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**THE HELICOPTER CASE AND THE
JURISPRUDENCE OF JURISDICTION***

58 So. Cal. L. Rev. 913 (1985)

LOUISE WEINBERG**

I. THE HELICOPTER CASE

On January 26, 1976, a helicopter churning through deep fog over Peruvian jungle terrain crashed into a tree. All on board were killed. The craft had been ferrying pipeline workers to their jobsite. Among the dead were four United States citizens. Wrongful death actions were brought by their survivors in a Texas state court. Joined as parties defendant were the oil consortium that had hire the men, and the manufacturer of the craft, both Texas-based. Also joined was the owner-operator of the helicopter, a Colombia corporation.

The Texas place of trial seemed reasonable enough. None of the survivors or their decedents were Texan, but two of the three defendants were. Moreover, the business arrangements connecting the parties seemed either to have been negotiated or contracted for in Texas. The helicopter manufacturer had sold the craft to the Colombian transport company in Texas, and there had trained the latter's pilots on the new equipment. There the defendant employer had hired the plaintiff's decedents, and had negotiated with the transport company to secure helicopter service for the pipeline job. But from the point of view of the Colombian transport company, Helicopteros Nacionales de Colombia, (1985) 58 So. Cal. L. Rev. 913 S.A. ("Helicol"), this was a lawsuit by nonresidents against another nonresident on a foreign cause of action. Helicol objected to the Texas court's jurisdiction.

The consolidated cases nevertheless went to the jury, and pilot error was found to have been the cause of the tragedy. The cases against the manufacturer and the employer were dismissed. Judgments were entered solely against Helicol in total amounts of \$1,141,200 in favor of the survivors, and \$70,000 in favor of the employer.

Why did the trial judge take jurisdiction over Helicol? And why did the Supreme Court of Texas, after reversing the intermediate appellate court,¹ and then reversing itself² on rehearing, think Texas had jurisdiction over Helicol?³ How, for that matter, could Justice Brennan dissent from the United States Supreme Court's tidy opinion to the contrary when, as he remarked, "the Court's holding on this issue is neither implausible nor unexpected"?⁴

By the time *Helicopteros Nacionales de Colombia v. Hall*⁵ was before the United States Supreme Court, the issue had been framed as one of "general" jurisdiction.⁶ That is, it was conceded on all sides that the cause of action—wrongful death occasioned by pilot error—was unconnected with Helicol's business activities in Texas.⁷ Thus, under settled principles, only continuous and systematic activity on Helicol's part, sufficient to approximate the notion of a corporate presence in Texas,⁸ could give Texas jurisdiction over Helicol.

The Supreme Court majority took it that Helicol's only significant activity in Texas had to do with its regular and substantial purchases of **(1985) 58 So. Cal.**

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** Raybourne Thompson Professor of Law, The University of Texas.

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1. *Helicopteros Nacionales de Colom. v. Hall*, 616 S.W.2d 247 (Tex. Civ. App. 1981), *rev'd*, 638 S.W.2d 870 (Tex. 1982), *rev'd*, 104 S. Ct. 1868 (1984).

2. The original, unpublished opinion of the Texas Supreme Court is *Hall v. Helicopteros Nacionales de Colom.*, 25 Tex. S. Ct. J. 190, *withdrawn*, 638 S.W.2d 870 (Tex. 1982).

3. *Hall v. Helicopteros Nacionales de Colom.*, 638 S.W.2d 870 (Tex. 1982).

4. *Helicopteros Nacionales de Colom. v. Hall*, 104 S. Ct. 1868, 1875 (1984) (Brennan, J., dissenting).

5. 104 S. Ct. 1868 (1984).

6. See A. von Mehren & D. Trautman, *The Law of Multistate Problems* 656, 702 (1965) and their seminal article, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136, 1144 (1966) (proposing use of terms "general" and "specific" jurisdiction).

7. *Helicopteros*, 104 S. Ct. at 1873 n. 10; Brief for Respondents at 14, *id.*

8. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952). It is by no means settled whether specific jurisdiction exists in an action related to, but not arising from the defendant's forum activities. This question was reserved in *Helicopteros*. 104 S. Ct. at 1873 n. 10, Justice Brennan, dissenting, would have sustained specific jurisdiction over Helicol based on its Texas activity "related to" the cause of action. See *infra* note 16 and accompanying text.

L. Rev. 915 helicopters there.⁹ Under the law as it then stood¹⁰ and now continues to stand, making purchases in a state, however regularly or substantially, was not the sort of activity that could justify subjecting the purchaser to trial there in a case unrelated to the purchases. The only moderately interesting question before the Court, then, seemed to be whether to reconsider *Rosenberg Brothers & Co. v. Curtis Brown Co.*¹¹ That case, predating both *International Shoe Co. v. Washington*¹² and *Erie Railroad Co. v. Tompkins*,¹³ held, apparently as a matter of general common law, that purchases in the forum state, without more, could not ground general jurisdiction over a nonresident corporation.¹⁴ *Helicopteros* might be said to hold that the Supreme Court will not reconsider *Rosenberg*.¹⁵

But the opinions below, which had sustained jurisdiction, are not written within this analytic framework. Those opinions do not simply hold that purchases alone *are* enough. Other features of the case surface there, raising more questions than the Supreme Court thought fit to decide.

Justice Brennan's dissent does parallel the majority's analysis, but he finds *specific* jurisdiction in Helicol's Texas activities, connections that do supply tenuous links to the action for pilot error.¹⁶ Helicol, after all, had purchased in Texas the very helicopter involved in the tragedy. It had sent its pilots to Texas for training, and the very pilot involved in the tragedy had been trained there. Helicol's services to the pipeline construction venture had been obtained in Texas; negotiations there had led to the transportation contract formally concluded in Peru. But whether or not these features of the case could support

9. *Helicopteros*, 104 S. Ct. at 1870-71.

10. *See Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517-18 (1923) (Brandeis, J., unanimous opinion). *But see* Henry R. Jahn & Son v. Superior Court, 49 Cal.2d 855, 859, 323 P.2d 437, 440 (1958) (Traynor, J.) (*Rosenberg* obsolete).

11. 260 U.S. 516 (1923) (Brandeis, J., unanimous opinion). Curiously, Helicol did not rely on *Rosenberg* in the Texas Supreme Court. Respondent's Motion for Rehearing, *Hall v. Helicopteros Nacionales de Colom.*, 25 Tex. S. Ct. J. 190, *withdrawn*, 638 S.W.2d 870 (Tex. 1982); Presubmission Brief for Respondent, *id.*; Reply to Application for Writ of Error, *id.*

12. 326 U.S. 310 (1945).

13. 304 U.S. 64 (1938).

14. The Supreme Court has now granted certiorari to consider the effect on this ruling of a distinction between "active" and "passive" purchasing activity. *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 77 (1984). *See infra* note 175.

15. *Helicopteros*, 104 S. Ct. at 1874.

16. *Id.*, at 1877 (Brennan, J., dissenting).

“specific” as opposed to “general” jurisdiction was a question the Supreme Court did not feel called upon to decide.¹⁷ (1985) 58 So. Cal. L. Rev. 916

The Texas Supreme Court had thought that Helicol’s various business arrangements in Texas comprised “sufficient minimum contacts” to make Helicol amenable to suit there.¹⁸ That court had not discussed the distinction between general and specific jurisdiction. The concurring judges had regarded Helicol’s Texas contacts as not merely “minimal,” but “substantial”; in their view, Helicol was “an active customer of Texas corporations . . . who sought, initiated, and . . . profited from its many and purposeful contacts with Texas.”¹⁹

But these opinions go beyond minimum contacts analysis. To the Texas Supreme Court, other considerations had seemed to support jurisdiction, considerations about which the Supreme Court was silent when it overturned the judgments below.

II. THE VANISHING JURISPRUDENCE OF JURISDICTION

To begin with, *Helicopteros* presented an obvious problem in the balancing of conveniences. A notable body of jurisprudence, developed in some of our best conflicts writing, has always taken personal jurisdiction to be a function of a fair balancing of conveniences.²⁰ Only recently the Supreme Court has seemed to invite a balancing of conveniences for these cases.²¹ But if one extracts from *Helicopteros* those facts relevant to the respective conveniences of the parties, one’s view of the case may shift; the Court’s opinion may begin to seem less tidy that evasive.

17. *Id.*, at 1873 n. 10.

18. *Hall*, 638 S.W.2d at 872.

19. *Id.* at 877 (Campbell, J., concurring). For a similar analysis of purchases as “purposeful availments,” predating the terminology of “specific” and “general” jurisdiction, *supra* note 6, see *Henry R. Jahn & Son v. Superior Ct.*, 49 Cal.2d 855, 861, 323 P.2d 437, 441 (1958) (Traynor, J.) (action for breach of sales agreement).

20. Restatement (Second) of Conflict of Laws § 37 (1971); von Mehren & Trautman, *supra* note 6, at 1167-69; *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 924-25 (1960); see, e.g., *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 497-98 (5th Cir. 1974); see also Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1139 (1981). See *infra* note 21 and accompanying text; but see *infra* notes 52-58 and accompanying text, and text accompanying note 101.

21. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). See *infra* text accompanying note 128. Despite the quoted language, *Volkswagen*, of course, was not decided on a fair balancing of conveniences. See *infra* text accompanying notes 56, 61.

Among the facts that should have had bearing was that the alternative forum for the *Helicopteros* plaintiffs would not have been some other state. Helicol was amenable to suit in no state if not in Texas;²² the alternative would have been a foreign country.²³ **(1985) 58 So. Cal. L. Rev. 917**

To a fair approximation the plaintiffs represented dependent widow and children, newly deprived of their breadwinners. On the other hand, Helicol is a sophisticated multinational corporation, easily distinguishable from the “small retail dealer in . . . Tulsa, Oklahoma” in *Rosenberg*,²⁴ the case from which the Supreme Court refused to budge.²⁵ Helicol is part of a network of corporate entities, one somewhat insulating another. Helicol’s parent corporation is Avianca, the national airline of Colombia: a sister helicopter-operating subsidiary of Avianca is a New York corporation authorized to do business in Texas;²⁶ and Helicol is itself the parent of another helicopter-operating Colombian corporation.²⁷ Pan American World Airways, Inc., a corporation headquartered in New York, reportedly holds the single largest bloc of Avianca shares.²⁸

Helicol had set up international mechanisms for transfers of payments between itself and contracting parties, mechanisms intended to keep its dollar earnings not only out of locales of performance like Peru, but out of its home country, Colombia. In the contract under which Helicol was providing the services involved in the *Helicopteros* case, payments were to be transferred out of the oil consortium’s Texas banks to banks acting for Helicol in New York and Panama.²⁹ Helicol’s corporate officers flew frequently to Texas and Oklahoma in the negotiation that led to the Peruvian transportation contract. At that time, Helicol was also actively negotiating the Bell Helicopter Company, of Fort

22. Brief for Respondents at 9, 18, *Helicopteros*.

23. The alternative appears to have been Colombia, or perhaps Peru. The contract between the employer and Helicol stipulated for jurisdiction in Peru, but the plaintiffs were not parties to that contract.

24. *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 518 (1923).

25. *See supra* text accompanying note 15.

26. *Helicopteros Nacionales de Colom. v. Hall*, 616 S.W.2d 247, 249 (Tex. Civ. App. 1981).

27. Brief for Petitioners at 2 n. 2, *Helicopteros*.

28. The bloc is stated as 44% in G. Endres, *World Airline Fleets* 162 (1978); the Colombian government reportedly holds 15%. W. Green & C. Swanborough, *The Observer’s World Airlines and Airliners Directory* 240-41 (1980).

29. Arrangements of this kind were held to establish an alien corporation’s expectation of trial in the United States in *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300, 314-15 (2d Cir. 1981) (action on the purchasing agreement).

Worth, Texas, to be designated its authorized repair facility in Colombia.³⁰ Top local counsel handled the *Helicopteros* defense in Texas. It would be, and is, silly to say that the litigation in Texas was somehow inconvenient for this company, just as it would be, and is, fatuous, if not callous, to say that the American widows could just as well sue in Columbia.³¹ **(1985) 58 So. Cal. L. Rev. 918**

It cannot be pretended that there is much room in the Supreme Court's philosophy for a jurisprudence of balanced conveniences.³² But until *Helicopteros* it was possible to delude ourselves into thinking that, whatever else the Court's contrived jurisdictional rules might mean, the Court had actually set up a system in which jurisdiction could be had over the giant multistate corporation, while the little fellow would be protected.³³ After *Helicopteros*, the

30. Brief for Respondents at 4, *Helicopteros*. Bell was the manufacturer-defendant in the trial court.

31. See *infra* text accompanying notes 103-16. Professor von Mehren takes the position that the respective needs of plaintiffs and defendants should be dealt with in an abstract way, without reference to the circumstances of the particular parties. This bit of judicial eye closing is necessary, he feels, to prevent acceptance of a "forum conveniens theory of jurisdiction." See von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. Rev. 279, 313 n. 103 (1983).

32. The Court has emphasized that the focus of the inquiry must be on the contacts between the forum state and the *defendant*. E.g., *Rush v. Savchuk*, 444 U.S. 320, 332, (1980). Apart from occasional dicta, the Court refers expressly to the balance of conveniences only in cases reviewing the propriety of a discretionary *forum non conveniens* dismissal. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981); *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947). Justice Black's efforts to the contrary, see *Hanson v. Denckla*, 357 U.S. 235, 259 (1958) (Black, J., dissenting); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223-24 (1957) (Black, J.); *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643, 647-49 (1950) (Black, J.); *International Shoe Co. v. Washington*, 326 U.S. 310, 323-24 (1945) (Black, J., concurring), have not prevailed. But Justice Black's legacy seems to have continuing validity in lower courts. See, e.g., *Poyner v. Erma Werke GmbH*, 618 F.2d 1186, 1190-92 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980); *Manufacture Francaise des Pneumatiques Michelin v. District Court*, 620 P.2d 1040, 1047-48 (Colo. 1980).

33. Cases striking down assertions by interested states of long-arm jurisdiction over individuals include, e.g., *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958). Cases sustaining assertions of long-arm jurisdiction over corporations include, e.g., *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Cosol. Mining Co.*, 342 U.S. 437 (1952); *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643 (1950). In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), a regional distributor and a retailer were held not amenable to jurisdiction where the multinational manufacturer would have been.

nonresident big fellow as clever as Helicol³⁴ can shield itself from tort liability in the very market in the United States in which it arranges to transport workers elsewhere under hazardous circumstances. We can no longer lay that flattering unction about big and little fellows to the Court's soul.

It would be unsettling then, if not embarrassing, to have to read that the *Helicopteros* survivors were remitted to some foreign forum in the name of fairness, or even in the interest of convenience, or of general, all- **(1985) 58 So. Cal. L. Rev. 919** around reasonableness. With studied good taste, Justice Blackmun, writing for the majority, avoids such pitfalls. He speaks only of sufficiency, of consistency with the due process clause, quite without regard to fairness, convenience, or reasonableness.³⁵

None of this would matter, perhaps, if "minimum contacts," "purposeful availment," "continuous and systematic activity," and the like, functioned to protect important rights of defendants, big or little. But the Supreme Court has taken pains, long in advance of *Helicopteros*, to decouple these abstractions from any conceivable value the due process clause might be thought to embody. The Court, in effect, is saying that, while defendants should be protected from serious inconvenience or fundamental unfairness, the actual convenience or fairness of a particular forum can make no difference in the absence of the required contacts, activities, or availment. In other words, minimum contacts are required *for their own sakes*. Does this make sense?

The myth of fairness. Take, for example, the myth of fairness. Fairness is thought to be the essence of due process. In our thinking about personal jurisdiction, fairness, as distinguished from convenience, has come to require some consideration of the expectations of the defendant concerning the place of trial. In other words, it is thought that the place of trial should be reasonably foreseeable to the defendant;³⁶ he should not be unfairly surprised by it.

Id. at 317-18 (Blackmun, J., dissenting). *But see* *Calder v. Jones*, 104 S. Ct. 1482 (1984) (holding two journalists amenable to jurisdiction where the employer publication was concededly amenable). In *Rush v. Savchuk*, 444 U.S. 320 (1980), jurisdiction over an insurer was struck down, but only on the ground that the attempted assertion of jurisdiction was actually over the insured individual, not the insurance company.

34. For a typical case illustrating the plight of American tort plaintiffs attempting to sue well-insulated alien defendants, see *Oostdyk v. British Airtours Ltd.*, 424 F. Supp. 807 (S.D.N.Y. 1976).

35. *Helicopteros*, 104 S. Ct. at 1873-74.

36. Each of the Court's more recent jurisdiction cases has made some references to a defendant's right to avoid trial where the defendant could not reasonably anticipate being "haled" into court. *Calder v. Jones*, 104 S. Ct. 1482, 1486 (1984); *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1478-79 (1984); *World-Wide Volkswagen v. Woodson*,

That the Court frequently expresses such views would be puzzling even if the Court's rulings were consistent with them. After all, foreseeability of the place of trial is a value that does not seem to need heavy-handed constitutional protection. Contract defendants may plan their affairs or receive notice through forum selection clauses. As for tort defendants, at least in the typical cases, like *Helicopteros*, in which insurers conduct the defense, Professor Weintraub reminds us that it is silly to worry about insurers' expectations.³⁷ Insurers are in the business of taking all risks into account. But even an unanticipated forum with which a (1985) 58 So. Cal. L. Rev. 920 defendant has little connection does not in fact raise functional difficulties beyond those of inconvenience and perhaps an uncongenial choice of law: issues that, however serious, are separable. That may explain why the Supreme Court's cases do not turn on foreseeability.

Consider the recent Supreme Court case of *Keeton v. Hustler Magazine, Inc.*³⁸ There, the question was whether, in a libel action by a nonresident of New Hampshire, New Hampshire would take jurisdiction over a nonresident publisher with no connection to New Hampshire other than the sale of magazines there. The plaintiff in that case had concededly shopped for a forum state with an unexpired statute of limitations, and New Hampshire offered the only open door.³⁹ There was no more reason for the defendant to expect to be haled into court in New Hampshire than in any other state. Nevertheless, the Supreme Court sustained jurisdiction.⁴⁰

On the other hand, even a fully foreseeable forum may not pass constitutional muster in the absence of minimum contacts. As Justice White wrote for the Court in *World-Wide Volkswagen Corp. v. Woodson*, "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."⁴¹ Thus, in *Kulko v. Superior Court*,⁴² California was not permitted to exercise jurisdiction in a lawsuit by a California mother seeking additional child support in an action against the New York father. That a California forum was

444 U.S. 286, 297-98 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977).

37. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 Hofstra L. Rev. 17, 27, (1981). Professor Weintraub was commenting on unfair surprise in choice of law, but the observation would seem to hold equally for unfair surprise in forum selection.

38. 104 S. Ct. 1473 (1984).

39. *Id.* at 1480.

40. *Id.* at 1481-82.

41. 444 U.S. 286, 295 (1980).

42. 436 U.S. 84 (1978).

unforeseeable to the husband seems implausible; he had allowed his children to join the mother in California and then had failed to provide them with sufficient support there.⁴³ Equally implausible is the argument that, in *Shaffer v. Heitner*,⁴⁴ directors of a Delaware corporation could not foresee trial in Delaware in an action alleging mismanagement of the corporation, or that, in *Hanson v. Denckla*,⁴⁵ the trustee employed by a Florida decedent could not anticipate being drawn into Florida probate. Trial at the place of injury does not seem very surprising in a case involving product liability for sale of a defective motor vehicle, like *World-Wide Volkswagen v. Woodson*.⁴⁶ And defending in a state in which it is doing business is not **(1985) 58 So. Cal. L. Rev. 921** much of a surprise to an insurer, the real defendant in interest in cases like *Rush v. Savchuk*.⁴⁷

No argument based on the expectations of the defendant supports the result in *Helicopteros*. By agreement with the employer, Helicol maintained insurance in dollars to cover liability to employees it would transport on the Peru pipeline job.⁴⁸ It follows that Helicol contemplated liability in Texas. In part, that is because Helicol could be sued in an action for dollar damages only in the United States, and was colorably amenable to suit in the United States only in Texas. Moreover, third-party industrial accident litigation commonly takes place at the state of the employment contract and the employer's residence.⁴⁹ The action is typically against some third party, but the employer may be impleaded or brought in by other means.⁵⁰

43. See *Volkswagen*, 444 U.S. at 296 (pointing out foreseeability of the California forum barred in *Kulko*).

44. 433 U.S. 186 (1977).

45. 357 U.S. 236 (1958).

46. 444 U.S. 286 (1980).

47. 444 U.S. 320 (1980).

48. *Hall v. Helicopteros Nacionales de Colom.*, 25 Tex. S. Ct. J. 190, 191, *withdrawn*, 638 S.W.2d 870 (Tex. 1982).

49. E.g., *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir.) (Friendly, J.), *cert. denied*, 439 U.S. 1034 (1978).

50. The employer's state of residence is the only assured forum for the third party's action against the employer, and thus for the employer's compensation carrier's recoupment from the plaintiff's recovery against the third party. See *infra* note 83.

In *Helicopteros*, the employer was joined as a codefendant. Compensation payments were made to the families involved not under Texas law, but under the laws of their respective residences. Telephone interview with the offices of George Fletcher, Esq., Houston, counsel for the plaintiffs (Sept. 27, 1984). At that time, compensation probably would not have been available under Texas law for workers hired to work exclusively

Even more significantly, Helicol had agreed to indemnify the employer and hold it harmless against having to defend the very sort of litigation that eventually ensued. It was breach of this hold-harmless clause that resulted in the employer's separate judgment against Helicol for attorneys' fees in the amount of \$70,000. Helicol had essentially agreed in advance to litigate the Texas-based employer's end of the case, if necessary, and, as was not likely, in Texas. Thus, the Supreme Court was understandably, if not justifiably, silent on fairness/foreseeability as an issue in *Helicopteros*.

The myth of convenience. Convenience, rather than foreseeability, might be thought the essential policy concern underlying our jurisdictional law.⁵¹ Concern for a defendant's convenience certainly seems more realistic than concern for a defendant's expectations about place of trial. (1985) 58 So. Cal. L. Rev. 922 But convenience, too, turns out to be something of a myth. Law teachers wryly point out to their bemused students how much more convenient may be the nearby court just over the state line than the remote home-state one.⁵² The arbitrariness of state lines is bound to produce such anomalies.

It seems settled that Congress has power to require a party at one end of the country, at whatever cost and inconvenience, to defend an action at the other.⁵³ Congress has exercised this power for cases that may raise no substantive federal question,⁵⁴ and the Supreme Court has not questioned the constitutionality of such provisions.⁵⁵ If Congress has power to authorize nationwide service of process,

outside of Texas. See *Southern Underwriters Ass'n. v. Gallagher*, 135 Tex. 41, 42-47, 136 S.W.2d 590, 591-94 (1940); Tex. Rev. Civ. Stat. Ann. art. 8306, § 19 (Vernon Supp. 1984).

51. See *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (constitutional protection is "against inconvenient litigation").

52. E.g., Reese, *Legislative Jurisdiction*, 78 Colum. L. Rev. 1587, 1591-92 (1978).

53. See the hypothetical posed by Professor Abrams in Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 Ind. L. J. 1, 1-2 (1982).

54. E.g., 28 U.S.C. §§ 1335, 1397, 2361 (1982) (federal statutory interpleader).

55. E.g., *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967); *Griffin v. McCoach*, 313 U.S. 498 (1941). But see *Stafford v. Briggs*, 444 U.S. 527 (1980), in which the Court struck down an assertion of jurisdiction over a remote defendant under the Mandamus and Venue Act as a matter of statutory interpretation. Justice Stewart, dissenting, assumed the constitutionality of the statute under a contrary interpretation. *Id.* at 554 (Stewart, J., dissenting). See also, for this sort of sidestepping, *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979), in which the Court disapproved the place of trial, in an action under the Securities Exchange Act in which service of process was had under

the unconstitutionality of a state's long-arm service of process in a case on similar facts cannot hinge on inconvenience to the defendant, which is as great in the federal as in the state case.

Understandably, then, the Supreme Court has been just as cavalier about convenience as it has been about fairness/foreseeability. In *Volkswagen*, for instance, we find Justice White insisting that a state's assertion of personal jurisdiction over a nonresident would be struck down for want of minimum contacts "[e]ven if the defendant would suffer minimal or no inconvenience . . . ; even if the forum State is the most convenient location for litigation. . . ."⁵⁶

Inconvenience continues to be mentioned in the opinions. But it never seems to present a difficulty. As Justice Brennan has pointed out, litigation anywhere in this country, at least in the contiguous states, is today reasonably convenient for any defendant residing in the country.⁵⁷ Much tort litigation, of course, like *Helicopteros*, is defended by insurers (1985) 58 So. Cal. L. Rev. 923 doing business nationwide, for whom no state forum is inconvenient.⁵⁸ In any event, *forum non conveniens* would seem to provide reasonable protection on this score.

In *Helicopteros*, no credible showing could be made that the litigation in Texas had been inconvenient for Helicol,⁵⁹ and the Supreme Court was as discreetly silent on convenience as on fairness.

The myth of comity and federalism. Although the Court has continued to give fairness or convenience occasional lip service, it has quietly but summarily banished concerns of federalism or comity from the due process inquiry. It is true that *Volkswagen* was decided on grounds of federalism. There, Justice White pointed out that the Court had "never accepted the proposition that state lines are irrelevant for jurisdictional purposes."⁶⁰ Thus, even in the absence of inconvenience to defendants, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."⁶¹

state long-arm legislation, by narrowly construing the federal venue statute, 28 U.S.C. § 1391(b) (1982).

56. *Volkswagen*, 444 U.S. at 294.

57. *Id.* at 312 (Brennan, J., dissenting). See also *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 200 (2d Cir.) (Friendly, J.), *cert. denied*, 439 U.S. 1034 (1978).

58. See, e.g., *Volkswagen*, 444 U.S. at 304 (Brennan, J., dissenting). *But cf.* *Rush v. Savchuk*, 444 U.S. 320 (1980) (striking down jurisdiction quasi in rem over an insurer were the named defendant was not amenable to process).

59. See *supra* text accompanying notes 24-31.

60. *Volkswagen*, 444 U.S. at 293.

61. *Id.* at 294.

But the Court disembarrassed itself of interstate federalism as a component of due process in 1982, in a footnote in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.⁶² There, Justice White, the author of *Volkswagen*, note that the due process clause could not vindicate concerns of federalism. Reasoning that concerns of federalism amounted to concern for the interests of sister states, he thought that such interests could not be taken into account without delivering apparently grave conceptual wounds to useful existing arrangements for waiver. How could a defendant be allowed to waive the interests of sovereign states? Jurisdictional due process, then, would have to be conceptualized as exclusively the personal right of defendants. Justice Brennan has recently underscored this newer perception of the scope of the due process clause.⁶³

The brief flirtation in *Volkswagen* with federalism as a component of due process would have been ill-advised even if defendants could have been permitted to waive sister state interests—a prospect that seems no **(1985) 58 So. Cal. L. Rev. 924** more daunting than permitting plaintiffs to raise forum state interests.⁶⁴ The relevance of state sovereignty to the due process inquiry is questionable. State sovereignty seems a priori to have nothing to do with due process and is not mentioned in the due process clause. The concerns of sister states also seem largely mythological in the jurisdictional context. A defendant may not want to be sued in the forum of the plaintiff's choice, but to suppose that there is some other state with a burning desire to take the plaintiff's case is to indulge in fantasy. Any interest of a sister state in providing some forum for the plaintiff's litigation is satisfied by the plaintiff's having found a forum elsewhere. Any other jurisdictional concerns of a sister state are likely to be fiscal or administrative ones; it is expensive for taxpayers and burdensome to already overcrowded dockets to take on additional cases. It is true, of course, that a state will open its doors to a suit against a person present there, and in part this hospitality is protective of the defendant. But the state exhausts the limits of its interest when it makes its courts available in that way. It has never been thought that the state's sovereignty is somehow offended if the defendant, being amenable to process in another state, is in fact sued there.

62. 456 U.S. 694, 702-03 n. 10 (1982).

63. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1482 (1984) (Brennan, J., concurring).

64. This is standard procedure in conflicts cases. The current Court has relied on forum state interests in approving choices of forum law under the due process clause, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314-20 (1981) (plurality opinion), and under the full faith and credit clause, *Nevada v. Hall*, 440 U.S. 410, 421-24 (1979).

The international case, if different, seems to be different because trial in the United States suggest inevitable inconvenience for foreign litigants, rather than any real affront to foreign sovereigns. A bare taking of jurisdiction, if otherwise regular, over a foreign national, may from time to time offend a foreign sovereign, but cannot be said to offend the law or comity of nations in any fundamental way.⁶⁵ Of course, coercive court orders and treble or punitive damages under domestic law can produce (1985) 58 So. Cal. L. Rev. 925 tensions in international relations.⁶⁶ But the taking of jurisdiction, without more, can provoke concern only speculatively.⁶⁷

In *Helicopteros*, no one pretended that either Colombia or Peru would be outraged by suit against Helicol in Texas, and the Supreme Court, in accordance with the *Bauxites* footnote,⁶⁸ was silent on that possibility. It would be an unusual jurisdictional concern of a foreign sovereign that could not be vindicated by application of that sovereign's law on whatever issue was generating that concern. In any event, the argument from comity would seem to have more to do with the discretion of courts to decline to exercise conceded jurisdictional power than with the existence of power in the first instance.

65. See Restatement of Foreign Relations Law of the United States (Revised) §§ 481, 482 and comments and reporter's notes (Tent. Draft No. 5, 1984). Interestingly, the House of Lords recently has ordered or approved dissolution of English injunctions against American suit in two cases. *Castanho v. Brown & Root (U.K.) Ltd.*, 1981 A.C. 557 (parallel litigation in England); *British Airways Bd. v. Laker Airways*, [1984] 3 W.L.R. 413 (no action on merits available in England; one English defendant). *Smith, Kline & French Laboratories Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A.), is not contrary. As Lord Diplock explained, that case involved a wholly nonmeritorious claim. *Laker*, [1984] 3 W.L.R. at 426.

66. See generally J. Atwood & K. Brewster, *Antitrust and American Business Abroad* §§ 4.01-.19 (2d ed. 1981); Pettit & Styles, *The International Response to Extraterritorial Application of United States Antitrust Laws*, 37 Bus. Law. 697 (1982). For foreign objections to coercive American discovery and other procedures, see Oliver, *International Law and Foreign Investigatory Subpoenas Sought To be Served Without the Consent or Cooperation of the Territorial Sovereign: Impasse or Accommodation?*, 19 San Diego L. Rev. 409 (1982); Note, *Section 6 of Great Britain's Protection of Trading Interests Act: the Claw and the Lever*, 14 Cornell Int'l. L. J. 457 (1981).

67. The State Department has taken the view that suit against the foreign sovereign itself generally does not affect United States foreign relations. Letter from Monroe Leigh, Legal Advisor, Dep't. of State, to the Solicitor General (Nov. 26, 1976), reprinted in *Alfred Dunhill, Inc. v. Cuba*, 425 U.S. 682, 706, 710 app. 1 (1976).

68. See *supra* note 62 and accompanying text.

But if neither comity, convenience, nor fairness are what minimum contacts analysis ensures, what is the function of our jurisdictional rules?

The myth of reasonableness. Ever since *International Shoe*,⁶⁹ philosophical support for constitutional limitations on assertions of adjudicatory jurisdiction repeatedly has been found in a generalized notion of reasonableness.⁷⁰ Because “reasonableness” necessarily means “reasonableness in all of the circumstances,” it has not been possible, however, to make reasonableness a coherent referent of minimum contacts analysis. Minimum contacts analysis if focused too narrowly on only those circumstances connecting the defendant with the forum state.⁷¹ Thus, in (1985) 58 So. Cal. L. Rev. 926 *Shaffer v. Heitner*⁷² and later cases, the Supreme Court has attempted to establish an inquiry broader than a strict minimum contacts analysis in order to enable courts to determine reasonableness.⁷³ As newly elaborated in *Volkswagen*, minimum contacts analysis, while continuing to emphasize the purposeful activities of a defendant in the forum state, now also includes consideration of the “relationships among the defendant, the forum, and the litigation”⁷⁴—those circumstances that might make it generally reasonable for the forum to exercise jurisdiction. So thought Justice Rehnquist in *Keeton v. Hustler Magazine, Inc.*,⁷⁵ decided shortly before *Helicopteros*.

Now, the only difference this broadened inquiry might make is to bring into the amalgam of convenience, fairness, and respect for state sovereignty which “reasonableness” might be thought to imply, some further virtue that could actually help decide cases. Indeed, the expanded inquiry seems intended to lead to discussion of the interests of the forum in trying the case. As Justice White put

69. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

70. *Id.* at 317 (“ . . . such contacts of the [defendant] with the . . . forum as to make it reasonable . . . to require the [defendant] to defend . . . there”); see *infra* notes 71-73 and accompanying text.

71. See, e.g., *Rush v. Savchuk*, 444 U.S. 320, 327, 332 (1980). The Court’s almost medieval test of submission, “purposeful availment,” seems to have been aimed at wringing a finding of “reasonableness” out of an analysis focused exclusively on the defendant. Without referring to the forum’s other possible jurisdictional interest, “purposeful availment” invokes the forum’s “right” to take jurisdictional hold over one who has profited from contact with it.

72. 433 U.S. 186, 204 (1977).

73. *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1478-79 (1984); *Rush v. Savchuk*, 444 U.S. 320, 327, 332 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

74. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

75. 104 S. Ct. 1473, 1481 (1984).

it in *Volkswagen*, “[i]mplicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute.”⁷⁶

In the related field of conflict of laws, “reasonableness” and “state interest” are connected concepts. At the constitutional level, “reasonableness” is a term of art; the choice of an interested state’s law will be *held* to be reasonable. An interested state will be allowed to regulate because its governmental interest ensures that the regulation will be nonarbitrary—that is, not fundamentally unreasonable.⁷⁷ In other words, the interested state has a rational basis for application if its law.⁷⁸

In just this way, Justice Rehnquist’s *Hustler* opinion identifies the interest of the forum state in furnishing a tribunal for a case of alleged reputational harm within its borders, and uses it to buttress more traditional arguments relying on the expectations and activities of the (1985) 58 So. Cal. L. Rev. 927 defendant.⁷⁹

But the interests of the forum, to an even more marked degree that concerns of convenience, fairness, or federalism, have not been allowed to *decide* jurisdiction cases. The uninterested forum is permitted to take jurisdiction in cases in which the defendant’s contacts with it are deemed sufficient,⁸⁰ while the

76. *Volkswagen*, 444 U.S. at 292.

77. *Cf.* *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (plurality opinion) (choice of interested forum’s law held “neither arbitrary nor fundamentally unfair”).

78. *See* Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440 (1982) (unifying constitutional review of conflicts cases with general constitutional rational basis review).

79. 104 S. Ct. at 1479-82. Interestingly, Justice Brennan now seems determined, for reasons that remain obscure, to keep interest analysis out of the jurisdictional inquiry. Concurring separately in *Hustler*, Justice Brennan insisted that state interests were no part of minimum contacts analysis., whether they were forum state interests or the sister state interests that had been jettisoned in the *Bauxites* footnote. *Id.* at 1483 (Brennan, J., concurring). This position seems somewhat puzzling in view of Justice Brennan’s strong support of interest analysis in constitutional review of choices law. *Allstate Ins. Co. v. Hague*, 449 U.S. at 314-15, 319, and his emphasis on the relevance of forum interests to jurisdictional determinations. *Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting).

80. The classic case is *Fauntleroy v. Lum*, 210 U.S. 230 *1908), in which the Missouri forum had no connection with either of the parties or the obligation sought to be enforced; jurisdiction was grounded solely on the defendant’s temporary presence there. The harm was that the forum, in effect, applied its own, irrelevant, law. *See* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 Yale L. J. 289 (1956).

interested forum is denied the power to do so in cases in which those contacts seem deficient.⁸¹

In *Helicopteros*, Texas in fact had a legitimate interest in furnishing a forum for litigation by survivors of employees hired in Texas by a Texas employer. That is partly because the industrial accident litigation I have already described⁸² is the vehicle for an employer's recoupment of (1985) 58 So. Cal. L. Rev. 928 compensation paid.⁸³ In denying adjudicatory power to Texas in a suit of this

The forum asserting jurisdiction grounded on defendant's transient presence is not necessarily uninterested. The forum that is the plaintiff's residence, or otherwise sustains deleterious effects of the defendant's conduct, will be an interested one even where the defendant lack other, more direct, contacts with the forum state. Similarly, in a dispute between nonresidents involving foreign occurrences, a stipulated-for forum may also be an interested one. In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), for example, the Court sustained a forum selection clause in admiralty and in so doing ousted federal jurisdiction: the selected place of trial, England, was neither the residence of a party nor the place of transaction or occurrence. However, London is the locus of virtually all marine reinsurers and protection and indemnity "clubs" London was thus, as a practical matter, an interested forum.

81. Every Supreme Court case striking down an assertion of jurisdiction since *Hanson v. Denckla*, 357 U.S. 235 (1958), has done so at the expense of forum interests. In each of these cases, except *Helicopteros*, the Court expressly stated that forum interest would sustain a choice of forum law, but was insufficient, in the absence of minimum contacts between the forum and the defendant, to ground jurisdiction. *See infra* note 97. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), Delaware had an obvious interest, as place of incorporation, in furnishing a forum for scrutiny of alleged corporate mismanagement. In *Kulko v. Superior Court*, 436 U.S. 84 (1978), California had an obvious interest, as the place where the defendant had agreed that his children should join their mother, in furnishing a forum for scrutiny of allegedly insufficient child support. In *Rush v. Savchuk*, 444 U.S. 320 (1980), Minnesota, as the place of injury and of medical care, had interests in deterrence and in compensation of medical creditors. In *Helicopteros*, Texas was interested, among other things, in furnishing a litigational vehicle for the Texas employer's recoupment of compensation paid or payable. *See supra* note 50 and accompanying text; *infra* notes 82-85 and accompanying text.

82. *See supra* note 50 and accompanying text.

83. *E.g.*, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) (employer's recoupment of compensation paid to employee from employee-plaintiff's recovery against third party in admiralty may not be reduced in account of employer's fault). *See also, e.g.*, *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969) (employer had independent action in admiralty for damages against third party on account of plaintiff's injury).

kind, the Supreme Court added *Helicopteros* to the lengthening list of cases striking down “reasonable” to exercises of jurisdiction.⁸⁴

But let us suppose that “reasonableness” is not a function of forum interests, but instead is only a general reference to all of the circumstances. If so, analysis obviously will tend to boil down to a balancing of conveniences. As the concurring judges in the Texas Supreme Court remarked of the *Helicopteros* litigation.

It is not unreasonable to require a company with . . . expertise in international business . . . to defend a suit in a state where it has conducted multi-million dollars of business. However, it is unreasonable to require the widows and children seeking relief here to go to a foreign country to prosecute their action.⁸⁵

To these judges, reasonableness hinged, inevitably, on the balance of conveniences. But the Supreme Court has never allowed a case to turn on a balance of conveniences, or indeed on any overt consideration of the plaintiff’s need for the particular forum. It is the defendant’s convenience alone that has been thought dispositive.⁸⁶

The Supreme Court in *Helicopteros* was as silent about the general reasonableness of Texas’ assertion of jurisdiction as it was about Texas’ interests, if any, or about concerns of fairness, convenience, or comity. Indeed, whatever vitality concerns of fairness, convenience, comity, or reasonableness may have for the future of jurisdictional thinking, it is striking that the *Helicopteros* case is not even an example of “minimum contacts” and “continuous and systematic activities” *for their own sakes*. Modern due process analysis is not displayed here at all; or, if it is, it is displayed with new and stunning vacuity.

Justice Blackmun, as we have seen, abandoned any attempt to pitch *Helicopteros* on policy grounds. The reason actually given for tearing up the Texas judgments was of another order. The defendant’s activities in the forum state were, although perhaps continuous and systematic, of *the (1985) 58 So. Cal. L. Rev. 929 wrong kind*.⁸⁷ In other words, even if Helicol was engaging in

84. *See supra* note 81.

85. *Hall v. Helicopteros Nacionales de Colom.*, 638 S.W.2d 870, 875 (Tex. 1982) (Campbell, J., concurring) (joined by McGee, J.).

86. *See supra* note 32 and accompanying text. There is dictum in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) that does refer to the plaintiff’s needs. *See infra* note 128 and accompanying text.

87. *Helicopteros*, 104 S. Ct. at 1872-74.

substantial and regular purchasing activities in Texas, the Court was simply saying, “Purchases do not count.” To which one can only respond, “Why not?”

The Justice Department, as amicus, had argued that giving the *Helicopteros* survivors the benefit of their judgments would create unfavorable repercussions for the balance of payments.⁸⁸ To expose those who buy our goods to general jurisdiction here would seem to give scant encouragement to them to make such purchases, or so the argument went. Petitioner Helicol had picked up this theme and offered the candid policy argument in its own brief.⁸⁹ You and I, however, need not share the government’s fears. Even if a taking of jurisdiction, as distinct from a choice of forum law, implies exposure to liability to American residents for unrelated torts abroad, insurance to that extent can and will be maintained. American products will continue to be purchased to the extent they fill needs on the international market at the right price. Insurance for unrelated liabilities does not raise the effective price of American goods to purchasers in Helicol’s position because they are already exposed to liability for their torts to Americans no matter where they purchase their equipment, and already maintain insurance.⁹⁰ They contemplate tort litigation in Texas.⁹¹ The assertion of jurisdiction by Texas, therefore, would not have influenced Helicol’s procurement decisions. In short, Helicol’s liability-generating activity, being unrelated *ex hypothesi* to its purchasing activity, required insurance without regard to its purchasing decisions.

But if anxiety about foreign trade induced the Supreme Court to cast the *Helicopteros* widows and children abroad to seek relief, the Court did not say so. Instead it manipulated abstract catch phrases in order to serve a purpose outside the concerns of the due process clause. In the absence of a more suitable procedural vehicle, an opportunity of approving on policy grounds the grant of a *forum non conveniens* dismissal, the Court reached the same result via a quite inappropriate route. The manipulation was possible because the terms of jurisdictional analysis have little meaningful content, as we have just seen. But my point is (1985) 58 So. Cal. L. Rev. 930 that, for this reason, the analysis tends to be irrelevant to real jurisdictional issues. If a state or national policy goal, like encouragement of international commerce, will be affected by a taking of jurisdiction, surely that is an issue for which any rational jurisprudence of jurisdiction ought to make room.

The sort of manipulation that in *Helicopteros* concealed the probable policy basis of the decision has previously been seen in cases where the Court used

88. Brief for the United States as Amicus Curiae at 6, *Helicopteros*.

89. Brief for Petitioner at 23, *Helicopteros*.

90. See *supra* text accompanying note 48.

91. See *supra* text accompanying notes 48-50.

minimum contacts limitations on state jurisdiction to serve the covert purpose of preventing application of forum law. Cases like *Hanson v. Denckla*⁹² are widely understood not as protecting defendants from any procedural inconvenience or unfairness, but rather as protecting them from substantive regulation by insufficiently concerned states. Incredibly, the unfairness of a possible choice of forum law cannot be argued on the jurisdictional point.⁹³ The one jurisdictional issue with any bite to it must remain unaddressed.

Justice Brennan has suggested, fruitlessly, that forum law ought to be taken into account explicitly in evaluating jurisdiction.⁹⁴ Most recently, however, in *Keeton v. Hustler Magazine, Inc.*,⁹⁵ the Supreme Court stonily rejected as irrelevant the defendant's argument that the threatened choice of forum limitations law in that case would be unfair. The plaintiff, it will be remembered, had sued in New Hampshire specifically to take advantage of the only open statute of limitations in the country, an exercise in forum shopping that had unmistakably disgusted the court below.⁹⁶ But, Justice Rehnquist insisted for the *Hustler* Court, the issue was one of jurisdiction, not choice of law.⁹⁷

So minimum contact analysis seems increasingly detached from any of the actual jurisdictional issues in a case, and from the policy goals that should underlie decision of those issues. **(1985) 58 So. Cal. L. Rev. 931**

III. JURISDICTION AND THE ALIEN DEFENDANT

That the law of jurisdiction seemed irrelevant to the issues *Helicopteros* raised was the acute difficulty for plaintiffs' counsel. The case had been pitched on a particularly abstract plane in that remote and obscure sphere of reasoning

92. 357 U.S. 235 (1958).

93. *See, e.g.*, *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1479 (1984). I do not mean to suggest that constitutional scrutiny of state choices of law should be more restrictive than it is at present. For my position on that question, *see* Weinberg, *supra* note 78, at 463-87.

94. *Shaffer v. Heitner*, 433 U.S. 186, 226 (1977) (Brennan, J., concurring in part and dissenting in part). Professor Ehrenzweig thought that jurisdiction ought to be limited to courts of a state that could rationally justify application of its law. Ehrenzweig, *supra* note 80, at 292.

95. 104 S. Ct. 1473 (1984).

96. *Keeton v. Hustler Magazine, Inc.*, 682 F.2d 33, 35-36 (1st Cir. 1982), *rev'd*, 104 S. Ct. 1473 (1984).

97. *Hustler*, 104 S. Ct. at 1479. The Court has repeatedly insisted on this distinction. *See, e.g.*, *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

which seems to serve the Court so well, and serves the jurisprudence of jurisdiction so ill. Whether or not the widows could find or afford justice far from home; whether or not the company might as easily be sued in Texas as elsewhere; whether or not any interest of the state or nation would be served or affronted by sustaining jurisdiction, were all analytically decoupled from the question whether Helicol's purchases in Texas constituted continuous and systematic activity.

Added to this were special perplexities deriving from the fact that Helicol was an alien; rather than an American nonresident of Texas. Plaintiffs' arguments could not be made without engulfing them in the murky subissues generated by international cases. These subissues were to remain submerged throughout the litigation, surfacing only occasionally in a judicial opinion or an appellate brief, never to be sorted out and dealt with in their own terms. Yet thinking about them yields some insights.

The least tangled of these snarls had to do with Helicol's allegation of discriminatory treatment at the hands of the Texas Supreme Court. Helicol's petition for review in the United States Supreme Court was based in part on the equal protection clause. Helicol asserted that Texas had taken jurisdiction over it in circumstances in which Texas would not, and constitutionally could not, take jurisdiction over an American nonresident corporation.⁹⁸ Nothing in the Texas court's opinion warranted an inference of intentional discrimination, but a concurring judge had remarked that in applying the due process clause to an alien corporation, the court's analysis "must be broader in scope."⁹⁹ This language was changed before it appeared in the published reports, and now reads, "due process in this case must be universal in its application."¹⁰⁰ That the **(1985) 58 So. Cal. L. Rev. 932** vague phrase, "must be broader in scope," should have stirred a reaction sufficient to persuade its author to change it to one even vaguer is a measure of the problems inherent in attempting a balancing of conveniences.

For, sooner or later, we must face the fact that convenience balancing, if it is to be permitted, does lead to differential treatment of some defendants. It must

98. Brief for Petitioner at 1, *Helicopteros*.

99. See Petition for Writ of Certiorari at 18, note 6. This may have been a reference to the scrutiny for contacts with the nation as a whole, rather than merely with the state, sometimes thought to be appropriate in certain cases against aliens. See *Cryomedics, Inc. v. Spembly Ltd.*, 397 F.Supp. 287, 290-92 (D. Conn. 1975); Note, *The Outer Limits of In Personam Jurisdiction over Alien Corporations: The National Contacts Theory*, 16 *Geo. Wash. J. Int'l. L. & Econ.* 637, 646-47 (1982). But the theory has not been thought applicable in state courts. See *infra* note 150 and accompanying text.

100. *Hall v. Helicopteros Nacionales de Colom.*, 637 S.W.2d 870, 875 (Tex. 1982) (Campbell, J., concurring).

come down to saying, “Because it would be harder on the plaintiff in this case to sue elsewhere, it is proper to offer a little less due process protection to this defendant than we might have done in another case.” The Supreme Court teetered on the edge of just this precipice when it invited a balancing of conveniences in dictum in *Volkswagen*.¹⁰¹ Is a balancing of conveniences too hot to handle? Is it really discriminatory?

In a case involving available alternative forums in the contiguous United States, a balancing of conveniences may indeed operate with some discriminatory effect. But the fact is that the lack of an alternative forum in the United States for the widows and children in *Helicopteros* does make a difference. And if the realities of litigation against an alien non resident distinguish such litigation from litigation against an American¹⁰² nonresident, the forum has a rational basis for classifying the alien somewhat differently from the American for purposes of answering the jurisdictional question.

For these reasons, a number of courts have suggested the propriety of a more liberal view of personal jurisdiction in some federal actions against alien corporations.¹⁰³ For analogous reasons, the Supreme Court has approved less favorable limitations tolling for the nonresident defendant than for the local one,¹⁰⁴ and subordination of rights based on the out-of-state judgment to those based on the local one.¹⁰⁵ The very purpose of long-arm jurisdiction is to overcome, by provision of a local forum, some of the special difficulties of suing a nonresident.

Neither party in *Helicopteros* attempted to show that plaintiffs could or could not find justice in Colombia or Peru substantially **(1985) 58 So. Cal. L. Rev. 933** equivalent to justice at home. The Supreme Court simply did not ask whether an alternative forum abroad was realistic. This very relevant jurisdictional inquiry apparently has no place in minimum contacts analysis. But Helicol had raised an issue of discrimination in the taking of jurisdiction. Helicol’s equal protection

101. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). *See infra* text accompanying note 128.

102. I use the term “American” for convenience, and without intention to offend citizens of other countries in the hemisphere.

103. *See, e.g.*, *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp 706, 710 (S.D.N.Y. 1978); *Centronics Data Computer Corp. v. Mannasman*, 432 F. Supp. 659, 664 (D.N.H. 1977); *Cryomedics, Inc. v. Spembly Ltd.*, 397 F.Supp. 287, 291-92 (D. Conn. 1975); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F.Supp. 722, 728 (D. Utah 1973).

104. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982).

105. *McElmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 328-30 (1839).

argument could have freed the case to some extent from the rigid, defendant-focused constraints of minimum contacts theory. The Supreme Court could have addressed the equal protection point by considering the litigational differences that might have warranted the taking of jurisdiction in *Helicopteros* even if not in some other case. A way would have been found to introduce a legitimate balancing of conveniences. This might not have been unwelcome to the Court, especially had overt consideration of the foreign trade policy apparently underlying the result revealed to the Justices the spuriousness of the foreign trade concern.¹⁰⁶ In the absence of facts of record, the Court could have requested further briefing and argumentation, and might have taken judicial notice of certain features of litigation abroad.

Counsel in this country can be counted on to bankroll and shepherd foreign litigation only in cases involving substantial potential recoveries. But no assessment in Colombia or Peru of the plaintiff's damages, as a practical matter, would be likely to be realistic. Wages and prices are likely to be structured so differently in those countries that an American tort plaintiff claiming actual damages is likely to lose the sympathy of the trier of fact.¹⁰⁷ Damages are likely to be awarded in local currencies in countries that regulate the export of dollars,¹⁰⁸ based on "official" exchange rates having little relation to actual rates. The defendant's more valuable assets are likely to be unreachable in the home country because of this and other regulation; execution might therefore be needed at yet another forum.¹⁰⁹

The contingency fee arrangement that gives access to justice to most American tort plaintiffs is likely to be impermissible or unknown in such **(1985) 58 So. Cal. L. Rev. 934** countries, as it is virtually everywhere outside the United

106. See *supra* text accompanying notes 88-91.

107. Brainerd Currie famously remarked of the reverse situation, in which an alien would be permitted to sue in New York, that the alien, a Spaniard, would retire "to live in ducal splendor in his home country." Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. Chi. L. Rev. 1, 67 (1959). As of 1973, over 70% of the Colombian population had an average monthly per capita income of less than \$100; less than .2% had earnings over \$700 per month. Fernandez, *Access to Justice in Colombia: A Summary*, in I Access to Justice: A World Survey 395, 398-99, 403 (M. Cappelletti & B. Garth eds. 1978).

108. See *supra* text accompanying note 29. These arrangements for dollar payments were necessitated by Peruvian and Colombian currency controls. Brief for Respondents at 6, *Helicopteros*.

109. Recall that Helicol kept its dollars out of Colombia by arranging for contract payments to banks in Panama and elsewhere. See *supra* text accompanying note 29.

States.¹¹⁰ It is certain that an American tort plaintiff would be disadvantaged by the inexperience of American trial counsel in foreign litigation, even assuming such counsel would be admitted *pro hac vice* and would be willing not only to run the case but to try it abroad personally. The plaintiff, then, would need to retain local counsel in that country almost always through an immediate outlay of cash. But where would these funds come from? If the case is lost, foreign courts often require plaintiffs to pay not only their own legal fees, but those of winning defendants.¹¹¹ Could the *Helicopteros* widows and children, in the event that their case was lost, afford the services of the sort of sophisticated counsel typically employed in Helicol's defense? Or even some court-awarded fraction thereof? Thus, even before one details the obvious sacrifices of untranslated direct evidence, trial by jury,¹¹² rationalized joinder rules,¹¹³ powerful discovery,¹¹⁴ and the rest of the unmatched features of American litigation for American tort plaintiffs, one is led to the conclusion that a dismissal on jurisdictional grounds in a case like *Helicopteros* is tantamount to a dismissal for all purposes.¹¹⁵ So sobering are these reflections that, assuming jurisdiction, it is unthinkable that such a case could have been dismissed on a motion *forum non conveniens*.¹¹⁶

110. R. Schlesinger, *Comparative Law: Cases-Text-Materials* 342-46, 659-60, 805-14 (4th ed. 1980).

111. In Colombia, losing plaintiffs must not only pay their own lawyers a percentage of the amount claimed, but must also pay the defendants' legal fees, as determined by the court. Letter to the author from C. Torrente of the Colombian bar (Bogota, Aug. 6, 1984).

112. There is no right to trial by jury in civil cases in Colombia. Fernandez, *supra* note 107, at 397.

113. Joinder of parties is circumscribed in Colombia, although voluntary third-party defendant intervention is possible. *Id.* at 414.

114. American discovery practices would be especially helpful, of course, in aviation disaster cases. European survivors in these cases may seek an American forum in part to compel discovery of the causes of the accidents. On current problems of aviation disaster investigation abroad, see generally *Aircraft Accident Investigation*, 9 Air L. 5 (1984).

115. See *Le Manufacture Francaise des Pneumatiques Michelin v. District Court*, 620 P.2d 1040, 1048 (Colo. 1980).

116. See *Piper Aircraft v. Reyno*, 454 U.S. 235, 255 (1981) (distinction between resident and foreign plaintiffs favoring home forum for the former is fully justified); Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 Cornell L.Q. 12, 44 (1949) (arguing it is abuse of discretion to dismiss resident plaintiff's tort suit against foreign defendant). This is so even though dismissal may be conditioned on waiver of jurisdictional and limitations defenses at the alternative forum.

Yet the Texas Supreme Court itself had referred neither to the balance of conveniences nor more directly to the unreality of a presumed foreign forum for these plaintiffs, a reticence shared, for the most part, by plaintiffs' counsel. It was not merely that such arguments were outside (1985) 58 So. Cal. L. Rev. 935 the ordinary terms of jurisdictional analysis, since, as we have seen, they might be raised appropriately to counter any inference of discrimination. There was a further, more serious, problem presented by the unique facts of *Helicopteros* itself. If the unreality of a foreign forum in this case created a compelling governmental interest in allowing these tort plaintiffs to sue at home, the question immediately arose, *which* government's interest? No deleterious effects of the tort seemed to have been sustained in Texas; these plaintiffs were all nonresidents, and would return aggrieved and empty-handed to their respective home states.

Reasoning that a state lacks power to govern beyond its legitimate sphere of interest,¹¹⁷ some courts have held that a forum cannot constitutionally take jurisdiction over a nonresident defendant on a foreign cause of action¹¹⁸ if the plaintiff is a nonresident. Thus, in *Alton v. Alton*,¹¹⁹ the Third Circuit Court of Appeals, in the face of the defendant's waiver of jurisdictional objections, struck down under the due process clause an assertion by the Virgin Islands of subject-matter jurisdiction over a divorce between two nonresidents. And thus the New York Court of Appeals limited to resident plaintiffs the availability of its *Seider v. Roth*¹²⁰ attachment mechanism.¹²¹

117. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

118. A local "cause of action" should shift the result because of the forum's interest in adjudicating the local wrong. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473, 1479 (1984); *Myers v. Brickwedel*, 259 Or. 457, 463-68, 486 P.2d 1286, 1289-91 (1971). *But see World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) (place of injury lacks jurisdiction where minimum contacts deemed insufficient).

119. 207 F.2d 667 (3d Cir. 1953).

120. 17 N.Y.2d 111, 216 N.E.2d 312, 268 N.Y.S.2d 99 (1966) (providing, in effect, a direct action by tort victims against liability insurers). *Seider* is a dead letter, of course, after *Rush v. Savchuk*, 444 U.S. 320 (1980).

121. *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 387 N.Y.S.2d 633 (1967), *reh'g denied*, 21 N.Y.2d 990, 238 N.E.2d 319, 290 N.Y.S.2d 914 (1968); *see also* *Rush v. Savchuk*, 444 U.S. 320, 324, 332 (1980); *Chamung Canal Bank v. Lowery*, 93 U.S. 72, 76 (1876) (statute tolling limitation of actions against absent defendants enacted for exclusive benefit of resident plaintiffs); *American Int'l Pictures v. Morgan*, 371 F.Supp. 528, 532 (N.D. Miss. 1974) (long-arm statute enacted for exclusive benefit of resident plaintiffs).

This brings us back to the problem of state interest in *Helicopteros*. Was or was not Texas an interested state? Under the due process clause, was Texas *required* to be an interested state before it could take jurisdiction? As we have seen, forum interests, though often taken into account, have not been thought dispositive of the jurisdictional question.¹²² The Court has not passed on the key question whether transient jurisdiction (1985) 58 So. Cal. L. Rev. 936 asserted by an uninterested state survives *Shaffer v. Heitner*.¹²³ But until it does, the uninterested forum apparently is free to take jurisdiction over the nonresident who happens to wander, however briefly, into its territory. And the interested forum, under every case since *Hanson v. Denckla*,¹²⁴ is not necessarily empowered to *take* jurisdiction.¹²⁵ In *Helicopteros*, the Supreme Court did not touch upon these questions.

But the Texas Supreme Court had felt called upon to inquire into the existence *Vel Non* of a state governmental interest. Like little Jack Horner, the Texas court had put its thumb into the unpromising *Volkswagen* pie and pulled out a plum,¹²⁶ the paragraph about reasonableness to which I have already had occasion to refer:¹²⁷

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute . . . ; the plaintiff's interest in obtaining convenient and effective relief . . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies. . . .¹²⁸

122. See *supra* notes 80=81 and accompanying text.

123. 433 U.S. 186 (1977) (despite attachment of property in forum state, minimum contacts with nonresident owner is prerequisite to jurisdiction).

124. 357 U.S. 235 (1958).

125. See *supra* note 81.

126. *Hall v. Helicopteros Nacionales de Colom.*, 638 S.W.2d 870, 873 (Tex. 1982). *Keeton v. Hustler Magazine, Inc.*, under review in the same term, had also featured this *Volkswagen* "plum." *Hustler*, 682 F.2d 33, 34 (1st Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 1473 (1984).

127. See *supra* text accompanying note 76.

128. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).

The Texas Supreme Court had offered a short, but not unpersuasive, answer to the question whether Texas was an interested forum. The forum was an interested one because Texas had an interest in protecting the employees of resident companies.¹²⁹ Although somewhat strained, this reasoning is not entirely without support; similar reasoning was used recently by the United States Supreme Court to sustain, against a due process challenge, a choice of forum law.¹³⁰

More obviously, as we have seen, Texas, as the employer's state, would have an interest in furnishing a forum for third party industrial accident litigation which could benefit the Texas employer.¹³¹ It ought **(1985) 58 So. Cal. L. Rev. 937** to make no difference for purposes of identifying the adjudicatory interests of the employer's state that the employee is a nonresident.¹³²

The Texas Supreme Court was satisfied that Texas was an interested forum because of the employer's Texas base. But the court also thought it worth mentioning that the plaintiffs, though not residents of Texas, were *residents of the United States*.¹³³ This factor was dispositive for the concurring judges;¹³⁴ these judges seemed to be saying that in *Helicopteros* the Texas court sat in part as a court of the nation, not solely as a court of the state. They seemed to be saying that all states share an interest in furnishing a forum to the United States citizens unable to sue elsewhere in their own country.

Although there is considerable appeal in such a view, it stirs even murkier eddies in the pool. Suppose the trial court was indeed a court of the nation. Suppose a federal trial court was trying the case as one in admiralty. This might easily have been the situation had the helicopter crashed over the navigable waters of the Pacific while engaged in the traditional maritime activity of ferrying workers.¹³⁵ In such cases, federal courts apply state jurisdictional laws; but congress clearly has power to specify other territorial limits on effective

129. *Hall*, 638 S.W.2d at 873.

130. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313-15 (1982) (plurality opinion) (choice of forum law sustained under due process clause, in part because forum had interest in protecting employees who commuted to their workplace there).

131. *See supra* note 83 and text accompanying notes 48-50 and 82-83.

132. *See, e.g., Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310 (1970) (United States law approved in admiralty tort claim by nonresident injured in United States waters, in part on ground that United States had competition interest in imposing same duty on alien employer as on American employer).

133. *Hall*, 638 S.W.2d at 873.

134. *Id.* at 875 (Campbell, J., concurring).

135. *Cf. Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972). For an admiralty case on facts similar to those in *Helicopteros*, see *Navarro v. Sedco, Inc.*, 449 F.Supp. 1355 (S.D. Tex. 1978).

service.¹³⁶ For such cases, it has sometimes been suggested that the relevant “contacts” for testing the constitutionality of an assertion of jurisdiction over an alien under the fifth amendment would be the defendant’s aggregate contacts with the nation, rather than with the forum state alone,¹³⁷ as is the case when **(1985) 58 So. Cal. L. Rev. 938** Congress does actually provide nationwide, or worldwide, service of process.¹³⁸

136. See *supra* note 55 and accompanying text. For statutes providing nationwide service of process, see compilations in Note, *Fifth Amendment Due Process Limitations on Nationwide Federal Jurisdiction*, 61 B.U. L. Rev. 403, 409 n. 36 (1982); Note, *Removing the Cloak of Personal Jurisdiction from Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 Fordham L. Rev. 127, 128 n. 6 (1982).

137. Restatement of Foreign Relations Law of the United States (Revised) § 441 comment f (Ten. Draft No. 2, 1981). See, e.g., *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (relevant sovereign for determining contacts is entire United States when service is made under 28 U.S.C. § 1608). But see *DeJames v. Magnificence Carriers, Inc.* 654 F.2d 280, 285 (3d Cir.) (fifth amendment due process requires nexus with state), *cert. denied*, 454 U.S. 1085 (1981); see also *id.* at 292 (Gibbons, J., dissenting) (fifth amendment due process requires nexus with nation, not state). See also *infra* cases cited note 138.

138. In federal adjudication, where an act of Congress provides nationwide or worldwide service of process, see *supra* note 136, it is generally assumed that the nation is the relevant sovereign in a case under federal law, and that the defendant’s contacts with the nation as a whole, rather than with the forum district or state, are the operative contacts for purposes of evaluating fifth amendment due process. See, e.g., *Stafford v. Briggs*, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 192 (1979) (White, J., dissenting). But in *Stafford*, the Supreme Court sidestepped the question under the Mandamus and Venue Act by dealing with it as a matter of statutory interpretation. In *Leroy*, the Supreme Court sidestepped the question under the Securities Exchange Act and the Texas long-arm statute by dealing with it as a matter of venue under 28 U.S.C. § 1391(b) (1982).

In other federal cases, in the absence of federal long-arm power, even where service is proper under Rule 4 of the Federal Rules of Civil Procedure, aggregation of national contacts to measure due process is more controversial. See *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 416 (9th Cir. 1977) (aggregation permissible only where Congress provides worldwide service of process). In admiralty, despite the absence of federal long-arm legislation, aggregation is increasingly permitted in actions against aliens where service is otherwise proper. See, e.g., *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 709-10 (S.D.N.Y. 1978) (aggregating contacts). But see *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

Even if this were so, would the same standards apply to a case in federal court in which there was no substantive national interest, but merely a national interest in supplying a forum, as, for example, in a case employing statutory interpleader?¹³⁹ Would the same standards apply under the fourteenth amendment to an admiralty case in state court by virtue of the “saving clause”?¹⁴⁰ In a case in state court in which nonresident plaintiffs had their only American forum for suit against an alien? If so, did Helicol in fact have more contacts with the nation as a whole than it had with Texas? These messy questions join the other unaddressed issues in *Helicopteros*. The plaintiffs did urge the United States Supreme Court to sustain jurisdiction under a theory of “jurisdiction by necessity.”¹⁴¹ This the Supreme Court declined to do,¹⁴² for the formal reason that no record had been made bearing on the question whether the Texas forum was necessary. (1985) 58 So. Cal. L. Rev. 939

It is intriguing in thinking about these problems to consider a hypothetical case in which Avianca, Helicol’s parent, is substantially owned by the government of Colombia, and in which, therefore, Helicol is a governmental instrumentality. In such a situation, today the complaint arguably would sound in “commercial tort” under the Federal Sovereign Immunities Act.¹⁴³ The Act expressly contemplates concurrent jurisdiction in both state and federal courts,¹⁴⁴

The *Wells Fargo* view, 556 F.2d at 416, that federal statutory authorization of long-arm service is prerequisite to aggregation, has no relevance for situations in which service is otherwise available, in accordance with Rule 4 of the Federal Rules of Civil Procedure, and is proper. The question is, who is the relevant sovereign for purposes of determining amenability under the fifth amendment? That question is logically unrelated to the legality of the service of process. See *infra* text accompanying note 166.

139. E.g., 28 U.S.C. §§ 1335, 1397, 2361 (federal statutory interpleader).

140. 28 U.S.C. § 1333 (1982). So thought Judge Gibbons. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d at 290, 292 (Gibbons, J., dissenting). For a useful discussion of questions of this kind, see Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 Va. L. Rev. 85, 124-49 (1983).

141. *Helicopteros*, 104 S. Ct. at 1874 n. 13. The plaintiffs stressed that no foreign forum would have had jurisdiction over all *Helicopteros* defendants.

142. *Id.*

143. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1982)) (effective Jan. 19, 1977) (*Hall v. Helicol* was filed in the District Court for Harris County, Texas, on August 6, 1976). Narrow jurisdictional interpretations make the suggestion in the text very speculative. See *infra* notes 161-62.

144. *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 489 (1983); 28 U.S.C. § 1604 (1982).

subject to a sovereign defendant's right to remove.¹⁴⁵ A "sovereign," as defined by the Act, includes a governmental instrumentality.¹⁴⁶

Under the Act, subject-matter jurisdiction, personal jurisdiction, and the nonavailability of the defense of sovereign immunity are all substantially coextensive. The basic requirements are that the commercial activities of the defendant, or any activities of the defendant resulting in personal injuries or death in this country, cause damage in this country.¹⁴⁷ The Act provides for worldwide service of process.¹⁴⁸ Could Texas take jurisdiction over Helicol as a hypothetical governmental instrumentality today under the Act?

In federal courts, it is settled that where Congress has provided worldwide service of process the relevant contacts for purposes of the fifth amendment inquiry are with the nation as a whole.¹⁴⁹ For state courts, the weight of authority rejects the proposition that contacts can be aggregated for purposes of the fourteenth amendment inquiry, even in cases where Congress has provided worldwide service of process.¹⁵⁰ Recently, the American Law Institute has adopted this conservative view.¹⁵¹ Minimum contacts between the defendant and the forum state **(1985) 58 So. Cal. L. Rev. 940** are thought to be required.

Yet it is hard to believe the Constitution imposes rules for no reason at all. Plaintiff, after all, could have chosen a federal forum initially and brought the defendant in, assuming sufficient aggregate contacts, without offense to the Constitution. Why should the choice of a state court in the same forum state affect the constitutionality of the jurisdiction? From the point of view of a foreign sovereign instrumentality, internal subdivisions of the country of trial are of little concern.¹⁵² After all, the fourteenth amendment, too, speaks to the jurisdiction of

145. 28 U.S.C. § 1441(d) (1982). Professor Kane argues that a sovereign defendant could remove the entire action even as to unwilling nonsovereign codefendants. Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 Stan. L. Rev. 385, 393-96 (1982).

146. 28 U.S.C. §§ 1603(a), (b)(1)-(2) (1982). An intervening "tier" of private ownership would not deprive a corporation of its status as a governmental instrumentality if the ultimate beneficial ownership was substantially governmental. *O'Connell Mach. Co. v. MV Americana*, 734 F.2d 115 (2d Cir. 1984).

147. 28 U.S.C. §§ 1330(b), 1603(d), 1605(2), (5). The statutory language I have paraphrased as "damage" actually reads "direct effect."

148. *Id.* § 1608.

149. *See supra* note 138.

150. Restatement, *supra* note 137, § 458(1).

151. *Id.*

152. Thus, in federal courts an alien may be sued in any district. 28 U.S.C. § 1391(d) (1982). Under the Federal Sovereign Immunities Act, however, there are significant venue constraints for suits against foreign sovereigns. *Id.* § 1391(f).

the state as a whole, without regard to alternative intrastate venues.¹⁵³ So let us take the more daring but apparently more sensible position that, even in state court, due process would require only minimum contacts with the nation as a whole, rather than with the forum state, in a suit under the Federal Sovereign Immunities Act.

It would help, in reaching this conclusion, if we could identify a national interest supporting it.¹⁵⁴ It might be argued that importing fifth amendment jurisdictional standards into the fourteenth amendment, even if justifiable in a state court case arising under federal law, seems excessive in a case like *Helicopteros*, where only state or foreign law would apply to virtually every issue.¹⁵⁵ It helps only marginally that the Supreme Court has held that cases under the Federal Sovereign Immunities Act do “arise under” federal law for purposes of establishing a federal court’s article III power; that is because the Act provides substantive **(1985) 58 So. Cal. L. Rev. 941** federal defenses to the foreign sovereign at the threshold of the litigation.¹⁵⁶ Our hypothetical case is not in federal, but in state court; that is our difficulty.

The national interest underlying the Act, an interest in furnishing a forum for claims against foreign governmental instrumentalities causing damage in this

153. The venue provisions for suits under the Act do impose significant constraints. 28 U.S.C. § 1391(f). The statutory language, referring to “district,” suggests that these constraints were intended to apply only to suits brought in federal court. However, these protections would be available to a defendant under the Act through removal. *Id.* § 1441(d). The venue provisions most favorable to a plaintiff suing on *Helicopteros* facts are *id.* § 1391(f)(1), providing for venue “in any judicial district in which *a substantial part* of the events or omissions giving rise to the claim occurred,” (emphasis added), and § 1391(f)(3), providing for venue “in any judicial district in which the agency or instrumentality is licensed to do business or is doing business.” These provisions could receive a narrow construction in a case removed under the Act. In our hypothetical, a more appropriate United States venue being unavailable, dismissal rather than transfer could be the consequence.

In order to get on with my argument, I will indulge the presumption that Helicol would not have sought removal under the Act, since it did not seek removal in the case as filed. I should add that in my view venue in Texas would be proper under the Act; but in any event I do not think Congress’ venue provisions cast any significant light on the constitutional question.

154. *See supra* note 117 and accompanying text.

155. It should be noted that the Act incorporates nonfederal law by reference. 28 U.S.C. § 1606 (1982).

156. *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 491-97 (1983).

country,¹⁵⁷ surely justifies Congress' provision of the alternative state forum operating under standards unified with those applied in the federal forum.¹⁵⁸

I pause to note that an analogous interest was surely invoked in the actual *Helicopteros* litigation, as the Texas judges seemed to understand. Failure to provide a forum to the *Helicopteros* survivors had the effect of allowing a foreign corporation to negotiate, in this country, a contract for the transportation of American workers abroad without incurring liability in this country for causing their death through negligent performance of that contract. When we have said this much we have identified the national interest in avoiding such a result. At the same time, we have identified the activities of Helicol in this country which arguably could ground jurisdiction in our hypothetical, under aggregated minimum-contacts reasoning, both under the Act and under the Constitution.¹⁵⁹

The statutory requirements would give some difficulty. Our hypothetical case would have to be pleaded under the "commercial tort" provisions, which provide jurisdiction over a cause of action "based . . . upon an act outside" this country if the act is "in connection with a direct effect in this country."¹⁶⁰ The statute clearly requires a "nexus" between the commercial activity and the cause of action.¹⁶¹ Helicol's pilot error, during its performance of the transportation agreement in Peru, would seem to satisfy this requirement. The greater difficulty is the problem of proving a "direct effect" in this country. Courts have construed this requirement very narrowly; the residence here of the tort plaintiff (1985) 58 So. Cal. L. Rev. 942 has been held not to amount to "a direct effect in this country."¹⁶² But these results, which seem contrary to the intent of Congress,¹⁶³ have no relevance to the constitutional question our hypothetical is intended to explore.

157. See also *infra* text accompanying note 174.

158. *Verlinden*, 461 U.S. at 489; 28 U.S.C. § 1602 (1982); House Judiciary Comm., Jurisdiction of United States Courts in Suits Against Foreign States 32, H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976). The states cannot decline jurisdiction of federal cases on substantive policy grounds. See *Testa v. Katt*, 330 U.S. 386, 394 (1947).

159. See *infra* text accompanying note 164.

160. 28 U.S.C. § 1605(a)(2) (1982). The personal injuries section does not work, because it seems to require that the injuries occur in the United States. *Id.* § 1605(a)(5).

161. *Id.* § 1605(a)(2). See, e.g., *Verlinden*, 488 F.Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983).

162. See, e.g., *McKeel v. Islamic Repub. of Iran*, 722 F.2d 582, 587-89 (9th Cir. 1983), *appeal denied*, 105 S. Ct. 243 (1984) (relatives and dependents in this country); *Upton v. Empire of Iran*, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979) (injury to an American plaintiff).

163. See *infra* note 175.

Aggregating the contacts with this country of Helicol as a hypothetical governmental instrumentality, we can conclude that jurisdiction under the Act would have been constitutional. We do not have to aggregate *all* of Helicol's "contacts" with the nation as a whole to come to this conclusion. Helicol came to Texas to negotiate, for profit, an agreement under which it undertook to assume responsibility for the safe transportation of certain American workers abroad. Helicol then performed its part of the agreement negligently, directly affecting (non-Texan) dependents in this country.¹⁶⁴ The cause of action arose out of misfeasance of the contract negotiated here; had death not occurred, the injuries could have been remedied in third-party beneficiary suits on that contract.¹⁶⁵ The purposefulness and profitableness of Helicol's Texas negotiations, and the foreseeability of the damage to the non-Texas American survivors which negligent performance of the ultimate agreement would entail, strongly support the conclusion that jurisdiction under the Act would have been constitutional, under aggregated but otherwise typical minimum contacts analysis.

It would seem to make no difference to the constitutional inquiry if service was had in our hypothetical, as it was in *Helicopteros*, under a state long-arm statute, rather than under the federal provision for world-wide service of process. Service itself was proper under the Texas long-arm statute in *Helicopteros*;¹⁶⁶ the issue was whether, given that service, (1985) 58 So. Cal. L. Rev. 943 the defendant's contacts with the forum satisfied the requirements of due process. In our hypothetical, the mode of service authorized by state law is in fact made

164. "Direct effect" for constitutional (i.e., minimum contacts) purposes would seem to be made out here, even if not for statutory purposes. *See supra* note 162 and accompanying text.

165. Wrongful death is generally construed as sounding exclusively in tort. *See, e.g.*, *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 38, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133, 135 (1961). That is the position in Texas. *Goelz v. J.K. & Susie L. Wadley Research Ins. & Blood Bank*, 350 S.W.2d 573, 577 (Tex. Civ. App. 1961). For an example of an action for personal injuries brought as an action by a third-party beneficiary of a contract providing for safe maintenance of a transportation facility, *see Miree v. deKalb County*, 433 U.S. 25, 27 (1977). In Texas, an express contract stipulation for liability to third parties, like Helicol's undertaking to the employer, will enable third-party beneficiaries to sue. *See, e.g.*, *Dairyland County Mutl. Ins. Co. v. Childress*, 650 S.W.2d 770, 775 (Tex. 1983).

166. *Tex. Rev. Civ. Stat. Ann. art. 2031b* (Vernon 1964 & Supp. 1982-1983). The statute is construed by the Supreme Court of Texas to be coextensive with the due process clause. *U-Anchor Advertising, Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977).

alternatively available under the Act for actions against governmental instrumentalities.¹⁶⁷

Of course, *Helicopteros* was not brought under the Federal Sovereign Immunities Act. Yet if, based on our thinking about Helicol's activities in Texas and the effects in this country of its Peruvian activities, we have concluded that Texas' taking of jurisdiction over Helicol would not have been fundamentally unfair or unreasonable in the constitutional sense, then that conclusion should hold, whatever the legal theory employed by the plaintiff, and whether or not Helicol was a governmental instrumentality.

The difficulty, of course, is that in thinking about the hypothetical case, we have aggregated Helicol's contacts with Texas and its contacts with the decedents' respective domiciles. We have treated the Texas court as more or less a court of the nation. The hypothetical is intended, of course, to suggest the national interest in the taking of jurisdiction, and thus the suitability of aggregating an alien defendant's national contacts to test the propriety of a taking of jurisdiction. On the other hand, what we have said thus far does not mean that jurisdiction in the *Helicopteros* case could not have been sustained on the narrow ground urged by Justice Brennan.¹⁶⁸ or on the broader reasoning in the Texas Supreme Court;¹⁶⁹ the significance of the pilot training in Texas, and of the employer's base in Texas, should not be discounted. Still, there is a sense in which those analyses are unsatisfying. With the exception of some salient insights in the Texas Supreme Court, none of these opinions takes hold of the crucial issues in the case; none articulates the national interest in the taking of jurisdiction.

In fact, it was open to the United States Supreme Court to do well with the case, even if the Court was unprepared to aggregate national contacts in suits against aliens, or to make the drastic changes in jurisdictional law commentators increasingly urge.¹⁷⁰ First, the Court should **(1985) 58 So. Cal. L. Rev. 944** have

167. The Act's provisions for service of process are applicable in state courts, 28 U.S.C. § 1608 (1982), but the provisions applicable to corporate instrumentalities effectively incorporate state provisions, subject to a need for court order. *Id.* § 1608(b)(3)(C).

168. *See supra* note 16 and accompanying text.

169. *See supra* note 18 and accompanying text.

170. *E.g.*, Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 Ore. L. Rev. 485, 527-28 (1984) (suggesting abandonment of current tests for single test of "reasonableness in circumstances"); Redish, *supra* note 20, at 1114 (suggesting readjustment of theoretical basis of existing jurisprudence to limit it to "injustice to individual"); Seidelson, *Jurisdiction over Nonresident Defendants:*

resisted the temptation to categorize the case abstractly as one of “general jurisdiction” based on “purchases alone.” That analysis is simply too remote from anything at stake in the case. Once freed of “purchases alone,” the Court would also have been freed of the Justice Department’s “foreign trade” bogey. The Court could have pointed out, in laying that ghost, that the argument about foreign trade lacked merit even if “purchases alone” *was* the measure of Helicol’s activities in Texas.¹⁷¹

The Court could then have come to grips with the issues even under a standard minimum contacts analysis. As we have already pointed out, Helicol negotiated in Texas the contract formally executed in Peru. The cause of action in tort arose out of its negligent performance of this contract. This negotiating activity was purposeful and profitable to Helicol. Thus, Helicol could be understood to have “purposefully availed” itself of the benefits and protections of Texas law. Moreover, in assuming duties both to carry insurance covering personal injuries to the employees of the Texas employer, and to indemnify and hold the employer harmless on account of such injuries, Helicol impliedly submitted itself to the jurisdiction of Texas. In undertaking these duties, Helicol must have contemplated liability in Texas, the only state in which the employer and the helicopter manufacturer could also have been joined in the event of a crash, and the appropriate state for tripartite industrial accident litigation. Helicol could expect to be ‘haled’ before a Texas court.

The Court could have taken account of the forum’s interest in trying the case, as *Volkswagen* seems to require,¹⁷² and as *Keeton v. Hustler Magazine, Inc.*,¹⁷³ very recently does. As the employer’s base, Texas had an interest in furnishing a forum not only for claims against the employer, but for related claims arising out of the employment, including claims by the employer. As we have seen, states effectuate such interest through opening their doors to industrial accident litigation, in which (1985) 58 So. Cal. L. Rev. 945 claims against third parties are the norm. The defendant’s negotiations for the pipeline transportation job in

Beyond “Minimum Contacts” and the Long-Arm Statutes, 6 Duq. L. Rev. 221, 223 (1967) (proposing abandonment of constitutional jurisdictional tests in favor of discretionary *forum non conveniens* control).

171. See *supra* text accompanying notes 88-91.

172. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1982), includes, among the matters suitable for the broadened inquiry proposed therein, the shared interests of the several states in effectuating substantive policy, and in the efficient resolution of controversies, as well as the plaintiff’s need for a convenient and effective forum. See *supra* note 128 and accompanying text.

173. 104 S. Ct. 1473, 1479-82 (1984).

Texas, and its subsequent negligent performance of that contract, also implied some forum interest in adjudicating the misfeasance. In addition, Texas had an interest it shares with all states in furnishing a forum to American plaintiffs in suits against aliens where no alternative domestic forum is available.¹⁷⁴

In support of these arguments, the Court could have noted the impolitic quality of the contrary result urged by the defendant. To have struck down jurisdiction would have been to allow Helicol to enter this country to obtain valuable contracts for transportation of our workers abroad, while insulating itself from liability in the United States for negligent harms to those workers in performance of those contracts, and, thus, as a practical matter, from all such liability. That practical immunity would follow from the obvious imbalance of conveniences that such a result would entail. The Court could have noted here that the defendant's claim of discrimination was ill-founded. The inconvenience to the plaintiffs in attempting to sue the defendant abroad would easily distinguish the case from one in which there was an alternative domestic forum. Thus, the Court persuasively could have sustained jurisdiction.

The Supreme Court should have been working in this or some other way to make its problematic jurisdictional jurisprudence at least *bear the weight of the questions the cases raise*.

CONCLUSION

It is difficult to believe that justice triumphed in *Helicopteros*. Nor can we take from the case what might have been hoped for from the interesting questions it presented: some thoughtful jurisprudence on the power of American state and federal courts to act within their legitimate governmental need to provide adjudicatory services to those who are entitled to seek justice from them. I leave it to the reader to derive what comfort may be had from the now broadened rule that a defendant's substantial and regular purchases in the forum state, standing alone, do not constitute the sort of continuous and systematic activity, when unrelated to the cause of action, that will allow the state to open its tribunals to suits on foreign occurrences against foreign multinational corporations by American personal-injuries plaintiffs.¹⁷⁵ **(1985) 58 So. Cal. L. Rev. 946**

174. *See supra* notes 103-16 and accompanying text and text accompanying note 128.

175. The Court already seems to have repented of this sort of mechanistic thinking. In *Burger King v. Rudzewicz*, 53 U.S.L.W. 4541 (1985), the Court, per Justice Brennan (who dissented in *Helicopteros*), sustained the forum's reasonable assertion of jurisdiction, without resorting to the sterile categorizations of purchasing activity in which the petitioners had sought to confine the jurisdictional question. *See supra* note

In *Helicopteros*, the Supreme Court, impressed by the spectre of a supposed threat for foreign trade, offered an abstract doctrinal analysis irrelevant to the real issue in the case: the power of American courts to hear suits against well-insulated alien corporate tortfeasors by American workers injured in a foreign workplace. It is national policy in analogous cases under the Federal Sovereign Immunities Act to facilitate the exercise of such power,¹⁷⁶ and that policy sheds considerable light on the intended reach of that power. In blindly limiting that power the Court has succumbed to the risk that always attends mechanical adjudication—adjudication detached from sensitive jurisprudence and considered policy. It has done the crashingly wrong thing.

14, Justice Blackmun, the author of *Helicopteros*, was a member of the *Burger King* majority.

176. The purpose of the Act was to ensure that “our citizens will have access to the courts” in suits against foreign states and their instrumentalities. House Judiciary Comm., Jurisdiction of United States Courts in Suits Against Foreign States 6, H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976).