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The Nature of Legal Argument: The Personal Jurisdiction Paradigm

by

RICHARD K. GREENSTEIN*

The idea of black letter law seduces us. We crave coherence and certainty in the law as we do in many areas of our lives. We know better, of course. We know that legal doctrine is often indeterminate—that in a particular case, perfectly convincing arguments supporting one conclusion can often be countered by perfectly convincing arguments supporting the opposite conclusion. Yet we continue to search for rules, principles, tests, approaches—anything that will impose order on doctrine. Nowhere is the inherent frustration of this quest more vividly illustrated than in the debates concerning the due process limitations on the assertion of personal jurisdiction by state courts.

The conventional view of personal jurisdiction1 goes something like this: In the beginning, the Supreme Court understood jurisdiction to be fundamentally the exercise of physical power by the state, limited, by analogy to principles of international law, to the state's geographic territory. Accordingly, a state court could not, consistent with due process, assert jurisdiction over someone beyond its borders unless that individual somehow submitted himself or otherwise consented to jurisdiction. This was the teaching of Pennoyer v. Neff.2

This early view was thought to have changed in 1948 when the Supreme Court announced a new analysis of the due process limitations on personal jurisdiction. In International Shoe Co. v. Washington,3 the

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I wish to express my deep gratitude to Professors Jane Baron, Robert Bartow, and David Sonenshein, of Temple University School of Law, for their exceptionally helpful insights in response to an earlier version of this article. I would also like to blame them for all the remaining defects in my analysis, but I cannot; these lingering deficiencies are my responsibility alone.

1. Although this Essay focuses on in personam jurisdiction, it should be kept in mind that derivative principles apply to in rem and quasi in rem jurisdiction. Shaffer v. Heitner, 433 U.S. 186, 207-12 (1977).
2. 95 U.S. 714 (1878).
3. 326 U.S. 310 (1945). Although the Pennoyer controversy arose prior to the ratifica-

[855]
Court focused on whether the defendant had sufficient minimum contacts with the forum state to make the state's exercise of jurisdiction consistent with "traditional notions of fair play and substantial justice." 4

But Pennoyer refused to die. Despite the Court's insistence that jurisdictional questions were to be evaluated in light of the "fair play and substantial justice" standard of *International Shoe*, 5 the concern with territorial sovereignty continued to play a role in occasional personal jurisdiction cases. 6 Moreover, the Court seemed to be sending mixed signals about how fairness and justice were to be determined. Sometimes the court balanced the defendant's interests along with those of plaintiff, the forum state, and the nation; 7 yet other times, the approach focused exclusively on the defendant. 8

The search for order has led to predictably divergent reactions among scholars in the field. Some have identified multiple "tests" for personal jurisdiction that vary according to the substantive nature of the case. 9 Others have criticized the Supreme Court's reasoning in various post-*International Shoe* cases as "arbitrary," 10 "muddled," 11 or "grounded in faulty logic." 12

This Essay offers an alternative approach. The doctrine of personal jurisdiction, as historically articulated by the Supreme Court, is consistent and coherent—although it may not yield a single test that will determine the answer to jurisdictional questions in all cases, it defines the constitutional dimensions of jurisdiction over persons as comprising a group of specific, intertwined, but irreconcilable themes and attendant principles. 13 These themes have coexisted in tension in all of the personal
jurisdiction cases, from *Pennoyer* to the most recent Supreme Court pronouncements on the subject.

Although the themes are irreconcilable, it is possible for any one or group of them to dominate and determine the outcome of a particular case. Thus, what appears in the conventional view of jurisdiction to be abrupt shifts in doctrine or inconsistent decisions, simply reflects the ever shifting relationship among the themes. It is the constant presence of the themes, not their resolution into a particular approach, that gives the law of personal jurisdiction its unity.

Section I of this Essay attempts to untangle these themes and to describe them in some detail. Section II argues that the coexistence of irreconcilable themes is inherent in all legal doctrine. Indeed, an understanding of this fact helps illuminate some of the mysteries of legal argument: What is the difference between good legal arguments and bad ones? Why are some cases easy (all the good legal arguments lead to the same conclusion) while other cases are hard (good legal arguments lead to opposite conclusions)? Finally, section III tentatively explores some of the implications of this discussion for an important question that has received considerable attention in recent years: What do we mean when we characterize litigation as involving conflicting claims about legal rights? I conclude that the "right" that litigants have is to a conscientious consideration of the themes inherent in the legal doctrine in question, not to any particular substantive outcome.

I. The Structure of Personal Jurisdiction Doctrine

Personal jurisdiction involves the assertion of authority over the individual by a social institution: the court. We can think about the relationship between the individual and society in two fundamentally different and irreconcilable ways, both of which exist within the doctrine of jurisdiction.

Personal jurisdiction also involves the exercise of authority by a state, which coexists with other states within the nation. We can think about the relationship between the state and the nation in two fundamentally different and irreconcilable ways, both of which also exist within the doctrine of jurisdiction.

The following analysis identifies these four themes and documents their coexistence in personal jurisdiction doctrine by showing how each finds expression in various Supreme Court cases.

spectives on the same concern. In short, irreconcilable themes cannot be collapsed into a single theme.
A. Themes Relating to the Relationship Between the Individual and Society

One theme, which might be termed the "individualist theme," encompasses two perspectives of the relationship between the individual and society. At one extreme, the individual experiences society as wholly separate from herself. The individual seeks maximum liberty to pursue her goals. She sees society as a threat to that liberty; each exercise of power by society is an imposition upon the individual's autonomy.¹⁴

A more moderate version of this theme conceives of society as a creation of individuals, designed to serve certain basic, limited needs, such as services and security. Since society is a tool of individuals, it derives its legitimacy from individuals. Accordingly, any exercise of authority by society over the individual is justified only on the basis of the individual's consent to that authority.¹⁵

If you held the individualist view of the relationship of the individual to society, you might think about personal jurisdiction in a particular way. You might understand jurisdiction as the voluntary acceptance of social authority by the individual or, alternatively, as the assertion of brute force over the individual by a hostile society. From the first perspective, you would see the assumption of jurisdiction, in the absence of consent, as simply an exercise of "physical power"¹⁶ over the individual; jurisdiction under such conditions would be a de facto recognition of society's superior might. From the second perspective, you would see the exercise of jurisdiction by a court over the individual as legitimate only when the individual has freely "submitted"¹⁷ to the court's authority; you would talk about jurisdiction being based on the "consent"¹⁸ of the party. That submission or consent would be expressed either through explicit statements or through the "purposeful"¹⁹ conduct of the individual and on her ability to "foresee"²⁰ that legal action based on that conduct might be brought in a particular forum.

A second theme, which might be termed the "communitarian

theme," presents another view of the relationship between the individual and society. This view perceives the individual as a fundamentally social being. Society is not an entity created by the free wills of individuals to serve their individual goals; rather, society is the basic unit through which the individual receives not only sustenance, but self-definition. From this viewpoint, the rights of the individual derive from society. The interests of the individual, while perhaps of concern to society, are ultimately subordinate to societal interests.  

If you held the communitarian view of the relationship between the individual and society, you might think about personal jurisdiction in a particular way. You might see jurisdiction as primarily serving the "public interest," with a chief concern being "the orderly administration of justice." The individual's obligation to acknowledge the legitimacy of the court's exercise of authority would be based on a "duty" owed to society; it would be a "responsibility," arising out of his "relationship to the state."

The due process limitations on jurisdiction would depend not on the subjective will of the individual, but on a public standard of "justice" and "fair play." The "reasonableness" of subjecting a defendant to the court's power would be measured by balancing the defendant's interests against those of the forum state, the plaintiff, and the nation.

In reality, of course, we do not hold either the individualist or the communitarian view of the relationship between the individual and society exclusively. Instead, we hold both views simultaneously and irreconcilably. We believe that the individual is both antagonistic to and an integral part of society. We believe, for example, that society has no right to invade the privacy of the individual and that society nevertheless has an obligation to invade individual privacy to insure public safety. We believe that society imposes upon the liberty of the individual when it confiscates property through taxation; yet we believe that society has an

25. Id.
obligation to provide certain public services that must be funded through taxation.

Similarly, we hold both views—simultaneously and irreconcilably—regarding the legitimate bases of personal jurisdiction. As will be illustrated below, the conceptions of jurisdiction that flow from these views are present in each of the Supreme Court's decisions on the subject.

B. Themes Relating to the Relationship Between the State and the Nation

One way of thinking about states is to analogize them to sovereign nations. From this viewpoint, which underlies what might be termed the "state sovereignty theme," the states have agreed to relinquish limited powers—limited parts of their sovereignty—to the national government. But in all other respects, each state has retained sovereign control over its affairs.\textsuperscript{30}

If you had this view of the relationship of the state to the nation, you might think about personal jurisdiction in a particular way. You might characterize jurisdiction as the exercise by an "independent State"\textsuperscript{31} of "sovereign"\textsuperscript{32} power and appeal to principles of "public [international] law"\textsuperscript{33} to determine the extent of that power. Those principles would tell you that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," but that "no State can exercise direct jurisdiction and authority over persons or property without its territory."\textsuperscript{34}

You might also conclude that a state can always exercise jurisdiction over its domiciliaries.\textsuperscript{35} This is so because domicile in a state is the equivalent of "citizenship"\textsuperscript{36} in a nation, and nations have traditionally exercised jurisdiction over their citizens even when they are physically absent from the state.\textsuperscript{37}

But as with the relationship between the individual and society, there is another view of the relationship between the state and the nation. From this point of view, states are seen as integral parts of a single na-

\textsuperscript{30} This idea receives constitutional expression in the tenth amendment to the United States Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

\textsuperscript{31} Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

\textsuperscript{32} World-Wide Volkswagen, 444 U.S. at 292; Pennoyer, 95 U.S. at 722.

\textsuperscript{33} Pennoyer, 95 U.S. at 722.

\textsuperscript{34} Id.

\textsuperscript{35} Milliken v. Meyer, 311 U.S. 457 (1940).

\textsuperscript{36} Id. at 463.

\textsuperscript{37} See Blackmer v. United States, 284 U.S. 215, 221 (1932).
tion—a view which underlies what we will call the “nationalist theme.” Indeed, political, social, cultural, and commercial realities, together with technological developments in transportation and communication, have made the United States an increasingly unified country and have concomitantly rendered state borders more and more irrelevant.

If you held this view of the relationship between the state and the nation, you might think about personal jurisdiction in a particular way. You might begin by observing that the state’s recognition and enforcement of the laws and judgments of sister states is not a matter of comity (as it would be if states were sovereign nations), but a constitutional obligation imposed by the “full faith and credit clause.” In commercial cases, you would focus on how the “increasing nationalization of commerce” has made state lines less significant; you would observe that “[a]s technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.” You would consider “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and the “shared interests of the several States in furthering fundamental substantive social policies.” You would also assess the impact of “modern transportation and communication” on the propriety of subjecting persons outside the state to the court’s authority.

In reality, of course, we do not hold either of these views of the relationship between the state and nation exclusively. We think of the United States as a single country and as a collection of individual states. It is the essence of federalism to hold these two views simultaneously and irreconcilably. Again, as will be illustrated below, both of the conceptions of jurisdiction that flow from these views are present in each of the Supreme Court’s decisions on the subject.

C. The Interplay of Themes

This section explores the interrelationship among the four jurisdictional themes by means of two comparisons. The first is between two

38. See Pennoyer, 95 U.S. at 729.
43. Id.
44. McGee, 355 U.S. at 223.
45. F. JAMES & G. HAZARD, supra note 9, at 81-83.
landmark cases, Pennoyer v. Neff\textsuperscript{46} and International Shoe Co. v. Washington.\textsuperscript{47} The second is among a trio of recent Supreme Court decisions: Kulko v. Superior Court,\textsuperscript{48} World-Wide Volkswagen Corp. v. Woodson,\textsuperscript{49} and Burger King Corp. v. Rudzewicz.\textsuperscript{50}

The goal of these comparisons is to illustrate how, although all four themes are present in every case concerning personal jurisdiction, a shifting emphasis among the themes can produce vastly different results. In Pennoyer and International Shoe, the change in emphasis results in what are perceived as two fundamentally different approaches to jurisdictional issues. In Kulko, World-Wide Volkswagen, and Burger King, the meaning of a key concept—"purposeful availment"—undergoes perceptible change as the interplay among the four, ever-present themes varies from one case to another.

The following discussion will examine the two themes relating to the relationship between the individual and society—the "individualist"\textsuperscript{51} and "communitarian"\textsuperscript{52} themes—and the two themes relating to the relationship between the state and the nation—the "state sovereignty"\textsuperscript{53} and "nationalist"\textsuperscript{54} themes.

(I) Pennoyer and International Shoe

The issue before the Supreme Court in Pennoyer v. Neff was whether the federal courts should recognize as valid a personal judgment entered against Neff by an Oregon state court in a previous lawsuit. In the original suit, the Oregon court had asserted jurisdiction over Neff even though he was neither domiciled nor actually present in the state. The United States Supreme Court held that the Oregon court lacked the power to assume jurisdiction in such a case and that the judgment was consequently void.\textsuperscript{55}

In International Shoe Co. v. Washington, the State of Washington asserted jurisdiction over the International Shoe Company for the purpose of collecting contributions allegedly owed to the state's unemployment insurance fund, based on the company's business activities in the

\begin{footnotesize}
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\item \textsuperscript{46} 95 U.S. 714 (1877).
\item \textsuperscript{47} 326 U.S. 310 (1945).
\item \textsuperscript{48} 436 U.S. 84 (1978).
\item \textsuperscript{49} 444 U.S. 286 (1980).
\item \textsuperscript{50} 471 U.S. 462 (1985).
\item \textsuperscript{51} See supra notes 14-20 and accompanying text.
\item \textsuperscript{52} See supra notes 21-28 and accompanying text.
\item \textsuperscript{53} See supra notes 30-37 and accompanying text.
\item \textsuperscript{54} See supra notes 38-44 and accompanying text.
\item \textsuperscript{55} Pennoyer, 95 U.S. at 734.
\end{itemize}
\end{footnotesize}
state. The nature of those activities, crucial to the Court’s analysis of the jurisdictional question, was described as follows:

Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. . . .

Appellant has no office in Washington and makes no contracts either for sale or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commissions based upon the amount of their sales. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in business buildings, or rent rooms in hotels or business buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.

The authority of the salesmen is limited to exhibiting their samples and soliciting orders from prospective buyers, at prices and on terms fixed by appellant. The salesmen transmit the orders to appellant’s office in St. Louis for acceptance or rejection, and then accepted, the merchandise for filling the orders is shipped f.o.b. from points outside Washington to the purchasers within the state. All merchandise shipped into Washington is invoiced at the place of shipment from which collections are made. No salesman has authority to enter into contracts or to make collections.56

On these facts, the Court concluded that Washington could constitutionally assert jurisdiction over International Shoe.57 In so ruling, the Court refused to focus its analysis on whether the company had been “present” in the state,58 an issue of crucial importance in Pennoyer. Instead, jurisdiction was justified on the basis of “contacts” with the state.59

The different approaches in the two cases can be explained by their emphasis on different themes. Pennoyer is dominated by state sovereignty rhetoric:

The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by the instrument, they possess and exercise the authority of independent States, and the principles of public [international] law to which we have referred are

57. Id. at 321.
58. See id. at 315-17, 321.
59. Id. at 320.
applicable to them.\textsuperscript{60}\ Those "principles of public [international] law" included the notions of plenary sovereignty over persons and property within the state’s borders and a correlative lack of such power outside those borders.\textsuperscript{61}\ The latter point was critical in light of Neff’s residence in California at the time the Oregon court sought to assert its jurisdiction over him. "[A]ny direct exertion of authority over [persons outside the state] in an attempt \ldots \text{ to enforce an extraterritorial jurisdiction by [the state’s] tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled \ldots and be resisted as usurpation."\textsuperscript{62}

By contrast, the emphasis in \textit{International Shoe} was on communitarian values. Whether the constitutional requirements of personal jurisdiction had been satisfied depended upon "the quality and nature of [International Shoe’s] activity in relation to the fair and orderly administration of the law which it was the purpose of the due process clause to insure."\textsuperscript{63}\ According to the Court, jurisdiction may be asserted over an absent individual when he or she has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’"\textsuperscript{64}\ This test was met under the facts of \textit{International Shoe} because the company had benefited from the laws of Washington in the conduct of its business in the state.\textsuperscript{65}\ Therefore, it was fair to impose upon the company the obligation to defend a lawsuit arising out of those activities.\textsuperscript{66}

While it is true that each case has a dominant theme, it would be mistaken to conclude that the cases do not reflect the remaining themes. Implicit throughout the \textit{Pennoyer} opinion is the individualist theme that personal jurisdiction, in the absence of a "voluntary appearance"\textsuperscript{67} by the defendant, is a function of the state’s superior physical power over the individual. The extraterritorial exercise of jurisdiction would be tantamount to an invasion of a sister sovereign state. At the same time, the Court acknowledged the propriety of the extraterritorial assertion of jurisdiction in a divorce action on the communitarian ground of simple justice: If the defendant moved to a state that would not permit the divorce, the plaintiff’s own state should proceed "without personal service

\begin{itemize}
  \item \textsuperscript{60.} \textit{Pennoyer}, 95 U.S. at 722.
  \item \textsuperscript{61.} \textit{Id}.
  \item \textsuperscript{62.} \textit{Id.} at 723.
  \item \textsuperscript{63.} \textit{International Shoe}, 326 U.S. at 319.
  \item \textsuperscript{64.} \textit{Id}. at 316.
  \item \textsuperscript{65.} \textit{Id}. at 320.
  \item \textsuperscript{66.} \textit{Id}.
  \item \textsuperscript{67.} \textit{Pennoyer}, 95 U.S. at 729.
\end{itemize}
of process or personal notice to the offending party,” otherwise, “the injured citizen would be without redress.”

The Court made no serious attempt to reconcile these positions. 

Pennoyer also relied on important nationalist considerations. As indicated above, the opinion understands jurisdiction as an assertion of power. But as the Court well knows, physical power is not, in fact, used against the defendant. Rather, the state asserts jurisdiction through service of process, which is a symbolic exercise of power, after which the defendant is free to leave the state. But if the state does not have actual physical power over the defendant, how can it enforce an adjudication of the defendant’s legal rights? The answer is that the Constitution’s “full faith and credit” clause, as implemented by Congress,

This gives effect to the nationalist interest.

This idea that the efficacy of jurisdiction and judgments depends upon the legal duty of sister states (and the federal government) to recognize certain symbolic acts of the state seems inconsistent with the idea that jurisdiction is based upon the exercise of physical power that stops at the state’s borders. The Pennoyer Court did not attempt to reconcile these two positions.

International Shoe also reveals all four themes. The communitarian theme regarding the relationship between the individual and society is, as noted above, dominant. Yet, the Court also sounded the individualist theme in its reference to the traditional notion that a corporation “consents” to jurisdiction when it engages in business activities in the forum state. The Court discussed this consent theory and ultimately dismissed it as a “legal fiction.” What emerged in its place is the idea that when a defendant has engaged in purposeful, beneficial activities in the state, the state is entitled to assert personal jurisdiction over the defendant—at least with regard to activities arising out of those activities. This notion of jurisdiction as a quid pro quo that flows from the defendant’s choice

68. Id. at 734-35.
69. See id. at 719-20, 727.
70. U.S. CONST. art. IV, § 1.
72. See Pennoyer, 95 U.S. at 729-33.
74. Id.
75. Specifically, the Court discussed this concept in terms of “purposeful availment” and “forseeability.” See infra notes 80-122 and accompanying text.
expresses not only the communitarian idea of fairness, but also the individualist concept of the essential, legitimating importance of free will.

*International Shoe* presents the state sovereignty theme through the very concept of "minimum contacts." Nothing in the Court's basic concern with "traditional notions of fair play and substantial justice" necessarily ties due process to a requirement that the defendant have "contacts, ties, or relations" with the forum state. Indeed, it is easy to hypothesize situations in which the exercise of jurisdiction over a defendant without such contacts would be fair or, at least, would not be so unfair as to constitute a denial of due process. Thus, the Court's insistence upon the fundamental importance of minimum contacts between the defendant and the forum state's territory can be seen as the continuing influence of the idea of state sovereignty.

At the same time that the state sovereignty theme tends to limit the scope of personal jurisdiction through the minimum contacts requirement, a strong nationalist theme in *International Shoe* tends to expand jurisdiction, particularly in cases involving commercial enterprises. As the Supreme Court would subsequently note in a case applying *International Shoe*:

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by a full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

In sum, the apparent difference in the approaches taken by the Supreme Court in *Pennoyer* and *International Shoe* merely reflects the dominance of different themes in the two cases. Nevertheless, all four themes seem to be alive in each case. Because these themes are irreconcilable, they coexist in constant tension; because they coexist in constant tension, no obvious reason suggests that the balance struck in *International Shoe* should be any more stable than that struck in *Pennoyer*. This inherent instability of jurisdiction doctrine can be demonstrated by comparing three cases decided more than thirty years after *International Shoe*:

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76. *International Shoe*, 326 U.S. at 319.
77. Consider, for instance, the "rare parrot" hypothetical discussed in the text at 324.
PERSONAL JURISDICTION

79. It is important to note that the rhetoric of modern Supreme Court decisions suggests that personal jurisdiction has stabilized. Thus, in Shaffer v. Heitner, the Court describes International Shoe as a fundamental break with the kind of analysis represented by Pennoyer and suggests that the modern due process analysis of personal jurisdiction now hews the International Shoe line. 433 U.S. 186, 227 (1977). Similarly, the Court insists in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982), that modern cases such as World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), are not concerned with state sovereignty considerations independent of an individual rights focus.

Such statements might reflect the proportionate mix of the four themes in vogue at a particular point in time among a majority of the Court; or they might simply reflect a rhetorical preference for discussing personal jurisdiction in terms of individual rights, rather than state sovereignty. In either case, the following discussion of three post-International Shoe cases suggests that, notwithstanding these pronouncements, the themes commonly associated with Pennoyer (including the state sovereignty theme) continue to influence the outcome of personal jurisdiction cases, just as "modern" concerns (such as fairness and nationalism) can be detected in Pennoyer.

83. Shaffer v. Heitner, 433 U.S. 186, 216 (1977), quoted in Kulko v. Superior Court, 436 U.S. 84, 94 (1978). As noted supra text accompanying notes 73-75, the idea of purposeful availment first emerged from the discussion of corporate consent in International Shoe. It received its full articulation 13 years later in Hanson v. Denckla, 357 U.S. 235 (1958), when the Court concluded that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id. at 253.
see being hailed into the forum's court. Accordingly, if the defendant freely chose to engage in activities from which she could anticipate potential litigation arising in the forum, then personal jurisdiction is grounded in that free choice, and a principal concern of the individualist theme is satisfied.

More specifically, the concept of purposeful availment rests on the notion of *quid pro quo*: the individual owes society a debt in return for the benefits society has bestowed on him through, among other things, its laws. This debt is satisfied, in part, through the individual's submission to the orderly process of adjudication. As suggested earlier, the principle of *quid pro quo* has both individualist and communitarian dimensions. It is individualist in the sense that it expresses ideas of contract—the defendant has freely chosen to accept obligations in exchange for benefits. The principle is communitarian in the sense that it expresses the idea that the society, through the forum, conferred benefits on the defendant and has a right to hold her accountable. This latter idea focuses not on subjective choice, but on objective fairness; it expresses not principles of actual contract, but those of quasi-contract, of unjust enrichment.

a. *Kulko v. Superior Court*

In *Kulko*, a California court asserted jurisdiction over a New York defendant for the purpose of increasing the amount of child-support he should pay to his ex-wife, who was domiciled in California with primary custody of their children. The defendant objected that this exercise of jurisdiction violated his due process rights. The United States Supreme Court held that whether the defendant had the requisite minimum contacts with California hinged on whether he had "'purposefully availed himself' of the 'benefits and protections' of California's laws."

The key contact with the state was the defendant's decision to send his daughter (at her request) to live in California with her mother for

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84. *E.g., Kulko*, 436 U.S. at 97.
85. See *supra* text accompanying notes 73-75.
86. *Cf. Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940) ("an incident of domicile is amenability to suit within the state"); *Adam v. Saenger*, 303 U.S. 59, 67-68 (1938) ("Amenability to a defendant's cross-action is the price a state may exact as a condition of opening its courts to a plaintiff").
87. See *supra* text accompanying notes 74-75.
88. An analogy to restitution principles also suggests itself, but such an analogy can be misleading. *World-Wide Volkswagen* teaches that causing bad effects within a state may not be a sufficient basis for jurisdiction. 444 U.S. at 287, 299. Thus, it is the benefit to the defendant, not injury to others, that triggers the obligation described as a *quid pro quo*.
most of the year. The Supreme Court concluded that in so acting, the defendant had not purposefully availed himself of the "benefits and protections" of California's laws. At first, this conclusion seemed odd; after all, the defendant did purposefully send his child to California, and he would undoubtedly benefit from the obligations of child care that California law would impose on his ex-wife as well as California's regulation of his own child support obligation and visitation privileges.

But it is clear that the Kulko Court was concerned with a much narrower "purpose." The Court discounted the above reasons by emphasizing that it was the mother, not the defendant, who chose California as the state of domicile for their child.90 Thus, whatever purpose the defendant had, it was not specifically directed toward California. The Court summarized this conclusion with a quotation from its earlier opinion in Hanson v. Denckla:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . . .91

In short, the defendant did not purposefully avail himself of California's benefits because he had not participated in the choice of that state as the domicile of the mother and children. This emphasis on the defendant's power of choice is highly individualistic.

At the same time, the Kulko Court supported its conclusion with an appeal to communitarian values—objective, public concerns for fairness and reasonableness:

[B]asic considerations of fairness point decisively in favor of [New York] as the proper forum for adjudication of this case, whatever the merits of [the mother's] underlying claim . . . . As noted above, appellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California. This single act is surely not one that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away, and we therefore see no basis on which it can be said that appellant could reasonably have anticipated being "hailed before a [California] court."92

These communitarian values also require consideration of the forum state's stake in the litigation. In this regard, the Court addressed California's "substantial interests in protecting the welfare of its minor residents and in promoting to the fullest extent possible a healthy and supportive

90. Id. at 93-94.
91. Id. (quoting Hanson v. Denckla, 357 U.S. 235, 250-51 (1958)).
92. Id. at 97-98 (quoting Shaffer v. Heitner, 433 U.S. 186, 216 (1977)).
family environment in which the children of the State are to be raised.” However, this interest could have been vindicated through either California or New York’s versions of the Revised Uniform Reciprocal Enforcement of Support Act which would have permitted the mother to file her child-support claim in California and have it adjudicated in New York. Thus, the balancing of the interests of the defendant, California, and (by implication) the plaintiff—a technique expressive of the communitarian theme—pointed toward New York, not California, as the appropriate forum.

The discussion of Pennoyer and International Shoe emphasized the tension between the individualist and the communitarian themes. As Kulko illustrates, these themes, though fundamentally different, can in certain factual settings point in the same direction: both suggested the inappropriateness of California as the forum for the Kulko litigation.

The Kulko opinion provides less discussion of the state sovereignty and nationalist themes. As suggested above, the very notion of minimum contacts reflects an ongoing concern with territorial sovereignty. At the same time, the Court in Kulko acknowledged the nationalist theme running through the cases. It used references to the “nationalization of commerce” and to “modern transportation and communication” to distinguish this domestic relations problem from the kind of commercial activity in which the significance of state borders diminishes.

This latter point suggests just how much the result in Kulko is a function of the particular mix of themes in the Court’s analysis. The emphasis on the individualist and communitarian themes led the Court to think about personal jurisdiction, particularly purposeful availment, in fairly restrictive terms. Had the Court focused more attention on the nationalist theme, it might have concluded that, like commerce, child support has become a problem of national rather than local concern in a society characterized by mobility and increasing fragmentation of the family. This, in turn, would have argued for attaching less significance to state lines in child-support litigation and for a correspondingly more liberal approach to the issue of California’s jurisdictional reach.

93. Id. at 98.
94. Id. at 98-100.
95. But see Hanson, 357 U.S. at 254 (apparently rejecting a balancing approach).
97. Id.; see id. at 97.
98. The very existence of the Uniform Reciprocal Enforcement of Support Act suggests the national scope of child-support issues, just as the Uniform Commercial Code helps us view commerce as a national phenomenon.
b. *Burger King Corp. v. Rudzewicz*

In *Burger King*, the Burger King Corporation sued the owner of one of its Michigan franchises in Florida, where Burger King was incorporated and had its principal place of business. The franchisee did business exclusively in Michigan; its contacts with the Burger King Corporation were largely through the latter's Michigan district office, and supervision and support services came from that district office. Nevertheless, analyzing whether the defendant had purposefully availed himself of the benefits and protection of Florida law, the Supreme Court held that Florida could constitutionally exercise jurisdiction over the defendant.

In reaching its conclusion, the Court focused on two contacts between the defendant and Florida. First, the defendant “most certainly knew that he was affiliating himself with an enterprise based primarily in Florida.” The defendant initiated negotiations leading to the franchise arrangement, sent all fees and notices to the Florida headquarters, and apparently dealt directly with some of the Florida personnel when trouble arose in the operation of the franchise. Yet, while it is clear that the defendant purposefully affiliated himself with Burger King, it does not follow that he purposefully affiliated himself with Florida (any more than Kulko had purposefully affiliated himself with California when he sent his daughter to her mother).

Second, the Court noted that the franchise agreement between defendant and Burger King specified that it would be governed by Florida law. This contractual provision, the Court concluded, indicated that the defendant had “purposefully availed himself of the benefits and protection of Florida’s laws.” But the provision was inserted into the form contract by Burger King, and its purpose was certainly to benefit Burger

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100. *Id.* at 482.
101. *Id.* at 480.
102. *Id.* at 481.
103. It has been suggested to me that the franchisee's action was more purposeful than Kulko's—the franchisee sought out a contact with Burger King while Kulko was merely responding to his daughter's wishes. This seems to me mistaken. Each defendant acted to make a contact with the forum state. (The franchisee contacted Burger King, and Kulko sent his daughter to his former wife in California.) The franchisee and Kulko clearly had different motives in making their respective contacts. (The franchisee made his contact with Florida to make money; Kulko made his contact with California to satisfy his daughter's wish.) Each motive was presumably important to the respective defendant. I do not see the difference in the motivation for each defendant's actions affects the purposefulness of those actions.
104. *Id.* at 482 (quoting *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1513 (1984) (Johnson, J., dissenting)).
King, not the defendant.105

All this seems to suggest that “purposeful availment” was being applied differently in Burger King than in Kulko. This difference is confirmed by the Burger King Court’s general discussion of the concept. Purposeful availment, according to the Court, is established when a defendant “‘purposefully directs’ his activities toward forum residents” and the litigation relates to those activities106—a characterization that perfectly describes Kulko’s activities.

Thus, Burger King expanded the meaning of purposeful availment. Kulko required that the defendant choose a particular forum in which to conduct beneficial activities. In Burger King, it was enough to enter into a beneficial relationship with someone who happened to be in a particular forum.

Underlying the difference in the definition of purposeful availment is a difference in the proportionate weight given the four jurisdictional themes. Nationalism, invoked only in passing in Kulko, comes to the fore in Burger King. The Court reminded us that “it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.”107 Moreover, determining the legitimacy of an assertion of personal jurisdiction requires consideration of “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies” as well as the “shared interest of the several States in furthering fundamental substantive policies.”108 These nationalist observations naturally create pressure to think of personal jurisdiction in expansive terms. The Burger King Court reacted to this pressure by broadening the meaning of purposeful availment.

c. World-Wide Volkswagen Corp. v. Woodson

World-Wide Volkswagen, decided after Kulko and before Burger

105. Because its franchises are scattered far and wide, it was clearly in Burger King’s interest to specify a single state’s law to govern all franchise agreements, thereby achieving uniformity of results. See Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 195 (2d Cir. 1955).


107. Id. at 476. This represents an interesting metamorphosis of the nationalist theme. Pre-International Shoe cases explained the expansive reach of jurisdiction in commercial cases in terms of the business entity being “present” in those places where it conducted business. See International Harvester Co. v. Kentucky, 234 U.S. 79 (1914). This metaphor of presence was abandoned in International Shoe, 326 U.S. at 316-17.

King, shows us yet a different mix of the jurisdictional themes, leading to a restrictive view of purposeful availment. This products liability case began in Oklahoma. The action arose out of an automobile accident in that state. The plaintiff's injuries were allegedly caused by a defective car purchased in New York from Seaway Volkswagen, one of the retail dealerships for cars distributed regionally by World-Wide Volkswagen, a New York corporation. The Supreme Court held that Oklahoma’s exercise of jurisdiction violated the due process rights of Seaway and World-Wide.109

Once again, much of the Court’s analysis focused on the question of purposeful availment. The Court held that since Seaway and World-Wide did not directly sell automobiles to customers in Oklahoma, they had not purposefully availed themselves of the benefits and protections of Oklahoma’s laws.110

But this analysis is not obviously correct. As the dissenters pointed out, modern automobiles are frequently driven to distant places and are designed for such travel. Moreover, the construction and maintenance of roads for automobile travel in distant states like Oklahoma benefitted World-Wide and Seaway by increasing the demand for their cars.111 Indeed, as the majority had to concede, “[i]t is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma.”112

If the notion of purposeful availment adopted in World-Wide Volkswagen seems a bit farfetched, consider that the Court cited with apparent approval113 the decision of the Supreme Court of Illinois in Gray v. American Radiator & Standard Sanitary Corp.114 In Gray, the Titan Valve Manufacturing Company, an Ohio corporation, sold valves outside of Illinois to American Radiator & Standard Sanitary Corporation, which used the valves in the construction of hot water heaters in Pennsylvania. American Radiator, which had customers throughout the country, sold one of these heaters to a consumer in Illinois. Allegedly as a result of a defect in one of Titan’s valves, the heater exploded in Illinois and caused injuries. The court held that Illinois could exercise jurisdic-

110. Id. at 297-98.
111. See id. at 298-99; id. at 307 (Brennan, J., dissenting); id. at 314 (Marshall, J., dissenting).
112. Id. at 298.
113. Id. at 297-98.
tion over Titan. Titan presumably expected that American would sell heaters containing Titan's valves in Illinois, and Titan benefited from those Illinois sales and "from the protection which [Illinois] law has given to the marketing of hot water heaters containing its valves."116

Thus, the foreseeability that heaters containing Titan's valves would be sold in Illinois, even though the specific decision to sell the heaters was made, not by Titan, but by Titan's customer, was sufficient to sustain Illinois' jurisdiction over Titan in Gray. Yet the foreseeability that cars sold in New York would be used in Oklahoma, even though the specific decision to take a car to Oklahoma was made unilaterally by the customer, was not sufficient to sustain Oklahoma's jurisdiction over Seaway and World-Wide Volkswagen. In short, defendants in both cases benefited from the ultimate use of their product in the forum state, and that use was foreseeable.

The World-Wide Volkswagen Court avoided discussing these possible inconsistencies with Gray by highlighting the individualist theme. If automobile sellers could be sued wherever the buyer drove the car, then "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel."117 Such a result would smack of tying jurisdiction to the "unilateral activity of those who claim some relationship with a nonresident defendant" —an approach disapproved in Hanson118—an approach disapproved in Hanson119 and Kulko.120 In short, jurisdiction in such a situation would be a product of the plaintiff's, not defendant's, choice.

In World-Wide Volkswagen, the theme of state sovereignty was just as influential as the individualist theme. The Court repeatedly pointed out that the purpose of the minimum contacts limitation on jurisdiction is "to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."121 In short, that limitation is the "consequence of territorial limitations on the power of the respective states."122 This view is obviously reminiscent of Pennoyer.

115.  Gray, 211 Ill. 2d at 444, 176 N.E.2d at 767.
116.  Id. at 442, 176 N.E.2d at 766.
117.  World-Wide Volkswagen, 444 U.S. at 296.
118.  Id. at 298 (quoting Hanson, 357 U.S. at 253).
119.  357 U.S. at 253.
120.  436 U.S. at 98; see supra note 90 and accompanying text. Rejection of this approach also rests on the communitarian theme of fairness: Why should a local business have to defend an action in a remote forum simply because a customer chose to take the product there?
121.  World-Wide Volkswagen Corp., 444 U.S. at 292.
122.  Id. at 294 (quoting Hanson, 357 U.S. at 251).
The emphasis of the individualist and state sovereignty themes in *World-Wide Volkswagen* led to an articulation of personal jurisdiction in relatively narrow terms, and, in particular, to a restriction of the concept of purposeful availment. Hence, even though *World-Wide Volkswagen* is a commercial case like *Burger King*, the particular interplay of themes in the former case tends to narrow the crucial jurisdictional concepts in a manner more reminiscent of *Kulko*.

These three cases, with their varying interpretations of purposeful availment, might seem inconsistent and thus confused. But the truth is that the term purposeful availment can mean different things; its meaning can be expanded and contracted. Thus, while the meanings given the phrase in the three cases are inconsistent, they are also all "correct."\(^{123}\)

What correlates with the particular meaning used in a particular case is the particular mix of the four jurisdictional themes that appeals to the majority of the Court. This relationship between the coexistence of irreconcilable themes and the indeterminacy of legal doctrine pervades the law.

II. The Nature of Legal Argument

We find the idea of black letter law so appealing because we imagine that the development of legal doctrine is an ongoing process of defining ever more clearly and precisely our legal relationships, rights, and duties. In short, we see legal argument as the pursuit and identification of rules.\(^{124}\)

The foregoing analysis suggests a different model. I have tried to present personal jurisdiction doctrine as a pulsating mass with irreconcilable parts, as an amoeba whose shape continually changes within a confining membrane. Moreover, I assert that this characterization is not limited to personal jurisdiction; it describes all legal doctrine.

Why should this be so? One possible explanation currently receiving some attention in legal literature, is that all ideas and perceptions about the real world are fundamentally arbitrary; they represent artificial ways of dividing up the world that we impose upon it. Since our ideas and perceptions lack roots in the world, they are unstable when used as

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\(^{123}\) "Correct" is used here as an analytical judgment, not a normative one. Each meaning of purposeful availment is correct in that it is logically consistent with certain mixes of the four themes developed in the precedents.

\(^{124}\) An interesting example of this phenomenon is the treatment of choice-of-law in the *Restatement (Second) of Conflict of Laws* (1971), which seeks to develop concrete rules in the long run through the ad hoc consideration of several specified themes. See generally Reese, *Choice of Law: Rules or Approach*, 57 Cornell L. Rev. 315 (1972).
tools for dealing with the world. Legal doctrine, which purports to be a tool for dealing with the world, simply shares a quality common to all products of human thought.125

Another theory can be built on psychological data that suggests we experience ourselves as both separate from the outside world and attached to the world.126 Thus, we would sensibly expect our ideas about the world, including our legal and other relationships, to simultaneously express notions of alienation and community. The four themes of jurisdiction reflect this ambivalence on both a personal level—the individualist and communitarian themes—and a political level—the state sovereignty and nationalist themes.

Whatever the truth of these explanations, it is certainly true that one of the essential purposes of legal doctrine is to serve as a tool for resolving conflicts—conflicts that arise out of different material interests, different points of view, different ways of thinking about the world. Legal doctrine—be it promissory estoppel, negligence, or personal jurisdiction—seeks to accommodate these differences. But the differences are fundamental; they cannot be accommodated. They do not vanish in the face of developing legal doctrine. Rather, they are contained in perpetual tension within legal doctrine.

Synthesizing cases, reading a group of precedents in search of the threads that give coherence to the doctrine they collectively express127 is the process that uncovers the irreconcilable themes. It is those very themes that give legal doctrine its coherence.128 Paradoxically, it is those very themes that make legal doctrine mutable.

This view of legal doctrine as a fabric made of interwoven themes is sometimes expressly adopted by courts. For example, those jurisdictions that adopt Robert Leflar's approach to choice-of-law problems address those problems through a straightforward discussion of five "choice-influencing considerations": predictability of results, maintenance of interstate and international order, furtherance of the forum state's interests, simplification of the judicial task, and application of the better rule of

128. This point needs emphasis: Coherence does not require determinacy. Two courts wrestling with the four jurisdictional themes in the same case might resolve those themes differently and reach different results. Nevertheless, since they are confronting the same themes, each would understand what the other is doing; thus, the doctrine is coherent.
These five themes, like the four jurisdictional themes, vary in terms of relative proportion from case to case. Significantly, Leflar suggests that choice-of-law decisions, even those by courts that do not overtly refer to the five choice-influencing considerations, can be most satisfactorily accounted for in terms of those themes.

Approaches to issues that call for a balancing of interests are similar. This technique is, for example, commonly used in procedural due process notice-and-hearing cases. The idea is to resolve the question of what process is due by simultaneously considering distinct and often conflicting interests. The metaphor of balance, however, is misleading. It suggests that the contending forces can be resolved, that an objective point of equilibrium can be reached. But the “balance” often can be defensibly struck at many points. The interests are irreconcilable; they can all be considered, but in many cases they cannot all be accommodated. In those cases, one or more of the interests must be compromised; within limits determined by precedents, an infinite number of formulas for compromise are possible.

An understanding of the coexistence of irreconcilable themes within legal doctrine helps explain the difference between “easy cases” and “hard cases.” Here are two examples of easy jurisdictional cases:

1. I am involved in a boundary dispute with my neighbor concerning an alley that runs between our homes. We both live in Philadelphia, Pennsylvania. My neighbor files suit in the appropriate Philadelphia court. I am personally served with process at my house, in accordance with state law.

2. I am involved in the same boundary dispute. My neighbor, while vacationing in Alaska (with which I have no contacts) files suit in a Fairbanks court, which serves me by registered mail in accordance with the state’s long-arm statute.

Does the Philadelphia court have personal jurisdiction over me? Yes. How about the Fairbanks court? Of course not. These are easy cases. The application of jurisdictional doctrine to these facts is clear.


131. Id. § 108.


134. The problem of “hard cases” is explored at length in R. Dworkin, TAKING RIGHTS SERIOUSLY 81-130 (1977).
There are "right answers."\textsuperscript{135}

Why? Because as applied to each factual situation, the four themes that constitute jurisdictional doctrine lead to the same conclusion. The individualist, communitarian, state sovereignty, and nationalist principles that emerge from a synthesis of the precedents all point to the existence of jurisdiction in the first case and the absence of jurisdiction in the second.\textsuperscript{136}

Some cases are hard. Consider the following facts:

I purchase a rare parrot from a small pet store in Camden, New Jersey, just across the Delaware River from my home in Philadelphia. The parrot dies the next day. The store owner, a New Jersey domiciliary (who does not advertise outside of New Jersey), refuses to refund the purchase price. I sue in Philadelphia.

Can the Philadelphia court constitutionally exercise jurisdiction over the Camden pet store owner? The jurisdictional themes seem to point in different directions. The state sovereignty theme, with its territorial limitations on power, argues against jurisdiction. Similarly, the individualist theme, which sees personal jurisdiction exclusively in terms of voluntary submission or physical power, also weighs against finding jurisdiction. On the other hand, state boundaries have little significance in the context of the nationalist theme, particularly with regard to business enterprises with interstate aspects. Moreover, looking at the commu-

\begin{itemize}
\item \textsuperscript{135} The term "right answer" refers to an outcome that inevitably follows from the consideration of particular facts in the context of legal doctrine. As with the terms "correct," \textit{supra} note 123, and "legitimate," \textit{infra} note 138, I mean to express no normative judgment by the phrase.
\item \textsuperscript{136} When I say that the four themes all lead to a particular result in each of the hypotheticals in the text, I am not making any absolute statement about the content of those themes. It seems obvious to me, for example, that concepts like "fair play" and "substantial justice" are sufficiently vague to be usable in constructing arguments against jurisdiction in the first hypothetical and supporting jurisdiction in the second.
\end{itemize}

Thus, I must qualify my assertions about the function of the themes in easy cases in two ways. First, I am predicting the behavior of judges. My point is not that we \textit{must} (nor that we \textit{necessarily} should) understand the themes in particular ways, but that judges \textit{do} understand the themes in particular ways—ways that they derive from the reasoning contained in precedents. \textit{See infra} note 139. Accordingly, the rulings of judges in vast numbers of cases can be predicted with great precision. Second, I am speaking about the present. It is certainly possible that any case that is easy today might become hard in the future as the thinking about the themes evolves. But that potential does not make those cases hard today; it does not mean that any judge will at the present seriously consider novel arguments in those cases. Indeed, one of the characteristics of easy cases is that they are generally resolved summarily without significant debate. Debate takes place in the hard cases and may ultimately change judges' perceptions of what were once thought to be easy cases. My conclusion, thus qualified, is modest: At any given time, the outcomes of an enormous number of cases can be predicted with virtual certainty, regardless what arguments are offered to the judge. In this pragmatic sense, there are "easy" cases.
tarian theme, there seems to be nothing particularly unfair about requiring the pet store owner to travel two miles to defend in the court of a state that has an interest in providing a forum for resident plaintiffs.

A more detailed analysis of this problem reveals its key: the tension between the state sovereignty and nationalist themes. By emphasizing one or the other of these themes, the lawyer can affect the orientation of the individualist and communitarian themes.

Thus, the argument against jurisdiction might go like this: Respect for the sovereignty of New Jersey strictly limits the exercise of jurisdiction by Pennsylvania to persons or property within its borders. The one exception (to be construed narrowly so as not to swallow the rule of territorial sovereignty) is that jurisdiction can be exercised over absent defendants who voluntarily submit or consent to the court's authority. Here the defendant has not expressly consented to jurisdiction, nor has she advertised in Pennsylvania or otherwise conducted activities in that state so as to give rise to an implication of consent. In other words, she has not purposefully availed herself of the benefits of Pennsylvania law. Her business activities are essentially local; they do not involve the kind of national commercial operations that render state boundaries insignificant. The test for personal jurisdiction is whether the defendant has had minimum contacts with the forum. The only contact between the defendant and Pennsylvania in this case is the plaintiff's trip to New Jersey to make a purchase. Precedent makes clear that subjecting a defendant to jurisdiction based on the unilateral activity of the plaintiff is not consistent with "traditional notions of fair play and substantial justice."

An opposing argument requires simply a shift in emphasis from state sovereignty to nationalism: Retail activities are artificially contained within state borders. Economically, Philadelphia and Camden, by virtue of their proximity, constitute a single region; there is a free and constant flow of customers between the shopping districts of the two cities. Accordingly, anyone who runs a store in either city should reasonably expect that some portion of the business will come from nonresident customers, especially if one deals in rare items. Just as it is foreseeable that the defendant would serve Philadelphia customers, so she would expect to have recourse to Pennsylvania courts when customers from that state fail to pay. Since sales to Pennsylvania residents and reliance on Pennsylvania courts constitute foreseeable components of the defendant's business activities, she has purposefully availed herself of the benefits of Pennsylvania and the protection of its laws. Moreover, since the defendant has chosen to engage in business activities with Pennsylvania residents and to avail herself of that state's benefits, she can foresee the
possibility of litigation related to her business activities against her in Pennsylvania courts. As noted above, requiring her to travel a couple of miles to defend in such litigation seems reasonable and fair and thus does not offend communitarian values. Finally, since jurisdiction is not solely an assertion of power across borders, but flows from choices freely made by the defendant (the analogies here are to consent and submission), it does not offend notions of territorial sovereignty.

*Kulko, World-Wide Volkswagen,* and *Burger King* were also hard cases. The various objections made in the discussions of those cases to the Supreme Court's analysis were not suggestions that the Court's reasoning was irrational. The point, rather, was that the Court's reasoning was based on a particular mix of the four jurisdictional themes; a different mix would rationally support the opposite conclusion. Implicit in this point is the idea that legitimate legal arguments on an issue—arguments perceived to have some persuasive value—are based on themes uncovered through synthesis of the precedents relating to that issue. Conversely, arguments that cannot be connected to one or more themes constituting the applicable doctrine have no persuasive value.

The degree to which legitimate arguments integrate the themes measures the quality of the arguments. An argument based on a single theme is credible; one that uses the other themes in supporting roles is more persuasive. The degree of integration is particularly important in hard cases since the themes tend to pull in opposite directions. As the foregoing discussion of the jurisdictional cases and hypothetical of the dead parrot suggest, emphasis on one theme can be used to expand or contract the principles and concepts derived from other themes. By attending carefully to this interplay of themes, coherent arguments of great subtlety can be constructed.

None of this, of course, explains why a particular argument, with its particular mix of themes, will appeal to a court in one case, while a different argument, with a different mix of themes, will appeal to the court in

137. See *supra* notes 91-93, 95-104 & 111-12 and accompanying text.

138. "Legitimate" here describes the experience of reasonableness, of persuasive value; it is not intended to imply a normative judgment. When all the themes lead to a single conclusion, no legitimate argument can be made for the opposite result. That is an easy case. Since hard cases involve conflicting themes, legitimate arguments can be made supporting opposite conclusions.

139. Why should the themes "lead" anywhere at all? To some extent the themes are ridden with ambiguities just like the doctrine of which they are constituent parts. As a community concerned with understanding the themes of jurisdictional doctrine, however, we share a narrow range of understanding of those themes. Stanley Fish has explored the possible origin of this shared view in the institution of law itself and in the web of social institutions encompassing law. See, e.g., *Fish v. Fiss,* 36 STAN. L. REV. 1325 (1984).
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nor does it explain why the same argument will appeal differently to different courts. Why, for example, did expansive nationalist themes dominate in *Burger King*, while restrictive state sovereignty themes dominated in *World-Wide Volkswagen*? Why did the *World-Wide Volkswagen* Court approvingly cite *Gray*, which reached the opposite result, but is analytically indistinguishable?

If the jurisdictional themes will support opposite conclusions in these hard cases, then the choice of legal arguments based on those themes is clearly not a matter of logical necessity. One nonlogical comparison of *World-Wide Volkswagen* and *Gray* could focus on the chains that connected the defendants in the two cases to the respective forums. In *Gray*, the chain was a series of business transactions. (Titan sold valves to American, which sold a water heater to an Illinois customer.) In *World-Wide Volkswagen*, the last link was the activity of a private party. (World-Wide distributed to Seaway, which sold to a private customer, who drove to Oklahoma.) To a particular judge, this difference might give each case a different "feel." *Gray* "feels" like a commercial case. Thus, the nationalist themes typically associated with commercial cases may be perceived as more persuasive. Moreover, the high degree of commercial dependence on benefits and remedies given by state law might highlight the communitarian dimension of purposeful availment.

On the other hand, *World-Wide Volkswagen* "feels" like a tort case. Since tort cases traditionally have a strong territorial focus, state sovereignty themes may well seem more pertinent. Furthermore, the traditional focus on subjective fault in tort cases might underscore the individualist dimension of purposeful availment. Viewed in this light, *Burger King* makes sense. It is a quintessential commercial case. Hence, the predominance of the jurisdiction-expanding nationalist themes is unsurprising.

The foregoing discussion of *Gray*, *World-Wide Volkswagen*, and *Burger King* is not intended to present some particular psychological the-

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140. The world is, of course, not itself divided into tort problems and commercial problems; this is a distinction that we impose upon the world. See Peller, supra note 125. Moreover, the situation is circular: If cases like *Gray* and *World-Wide Volkswagen* reflect this distinction, they also reinforce it. That sense of circularity—that we are somehow trapped in a particular way of perceiving the world and that this perception both creates the themes of legal doctrine and is reinforced by them—lies at the heart of structuralist analysis. See generally Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984).

141. For example, traditional choice-of-law theory looks to the lex loci delicti to determine the substantive rights and liabilities of the parties in tort litigation. See, e.g., Alabama Great S.R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); *Restatement of Conflict of Laws*, §§ 378-379, 384-387, 390-391, 393, 412, 421 (1934).

ory of adjudication nor to describe a universal reaction to the cases.\textsuperscript{143} Rather, it is to emphasize the nonrational component of legal argument and judicial decision-making in hard cases.

The themes of the personal jurisdiction cases determine the contours of legitimate legal arguments about jurisdiction. In easy cases, such arguments will inevitably lead to one conclusion.\textsuperscript{144} Hard cases are different. Legitimate arguments can be made in opposite directions, and nothing about the themes can determine which legitimate argument a judge will find more persuasive than others. If the persuasive power of arguments does not come from their internal logic, then the challenge of legal theory is to account for that power in other terms.\textsuperscript{145}

Legal theory must also account for legal rights. Specifically, the notion of legal rights seems intuitively to make sense in an easy case, in which only one substantive result is correct.\textsuperscript{146} But if it is true that legitimate legal arguments in hard cases can support different results, then does it not follow that legal rights do not exist in such cases? Section III addresses this question.

\section*{III. Rights and Right Answers}

A question that has always stirred much controversy in legal philos-

\textsuperscript{143} The contingent nature of these reactions is illustrated by comparing the majority opinion in \textit{World-Wide Volkswagen} with the dissents of Justices Brennan, Marshall, and Blackmun. Moreover, the Court has recently split over the validity of the \textit{Gray} analysis. \textit{Asahi Metal Indus. v. Super. Ct.}, 107 S. Ct. 1026 (1987). Four members of the Court concluded that the mere introduction of a product into the stream of commerce is insufficient to subject the manufacturer to jurisdiction in a state where that product ultimately causes an injury. \textit{Id.} at 1033 (O'Connor, J., plurality opinion). Four other members reached the opposite conclusion. \textit{Id.} at 1035-38 (Brennan, J., concurring). The ninth Justice held that each case must be analyzed on its own facts, but that the "stream-of-commerce" analysis would normally support jurisdiction in the case of a manufacturer doing a large volume of business. \textit{Id.} at 1038 (Stevens, J., concurring). It thus appears that a bare majority would continue to approve the result in \textit{Gray}.


\textsuperscript{145} Of course, the mystery of persuasive power is significant not only in hard cases: it lies at the heart of legal argument generally. This Essay has sought to describe the connection between persuasive arguments and the themes contained in legal doctrine, but has not explored why that connection should exist, nor why we find arguments that are not connected to the themes unpersuasive. Stanley Fish has argued that our ability to interpret legal doctrine and thereby to assign meaning to doctrine is necessarily constrained by certain shared understandings about the context in which that interpretation takes place. See Fish, \textit{supra} note 139. If that is true, then arguments that would assign a meaning to jurisdictional doctrine falling outside those constraints will be experienced as irrational. The four jurisdictional themes express those constraints.

\textsuperscript{146} For the meaning of "correct," see \textit{supra} note 123
ophy is whether one can truly be said to have legal rights.\footnote{147. See, e.g., R. Dworkin, supra note 134 \textit{passim}; Symposium: \textit{A Critique of Rights}, 62 Tex. L. Rev. 1363 (1984).} What do we mean by legal rights? Where might they come from? How do we know what they are?

A separate question is whether the law provides right answers.\footnote{148. See, e.g., R. Dworkin, supra note 134.} Is the law determinate? Or is the logical form of legal argument simply a façade, masking the susceptibility of all legal questions to opposite resolutions?

These two questions can be merged. Ronald Dworkin does so when he grounds legal rights in the law's alleged capacity to produce determinate answers to all legal questions. Dworkin pictures the law as a complex of principles that have emerged over time.\footnote{149. \textit{Id.} at 105-23.} The judge can employ these principles, with their relative weights, to resolve any legal issue.\footnote{150. The relationship between the themes of personal jurisdiction and specific jurisdictional principles can be illustrated by the following:

One principle is that a state may exercise power over any person found within its borders. Another principle is that a court should not associate itself with wrongdoing. These principles must be harmonized when, for example, a defendant is fraudulently induced to enter a state and is then served with process. Generally, the courts have resolved this problem by treating the principle of avoiding wrongdoing as a qualification to (or weightier than) the principle of plenary sovereignty over persons inside the state's border. \textit{See, e.g.}, Smith v. Gibson, 83 Ala. 284, 3 So. 321 (1888).

The principle of plenary sovereignty expresses the state sovereignty theme of personal jurisdiction, and the principle of avoiding wrongdoing expresses the communitarian theme. In general, one could say that principles are normative statements that express one or more doctrinal themes.} To treat parties as others have been treated in the past.\footnote{151. \textit{See, e.g.,} R. Dworkin, \textit{supra} note 134, at 112-15.} To treat parties as others have been treated in the past, the judge must identify the applicable principles, give them their appropriate weight, and apply them to the facts to determine the right answer. In easy cases, the identification and application of the relevant principles are easy. In hard cases they are hard. But there is no fundamental difference between how the law is applied in hard and easy cases.

By contrast, H.L.A. Hart sees easy and hard cases as involving essentially different enterprises. The state authorizes judges to apply legal rules to the cases before them.\footnote{152. H.L.A. Hart, The Concept of Law 29, 94-95 (1961).} In easy cases, the rules specify the
outcome; there are right answers. In hard cases, the issue falls within what Hart calls the "open texture" of the law.\textsuperscript{153} Here, the rules are unable to determine the result. In such cases, the judge is authorized simply to make a decision one way or the other, thereby modifying the rules so as to henceforth determine the resolution of similar cases.\textsuperscript{154} Accordingly, such cases become easy in the future. Thus, parties have legal rights in easy cases. But it is meaningless to talk about legal rights in hard cases.

Finally, some scholars, including some representatives of American Legal Realism\textsuperscript{155} and Critical Legal Studies\textsuperscript{156} view law as essentially subjective, indeterminate, and political; there are no right answers in the sense that such answers are rationally deducible from a closed system of law. These qualities of subjectivity, indeterminacy, and ideology are traditionally hidden by the apparent logic and rationality with which legal arguments are clothed. This skeptical view attacks the facade of logic and rationality and exposes the essential manipulability of legal doctrine.

The implications of this view for the question of legal rights are ambiguous. Strictly speaking, the view suggests that legal rights do not exist. The indeterminacy of law means that all arguments for the existence of a right can be countered with arguments for its nonexistence and that there is no logical basis for choosing between these sets of arguments. Looked at another way, the question of legal rights is subsumed within the larger question of political and social morality: How should we treat one another? If this question cannot be resolved by the logical application of rules and principles (indeed, if it cannot be resolved at all), then it is a matter for ongoing dialogue and ongoing choices.\textsuperscript{157} The language of "rights" may be inadequate to describe or facilitate that process.\textsuperscript{158}

These three radically different approaches share a common idea: The existence of legal rights is inextricably tied to the ability of a legal system to produce determinate answers to specific legal questions. A detailed exploration of these issues is well beyond the scope of this Essay. However, the discussion in sections I and II suggest a somewhat different way of thinking about legal rights and right answers, which at least partially disentangles the two issues.

\textsuperscript{153} Id. at 120, 124-32. The phrase "open texture" comes from Friedrich Waismann's essay \textit{Verifiability}, in 1 \textsc{Essays on Logic and Language} 117 (A. Flew ed. 1952).

\textsuperscript{154} H.L.A. Hart, supra note 152, at 128-32. See R. Dworkin, supra note 134.

\textsuperscript{155} See, e.g., Cohen, \textit{The Ethical Basis of Legal Criticism}, 41 \textsc{Yale L.J.} 201 (1931).

\textsuperscript{156} See, e.g., Singer, \textit{The Player and the Cards: Nihilism and Legal Theory}, 94 \textsc{Yale L.J.} 1 (1984).

\textsuperscript{157} Id. at 38-39.

Law is fundamentally concerned with values; every case raises the question how we as individuals and as a collective society ought to act. Legal doctrine, in the form of constitutional provisions, statutes, administrative regulations, and precedents, comprises attempts to articulate the values that we appeal to in order to answer that question. In some cases those values are consistent, and it is clear how the dispute should be resolved. However, the values that the law represents are sometimes conflicting. The process of resolving these hard cases requires that we enter an ongoing debate over those conflicting values.

On a technical level, this debate is articulated in terms of arguments about legislative intent or the holding of a case or the ratio decidendi of a series of precedents. But these are metaphors. What we are really doing in these arguments is debating how to accommodate in a particular case the irreconcilable values captured within the applicable statute, case, or series of cases.

Section II asserts that the legitimacy of a legal argument depends on its connection to one or more of the themes that inform the legal doctrine in question. These themes, identified through processes like statutory interpretation and case synthesis, express the multiple values we hold simultaneously and irreconcilably regarding the matter at hand. If it is correct that easy cases are ones in which all of the themes lead to one conclusion (in which our values are consistent) and hard cases are ones in which the themes lead to opposite conclusions (in which our values conflict), then it follows that in easy cases all legitimate arguments lead to the same conclusion, while in hard cases legitimate arguments lead to different results. That, in turn, means that easy cases have right answers, but hard cases do not.

This description of legal argument, however, does not lead to the conclusion that there are legal rights in easy cases, but not in hard ones. Parties have the same legal right in every case: namely, to be treated the same as similarly situated litigants in the past. What does that mean? It means applying the same values to the present case as to past cases—that is, deciding the case by a conscientious consideration of the themes that constitute the applicable legal doctrine.

In the easy cases, application of the relevant values, consideration of the relevant themes, will lead inexorably to a particular result. Because so many cases are easy, we imagine that the right is really a right to the substantive result itself. Accordingly, we look for the same right answers in hard cases (à la Dworkin), or we conclude that hard cases must be an altogether different phenomenon (à la Hart). But both of these conclusions seem wrong. Hard cases do not have right answers, but neither are
they radically different from easy cases. Litigants in all cases have precisely the same right: the right to a limitation on the arguments deemed legitimate in the case, a limitation that excludes from consideration values not found in the applicable precedents, statutes, constitutional provisions, and administrative regulations.

Accordingly, the premise shared by Dworkin, Hart, and the skeptics—that legal rights are unalterably dependent on the possibility of right answers—is incorrect. Litigants in every case have the same legal right, regardless of whether the case has a right answer.159

Conclusion

In *Taking Rights Seriously*, Dworkin teaches us the myth of Judge Hercules, who can determine the right answers in hard cases. Judge Hercules has the ability to construct a complete theory of law in which all principles are accounted for in the most consistent manner possible. By resort to this theory, Judge Hercules can resolve all cases.160

Like the idea of black letter law, the myth of Judge Hercules seduces us. We want coherence; we want right answers; and we want, perhaps most of all, certainty.

The discussion of the personal jurisdiction cases suggests that we can have coherence. Four themes and principles derived from those themes form threads that connect all the cases. Legitimate arguments must tie into those themes, and legitimate decision-making is limited to a conscientious consideration of them.

The discussion of the personal jurisdiction cases also suggests that we can have right answers some of the time. In the easy cases all the themes point in one direction; there are right answers in such cases. However, in hard cases the themes, and consequently the arguments, lead to different, equally right answers.

Thus, we can never have certainty. Hard cases, with more than one right answer, demonstrate this. But even easy cases are not certain. Each of us may have a right to conscientious consideration of our legal problems within the thematic contours of applicable legal doctrine, yet

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159. This idea that legal rights are essentially process rights is scarcely new. John Hart Ely has forcefully argued that the fundamental rights that we have written them into the Constitution are basically process-oriented. J. Ely, *Democracy and Distrust* (1980). Moreover, the so-called internal morality of the law, identified by Lon Fuller as a fundamental requirement of any legal system, is also concerned exclusively with form and procedure. L. Fuller, *The Morality of Law* ch. II (1964); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 644-45 (1958).

we have no guarantee that every judge will try to be conscientious nor that every judge is capable of accurately identifying the themes.

I cannot, of course, disprove Dworkin's contention that if we look hard enough in hard cases, we will find principles that tell us how to weigh the contending themes and principles, in short, that we will be able to determine the right substantive answer. But Dworkin's myth of Judge Hercules acknowledges the common experience that in hard cases reasonable mortals do not and probably never will reach consensus on the appropriate substantive outcome. If that is true, then that do we gain by assuming the existence of ultimately unknowable right answers? One possibility is that this assumption provides the basis for moral critique. That is, if we believe there are right answers, then we impose on judges a duty to conscientiously strive to discover what they are. Upon this conclusion rests our ability to define and to criticize arbitrariness in adjudication.161

My conclusion is that arbitrariness can be defined another way. Precedents define the themes around which the debates regarding legal doctrine must take place, and conscientiousness in adjudication—respect for the parties' rights—requires analyzing and deciding a particular case within the limits set by those themes. It is thus that we can have rights without right answers and rule of law without myth.

161. See id. at 129-30.