection of the laws. A perfectly rational law may nonetheless be unjust. "Fair" refers to the expectations principle usually analyzed under the rubrics "taking without just compensation" or "impairment of obligations of contract." Again a law can be, with these definitions, rational and just but unfair. All this Humpty-Dumptying (See L. CARROLL, *THROUGH THE LOOKING GLASS* (1872)) about the meaning of words is meant to point up an important fact about the use of language in the due process area. It is characterized by imprecision and redundancy. Courts say this law is "arbitrary, capricious and unreasonable" as if these three words marked three different things wrong with the law. Such phrases should be a red flag to any reader that articulate analysis has stopped (if it ever started) and naked feelings or intuitions about the propriety of governmental action have taken over. No commentary worthy of the name "scholarly" is guilty of such locutions. I will do my best. If I should use a phrase like "arbitrary and capricious" (which I will not) I will mean two distinct things such that some things could be arbitrary but not capricious and vice versa.

DUE PROCESS AND TERRITORIAL OVERREACHING

The idea of a doctrine of "territorial due process" separate from "procedural due process" or "substantive due process" is relatively new.⁵ In fact, until very recently, the Supreme Court had only rarely attached any identifying label to the words "due process of law" when discussing its various applications.⁶ Moreover,

⁵ I use the phrase "territorial due process" to identify all the due process doctrine relating to territorial jurisdiction of government. The territorial jurisdiction of government may be asserted in either its legislative or adjudicative capacities. Thus there is "legislative jurisdiction" and "adjudicative (or judicial) jurisdiction." This seems to parallel two of the traditional three branches of government. There is no "executive or administrative jurisdiction" relevant to the territorial context. It would appear that in this context, at least, the traditional second branch of government, the executive, is always acting as an adjunct to one of the two governmental capacities—policy and law-making (legislative) and coerced policy application (adjudicative). The executive branch is best contrasted with the other branches not by the governmental capacity or power it exercises but by its mode of behavior. It does; the others think. Legislatures deliberate and make policy. Executives apply the policy in the form of law. Where there is a dispute in application, *i. e.*, where coercion is necessary, another deliberative body, the courts, settle the disputed application and order it applied, and again the actual application (*e. g.* writ of execution, jailing) is carried out by the executive. The courts to a limited extent also make policy, especially in common law countries. Territorial due process applied to legislative jurisdiction is concerned with the fairness of the territorial reach of a particular government's policy. More precisely stated, it is concerned with the fairness of a government's policy as to "who" is subject to that government's legislative policy. Territorial due process applied to adjudicative jurisdiction is concerned with the fairness of the territorial reach of its coercive dispute-settling machinery. In a few instances issues as to both adjudicative and legislative jurisdiction appear in the same case. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The phrase "territorial due process" probably appears somewhere in the legal literature but I cannot find it. I remember it being used by then Dean Frank Strong, who taught constitutional law at Ohio State University College of Law when I was a student there, although I cannot find the phrase in Dean Strong's book used in the course. See F. STRONG, *AMERICAN CONSTITUTIONAL LAW* (1950). A recent telephone conversation with Dean Strong verified my remembrance; he was surprised that his book made no use of the phrase. A recent note in the *Harvard Law Review* refers to "the territorial conception of due process." 91 *HARV. L. REV.* 72, 82 (1977).

⁶ Without doing exhaustive research on this perhaps not trivial trivia, I find the earliest use of the phrase "substantive due process" by the Supreme Court to be in 1973 in a concurring opinion by Mr. Justice Stewart in *Roe v. Wade*, 410 U.S. 113, 167 (1973). The first use I found of the phrase in legal literature was in a student note in 1949. 24 *IND. L. J.* 451, 453 (1949). The phrase is in quotation marks indicating a self-conscious use by the author. The next use I found was in the title of an article by Professor Monrad Paulsen, *The Persistence of Substantive Due Process in the States*, 34 *MINN. L. REV.* 91 (1950). Professor Paulsen's use of the phrase was quite unselfconscious, yet of all the sources he cited (that I could track

until 1945, territorial overreaching by state governments was thought of as an aspect of the concept now labeled procedural due process. A court with jurisdiction was part of the procedure one

down) in discussing substantive due process for some 28 pages, only the Indiana Note, *supra*, used the phrase "substantive due process." Even an entire book on substantive due process written in 1941 never used the phrase, although the author spoke of the "substantive conception of the due process clause" and the "substantive meaning of the due process clause." B. TWISS, *LAWYERS AND THE CONSTITUTION* 50, 82 (1942).

The phrase "procedural due process" was first used by the Supreme Court (again as far as I am able to discover) in *Riley v. New York Trust Co.*, 315 U.S. 343, 354 (1941), but was used again only rarely, *e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950), until *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 339, 340 (1968) (Douglas, J.), and 342 (Harlan, J., concurring). The earliest use of this phrase I found in the literature was in a title, *W. Van Alstyne, Procedural Due Process and State University Students*, 10 U.C.L.A. L. Rev. 368 (1963). Again, I feel sure the phrase must have been used earlier, but I did not find it. In any event, the doctrines preceded their now familiar labels by many years and the Supreme Court has only recently used any adjective at all to qualify "due process." Why is this so? I can only speculate. Perhaps the Court, unconsciously, wanted to foster the illusion that due process is one grand monolithic idea.

As to whether this seeming trivia as to names is indeed trivial consider the following. A recent article by Professor James A. Martin of the University of Michigan, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976), argues that "the full faith and credit clause provides a better analytical aid than reference to due process concepts in analyzing and understanding leading decisions." *Id.* at 186. The stated premise for this conclusion is that "[the full faith and credit clause] incorporates established concepts of mutual respect among sovereigns." *Id.* at 186. I have no quarrel with his stated premise. *See* text accompanying notes 83-86, *infra*. I do disagree, however, with his conclusion quoted above that full faith and credit yields a better rationale than due process for the results of decided cases and with his final conclusion that due process is theoretically inadequate for limiting a state's choice of law. His conclusion is really based on a totally inadequate concept of due process in the territorial context, a concept he labels "substantive due process." *Id.* at 185, 192. In explaining why *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), cannot be successfully rationalized in terms of due process, he states that "[a]lthough the result has intuitive appeal, neither of the ordinary meanings of due process—substantive or procedural fairness—seems to be involved in *Dick*." *Id.* at 188. His explanation of *Dick* proves he has no idea that due process could include territorial fairness or that it has in fact included territorial fairness for some time. Labels do count. Since we have recently (in the last thirty years) started labelling due process, and since we have come up with but two labels for due process—substantive and procedural—it is easy enough to assume that due process is of two kinds only, and that any use of due process must be one of the two kinds. If the emerging doctrine of territorial fair play is to have further fourteenth amendment development by the federal courts it needs its own label—territorial due process (or jurisdictional due process)—else it will be confused with the doctrines of the substantive fairness of laws, and thus distorted and shrunken out of any usefulness.

was due.⁷ Furthermore the laws of a state were of no effect and thus not *law* outside its boundaries; therefore taking property in the form of a tax or a penalty for acts done outside the state was a taking without due process of *law*.⁸ Note that in both the judicial and legislative contexts just mentioned “no jurisdiction” comes first and “no due process” follows from it. Territorial due process as a doctrine distinct from procedural due process turns the proposition around. “No jurisdiction, therefore no due process” is now “no due process, therefore no jurisdiction.”

This section on territorial due process has two aims: first, an explication of the original doctrine that flowed from the “no jurisdiction, no due process” proposition, briefly exploring the problems the original doctrine raised and the solutions attempted within the

⁷ See *Pennoyer v. Neff*, 95 U.S. 714 (1877). The Court's words are:

Since the adoption of the Fourteenth Amendment . . . the validity of [no jurisdiction] judgments may be directly . . . resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. [The words “due process of law”] when applied to judicial proceedings . . . mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution . . . to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Id. at 733.

⁸ *Id.* at 720, 722-23 (citing *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1850)); J. STORY, *CONFLICTS OF LAW* § 539 (7th ed. 1872). In *D'Arcy v. Ketchum*, the Court had no fourteenth amendment on which to pin its refusal to allow full faith and credit to be given a judgment against *D'Arcy*, who was not served with process and did not appear in the judgment-rendering state. It reached the same result by interpretation of the full faith and credit act of 1790 in light of the international law as it existed among the states in 1790, which was “that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither *the legislative jurisdiction*, nor that of courts of justice, had binding force.” The Court, finding “no evil in this part of existing law, and no remedy called for,” held that “Congress did not intend to overthrow the old rule,” by the act of 1790. 52 U.S. (11 How.) at 176 (emphasis added).

It was not until 1897, however, that the court had occasion to use the fourteenth amendment to hold a state law unconstitutional as applied because the governing events were territorially beyond the state's *legislative* jurisdiction. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Later cases held acts in violation of due process because their purpose was beyond the state's legislative jurisdiction delimited by the “police power.” See *Lochner v. New York*, 198 U.S. 45 (1905).

original concept; second, an explication of the still developing modern doctrine based on the opposite proposition, its solutions to the old problems and the problems that are, as yet, unresolved. The second part of this article will be an attempt to formulate and justify some standards for solving territorial due process problems.

A. The Old Concept

The original concept of due process applied to territorial overreaching, "no jurisdiction, therefore no due process," made jurisdictional concepts crucial. A concept of jurisdiction could be based on an analysis of fairness in the territorial context, but for some reason this did not occur to jurists in the late nineteenth and early twentieth centuries. Perhaps it was because jurisdictional concepts were better developed than due process ideas of fairness, or because due process was a quite mechanistic idea then and did not suggest general notions of fairness. Or perhaps it was because the proposition "no jurisdiction, no due process" made jurisdiction seem prior to any idea flowing from due process itself, such that defining jurisdiction in terms of fairness or justice would have seemed circular—no fairness (due process), therefore no jurisdiction, therefore no due process. That fairness was not crucial to the development of jurisdictional concepts does not mean it did not inform the idea; but fairness was not central.⁹ Rather the idea flowed from the simple (and apparently self-evident) notion that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."¹⁰ This meant "that no State can exercise *direct* jurisdiction and authority

⁹ See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 726-27 (1877). "If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instrument of fraud and oppression." But "[s]ubstituted service by publication . . . may be sufficient to inform parties . . . where property is once brought under the control of the court by seizure" because the "law assumes that property is always in the possession of its owner, in person or by agent" *Id.* Ironically this notion of fairness (actual notice of the suit) is today considered an essential aspect of procedural due process. *Milligan v. Meyer*, 311 U.S. 457 (1940); *Schnoeder v. City of New York*, 371 U.S. 208 (1962); see *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The five elements of fairness relevant to territorial due process do not include *actual* notice but do include *planning* notice. See text accompanying notes 35-36 *infra*.

¹⁰ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

over persons or property without its territory.”¹¹ “[N]o tribunal established by it can extend its process beyond that territory so as to subject either person or property to its decisions.”¹² The Court in *Pennoyer v. Neff* did concede that one state’s actions “will often affect persons and property [outside] it.”¹³ No objection can be taken “[t]o any influence exerted in this way,” but “any *direct* exertion of authority upon [extraterritorial people or property]” is “usurpation.”¹⁴

Thus jurisdiction meant direct physical control—a laying on of hands as by service of process in the judicial context, or the ability to seize land or chattels or arrest people inside the state in either the judicial or legislative contexts. Almost forty years after *Pennoyer*, Justice Holmes gave his vaunted “clarity” to the development of the concept of jurisdiction: the “foundation of jurisdiction is physical power.”¹⁵ Since one (including the agents through which governments act) can only have physical power over things physically present, jurisdiction turned on the presence of something physical at the *time of assertion*¹⁶ of jurisdiction.

This concept answered most questions, though not all, for some of the things over which governments assert jurisdiction are abstractions, such as corporations, property interests, choses in action, and relationships (*e.g.*, marriage). But answers to these problems were worked out by identifying what seemed the most natural physical “thing” (person, land, or other object) with which the abstraction was concerned. Thus property interests in land or

¹¹ *Id.* at 722 (emphasis added).

¹² *Id.*

¹³ *Id.* at 723.

¹⁴ *Id.*

¹⁵ *McDonald v. Mabee*, 243 U.S. 90, 91 (1917). Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 *YALE L. J.* 289, 296 (1956), criticizes the quoted Holmes statement as “factually unsupported and functionally unsupportable.”

¹⁶ “The foundation of jurisdiction is physical power, although in civilized times it is not necessary to maintain that power throughout the proceedings properly begun, and although submission to the jurisdiction by appearance may take the place of service upon the person.” 243 U.S. at 91. Thus *continuing* physical presence was not necessary. Moreover, even actual physical presence was not necessary if the defendant was a resident at the time of assertion. Perhaps residents were felt to have a kind of general presence even when temporarily absent from the state. In any event, there seems to have been jurisdiction over an absent resident if a means of notification that had a reasonable chance of actually notifying the defendant was used, as was not the case in *McDonald v. Mabee*. See *Knowles v. Gaslight & Coke Co.*, 86 U.S. (19 Wall.) 58, 61 (1873) (dictum).

chattels were usually identified with the land or chattel, not the person having the interest.¹⁷ The land *is* the "property" in common legal and lay parlance. In fact, the connection is so strong between property and the objects of property that "property" is usually not perceived as an abstraction at all.

Uninformed by any articulated idea of the arbitrariness of territorial overreaching, this concept of "physical presence at the time of assertion," or more fully, "physical presence of the most natural connection with the basis of jurisdiction at the time of assertion of jurisdiction" in many instances produced neither predictable nor just results. This failure was compounded by the fact that there are four different general contexts of governmental activity, and thus four different ways governments encounter jurisdictional problems—four somewhat different opportunities for the original jurisdictional concept to fail. The contexts are jurisdiction to adjudicate, jurisdiction to tax, jurisdiction to regulate through "public law," and jurisdiction to apply "private law."¹⁸

The failures in the judicial area have been the most noticeable. Here, the original concept of jurisdiction produced fairly predictable, but often arbitrary, results. Jurisdiction over persons was both too broad and too narrow, while jurisdiction over property often seemed just plain capricious. Claims completely unrelated to

¹⁷ See *Pennoyer v. Neff*, 95 U.S. 714, 723-24, 727. See note 9 *supra*.

¹⁸ These contexts are sometimes referred to as "judicial jurisdiction" and "legislative jurisdiction." See F. STRONG, *AMERICAN CONSTITUTIONAL LAW* 1255 (1950); P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, *CONSTITUTIONAL LAW CASES AND OTHER PROBLEMS* 455 n.2 (4th ed. 1977). See extended comment at note 5 *supra*. Legislative jurisdiction encompasses jurisdiction to tax and to regulate. Regulation encompasses both "public law" regulation (criminal codes and other statutory regulation in the public interest, with the state or its surrogate (*e.g.*, private attorney general) as one party in any litigation involving its enforcement), and "private law" regulation (statutory and common law regulation of private relationships such as torts, contracts, property and trusts, with the state not a party to litigation involving its enforcement). The territorial problems that arise in these four contexts are taught in four different law school courses which are not generally thought to have much overlap: judicial jurisdiction in a civil procedure course; jurisdiction to tax in a course on state and local taxation or constitutional law; jurisdiction to regulate (in the public areas) in a constitutional law course (occasionally) or perhaps in an administrative law or regulated industries course; and jurisdiction to regulate private relationships in a course in conflict of laws. In the courts there is little cross citation of authority between the contexts in territorial due process cases, as if they are four separate and distinct doctrines. The contexts do create somewhat different problems but territorial issues have much in common and it is the burden of this article to attempt a unitary doctrine of territorial due process.

the property could be adjudicated and a person's interest in such property thereby extinguished without jurisdiction over the person.¹⁹ Moreover, defining the location of intangible property such as a debt, or stocks and bonds left defendants at the mercy of their debtor's wanderlust²⁰ or of a corporation's often irrelevant place of incorporation.²¹

But the doctrine of jurisdiction over persons was hardest to swallow, at least in theory. Any state a person was in, no matter how fleetingly, could gain jurisdiction to adjudicate a claim against him, however unrelated that claim was to the state, if process was served during the fleeting passage.²² As a practical matter, the transitory cause of action was seldom so abused, and did serve occasionally as an antidote to the much greater injustice caused by tortfeasors or contract breakers who moved away from the state of the tort or contract. Because of the presence "at the time of assertion" requirement of the old concept, the plaintiff in such a situation would have to go to the defendant's new state to sue unless the plaintiff could find him temporarily visiting or passing through his state or even a neighboring state and had the foresight to have process waiting.

A solution to this too narrow reach of the old concept was found for automobile torts by coupling the notion of consent that was built into the original concept with the early perception of cars as dangerous instrumentalities such that states could bar the use

¹⁹ *Pennoyer v. Neff*, 95 U.S. 714 (1877); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 (1971); Von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1139-41 (1966). This has traditionally been called *quasi in rem* jurisdiction. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950); *Hanson v. Denckla*, 357 U.S. 235, 245-46 (1958). See Note, *Civil Procedure—Concepts of Personal Jurisdiction Before and After Shaffer v. Heitner*, 80 W. VA. L. REV. 285, 290 n.29 (1978). The recent case of *Shaffer v. Heitner*, 433 U.S. 186 (1977), merely calls it "in rem jurisdiction." Von Mehren and Trautman would call it "limited general jurisdiction"—"limited" to the value of the asset seized but "general" in that any claim against the owner can be adjudicated no matter how unconnected with the forum state or the asset.

²⁰ *Harris v. Balk*, 198 U.S. 215 (1905); *First Trust Co. v. Matheson*, 187 Minn. 468, 246 N.W.1 (1932) (jurisdiction of intangible assets embodied in a document are "present" where the document is); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 68 (1971).

²¹ See *Shaffer v. Heitner*, 433 U.S. 186 (1977); *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174 (1942) (Utah allowed to exact inheritance tax on common stock of Utah corporation when owner of stock had no other contact).

²² *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959) (service over Arkansas in non-stop flight from Tennessee to Texas).

of cars on their highways, even to interstate travelers.²³ Therefore a state could make motorists consent in advance to service of process as a condition of using its roads.²⁴ At first, any driver who received a license to use the highways expressly had to authorize the secretary of state to receive service of process as his attorney-in-fact.²⁵ The ritual of actual service inside the state was felt to be necessary to the physical control that was the precondition of jurisdiction. In 1927 the Supreme Court further fictionalized this "voluntary" submission when it declared that a state could make the act of driving on the highways an implied appointment of the secretary of state as agent to receive service in suits growing out of the use of its highways.²⁶ So it was that jurisdiction over the most common and transient cause of tort actions came to satisfy justice without destroying the original concept of jurisdiction.

This same fiction of "voluntary" submission had been used earlier to obtain jurisdiction over corporate defendants who were licensed to do business or doing business in the state. Since a corporation is an abstract legal person composed of many physical things, such as owners, managers, workers, land, other physical property, and even some nonphysical things such as accounts receivable and good will, courts and legislatures have had great difficulty "locating" it outside its state of birth. Thus courts usually relied on presumed consent ("voluntary submission") to obtain jurisdiction. Again this fiction started with the corporation's actual authorization of some in-state individual to act as its agent for receipt of service of process,²⁷ and evolved into a presumption of such authorization.²⁸ But the ritual of in-state service of process was always required.²⁹

²³ *Hendrick v. Maryland*, 235 U.S. 610 (1915).

²⁴ *Kane v. New Jersey*, 242 U.S. 160 (1916).

²⁵ *Id.*

²⁶ *Hess v. Pawloski*, 274 U.S. 352 (1927).

²⁷ *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

²⁸ *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856). However, since the Supreme Court held in *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910), that a state may not prevent a corporation from conducting purely interstate business in its territory, it had no basis to coerce "consent to" service as a condition of doing such business; so "presence" outside the state of incorporation had to be allowed (contrary to the concept of *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), that a corporation only exists in the state of incorporation), and such presence was then found in the jurisdiction-asserting state. *Green v. Chicago, B. & Q. Ry.*, 205 U.S. 530 (1907) (presence not found); *St. Louis Sw. Ry. v. Alexander*, 227 U.S. 218 (1913) (presence found).

²⁹ And still is required by the law of many states. See, e.g., W. VA. CODE §§ 56-3-33(a) (1978 Cum. Supp.) (general long-arm statute), 56-3-31 (1978 Cum.

In the legislative realm this ritual of process and its saving fictions were irrelevant. "Presence" was necessary. A state taxed the physical things within its boundaries that a corporation owned, or taxed receipts from (and regulated) corporate "activities" within the state. But the test for corporate presence under the original doctrine looked not at corporate activity that touched the state in relationship to the state's purpose in asserting jurisdiction to determine whether such jurisdiction would be fair to all concerned; rather the test was "mechanical or quantitative"—was the activity "a little more or a little less."³⁰ In other words, a corporation was either "present" or not, regardless of the reasons for the state's action or the fairness of its assuming jurisdiction. "Presence" was a thing in itself. The jurists of that era would have thought Chief Justice Stone's idea that a corporation is "present" when it is fair to say it is "present" illogical—a putting-the-cart-before-the-horse sort of nonsense.

But ideas evolve and in law they evolve in response to the felt injustice produced by the existing concepts. Old concepts have only so much flexibility; then they break. So it was with the old jurisdictional due process concept. It occurred to Harlan Fiske Stone, one of the great innovators of American jurisprudence, that since the ultimate question is one of due process and due process is a guarantee of fundamental fairness, the territorial problems should be analyzed in terms of fairness. So in 1945, in announcing a decision for a unanimous Court in *International Shoe Co. v. Washington*,³¹ he introduced the proposition, "no due process therefore no jurisdiction," turning on its head a century of doctrine.³² *Pennoyer* and its progeny suffered a lingering death until

Supp.) (motorist long-arm statute); W. VA. CODE § 31-1-15 (1975 Replacement Vol.) (corporation long-arm statute).

³⁰ *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The Court cites *International Harvester Co. v. Kentucky*, 234 U.S. 579, 585-89 (1914) where "a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state of Kentucky" was held to be "doing business" and thus was sufficient "to manifest its presence" within the state and thus "to legitimate service of process on it." 326 U.S. at 314.

³¹ 326 U.S. 310 (1945).

³² The Court in *International Shoe* does not use the phrase "no due process implies no jurisdiction." That phrase is a way of summarizing the Court's reasoning which concludes with the famous test:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the mainte-

1977 when the Court in *Shaffer v. Heitner*³³ put it out of its misery. It is now officially dead but not buried; so as these things usually go, its carcass will litter the judicial landscape for some years to come.

nance of the suit does not offend "traditional notions of fair play and substantial justice."

326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In other words asserted jurisdiction is constitutional if it is fair; that is, fairness (due process) implies jurisdiction. The Court explains that "presence" was short hand for "those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." 326 U.S. at 317. The Chief Justice there cited Judge Learned Hand in *Hutchinson v. Chase & Gilbert*, 45 F.2d 139 (2d Cir. 1930). But until Judge Hand's explanation in *Hutchinson*, "presence" had not followed from fairness but the other way around: presence implied jurisdiction implied fairness. A careful reading of the pre-*International Shoe* cases clearly reveals this. Judge Hand was, of course, quite aware of this. He said:

It scarcely advances the argument to say that a corporation must be "present" in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered.

. . . .

We are to inquire whether the extent and continuity of what it has done in the state in question makes it *reasonable* to bring it before one of its courts. Nor is it anomalous to make the question of jurisdiction depend upon a *practical test*. . . . [I]t seems to us that nothing is gained by concealing what we do by a word [presence] which suggests an inappropriate analogy, that is, the *presence of an individual* who may be arrested and compelled to obey. This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is "present," *but at least* it puts the real question, and that is something.

Id. at 141 (emphasis added). Thus Judge Hand had his (excuse the expression) learned hand in this revolution too. What Hand calls a "practical test," *i.e.*, saying a word means such and such when it is reasonable in light of its purpose or function in a particular doctrine to so say, is usually called the "functional" approach to law, as opposed to the older "conceptual" approach—a word means what it means. "Presence" as a concept, independent of fairness, means that something is physically in some space at some time. "Presence" as a "function" word in a legal doctrine (aiming for justice) means what is "fair" under the circumstances to say it means. Functionalism, though, does depend on concepts, but they are very basic concepts, concepts at the very heart of legal life—fairness, justice, reasonableness. Functionalism is a word for the process of analysis that goes to the very roots of a legal question (*e.g.*, from "Is there consideration for this promise?" to "Is this the kind of promise that ought to be judicially enforced?"). Functionalism is the hallmark of twentieth century legal development. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 73 (1921), where the writings of Dean Pound are quoted. Judge Hand and Justice Stone were two of the leading exponents of this "practical" approach. It is not surprising then that they, working in tandem, fathered the territorial due process revolution.

³³ 433 U.S. 186 (1977).

B. The New Concept

The new concept will in theory produce just results. It was introduced to cure defects of fairness in the old concept. The question is: does it introduce a new era of uncertainty that is as bad or worse than the occasional unfairness of the old idea?³⁴ If a conception of fairness is carefully and rigorously developed in the territorial context, it should make for predictable as well as just results. Four considerations come into play in developing a doctrine of territorial fairness. First is the identification of the factors that make territorial overreaching unfair. Second is identification of the various societal interests promoted by government insofar as they relate to territoriality. Third is the identification of the true nature (looking past form to substance) of the legal interests subjected to state jurisdiction. Finally, there is the ever-present problem of judicial review, the question of the deference to be paid to the decisions of nonjudicial institutions of government.

1. *The five aspects of territorial unfairness*

There are five different kinds of unfairness in the territorial context: lack of general notice, lack of reciprocity, comparative inconvenience, lack of representation, and divided allegiance. These considerations have varying relevance depending on the particular context and on their utility in generating workable rules. For instance, it would appear on first impression that "lack of representation" should be an important factor in legislative contexts (remember the revolutionary cry "taxation without representation is tyranny"), but it seems that relative political clout or lack of representation is an elusive factor incapable of generating line drawing rules.

That these five aspects of territorial unfairness all relate to presence can be readily seen: if you are in state Y and not in state X, then you have no notice for planning purposes that X may exact money or obedience from you; nor has X given you anything in

³⁴ See Justice Black's words of concern in his concurring opinion in *International Shoe Co. v. Washington*: "[The Court] has thus introduced uncertain elements confusing the simple pattern . . ." 326 U.S. at 323. No other justice concurred in his opinion. There were no other concurring opinions or any dissent in *International Shoe*. Judge Hand in *Hutchinson v. Chase* had characterized the "simple pattern" referred to by Justice Black: "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass." 45 F.2d at 142.

terms of governmental services or other benefits for which it should be compensated by money or obedience; nor will it be convenient to go to X or obey its rules, especially if X is a long way from Y; nor do you have any say in making the policies of X which you are now asked to obey; and finally you must pay and obey Y which may be inconsistent with doing X's bidding.

"General notice" does not refer to the notification of a specific law suit or a particular demand for obedience; it does refer to a general awareness of those governments to which one must be responsive. Without such awareness one cannot plan. This general or "planning" notice is more akin to the notice consideration of vagueness and retroactivity doctrines than to the procedural due process requirement of specific notice of *Mullane v. Central Hanover Bank*.³⁵ Specific notice protects one's interest in the accurate application of law by allowing one to prepare and defend against false charges of liability or guilt. General notice protects one's interest in predictability. Territorial predictability completes the predictability picture painted by prospectiveness of application and clarity of language in legislation. It adds place to time and meaning. Surprisingly, this general notice, guaranteeing at least a modicum of territorial predictability, has only very recently been identified by any Supreme Court Justice as an aspect of territorial fairness,³⁶ although it had very likely intuitively informed prior

³⁵ 339 U.S. 306 (1950). For an early suggestion that this notice involved the same problem as retroactivity, see Currie, *The Verdict of Quiescent Years*, 28 U. CHI. L. R. 258 (1961).

³⁶ See *Shaffer v. Heitner*, 433 U.S. at 217, 218 (Stevens, J., concurring). After citing Justice Black's opinion in *International Shoe Co. v. Washington* to the effect that due process is a protection against "judgments without notice" (which to Justice Black was the sole meaning of due process in this context), Justice Stevens goes on to expand this requirement of *specific notice* to one of *general notice*:

The requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to *predictable risks*.

433 U.S. at 218 (emphasis added). He goes on to condemn the Delaware law at issue in *Heitner* on general notice grounds:

If its procedure were upheld, Delaware would, in effect, impose a duty of inquiry on every purchaser of securities in the national market. For unless the purchaser ascertains both the State of incorporation of the company whose shares he is buying, and also the idiosyncrasies of its law, he may be assuming an unknown risk of litigation.

I would also [in addition to where real estate is involved] not read

decisions in each of the four contexts of jurisdiction. It or its first cousin, "justifiable expectations," was offered by one commentator³⁷ as the chief underlying (but unstated) rationale in the choice of law context, especially in such leading cases as *Home Insurance Co. v. Dick*³⁸ and *John Hancock Mutual Insurance Co. v. Yates*.³⁹ General notice is perhaps a slightly different concept than "justifiable expectations" and its corollary "unfair surprise."⁴⁰ The phrase "justifiable expectations" suggests vested rights theories⁴¹ which would make the concept too narrow and rigid in application. Once the reasonable expectation of the application of the law of one place is shown, the application of the law of some other place is "unfair surprise" and automatically unconstitutional no matter what the countervailing factors might be. Perhaps "justifiable expectations" also suggests that there must be specific proof of a detrimental change of position in reliance on the expectation before there is unfair surprise,⁴² or if not a specific detrimental change, at least a specific proven reliance, whether for accounting purposes or simple peace of mind.⁴³ General notice is a broader and more flexible concept meant to identify merely one of several ways territorial overreaching is unfair. It is broad enough to include various degrees of unfairness, from specific detrimental change of

it as invalidating other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that *their local activities* might subject them to suit.

Id. at 219 (emphasis added). For Justice Stevens, general and specific notice seemed to combine to be the sole test of territorial due process. As was pointed out in note 9, *supra*, specific notice is an aspect of procedural due process and does not further the analysis of the territorial propriety of jurisdiction.

³⁷ Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 455-61 (1959). See also R. LEFLAR, AMERICAN CONFLICTS LAW § 61, 121-22 (3d ed. 1977).

³⁸ 281 U.S. 397 (1930).

³⁹ 299 U.S. 178 (1936).

⁴⁰ Weintraub, *supra* note 37, at 457.

⁴¹ Professor Weintraub does not suggest this, and in fact decries the "rigid 'vested rights' theorizing" which had resulted in the *Dodge* decision, *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). Weintraub, *supra* note 37, at 458. But he goes on to justify the results in several "vested rights" cases on the sole basis of unfair surprise even though he is somewhat dubious of the results in such chestnuts as *Hartford Acc. & Indem. Co. v. Delta & Pine Lands Co.*, 292 U.S. 143 (1934). It is his use of "unfair surprise" as a complete test that leads me to believe it could easily become "rigid vested rights theorizing" in new dress.

⁴² Martin, *supra* note 6, at 189. Cf. *Carroll v. Lanza*, 349 U.S. 408, 413, 420 (1955).

⁴³ This seems likely to have been Professor Weintraub's meaning of the phrase "justified expectations," as used in his article, *supra* note 37.

position, to a vague, general lack of predictability,⁴⁴ and flexible to the point of its never being an exclusive litmus test of unconstitutionality even where the unfairness of no general notice is particularly intense.

Reciprocity was first articulated as a general policy by Chief Justice Stone in *International Shoe*.⁴⁵ However, it had been earlier mentioned, quite frequently, in tax cases, and probably is talked about more in cases upholding the state's action than vice versa.⁴⁶ Although it is true that one ought not to have to pay taxes for something which has not benefited one, it is equally true that one ought to pay for the benefits one does get. Avoiding a state's tax collector or courts because of some technical "absence" when sizeable benefits could be attributed to activities within that state became so transparently unfair that finally the courts took notice of it. It is ironic that it was perhaps the *unfairness to states* (i.e., to a state's people acting both collectively as a tax collector to pay for government and individually as plaintiffs in judicial actions) of this avoidance when benefits had been conferred that was the major impetus to reversal of the "no jurisdiction, therefore no due process" proposition.⁴⁷

⁴⁴ See *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), where Justice Douglas uses the concept of an "ambulatory contract" to find the existence of what I call general notice.

⁴⁵ 326 U.S. at 319-20.

⁴⁶ See, e.g., *Curry v. McCannless*, 307 U.S. 357, 364-68 (1939) (Stone, J.); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 449 (1940); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Braniff Airways v. Nebraska Board*, 347 U.S. 590 (1954); *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

⁴⁷ That is the major underpinning of Justice Stone's rationale in *Curry v. McCannless*, where he writes of "the highest obligation . . . to contribute to the support of the government whose protection she enjoyed." 307 U.S. at 370-71. The fact that there would be double liability was apparently outweighed by this "highest obligation." Thus the obverse side of the reciprocity factor outweighed in this instance the factor I have called "divided allegiance." See text accompanying notes 54-68, *infra*. In *Curry v. McCannless* and a companion case, *Graves v. Elliott*, 307 U.S. 383 (1939), Justice Stone, writing for the majority, concluded that double taxation of intangibles is at least minimally fair (i.e., fair enough for due process purposes), 307 U.S. at 373, because, unlike tangibles, *id.* at 364, intangibles enjoy the protection of more than one state since intangible property is really a relationship between two or several people who may be in different states, *id.* at 367-72. Taxes are payments for the services and order that government provides. If one benefits from the services and order of more than one state it is only fair to pay each state. See also the dissenting opinion of Mr. Justice Holmes in *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 96 (1929). The dissents of Justice Butler (in *McCannless*) and Chief Justice Hughes (in *Graves*) are not responsive to Justice

The third aspect to fairness—comparative inconvenience or, as the Court has stated, an “estimate of inconveniences”⁴⁸—is especially pertinent in the adjudicative jurisdictional context. There, Professor Ehrenzweig maintains, a general doctrine of *forum conveniens* should prevail.⁴⁹ Inconvenience may have some pertinence in the use tax area also.⁵⁰

The final two elements of fairness, representation and divided allegiance, only hover in the background of expressed doctrine de-

Stone’s argument. They have assumed the old due process model: no presence implies no jurisdiction implies no due process. Justice Stone is working toward the new model—no fairness (or reasonableness) implies no due process implies no jurisdiction—that he finally articulates in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See note 32 *supra*. The Stone and Butler opinions in *McCanless* provide a vivid contrast of the functionalist versus conceptualist approach to the elaboration of legal doctrine.

⁴⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)). See also *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958). In *Hanson*, Chief Justice Warren stated:

Those restrictions [on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. . . . However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the “minimal contacts” with that State that are a prerequisite to its exercise of power over him.

Id. at 251. Although the Chief Justice’s quoted remarks smack of the conceptualism of the pre-*International Shoe* era with “minimal contacts” merely a new phrase for “presence” in the old formulation, and are thus completely at odds with the spirit and substance of the *International Shoe* opinion of Chief Justice Stone, the remarks, nonetheless, remind us of a valid point that is in keeping with the spirit of *International Shoe*: inconvenience is only one of several factors in the calculus of territorial fairness.

⁴⁹ Ehrenzweig, *supra* note 15, especially at 312-14. Professor Ehrenzweig closed this most influential article on the following optimistic (or perhaps merely wishful) note:

Once jurisdiction over nonresidents, no longer tied to the shibboleth of “physical” service within the state, has embraced mail, wire and wireless all through the nation in giving notice of a suit in a convenient court having contacts with the case, there will be no need for “physically” catching an elusive defendant, nor for protecting him against an inconvenient forum. And pseudo-medieval formulas established and perpetuated by nineteenth century conceptualism, which for decades have obstructed the free flow of legal progress, will have been replaced by what may become known as the new and old American common law of interstate venue in the *forum conveniens*.

Id. at 313-14.

⁵⁰ See *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759-60 (1967).

spite the fact that both elements have given rise to ringing slogans which ordinarily indicates emotional commitment to the ideal: "taxation without representation is tyranny" and "a man cannot serve two masters." But as pointed out above, "representation" seems never to be mentioned in territorial due process cases.⁵¹ No individual voter has a detectable, let alone measurable, impact on the policy of any government. Moreover, corporations do not vote at all. In fact, voting is only a small part of the potential political clout of an individual and especially of a corporation. Political clout does not necessarily require presence, but it does require notice that one may be affected by the legislative policy of a state. Therefore the general notice requirement of territorial due process will in part cover representation. On the other hand, neither presence nor the right to vote are irrelevant to influence. But again, relative influence is as immeasurable as the influence of one vote is undetectable. Thus there is the nagging feeling that it should count in the calculus of fairness but that it cannot be counted and therefore as a practical matter cannot count. In other words, it counts theoretically but not practically.⁵² Does this mean it ought

⁵¹ Cf. *Holt Civic Club v. City of Tuscaloosa*, 99 S.Ct. 383 (1978). By a 6-3 vote the Court upheld a state law resulting in regulation without representation in an intrastate context. The court treated it as primarily an equal protection voting rights case. A municipality's police territory extended three miles beyond its corporate (thus voting) limits. But three things serve to weaken this case as authority in the territorial due process context: (1) its intrastate nature (the "disenfranchised" could vote in the state elections), in which the municipality is an agent of the state sovereign completely subject to its control, unlike the relationship a state bears to the federal sovereign—co (if not equal) sovereigns; (2) the extra-territorial regulation was not thought to be particularly burdensome, *id.* at 391 n.8 and at 394 (Stevens, J., concurring); and (3) the practice, under judicial scrutiny, is widespread, and tampering with the mild form of the practice in this case would necessarily invalidate most of these schemes, thus burdening the federal courts with tasks of judicial supervision far beyond their competence or present means. *Id.* at 391 & 391 n.8.

⁵² See Britton, *Taxation Without Representation Modernized* (pts. 1-2), 46 A.B.A.J. 369, 373-74, 526 (1960). To Mr. Britton, the great theoretical fault of all extra-territorial taxation could be summarized by the phrase "taxation without representation." He does not suggest that identifying this fault helps in drawing lines between what is extra-territorial and thus not taxable and what is not extra-territorial and thus taxable. Extra-territoriality is apparently a self evident concept, as "presence" was to the pre-*International Shoe* judges.

For cases in which the Court upheld taxation of income earned in-state by non-residents, see *Shaffer v. Carter*, 252 U.S. 37 (1920); *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937). No mention of taxation sans representation is made in either case. Of course, if the tax does not discriminate, in-state residents can be relied on to protect the out-of-state interests. Taxes that discriminate against non-residents are highly suspect. See *Shaffer v. Carter*, 252 U.S. at 58.

to be ignored entirely, to be eliminated from the recital of factors of territorial fairness? No. Lack of representation is one of the things that intuitively and logically makes territorial overreaching seem unfair. Although it could only clumsily be entered in the calculus of actual rules of decision, it hovers in the background, reminding the judicial decisionmaker that there is yet more unfairness in territorial overreaching than accounted for in his calculus.

Divided allegiance is a more useful element of fairness. It has special relevance in the context of public regulation and taxation. Double taxation, however, once a source of judicial censure⁵³ and perhaps a form of divided allegiance,⁵⁴ has lost its ability to cause

⁵³ *Farmers' Loan Co. v. Minnesota*, 280 U.S. 204, 209-12 (1930) (overruling *Blackstone v. Miller*, 188 U.S. 189 (1903)), and *First Nat'l Bank v. Maine*, 284 U.S. 312, 326-27 (1932), are the highwater marks of such censure.

⁵⁴ Divided allegiance in its strongest form is mutually exclusive allegiance. The act of obeying one master is disobeying the other. Conceptually, at least, escheat cases are the perfect example. If a state orders someone to give unique property X to it in the face of a similar order from another state, the bind is clear. As a practical matter, when escheat involves intangible assets represented by a debt in a dollar amount the cases do not *appear* to be clearly mutually exclusive. *Appearance* of mutual exclusiveness is not salient. But it *is* there. On the other hand, tax liability to one jurisdiction is not necessarily inconsistent with tax liability to another. Justice Holmes might have characterized most double taxation as being asked not to serve two masters, but to pay two servants. See his dissenting opinion in *Farmers' Loan Co. v. Minnesota*, 280 U.S. 204, 216-18 (1930), for instance. Some seeming mutual exclusiveness, such as in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), are logically only inconvenience, albeit gross inconvenience. See text accompanying notes 48-50, *supra*.

In *Bibb* the act of obeying the Illinois mudflap law was not itself a violation of the Arkansas law because the obedience of each law was limited to in-state trucks. They could stop at the border and change mudflaps. Both *Bibb* and *Raymond Motor* were decided on commerce clause grounds. The inconsistency caused an inconvenience that in light of the law's speculative contribution to highway safety was adjudged to be an "undue burden" on interstate commerce.

A weaker form of divided allegiance is probably what the biblical expression "[n]o man can serve two masters" has reference to, *viz.*: a servant is expected to give undivided effort and loyalty to his master. *Matthew* 6:24 (King James). In this sense if one state is my master, I should pay all that I am able to pay to him and obey only his commands. But the relationship of citizen (including corporate entities) to state is surely not that of servant to master in that biblical sense.

A weaker form of divided allegiance that is relevant is "inconsistent allegiance," by which I mean something more than mere inconvenience in obeying two state laws. Inconsistent allegiance occurs when commands are not technically mutually exclusive but are sufficiently inconsistent that full compliance with both is so difficult as to seriously jeopardize full compliance with the nonparty state's

judicial outrage.⁵⁵ Multiple taxation, if seen as an evil at all, is forbidden because it violates commerce clause policy, not due process.⁵⁶ There were three lines of argument in cases condemning double taxation: it is illogical; it is bad policy; and it lacks reciprocity. It is illogical because nothing can be in two places at once, including the subjects of taxation.⁵⁷ It is bad policy because it is oppressive (the tax bill is huge); it is discriminatory (intrastate subjects pay only once); and it breeds conflicts between states.⁵⁸ It lacks reciprocity in that one or the other of the two taxes must be on an extraterritorial subject for which one taxing state has provided no protection. That state cannot ask for payment for that which it has not provided.⁵⁹

command if the party state's law is obeyed. See *Texas v. Florida*, 306 U.S. 398, 401 (1939); *Massachusetts v. Missouri*, 308 U.S. 1, 15-16 (1939).

⁵⁵ *Curry v. McCannless*, 307 U.S. 357, 373-74 (1939); *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 181 (1942) (overruling *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932)). This was a return to the rule that there is no constitutional bar to double taxation of intangibles. See *Davidson v. New Orleans*, 96 U.S. 97, 105-06 (1877).

⁵⁶ *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938); *Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," Or What Have You?*, 4 VAND. L. REV. 496 (1951).

⁵⁷ *First Nat'l Bank of Boston v. Maine*, 284 U.S. 312, 326-27 (1932) (tax by state of incorporation on transfers by death of shares of stock of a non-domiciliary estate).

In its application to death taxes, the rule rests for its justification upon the *fundamental conception* that the transmission from the dead to the living of a particular thing, whether *corporeal or incorporeal*, is an event which cannot take place in two or more states at one and the same time. . . . [I]n the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of *correct thinking* compels the conclusion that a determination fixing the local *situs* of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there.

Id. (emphasis added). The quoted reasoning is the epitome of conceptualistic argument. See note 32 *supra*. Earlier cases had used this reasoning with tangible property only. See *Frick v. Pennsylvania*, 268 U.S. 473 (1925); *Railroad Co. v. Jackson*, 74 U.S. (7 Wall.) 262 (1868).

⁵⁸ See, e.g., *Farmers' Loan Co. v. Minnesota*, 280 U.S. 204, 209-12 (1930).

⁵⁹ See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905). The taxation of tangible personal property is unfair because "[s]ubject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration. . . . It is often said that protection and payment of taxes are correlative obligations." *Id.* at 204 (emphasis added). Mr. Justice Holmes dissented.

Except with the tangible subjects of property,⁶⁰ these arguments no longer add up to unconstitutional unfairness.⁶¹ Three things conspired to defuse double taxation as a cause of constitutional alarm: (1) The Holmesian view of minimal constitutionalism—constitutional fairness is fundamental,⁶² not optimal, fairness; (2) the growing realism in the use of legal concepts led by Harlan Fiske Stone;⁶³ and (3) probably a greater sympathy with the political policy of modern taxation—its somewhat egalitarian impetus.⁶⁴ Nonetheless, double taxation, even of intangibles, raises

⁶⁰ Mr. Justice Stone was careful to distinguish the tangible property cases when breaking with the Court's recent past in *Curry v. McCanless*, 307 U.S. 357, 363-66 (1939). He found the reciprocity argument persuasive as to tangibles. *Id.* at 364.

⁶¹ See cases cited in note 55 *supra*, as well as the dissents of Justices Stone and Holmes in the cases cited in note 53 *supra*. But see Mr. Justice Jackson's vigorous dissent in *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 185 (1942).

⁶² Justice Holmes' famous dissent in *Lochner v. New York*, 198 U.S. 45, 74 (1905) is the keynote of this attitude which came to fruition in the late thirties. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Justice Cardozo's introduction of the phrase: rights that are "the very essence of a scheme of ordered liberty"); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905), Justice Holmes' laconic dissent surely pointed the way: "the result reached by the Court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment." *Id.* at 211. The seeds of this attitude can be seen in O. HOLMES, *THE COMMON LAW* 131-32 (M. Howe ed. 1963). Justice Frankfurter's concurrence in *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 182, 184-85 (1942), summarizes this policy of reluctant judicial review.

⁶³ See, e.g., *Curry v. McCanless*, 307 U.S. 357, 365-69 (1939). This realism allowed the Court to see that the subjects of taxation (things, events, relationships) could be "in" more than one place; that more than one state, therefore, could render protection and benefits for which they could demand tax payments. *Id.* at 370-71. See notes 47, 54 *supra*.

⁶⁴ The older philosophy was that one should pay taxes in proportion to the benefits and protection one received from government, and since the benefits one received were in direct proportion to one's wealth then one should pay a fixed proportion in taxes (if twice as rich then pay twice as much). See *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 203 (1905). But double taxation upset the proper proportions (if twice as rich and in two states then pay four times as much). A philosophy, based on the marginal utility of the dollar, of graduating taxes according to ability to pay was gaining ground in the thirties. Ironically Justice Jackson cited "the graduation of tax burdens" which "progressive modern taxation strives to heed" as a reason for invalidating double taxation. *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 196 (1942). But once the proposition "if twice as rich, then pay more than twice as much," is admitted as valid then the question of how much more apparently requires a subjective judgment based in part on one's egalitarian impulse as well as economic factors—a judgment in the legislative realm of policy. The old philosophy could be reduced to a clear neutral principle and thus

a basic question of fairness since property located "in" several states will be subject to multiple taxation even though the property receives the benefit of the same *total* of government services as property located in only one state.⁶⁵ However, the Court in line with the Holmesian view will not use the blunt instrument of constitutional adjudication to draw the fine lines necessary to the excision of the unfairness. Consequently, the taxpayer must resort to other legal avenues, such as reciprocal statutes, which will be capable of drawing the fine lines necessary to delineate the tax burden according to the proportionate amount of government services in each state that benefit such property subject to multiple taxation.⁶⁶

constitutionalized. The new philosophy cannot be reduced to principle except one containing a clear policy choice. It cannot be constitutionalized. In *Aldrich*, the net estate was worth \$87,000,000. The subject of the tax was worth \$1,000,000. *Id.* at 195. The "chaos," *id.* at 196, of multiple taxation of such estates must have seemed to people of the new tax persuasion to have created a very small risk of unfairness and was surely not lacking in that "fundamental fairness" that the Holmesian view dictated for constitutional relief.

⁶⁵ Thus no matter what tax philosophy one has, multiple taxation does seem discriminatory against interstate transactions and activities: the same wealth is taxed more if interstate than if intrastate. But again, the felt unfairness is diluted by the nature of graduated tax philosophy—inordinate wealth is taxed not in proportion to its extent, but in proportion to its inordinance. "Inordinance," being a highly subjective notion, varies from place to place and time to time depending on the polity's egalitarian impulse and economic evaluation. *See* note 64 *supra*. The point is that graduated tax policy made a kind of variable, multiple taxation the norm. If great wealth is already taxed at a rate three, five, or seven times the rate of an ordinary person or estate, then a little higher multiple is not remarkable—graduation policy has numbed our outrage at multiple taxation. We do it as routine policy. Moreover, we probably never really see the same wealth being treated differently because of multiple taxation. Furthermore, interstate transactions may be more complex and consume more government services over the same period than comparable intrastate transactions. Thus if double taxation has evolved from "serving two masters" to "paying two servants" to "paying two servants one wage" to "paying two servants one and a fraction wages," it is still felt not quite fair to pay two servants two wages for less than two servant-day's work. This is attested to by the fact that only a "small minority of states do tax such intangibles and provide for no exemption." *Commissioners' Prefatory Note*, 8 Uniform Laws Annotated 255 (UNIFORM INTERSTATE ARBITRATION OF DEATH TAXES ACT). As of the end of 1976, 16 states had adopted the ARBITRATION OF DEATH TAXES ACT and 19 states had adopted the UNIFORM INTERSTATE ARBITRATION OF DEATH TAXES ACT. 8 Uniform Laws Annotated (Pocket Part) 72, 74 (Cum. Supp. 1979).

⁶⁶ But reciprocal statutes, uniform acts and now the federal interpleader statute, 28 U.S.C. § 1335, should spell relief from multiple taxation, at least, at death. *See* Appendix following this article discussing Justice Stewart's suggestive opinion in *California v. Texas*, 437 U.S. 601 (1978), concerning the use of the federal interpleader statute in this context.

Double escheat is another matter. Double escheat means double liability for the very same obligation. Because escheat is simply the sovereign's claim of priority as against the holder of essentially abandoned assets, the claims of more than one state cannot be justified by claiming that more than one state gave benefits for which escheat is payment. Escheat does not purport to be payment, but is merely priority of claim, a windfall for the sovereign. All agree that double escheat is constitutionally unfair.⁶⁷ Finding the remedy has been the problem. Because the conflict is essentially between two states with the interest of the individual being that of a stakeholder in an interpleader action, use of the federal interpleader action seems in order.⁶⁸

⁶⁷ *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), ordered Pennsylvania to dismiss its claim for escheat of certain intangibles because New York had just as plausible a claim of jurisdiction over the "res," and the Pennsylvania court had no jurisdiction over New York to bind it personally; therefore Western Union could not be protected from double escheat, which would be a denial of due process of law. Compare *Western Union* with *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), and *Security Savings Bank v. California*, 263 U.S. 282 (1923). The results of these cases might be reconciled on two slim factual bases: (1) in the latter three cases the escheating state had at least a slightly better claim to jurisdiction over the *res* than in *Western Union* and (2) the non-forum states with plausible escheat claims were not then pressing them as New York was in *Western Union*. But, perhaps the better explanation for the different results is a shift in the conceptualization of jurisdiction. In the latter three cited cases, it was assumed that there was valid jurisdiction (physical power plus, in the 1948 and 1951 cases, sufficient contacts with the transaction—an emerging notion) over the thing (abandoned monies or corporate stock) being escheated such that there was little danger of double escheat. In the 1923 case a unanimous Court through Justice Brandeis spoke squarely in terms of the established categories of jurisdiction; since the bank deposit was "in" the bank the state court had *in rem* jurisdiction and the bank was protected should the depositor later appear—the state now had "custody" of the deposit. In its terms the opinion makes sense. The 1948 and 1951 cases make less sense. By then the old *Pennoyer* jurisdictional concepts were less convincing. Even less convincing yet was the reification of abstract interests which application of the *Pennoyer* categories to intangible property required. With reification a state could take exclusive "custody" of an intangible interest much as it would take custody of a car, boat or diamond. This custodial concept obviates double liability. By 1948 (three years after *International Shoe* but sans Justice Stone's leadership) the Court was in conceptual transition. It still is.

⁶⁸ In this context the Court has twice exercised its original jurisdiction to settle disputes between states. *Pennsylvania v. New York*, 407 U.S. 206 (1972) (the sequel to *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961)); *Texas v. New Jersey*, 379 U.S. 674 (1965). See also *California v. Texas*, 437 U.S. 601 (1978). But the comments of Justice Stewart *et al* in the latter case (see Appendix following this article) suggest that federal interpleader is now the best remedy for the private party faced with the *Western Union* problem of potential double escheat. Moreover,

2. *Societal interests protected by "territorial policy"*

What state interests does territorial policy protect? With regard to adjudicative jurisdiction the state is primarily interested in providing a convenient forum for local citizens to vindicate their rights.⁶⁹ Where the events or some of the events giving rise to a cause of action arose within the state, the state has an additional interest in seeing that its laws are faithfully interpreted and applied to the in-state part of the transaction.⁷⁰ With regard to legislative jurisdiction the state has an interest in making outsiders pay taxes for general benefits and opportunities they receive from the state's being an orderly community guaranteed and protected by a costly government.⁷¹ It has an interest in protecting its citizens from the relative "unknownness" of outsiders (*i.e.*, we know less about such things as the honesty, solvency, carefulness, and healthiness of outsiders).⁷² And, of course, it has the usual state interest in controlling events occurring inside the state for the general benefit of everyone within its borders.⁷³ This involves territoriality where the events of a legal transaction or cause of action occur in several states.

All the above interests concern in-state activities of outsiders, or the in-state effects of out-of-state activities, or in-state activities tied closely to out-of-state activities. A state's laws seeking to protect such in-state interests may have an incidental extraterritorial effect which, if great enough, could cause the law to be territorially unconstitutional. But no one could deny that the interests the state sought to protect were legitimate; they could only deny that

the rule for the division of intangibles among escheat claimants which was established in *Texas v. New Jersey* and rigidly followed in *Pennsylvania v. New York* is so clear and simple that few disputes ought ever to arise.

⁶⁹ *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72-73 (1954).

⁷⁰ It should be noted that the state's interest in faithful application of its laws is not the same as the legislative interest in having local policy apply to local events. Here, assuming local policy controls the events, the interest is in faithful translation of general policy into concrete decisions. As used in this context, "faithful" represents both knowledge of local law (policy), and willingness or desire to apply it accurately. It is generally assumed that local courts will have this knowledge and desire in greater measure than foreign courts.

⁷¹ See notes 46 and 47 *supra*.

⁷² See, *e.g.*, *Osborn v. Ozbin*, 310 U.S. 53 (1940). See also *Hanson v. Denkla*, 357 U.S. 235 (1958), for a brief discussion of a state's interest in regard to "exceptional" activity subject to special regulations.

⁷³ This is the interest distinguished in note 70 *supra*.

the means of protection were not appropriate under the circumstances. On the other hand, does a state ever have a legitimate interest in simply projecting its power into other states?⁷⁴ Motive there might be for such projection in the normal human desire for power and control. The corollary to this desire is a feeling that "our" power, "our" control will ultimately bring the greatest benefit, that is, that "our" exercise of power is the most moral or based on the "highest" or "most natural" moral rules. A state may naturally then feel that it has a moral duty, a kind of mission, to extend its enlightened policy beyond its borders. Nations surely feel this way about their political philosophies.⁷⁵ States of our union no doubt feel the same, albeit with less grand purposes (for example, abolition of common law marriage, industrial safety, limitation on actions). But such a "better law" purpose seems entirely illegitimate.⁷⁶ It is provincialism of the purest form. Provincialism is acceptable in the province but not in the nation composed of that province and others. Among co-equal states in a federal union a "better law" theory can have no place in developing a federal judicial policy of territorial due process oversight. It might make sense, however, if *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁷⁷ were overruled and all choice of law doctrine became federal law by authorization of the full faith and credit clause. Then federal courts or state courts under ultimate federal review in the Supreme Court could pick the "better rule" as a matter of federal law. But even then the inherent uncertainty and subjectiveness of the "better rule" inquiry make it highly suspect as a useful tool.

3. *Nature of interests subjected to jurisdiction*

The third consideration in developing a doctrine of territorial due process is the "true" nature of legal interests and entities subjected to judicial and legislative jurisdiction. Obvious as a beginning point of analysis is to recognize that all roads of inquiry must lead to people—real flesh and blood human beings. What *persons* will be affected by the assertion of jurisdiction and *how*

⁷⁴ See the discussion in Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 188-90 (1976).

⁷⁵ Exemplifying this phenomena is America's foreign policy often based on evangelical democracy and the Soviet Union's policy based on evangelical communism. Can it not be said that most individuals believe their own ideas of basic fairness have universal validity?

⁷⁶ See, e.g., Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). See also Martin, *supra* note 74, at 194-95.

⁷⁷ 313 U.S. 487 (1941).

will they be affected? There are abstractions on abstractions on abstractions in the world of ownership and creditor interests in corporations. But ultimately only people can own; ultimately only people can be treated unfairly.⁷⁸ A corporation's "people" are its owners, its creditors, its directors or trustees (fiduciaries), its agents and its other employees. Treating a corporation fairly is to treat these people fairly. Any analysis that looks for an abstract corporate "presence" is on a fool's errand, unless such declaration is but a summarizing conclusion of analysis based on the fairness of subjecting certain people's interests to jurisdiction.⁷⁹

Physical presence of people is not irrelevant, of course; nor is the physical presence of real estate and other physical things in which people have property irrelevant. Moreover, the physical presence of tangible evidence of debt or credit or ownership is not irrelevant, especially where transfer of ownership is effected by transfer of the evidence of debt or ownership, as with a negotiable promissory note, chattel paper or stocks and bonds. Physical presence of things that can be physically present is generally crucial to fairness, although the physical presence need not be as of the time jurisdiction is asserted as in the pre-*International Shoe* era. The important lesson of the post-*International Shoe* cases is to avoid reifying the abstract and to avoid finding the physical presence of things without physical existence. Courts used to (and still do, occasionally) find a status "present," a relationship "present," or a corporation "present," not as a concluding metaphor but as premise to a conclusion.

The physical connection to a state could also come from physical things other than people or owned things. For example, the fact that products are sent into a state may make it fair to bring in the producer under some circumstances.⁸⁰ The means of communica-

⁷⁸ See Note, *Civil Procedure—Concepts of Personal Jurisdiction Before and After Shaffer v. Heitner*, *supra* note 19, at 296-97 n.61 (1978). See also *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

⁷⁹ See *First Nat'l Bank v. Maine*, 284 U.S. 312, 329 (1941).

⁸⁰ See, e.g., *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). In *Gray*, a device was made in Ohio and sold and shipped to Pennsylvania where it was incorporated into another product. This product later appeared in Illinois, where it malfunctioned, causing injury to the plaintiff. Illinois judicial jurisdiction was upheld. Compare *O'Brien v. Comstock Foods, Inc.*, 123 Vt. 461, 194 A.2d 568 (1963) (almost identical facts as *Gray* but jurisdiction denied), and *Taylor v. Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967) (a very weak contact—Miss Taylor might have known that her amorous antics off screen would hurt

tion with buyers or potential buyers (including telephone, radio, television or catalogues) are physical contacts of the seller. They all should count. How much is another matter.⁸¹

Finally there is an interest the locus of which may be discovered without reduction to its physical parts, although it generally entails a myriad of physically locatable acts. This is the interest of the state of creation of legal interests: *e.g.*, the state of incorporation, the state of entrustment. That state often will be the state whose law governs the transaction as a matter of choice of law doctrine, independent of any constitutional constraints on such doctrine.⁸² Where it is determined by choice of law doctrine that a

audience size in Oregon for her film, "Cleopatra"). There is a plethora of cases in the products liability area concerning proper jurisdiction, most of which turn on notions of "general notice" discussed in text accompanying notes 35 to 44, *supra*.

⁸¹ After comparing cases such as *Hanson v. Denkla*, 357 U.S. 235 (1958) (judicial jurisdiction), and *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954) (legislative jurisdiction), with cases like *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (judicial jurisdiction), and *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) (legislative jurisdiction), one can conclude that the element of deliberateness is important to territorial fairness. Although not articulated in the cases, deliberateness seems to be related to general notice. If an individual should know with reasonable probability that his deliberate acts will have consequences in a foreign state, then he has general notice that he might be subject to the policies of those states. What the Court has emphasized has been the relationship of deliberateness to reciprocity. If one deliberately goes into a state and reaps the benefits of the state, it is fairer to exact a payment in return (in the form of taxes or obedience), than if one is swept in by events beyond his control, or by outcomes that are, at best, highly contingent. This proposition has a certain intuitive appeal. It is also analogous to quasi-contract doctrines. But if one willingly accepts benefits, whether passively or actively, it seems fair (or at least, not fundamentally unfair) to exact a compensation where no altruistic motive is implied in the giving. In any event, deliberateness seems very important to fairness. The presence of products or catalogues in a state or communications into a state are factors from which deliberateness can be inferred. But the strength of the inference depends on the surrounding circumstances. It would make for sounder analysis if general notice itself were inferred from the presence of these things rather than deliberateness. Reciprocity is better plugged into the jurisdictional calculus as the simple question, "have benefits been conferred," without regard to the beneficiaries' acts. Remember that general notice is only one element of fairness. See *National Bella Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), where general notice was clearly present since sales catalogues were sent into the state. But lack of benefits (though this is disputable) and great inconvenience (see note 48 *supra*) tipped the scales against jurisdiction even to exact a compensated collection of a use tax. *General Trading Co. v. State Tax Comm'n*, 322 U.S. 355 (1944). In general, these use tax cases and interstate tax cases are further complicated by a commerce clause doctrine that is not kept separate from the due process doctrine in the Court's discussion. See note 54 *supra*.

⁸² See *In re Bauer's Trust*, 14 N.Y.2d 272, 200 N.E.2d 207, 251 N.Y.S.2d 207 (1964); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, Comment e.

particular state's law governs, then that state's interest in having its laws faithfully and accurately applied⁸³ makes the nonconstitutional choice of law determination relevant to the constitutional calculus of the territorial jurisdiction of courts. Of course due process is a question of minimum fairness to individuals, not to states, but the interest of the state asserting jurisdiction is relevant to an appraisal of that fairness. Such fairness is, overall, a function of the balancing of the individual's interest measured by the five factors of territorial fairness versus the state's interest⁸⁴ in asserting jurisdiction. Moreover, where choice of law doctrine points to the law of a state other than the one asserting jurisdiction, that other state's interest should count on the individual side against the state asserting jurisdiction in the following sense: if such interest in faithful application is definitely located outside the forum state, then at least it cannot be counted as part of the interest of the jurisdiction asserting state. Moreover, its location outside the state may be an indication of unfairness to the individual of the jurisdiction asserted.⁸⁵ Nonetheless, it is worthy of careful note that the other state's interest is only counted insofar as it affects the individual's interest and not for itself.⁸⁶ If the importance to the other state of its interest were counted in the balance, it would change the concept of territorial due process from one of "minimal territorial fairness to the individual of jurisdictional assertions," to one

⁸³ See note 71 *supra*.

⁸⁴ The "state's interest" means, of course, the collective interest of the people of the territory as well as the special interest of the particular individual or individuals who may have invoked the state protection causing it to assert jurisdiction.

⁸⁵ For example, the person who is served with process while temporarily in a state to answer to a lawsuit having nothing to do with his temporary or any former presence will, in addition to his arguments of general surprise, inconvenience and lack of reciprocity, be able to add the injustice of a relatively ignorant and indifferent court applying foreign state policies. See note 70 *supra*. Cf. *Van Dusen v. Barrack*, 376 U.S. 612, 644-46 (1964)(citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

⁸⁶ Professor Martin contends that because the full faith and credit clause does call for the balancing of a sister-state's interest, it is a more appropriate vehicle than due process for settling territorial conflicts in the conflict of laws context. However, the sister-state's interest does count for the individual in the sense described above in the due process calculus. Moreover, fairness between individuals and the state is ultimately what courts are appropriately concerned with, not fairness as between states. Perhaps that is why in cases such as *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954), and *Clay v. Sun Insurance Office Ltd.*, 377 U.S. 179 (1964), the Court seemed much more interested in discussing the due process aspect of the problem than full faith and credit, where both were applicable. See Martin, *supra* note 74.

of optimal jurisdictional location. Such a conceptual change would entail a shift of power from state to federal government that would overwhelm the federal courts.

4. *Deference to nonjudicial decisions*

At last we come to the problem of deference. What deference must be paid the judgment of legislatures and executives as to jurisdictional policy? Deference has and will vary from context to context and even from case to case within the four general contexts. Two generalizations about past court behavior with regard to deference are probably safe. First, the Court has said little about it, only occasionally making a passing reference that implies that deference to legislative judgment has influenced their judgment.⁸⁷ The other safe generalization is that, in the context of adjudicative jurisdiction, the Court pays no deference and recognizes no issue as to deference. This is probably because legislative standards have usually been general or ill-defined, implying a delegation of this policy making to the judiciary.⁸⁸ Unselfconsciously, courts made this policy by developing the received jurisdictional concepts. If the organ for making a particular state policy is its courts, the Supreme Court in its reviewing capacity will hardly feel it necessary or wise to defer to the lower court's policy judgment. The usual reasons for deference are absent. Much more will be said

⁸⁷ *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 549 (1948); *Osborn v. Ozlin*, 310 U.S. 53, 64-66 (1940). In the latter case, in context of the legislative jurisdiction to regulate, the Court stated:

When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislature adopts.

Id. at 64-65.

⁸⁸ See ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968). The Historical and Practice Notes following this statute begin: "With the adoption of this section . . . , Illinois expanded the in personam jurisdiction of its courts to the limits permitted under the due process clause of the Fourteenth Amendment." There follows an extended discussion of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. This indicates to me that the commentators think that the legislature was deferring to judicial judgment as to the proper limits of judicial jurisdiction. The Illinois statute is the pioneer in state long arm statutes. More recently legislatures have made no pretense of definition of limits but defer entirely to judicial limits. See, e.g., CAL. [Civ. Pro.] CODE § 410.10 (Deering 1972): "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." *But see* the new West Virginia long arm statute, *supra* note 30. Although this new act is prolix and unduly restrictive, it at least gives some long needed relief to local plaintiffs against foreign defendants.

with regard to deference in the articles on substantive and procedural due process. In the territorial context, in general, the court is almost by definition protecting an outsider's interest. Since one might be naturally suspicious of the product of the political process as it effects nonparticipants in that process, the usual reason for lowered deference is present.⁸⁹

Conclusion

Can this analysis of the territorial problem be somehow put together into one or two useable standards for judging actual cases? Hopefully, something more result-predicting than a general principle (as in *International Shoe*) will be generated in Part II of this article. *International Shoe* and its recent progeny⁹⁰ have carried us to the right principle. It is the duty of legal scholarship to attempt to make the principle yield some result-predicting rules.

⁸⁹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), in part reads: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching inquiry." Outsiders like certain "insular minorities" get little protection from "the operation of those political processes ordinarily to be relied on." Perhaps, in the area of deference to political judgments, the factor of lack of representation (see text accompanying notes 51-52 *supra*) can have its strongest impact.

⁹⁰ See Note, *Civil Procedure—Concepts of Personal Jurisdiction Before and After Shaffer v. Heitner*, *supra* note 19, at 297 n.62 and cases cited therein.

Appendix

In concurring in a denial of a leave to file a bill of complaint invoking the Court's original jurisdiction, in *California v. Texas*,¹ the three judges concluded (with Stevens, J. concurring)² that the Federal Interpleader Statute³ could be used by estates threatened with double death taxation.⁴ This implies that double taxation is perceived by them as at least unfair enough to allow a common federal forum to adjudicate all the tax claims at once. The language also suggests that multiple taxation⁵ is unfair but not unconstitutionally unfair, except when it is a tax on tangible property.

Curiously, Justice Stewart cites⁶ *First National Bank v. Maine*,⁷ without mentioning that that case was expressly overruled.⁸ Speculation that Justice Stewart is covertly resurrecting its broad holding that double taxation is per se unconstitutional is belied by the later citation⁹ of *Worcester County Trust Co. v. Riley*.¹⁰ However, the citation to *First National Bank v. Maine* does suggest that Justice Stewart feels that the principle that "intangible personal property may, at least theoretically, be taxed only at the place of the owner's domicile,"¹¹ is a rule of federal law. Although it was that very holding that was overruled in *State Tax Comm'n of Utah v. Aldrich*,¹² perhaps Stewart is saying that *Aldrich* only overruled the constitutional no-double-taxation predicate of *Maine* and so the domiciliary-only rule is still viable as a matter of federal common law. In fact the domiciliary-only rule is still followed in most states as a matter of state law. But since each state makes its own determination of domicile by its own definition, a taxpayer may be subject to conflicting findings of domicile and be multiply taxed.¹³ By allowing statutory interpleader the

¹ 437 U.S. 601 (1978).

² Brennan, J. wrote a brief comment, *id.* at 601, Stewart, J., a longer opinion, *id.* at 602, and Powell, J., a brief comment, *id.* at 615.

³ 28 U.S.C. § 1335 (1976).

⁴ See especially 437 U.S. at 608 & nn.9 & 10.

⁵ 437 U.S. at 608 n.9, 615-16.

⁶ *Id.* at 602 n.1, 607.

⁷ 284 U.S. 312 (1931).

⁸ See note 55, *supra*, main text.

⁹ 437 U.S. at 607, 612.

¹⁰ 302 U.S. 292 (1937).

¹¹ 437 U.S. at 602 n.1.

¹² 316 U.S. 174 (1942).

¹³ *In re Dorrance's Estate*, 116 N.J. Eq. 204, 172 A. 503 (Perog. Ct. 1934); *In re Dorrance's Estate*, 115 N.J. Eq. 268, 170 A. 601 (1934); *In re Dorrance's Estate*, 309 Pa. 151, 163 A. 303 (1932).

claims can be resolved in one law suit. But whose law? Since the basis of the statutory interpleader action is diversity, the *Klaxon* doctrine¹⁴ would dictate use of the forum state's choice of law rule. The choice of law rule is the domicile of decedent at the time of death.¹⁵ Thus the choice of the state law as to domicile of decedent for taxing intangibles turns on the domicile of the decedent of the estate, probably the same test. In any event, having domicile found in one federal law suit should avoid double domicile and thus double taxation. But applying state law in the federal interpleader action may promote, not avoid, forum shopping because the stakeholder (estate administrator) may choose for venue, under 28 U.S.C. § 1397, that state whose definition of domicile most likely will put domicile in the state with the lowest death taxes. Even conceding that that judgment would require a level of sophistication bordering on the mystical, and that fact-inference rather than law-inference is the more important cause in generating different results in domicile decisions, nonetheless, the use of state law in federal interpleader actions of conflicting state death tax of intangibles would promote some forum shopping, the avoidance of which is one of the twin aims of *Erie* as pronounced in *Hanna v. Plumer*.¹⁶ Moreover, sound choice of law doctrine dictates the avoidance of forum shopping, when possible.¹⁷

A special federal common law of domicile for death taxes is the obvious solution to the forum shopping problem. Two things are necessary for federal common law to obtain: first, the subject must be within national legislative power; and second, either Congress intended that the subject be governed by federal law fashioned by the federal judiciary, or the basic scheme of the Constitution demands federal law so fashioned.¹⁸ The idea that the basic scheme of the Constitution demands federal law is explored in Monaghan, *Forward: Constitutional Common Law*.¹⁹ Professor Monaghan criticizes the notion that the "need for national uni-

¹⁴ *Griffin v. McCoach*, 313 U.S. 498 (1941); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); recently reaffirmed in *Day & Zimmerman, Inc. v. Chaloner*, 423 U.S. 3 (1975).

¹⁵ *See, e.g., White v. Tennant*, 31 W. Va. 790, 8 S.E. 596 (1888).

¹⁶ 380 U.S. 460 (1965).

¹⁷ Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 350-56 (1974).

¹⁸ This is a paraphrase of Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964).

¹⁹ 89 HARV. L. REV. 1, 13-17 (1975).

formity" is a proper rubric for discussing the imperative of the basic constitutional scheme.²⁰ Such rubric does not suggest the depth of analysis necessary to the determination. However, such rubric does, I suggest, intuitively touch the heart of the problems generated by the "basic scheme" of federalistic interrelationships established by the Constitution. Whatever the correct formulation for the analysis of the propriety of federal common law, federal common law is appropriate in the domicile-for-death-taxes situation. First, it is clearly within the national legislative power to make this rule, as it is to make all choice of law rules.²¹ Second, Justice Stewart argues effectively in *California v. Texas* that it is the federalistic system, which was created by the Constitution, that causes the dilemma of either unfair double taxation or cutting off the perhaps legitimate tax claims of the second state.²² Thus this "basic scheme" dictates a uniform federal rule.

Moreover, the availability of the interpleader action itself implies an immunity for the estate from more than one death tax on intangibles on account of domicile. "Under both the statute and the rule, the purpose [of interpleader] is to protect against double vexation in respect to a single liability, rather than to double liability"²³ Justice Stewart adds: "If it is unfair to subject an estate to two domicile-based taxes when all agree that it is possible to have only one domicile, that unfairness is just as great, if not greater, when a decedent's estate is able to pay the taxes to both States."²⁴ The source of this immunity must be federal law since no single state law could create such an immunity. But Justice Stewart makes clear that the source of this federal immunity is not a due process right to immunity from double taxation. It must be a federal common law right to immunity from conflicting domiciliary findings. It is this latter conceptual leap that is difficult to digest. The source of the federal right is not statutory or constitutional, but common law, but the mandate to federal common law is inferred from the Constitution.

If the ultimate source of this right of immunity from double taxation is the Constitution, why is it not called a constitutional right? First, because ordinary constitutional rights are inferred

²⁰ *Id.* at 12 n.65, 13 n.70.

²¹ See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 713-18 (2d ed. 1953).

²² 437 U.S. at 608 n.9.

²³ C. WRIGHT, *LAW OF FEDERAL COURTS* 363 (3d ed. 1976).

²⁴ 437 U.S. at 611.

from discreet language in the Constitution, even though very general language—such as the due process clause. The doctrine defining the rights is said to flow from policy implicit in the discreet language. Constitutional common law, on the other hand, is inferred from the basic constitutional scheme, not discreet language. It is more frankly judicially created policy. But such policy is ultimately based on the judicial perception of a just legal order implicit in the constitutionally created federal system. In other words, unfairness, as perceived by a common law code of *optimal* fairness, not a constitutional code of *fundamental* fairness, and that is caused by the federal scheme established by the Constitution, ought to be cured by the imposition of federal law in so far as practical (here by a federal forum, remedy and right) without declaring the particular act of unfairness (here an adjudication of a second domicile and resultant double taxation) unconstitutional. This also avoids any unfairness to the second state. Moreover, federal common law can be changed by Congress but constitutional decisions cannot be.

In short, Justice Stewart suggests in *California v. Texas* that taxes on the transfer of intangibles on the death of the owner may be levied only by the state of the owner's domicile, and the determination of the owner's domicile is a question of federal common law to be developed in federal interpleader actions but to be applied also in state adjudications. Only thus can the citation of *First National Bank v. Maine* sans the overruling *Aldrich* case, and the noting of federal interpleader as an appropriate action for multiple-tax threatened estates be explained. Moreover, this solution avoids the dilemma of choosing between a second state's defensible adjudication of domicile and double taxation of the estate. Problems remain, however, where federal interpleader is not invoked by the estate. If the first state's adjudication of domicile becomes *res judicata* before the second state makes known its intent to tax on a domiciliary basis, the first judgment is not *res judicata* to the second state (a non-party) but is *res judicata* to the estate, and full faith and credit does not bar the inconsistent second state court adjudication.²⁵ A possible solution is to allow the threatened estate to bring its interpleader action at this point and let the rival state claimants fight it out in a neutral federal forum using federal law. If the first judgment has been paid then the estate can claim that the first state holds such payment as the

²⁵ *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

stake (as an equitable constructive trust if a traditional conceptual fiction is necessary), with the estate proffering the balance of the stake if the second state's tax is greater.

What is left of *Aldrich*? At least the proposition that double taxation is not per se unconstitutional. Perhaps double taxation of intangibles is still permissible if one tax is a domiciliary tax and the other is based on nondomiciliary contacts, as in *Aldrich*. That is consistent with the interpleader action but not with the citation of *Maine*. The test will come when someone tries federal interpleader in the *Maine-Aldrich* tax situations. My guess is that the obvious difficulty of determining the *fact* of double taxation when two different kinds of tax or two different theoretical subjects of taxation are used will give the courts pause, and the absolute minimum reading of *California v. Texas* (if any credence is given it at all) will be adopted: one has a right to a federal forum and remedy, and a right to a single domiciliary-based tax on intangibles at death, but no right to a single tax.

