Jurisdiction over Nonresident Defendants: Beyond "Minimum Contacts" and the Long-Arm Statutes

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To what extent may a state court, or a federal court exercising diversity jurisdiction, assert in personam jurisdiction over a nonresident defendant not served within the state? Ultimately, the perimeter of such jurisdiction must be determined by constitutional standards. The constitutional limitations which come immediately to mind are the fourteenth amendment's privileges or immunities and due process clauses. The Supreme Court early determined that the privileges or immunities clause was not applicable to corporations, consequently where the nonresident defendant is a foreign corporation the limitation of such jurisdiction will be determined by due process. Moreover, in cases involving nonresident natural persons, the Court has found no violation of privileges or immunities if the treatment afforded those defendants is not discriminatory as
compared with that which the forum affords its resident defendants.5 Since a state could hardly desire broader jurisdiction than it enjoys over its own residents,6 such decisions of the Court have virtually emasculated the privileges or immunities clause as a limitation upon the jurisdiction a state may exercise over nonresident defendants. Apparently, whether the nonresident defendant is a natural person or a corporation, the due process clause provides the principal limiting factor in determining the constitutional propriety of state court jurisdiction. In this context, the due process clause may be said to consist of two parts, one requiring an appropriate form of service and the other requiring an adequate justification for the exercise of such jurisdiction; for lack of more descriptive language, the first may be referred to as procedural due process, the second as substantive due process. In determining whether or not procedural due process has been complied with in such cases, the Court has fashioned a standard which requires that the form of constructive service utilized must be reasonably calculated to provide the defendant with actual notice of the proceedings and an opportunity to defend.7 Registered mail service directed to the defendant at his last known address, by the forum's secretary of state or the plaintiff or both, consistently has been found sufficient to meet the required standard.8 A form of service less cumbersome to the plaintiff would be difficult to conceive. Consequently, the only significant constitutional limitation upon a state court's jurisdiction over a nonresident defendant is substantive due process. Once the requirements of that constitutional mandate are determined, the permissible scope of such jurisdiction should become apparent.

Unfortunately, the language utilized by the Court in spelling out those requirements has been rather unspecific, as is sometimes the case when the Court seeks to verbalize basic constitutional tenets. In some instances, the very fact that it is a basic constitutional rule which is being expressed

8. Hess v. Pawloski, supra note 5; Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. 664 (1951). While service upon the secretary of state as "agent" for the nonresident defendant may still be thought by some the equivalent of an in-state service, it is suggested that the principal practical function of such service is to provide a disinterested party to forward mail service to the defendant. Where only the plaintiff is required to mail service to the defendant, there may be some concern over the performance of the chore by an interested party, although a return receipt should ameliorate the concern. Presumably, where both plaintiff and the secretary of state are required to mail service to defendant, as in Vermont's long-arm statute, Vt. Stat. Ann. tit. 12, § 856 (1963), receipt of such service by defendant is made more likely by the double mailing.
may compel general language. In other cases, however, even basic constitutional requirements have been amenable to precise formulations. Where specific expression is feasible, it is obviously preferable. The Court's recitation of that which comports with substantive due process has been that which does not offend traditional notions of fair play and substantial justice; hardly a specific formula which lends itself to ready application to determine the constitutional propriety of the assertion of jurisdiction over a nonresident defendant. That which offended such traditional notions when Pennoyer v. Neff was decided would hardly cause a forehead wrinkle today. And determining the necessary elements of fair play and substantial justice would seem to be as objective and exact as determining the dimensions of a floor by heel-to-toe measurement. A concise, specific statement of the scope of state court jurisdiction over nonresident defendants permissible under substantive due process would be highly desirable. Is it obtainable?

In Hess v. Pawloski, the Court justified the submission of a nonresident motorist to the jurisdiction of the forum in a case arising out of the operation of the vehicle in the forum state on two grounds: (1) implied consent, and (2) "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property." Mr. Justice Frankfurter, speaking for the Court in Olberding v. Illinois Central R. Co., Inc., annexed implied consent as a basis for the Hess decision: "The defendant may protest to high heaven his unwillingness to be sued and it avails him not." As for motor vehicles being dangerous machines, the reader is offered the following language for comparison with that used by the Court in Hess: "A person who uses an intrinsically dangerous means to accomplish a lawful end, in such a way as will necessarily or obviously expose the person of another to the danger of probable injury, is liable if such injury results, even though he uses all proper care." That language, utilized by a court describing the circumstances in which absolute liability will be imposed, is strikingly similar to the preceding quotation from Hess. Does that mean that the Court in Hess approved the assertion of

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10. 95 U.S. 714 (1877).
13. Id. at 356.
15. Id. at 341.
jurisdiction over the nonresident defendant because he had engaged in an ultrahazardous activity in the forum state? Of course not. The operation of a motor vehicle is not considered an ultrahazardous activity subjecting the actor to absolute liability, nor was it so considered when Hess was decided. Yet, in Hess, the Court seemed compelled to characterize motor vehicles as "dangerous machines" in order to satisfy substantive due process.

An analogous compulsion apparently gripped the Court in Henry L. Doherty & Co. v. Goodman. Analogous compulsion apparently gripped the Court in Henry L. Doherty & Co. v. Goodman.17 There, the Court approved the assertion of jurisdiction over a nonresident defendant who had engaged in the business of selling corporate securities in the forum state, in a cause of action arising out of that activity. In doing so, the Court cited Hess and stated that the asserted jurisdiction in Goodman, "goes no farther than the principle [there] approved. . . ." How did the Court equate selling corporate securities with the operation of a dangerous machine? Nothing to it. In Goodman, the forum state "treat[ed] the business of dealing in corporate securities as exceptional. . . ." And how did the Court determine that Iowa considered such activity "exceptional"? Iowa had "subject[ed] it to special regulation . . . [including an] [a]ct [which] requires registration and written consent for service of process upon the Secretary of State." So "exceptional" was given the same due process magic as "dangerous" had received, and the determination that an activity was exceptional could be based on the existence of a statute in the forum state requiring one to consent to service upon the forum's secretary of state.

In McGee v. International Life Insurance Co.,21 plaintiff, a California resident, there instituted an action against defendant, a corporation having its principal place of business in Texas, pursuant to a California statute "which subject[ed] foreign corporations to suit in California on insurance contracts with residents of that State even though such corporations [could not] be served with process within its borders." Defendant received service by registered mail at its Texas place of business. The California suit resulted in a judgment for plaintiff. "Unable to collect the judgment in California [plaintiff] went to Texas where she filed suit on the judgment in a Texas court." The Texas courts refused to extend full faith and credit to the California judgment, finding that the

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18. Id. at 628.
19. Id. at 627.
20. Id. at 627-28.
22. Id. at 221.
23. Id.
issuing court had not acquired jurisdiction over the defendant. The Supreme Court reversed. It has been suggested that the primary reason for reversal was defendant's business—insurance—and the exceptional nature of that business as indicated by the existence of the California statute.  

Just how far a state legislature could go in so labeling activities "exceptional" was never really determined. Before such approach was fully exploited, the Court decided *International Shoe Co. v. State of Washington.* In *International Shoe,* the Court said: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (emphasis added). Since the Court's decision, that italicized phrase has acquired a mystique and a purported determinative quality far exceeding any apparent intrinsic meaning it may possess. After all, the Court merely reiterated that substantive due process would be tested by traditional notions of fair play and substantial justice, and added that for jurisdiction over nonresident defendants the forum could satisfy the test by discovering minimum contacts between defendant and forum state out of which the action arose. Yet, "minimum contacts" stimulated state legislative activity in a manner not approached by the "exceptional activity" cases.

The state legislatures reacted with varying alacrity to the *International Shoe* decision, but ultimately many of the states did react. The manifestations of their reactions are the "long-arm" statutes. Some of the statutes are limited in their applicability to foreign corporations; others apply to nonresident natural persons as well. Most have been held to encompass the broadest scope of jurisdiction over nonresidents which due process permits, although the decisions so holding have differed markedly.

26. *Id.* at 316.
27. For a sampling of the various long-arm statutes extant, see Cheatham, Griswold, Reese & Rosenberg, *Cases and Materials on Conflict of Laws* 159 et seq. (5th ed. 1964).
28. *E.g.*, Minnesota, Minn. Stat. Ann. ch. 303, § 303.13 subdiv. 1(3) (1957); Vermont, Vt. Stat. Ann. tit. 12, § 855 (1963); West Virginia, W. Va. Code Ann., ch. 31, § 71 (1957). At one time, it may have been thought that such statutes could not be made applicable to natural persons without violating due process; however, the distinction between foreign corporations and nonresident natural persons for jurisdictional purposes probably has ceased to exist. See Calagaz v. Calhoon, 309 F.2d 248 (5th Cir. 1962); 30 Geo. Wash. L. Rev. 747, 751-52 (1962).
in their determinations of that scope. One of the early, and fairly typical, long-arm statutes is that of Vermont. It provides:

If a foreign corporation makes a contract with a resident of Vermont to be performed in whole or in part by either party in Vermont, or if such foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont, such acts shall be deemed to be doing business in Vermont by such foreign corporation and shall be deemed equivalent to the appointment by such foreign corporation of the secretary of the state of Vermont . . . to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against such foreign corporation arising from or growing out of such contract or tort . . . 31

With some trepidation, the Supreme Court of Vermont, in Smyth v. Twin State Improvement Corp., 32 held that the assertion of jurisdiction over a Massachusetts corporation whose employees, while reroofing a house, allegedly committed a tort in Vermont against a Vermont resident, in an action arising out of that tort, did no violence to due process. As recently as 1962, a federal district court, taking a more restrictive view of West Virginia's similar long-arm statute, cited Smyth as the only case which "permitted an extension of an in personam jurisdiction over a foreign corporation based on a single tort where there was no other business contact," and concluded that Smyth "does not seem to be sound law." 33 While that federal court decision appears contrary to a rather

30. See, e.g., Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 436, 176 N.E.2d 761, 763 (1961) ("[T]he statute contemplates the exertion of jurisdiction over nonresident defendants to the extent permitted by the due-process clause."); Williams v. Connolly, 227 F. Supp. 539, 542 (D. Minn. 1964) ("[T]he Minnesota Supreme Court has indicated it will assert its maximum jurisdiction."); Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583, 587 (2d Cir. 1965) ("[W]e shall assume that [New York's long-arm statute] is as broad as the Federal Constitution would permit it to be.") Despite the last quoted language, the court in Agrashell was not willing to assert jurisdiction over a Missouri corporation which had sold 115 tons of walnut shells to a New York partnership. The court determined that the constitutional propriety of jurisdiction depended on whether or not "the passage of risk in the sale and carriage of the goods" had occurred in New York. Id. at 589.


32. 116 Vt. 569, 80 A.2d 664 (1951). The trepidation is suggested by the following sentences from the court's opinion: "In the present case no problem of undue hardship is involved, since it is relatively easy for a Massachusetts corporation to defend in a Vermont court." 116 Vt. at 574, 80 A.2d at 667. "It has been made apparent already in what has been written that the instant case can be decided either way on argument from existing authority." 116 Vt. at 577, 80 A.2d at 669.

clear trend in the cases, it presaged a circumspective view of the Vermont statute by the Vermont court in somewhat different circumstances.

In *O'Brien v. Comstock Foods, Inc.*, plaintiffs, Vermont residents, sued defendant, a New York corporation, for injuries resulting from wife-plaintiff's ingestion of a piece of glass contained in a can of beans prepared and packed by defendant in New York. Plaintiffs asserted that the can of beans had been "placed . . . in the stream of commerce in New York . . . [and] purchased by [husband-plaintiff] in Burlington, Vermont. . . ." The Vermont court found that an assertion of jurisdiction over the nonresident defendant in *O'Brien* would violate due process. The obvious difference between *Smyth* and *O'Brien* is that, in the former, defendant's employees caused injury in the forum state, while in the latter the injury producing agent was defendant's product. The constitutional significance of that distinction, as seen by the court, was that the mere presence of defendant's product in Vermont was not sufficient to demonstrate an "intentional and affirmative action on the part of the non-resident defendant in pursuit of its corporate purposes within this jurisdiction." So "minimum contacts" was equated with "intentional participation," and the Vermont court, "unlike the Supreme Court of Illinois in *Gray v. American Radiator & Standard Sanitary Corp.*," was unwilling to "infer that the defendant's products have substantial use and consumption in Vermont."

In the *Gray* case, plaintiff, an Illinois resident, was injured when a water heater exploded in Illinois. Titan Valve Manufacturing Co., a foreign corporation, had constructed the heater's safety valve, allegedly in a negligent manner, in Ohio and sold the valve to American Radiator, which incorporated the valve into the heater in Pennsylvania. Ultimately,

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35. 123 Vt. at 462, 194 A.2d at 569. Upon remand, plaintiffs amended the complaint to allege that, after packing the can of beans, defendant sold it to International Grocers Alliance for resale and distribution to grocers in Vermont and other states. The amendment satisfied the jurisdictional requisites. *O'Brien v. Comstock Foods, Inc.*, 125 Vt. 158, 212 A.2d 69 (1965).
36. 123 Vt. at 464, 194 A.2d at 570.
37. 123 Vt. at 465, 194 A.2d at 571.
38. 123 Vt. at 465, 194 A.2d at 571. This unwillingness is especially interesting in light of the fact that students from the New England area in the author's Conflict of Laws classes invariably recognize "Comstock Foods" as a popular brand name. One might imagine that something so generally known in the area would have been an appropriate subject for judicial notice.
the heater “was sold to an Illinois consumer.” That was Titan’s “only contact with [Illinois].” The Supreme Court of Illinois, after paying homage to International Shoe and Smyth, concluded that “it is a reasonable inference that [Titan’s] commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State.” That said, the court concluded that jurisdiction over Titan was constitutionally appropriate. Now, “minimum contacts” was equated with “substantial use and consumption” in the forum state. And such substantial use and consumption apparently could be inferred from the presence of one of defendant’s products in the state, at least in Illinois. While the difference between a can of beans and a water heater safety valve is obvious, the legal significance of that difference is not. The sale of each to a consumer within the forum state benefits the manufacturer of each, since each sale of the manufacturer’s product enlarges its potentially profitable manufacturing capacity. That economic advantage exists whether the product is sold as an entity or as an integrated component of a larger product. If a legally significant difference between O’Brien and Gray cannot be found, one is impelled toward the conclusion that one of those decisions was wrong.

In O’Brien, the Vermont court was unwilling to conclude that defendant’s can of beans had come to be purchased in Burlington through some intentional act of defendant. It may be helpful to attempt to determine some of the various ways in which the beans came to be purchased there. Several possibilities exist: defendant made its beans available to an exclusive distributor in Vermont; defendant made its beans available to a number of distributors in Vermont; defendant made its beans available to a distributor in New England (outside Vermont), who in turn made them available to wholesalers in Vermont; defendant made its beans available to one or more distributors in New York, who in turn made them available to wholesalers in Vermont; defendant made its beans available directly to a retail outlet in Vermont; or defendant made its beans available directly to plaintiffs. Whichever of these possibilities existed in fact, it seems fair to conclude that defendant benefited from the purchase of its can of beans in Vermont since such purchase potentially enlarged defendant’s profitable manufacturing capacity. Moreover, it would seem appropriate to infer that defendant intended to acquire such benefit. Apparently, the Vermont court was wrong. Was the Illinois

40. 22 Ill. 2d at 438, 176 N.E.2d at 764.
41. 22 Ill. 2d at 438, 176 N.E.2d at 764.
42. 22 Ill. 2d at 442, 176 N.E.2d at 766.
43. The existence of an exclusive distributor within the forum state, and the control factors inherent therein, have been considered critical to the propriety of asserting jurisdiction over the foreign corporation defendant. Delray Beach Aviation Corp. v. Mooney Aircraft, Inc., 332 F.2d 135 (5th Cir. 1964), cert. denied, 379 U.S. 915 (1964). As to the manner in which the beans actually came to be purchased in Vermont, see note 35 supra.
court correct? Not necessarily. Why infer substantial use and consumption of defendant’s product in Illinois (especially from a record which led the court to note that “defendant’s only contact with this state is found in the fact that a product manufactured in Ohio was incorporated in Pennsylvania, into a hot water heater which in the course of commerce was sold to an Illinois consumer”)

if such a gross inference is unnecessary? The Illinois sale of the single water heater containing defendant’s component would appear sufficient to justify the conclusion that defendant had enjoyed economic benefit from the Illinois market. That single sale potentially enlarged defendant’s profitable manufacturing capacity, and presumably defendant intended to receive such economic advantage.

In O’Brien, the court, apparently willing to assert jurisdiction over the nonresident defendant upon a showing that one of its products was intended for Vermont, was unwilling to find the requisite intent from the actual purchase in Vermont. In Gray, the court, apparently unwilling to assert jurisdiction over the nonresident defendant upon a showing that one of its products was used in Illinois, was willing to infer substantial use and consumption of defendant’s products in Illinois. In O’Brien, the essence of “minimum contacts” seems to have been intent; in Gray, quantity. Thus, the highest appellate courts of two states differed in their interpretation of that mystical phrase from International Shoe. Such divergence isn’t surprising in light of the fact that the last time the Supreme Court of the United States directed its attention to jurisdiction over a nonresident based on minimum contacts, the Court divided 5-4 with two separate dissenting opinions. That division of the Court, in Hanson v. Denckla, further attests to the lack of inherent determinative


45. For a discussion approving of the “substantial use and consumption” test, see Note, 34 GEO. WASH. L. REV. 544 (1966).

46. 357 U.S. 235 (1958). It is suggested that one of the principal reasons for the Court’s difficulty in Hanson was the fact that the case involved a determination of the validity of a trust. It is apparent that if trusts are to perform their contemplated legal functions the trustee must have access to a forum which has jurisdiction to determine the validity of the trust and to have that determination given binding effect as to all who may claim pursuant to or against the trust, so long as they are given on appropriate form of constructive service. First Trust Co. of St. Paul v. Matheson, 187 Minn. 469, 246 N.W. 1 (1932). The Court has recognized that “the interest of each state in . . . trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard. . . . [T]he vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined.” Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950). Yet in First Trust Co., supra, the court felt compelled to justify its power to determine the validity of a Minnesota trust on the basis
quality in "minimum contacts." Perhaps the single sentence in the three Hanson opinions most worthy of reliance is that one referring to the future of the diminishing restrictions imposed upon the assertion of jurisdiction over nonresident defendants: "Yet further relaxation seems certain."\(^{47}\)

One wonders how the Illinois Supreme Court would react to a situation in which the nonresident defendant had engaged in a calculated, expensive—but unsuccessful—program of saturation advertising aimed at securing substantial use and consumption of its product in Illinois. If, despite the advertising campaign, only one or relatively few of defendant’s products were actually sold in Illinois, and one of the products so sold caused injury to the Illinois purchaser, would the Illinois court decline to assert jurisdiction over the defendant in an action brought by the injured purchaser, because there had been no substantial use or consumption within the state? On the basis of such a record, the "reasonable inference" employed in the Gray case would be impossible. Yet, a declination of jurisdiction would hardly seem justified. Similarly, one may wonder how the Vermont court would respond to a case in which thousands of nonresident-defendant’s products were sold in Vermont, with resulting injury to one of the Vermont purchasers, but no evidence was offered as to the distributive chain which preceded the Vermont sale. Would the court remain unwilling to infer an intentional participation in the Vermont market on the part of defendant? Or would the presence of thousands of defendant’s products in Vermont compel the court to conclude that defendant had voluntarily entered the Vermont market? If the court would be compelled to such an inference, apparently its decision in O’Brien was predicated on a conclusion that the sale of defendant’s can of beans from a grocer’s shelf in Burlington was an extraordinary, isolated event. Such a conclusion would seem rather extraordinary, and contrary to the general merchandizing methods of food retailers.

The Gray decision was described as "a thoughtful opinion" by a federal district court in Minnesota which found itself "in agreement with the Gray analysis."\(^{48}\) In Williams v. Connolly, plaintiff, a California of in rem jurisdiction, and devoted a substantial portion of its opinion to demonstrating that bearer bonds, the principal corpus of the trust, constituted an appropriate res. And in Hanson v. Denckla, supra, one of the dissenting opinions (Mr. Justice Black, joined by Mr. Justice Burton and Mr. Justice Brennan) cited Mullane, supra, as authority for the proposition that Florida could determine the validity of a trust and have its determination given binding effect as to the Delaware trustee which was never personally before the Florida court.

It is submitted that an action to determine the validity of a trust should be considered a non-transitory action, cognizable only in a forum of the trustee’s domicile, and that that forum should be deemed to have in personam jurisdiction over all who claim under or against the trust, provided they receive appropriate constructive service.

47. Hanson v. Denckla, supra note 46 at 260.
resident, was injured when a heater exploded in a motel room in Minnesota. He sued "the motel owner . . . , the Northern States Power Company, Skelly Oil Company, Stewart-Warner Corporation, and the Bastion-Morely Company." Bastion-Morely, served pursuant to Minnesota's long-arm statute, moved to quash the service. The court thereupon undertook the two-step task of determining (1) if the long-arm statute was applicable to the facts, and (2) if so, whether or not its application, and the consequent assertion of jurisdiction over the nonresident defendant, would be constitutionally appropriate.

The first step posed an interesting problem. The long-arm statute provided for jurisdiction over a foreign corporation making "a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota . . . in any actions . . . against the foreign corporation arising from or growing out of such contract. . . ." The statute did not expressly require that the foreign corporation contract with the plaintiff or that the plaintiff be a resident of Minnesota. Plaintiff asserted that his "complaint states a cause of action based on breaches of warranty and the warranties extend to the plaintiff. The warranty actions would be viewed as arising from or growing out of the contract." Assuming a contract between Bastion-Morely and a Minnesota resident, presumably the motel owner, the statute was applicable to the facts if privity was not necessary to maintain a warranty action and if the warranties from defendant extended to plaintiff. The court determined that Minnesota no longer required privity in warranty actions, and that plaintiff was entitled to the benefit of any warranties imposable upon Bastion-Morely. Thus, the court determined, the long-arm statute was applicable to the assumed facts. It then became "necessary to consider whether such jurisdiction would violate the due process clause of the Fourteenth Amendment to the United States Constitution."

The court cited and quoted from International Shoe, McGee, and Hanson v. Denckla. Then the court noted its "agreement with the Gray analysis." Here is the Minnesota federal court's version of the Gray analysis:

A corporation placing its products in the stream of national commerce is in a very real sense availing itself of the privilege of conducting activities within each state its products may ultimately enter. In addition to whatever direct reliance on the

49. Id. at 540.
52. Williams v. Connolly, supra note 48 at 541.
53. Id.
54. Id. at 542-43.
55. Id. at 546.
laws of a State might be necessary in any particular case, benefits from a national commerce depend upon an ordered legal system in each State making up the nation, and one who participates in this commerce takes advantage of the ordered system of laws prevailing in all fifty States. Under such circumstances the State, which as a practical matter must open its borders to this commerce, has an important interest in providing a forum for its injured residents.  

That language is interesting for several reasons. First, contrary to O'Brien, it suggests that the placing of a product in commerce may be sufficient to submit a nonresident defendant to the jurisdiction of plaintiff's home forum. Second, it intimates that any state may assert jurisdiction over a nonresident defendant engaged in interstate commerce, regardless of the extent of the use or consumption of defendant's product at the forum, and, apparently, absent any specific intent on the part of defendant to benefit from that forum's laws, in an action arising out of the use of defendant's product in the forum. This judicial recognition that one engaging in national commerce depends on an ordered system of laws, a totality necessarily contributed to by every state, adds a new dimension to "minimum contacts." Finally, the quotation concludes with a state's interest "in providing a forum for its injured residents," despite the fact that the plaintiff in Williams was not a resident of the forum.

Williams is not unique in its consideration of subjecting a foreign corporation to jurisdiction in an action commenced by a non-resident plaintiff. In Elkhart Engineering Corporation v. Dornier Werke, plaintiff, a Wisconsin corporation, sued defendant, a German corporation, in Alabama, under that state's "non-qualifying corporation" statute. Plaintiff sought to recover for damage to an aircraft it had purchased from defendant, caused while defendant's agents were demonstrating the plane in Alabama with plaintiff's permission. The court found that the statute was applicable, and that its application did not offend due process. In reaching its conclusion, the court moved from Pennoyer through Hess, International Shoe, McGee, Hanson, and Smyth. It expressly minimized the significance of the "dangerous" nature of the activity conducted within the forum state, so emphasized by Hess, and implicitly negated any requirement that plaintiff be a resident of the forum. The court determined that "a state has a substantial interest in providing a forum to redress tortious injuries committed within its borders by non-residents." The court did not indicate the specific elements of that "substantial interest."

56. Id.
57. 343 F.2d 861 (5th Cir. 1965).
58. CODE OF ALA., Tit. 7, § 199(1) (1961).
59. 343 F.2d at 868.
To a limited extent, Mr. Justice Goldberg implicitly negated any requirement that plaintiff be a resident of the forum state in order to utilize its long-arm statute. In *Rosenblatt v. American Cyanamid Company*, plaintiff, a Maine corporation (but one having "a substantial plant in New York"), used New York's long-arm statute to obtain service upon defendant, a United States citizen, in Rome. The alleged operative facts of the case were stated succinctly by Mr. Justice Goldberg:

[O]ne Fox, employed by appellee [American Cyanamid] at its New York plant, stole from appellee biological cultures and confidential documents pertaining to the production of some newly developed antibiotics; Fox went to Italy, where he conspired with appellant [Rosenblatt] and officials of an Italian pharmaceutical company to arrange a sale of the stolen material to the Italian company for use in the production of antibiotics in competition with those of appellee; pursuant to this conspiracy, appellant flew to New York to inspect the material for the Italian firm, and being satisfied, purchased it, paying part of the purchase price in New York, and returned with it to Italy.

Defendant moved to dismiss the complaint, asserting that application of New York's long-arm statute would offend due process. After defendant exhausted state court procedures without avail, he applied to Mr. Justice Goldberg "for a stay of the judgment of the [New York] Court of Appeals pending his appeal to [the Supreme Court of the United States.]"

In deciding whether or not to grant the stay, Mr. Justice Goldberg had to determine "whether plenary review by this Court of appellant's constitutional claim is likely; if so, a stay should be granted." Mr. Justice Goldberg denied the stay.

Of special interest are those aspects of the case which defendant asserted made it constitutionally inappropriate to apply New York's long-arm statute to him:

He contends that appellee is a Maine corporation, that appellant is not a corporation, that appellant is in a foreign country, that the appellee is a "half-billion" dollar corporation with access to Italian courts, that the "center of gravity" of the alleged conspiracy is in Italy, that the key witness for appellee is "completely within the control" of appellee, that appellant might be

61. 86 S. Ct. at 2 (1965).
63. 86 S. Ct. at 2.
64. *Id.*
65. *Id.* at 3.
subject to a second suit in Italy, and that appellee's property had been stolen by Fox before appellant was involved in the transfer. 66

Mr. Justice Goldberg's response was direct:

These facts are not relevant . . . to the jurisdiction of New York which is plainly supportable, as far as due process is concerned, on appellant's conduct in New York. They relate only to questions of convenience and not to jurisdiction in a constitutional sense. For the purposes of this appeal it is conceded that Fox stole the material from appellee's place of business in New York, and that pursuant to a conspiracy to convert appellant flew to New York, effected the tortious transfer, and paid a substantial part of the purchase price to Fox in New York. This is more than sufficient to meet the constitutional test as enunciated in our decisions. 67

The in-Chambers opinion in Rosenblatt suggests that a long-arm statute may be utilized to secure jurisdiction over a nonresident defendant in an action brought by a nonresident plaintiff, and that the relative convenience or inconvenience of such jurisdiction is irrelevant to its constitutional propriety. There may be at least a modicum of inconsistency in those two conclusions. Where the plaintiff is a nonresident of the forum state, what justifiable interest has that state in asserting jurisdiction over the nonresident defendant? The classic concern of the forum for its own residents is lacking. Perhaps the interest lies in regulating conduct within the state; certainly in Rosenblatt the acts which allegedly occurred in New York—theft and purchase of stolen material—are acts which New York would have a legitimate interest in regulating, or, more specifically, prohibiting. But the propriety of an assertion of jurisdiction in a civil action as a means of regulating conduct within the state is somewhat dubious. Where the conduct is criminal, as well as civilly actionable—as was the case in Rosenblatt—the state's ability to prosecute would seem to provide an adequate method of regulation, to the extent that conduct may be regulated by subsequently imposed judicial sanctions. Where the conduct is not criminal, but merely civilly actionable, imposition of jurisdiction as a means of regulation becomes questionable for a couple of more reasons. First, the state's concern with regulation of conduct presumably diminishes as the degree of culpability of the conduct deescalates from criminal to civil wrong. Second, and more significant, to the extent that the state has an appropriate interest in the activity or consequences thereof which occurred within its borders, presumably its law will be applied by whatever court entertains the civil action. Thus, to whatever

66. Id. at 4.
67. Id.
degree conduct may be regulated by the after-the-fact imposition of law, that regulation will occur even absent an assertion of jurisdiction by a court sitting in the state where the conduct occurred.

If the assertion of jurisdiction over a nonresident defendant is not a necessary (or even wholly appropriate) means of regulating activity or consequences thereof occurring within the forum state, what justification exists for such an assertion of jurisdiction? With due deference to the contrary indication of Mr. Justice Goldberg, it is suggested that the primary justification is convenience.

Simple candor compels recognition of the fact that litigation in a foreign court does impose tangible and intangible inconveniences upon the litigant. That same candor should suggest that the overriding reason for permitting a court to exercise in personam jurisdiction over a nonresident defendant in any circumstances exists in the recognition of, and desire to alleviate, that inconvenience which would otherwise be imposed upon the plaintiff. Why else permit the resident plaintiff to sue locally the nonresident motorist, security salesman, insurer, roofer, or safety valve manufacturer? Whatever validity may have existed for the justification of such jurisdiction in terms of regulation of conduct or consequences within the forum state, has been reduced to near nihility since "the Ice Age of conflict of laws jurisprudence . . . [entered] an advanced stage of thaw." That thawing process has progressed sufficiently that it may be asserted that, to the extent a state has an appropriate interest in the regulation of conduct, its dispositive law will be utilized to resolve those issues dealing with such conduct regulation wherever the case is heard. Moreover, in those jurisdictions which have eschewed an interest oriented approach to fashioning indicative laws, the dispositive law of the state wherein the conduct occurred is likely to be used to resolve nearly all of the issues of the case, as a consequence, for example, of a rigid adherence to lex loci delicti in tort cases. Thus, application of the regulatory law of the state in which the conduct occurred seems likely regardless of which state becomes the forum.

Given a potential plaintiff in one state and a potential defendant in another, if plaintiff is to have the opportunity of asserting his claim
judicially, one of the parties must have imposed upon him the inconvenience inherent in litigation in a foreign court. In essence, then, the question of the propriety of asserting jurisdiction becomes a matter of determining which of the parties should be compelled to bear that inconvenience. The appropriate answer would seem to be the defendant. Unless one is willing to assume that the plaintiff's claim is wholly spurious, the assertion of such claim indicates that, as a result of certain action or inaction on the part of defendant or plaintiff or both, the plaintiff has suffered an actionable wrong at the hands of the defendant. "The usual presumption is that a person submits a claim in good faith. To conclude otherwise requires a resort to speculation and reliance upon suspicion." Moreover, the presumption that plaintiff's claim is asserted in good faith would seem to rest on a rather sound factual basis. Typically, a condition precedent to the actual assertion of the claim will be consultation with counsel. During the course of that consultation, counsel and plaintiff will reach certain conclusions as to the substance of the claim. If the claim is found to be lacking in substance to the extent that it is not even colorably valid, economics will militate against assertion of the claim. If the case is one in which counsel will expect a retainer plus additional fees for subsequent services, very likely plaintiff, now aware of the lack of validity of his imagined claim, will balk at paying the necessary fees. Should the case be one in which counsel ordinarily would serve on a contingent fee basis, counsel, aware of the lack of validity of plaintiff's claim, is not likely to proceed. In addition, basic morality and ethics would seem to militate against the formal assertion of the spurious claim. It may be that plaintiff, once advised that his imagined wrong does not amount to legal injury, will experience a diminution of his sense of moral indignation, as well as his appetite for costly litigation. Hopefully, counsel will realize an ethical restraint from prosecuting such a claim. In short, it seems quite appropriate to presume that when a claim is asserted formally such assertion is bona fide. Therefore, at least in limine, plaintiff presumably is the wronged party and defendant the wrongdoer. If one must bear the inconvenience of a foreign forum, apparently it should be the defendant.

It is submitted, then, that when plaintiff asserts a transitory cause of action against a nonresident defendant in plaintiff's home forum, due process should not be deemed violated if the forum exercises in personam jurisdiction over the defendant. And, it is submitted, that such jurisdiction should be deemed constitutionally appropriate even absent any other "minimum contacts" existing between defendant and the forum state. The overriding "contact"—if one requires that word to be used—exists in the mere assertion of resident plaintiff's claim. That assertion,

71. Owens v. White, 342 F.2d 817, 819 (9th Cir. 1965), rev'd on other grounds on rehearing, 380 F.2d 310 (1967).
presumably valid, indicates that defendant, by his acts or omissions, has incurred a legal liability to the plaintiff, and that presumed liability to the plaintiff should justify plaintiff's use of his home forum and defendant's subjection to that forum for determination of the existence and extent of the asserted liability. The assertion of jurisdiction by plaintiff's home forum over nonresident defendant should not be deemed to deprive defendant of liberty or property without due process of law. It merely provides plaintiff with the convenience of a local forum and subjects defendant to the inconvenience of litigation in a foreign, yet competent, court. Such a statement of due process requirements in the jurisdictional context here under examination has two distinct advantages over International Shoe's "minimum contacts": (1) it is readily expressed and easily applied even in varying factual situations, and (2) it is consistent with and effectively implements the basic consideration of convenience which underlies the permissible assertion of jurisdiction over a nonresident defendant.

What consequences flow from this proposed statement of due process requirements? For one thing, the various state long-arm statutes, to the extent that they provide a local forum for the resident plaintiff, would appear to be too restrictive in requiring additional contacts between defendant and the forum state. Even the nebulous minimum contact of committing a tort in whole or in part in the forum against a resident of the forum or making a contract with a resident of the forum to be performed in whole or in part by either party within the forum will serve to deprive the resident plaintiff of the convenience of a local forum in some instances. In those cases where the additional statutory contacts do not exist, the wronged plaintiff, rather than the presumed wrongdoer-defendant, will be compelled to bear the inconvenience of trial in a foreign court. To the extent that it is constitutionally appropriate to subject a nonresident defendant to the jurisdiction of plaintiff's local forum, regardless of where the operative facts underlying plaintiff's cause of action occurred, the long-arm statutes may restrict rather than enlarge the permissible scope of jurisdiction.

An interesting example of such potential effect of a long-arm statute arose in St. Clair v. Righter. There, plaintiff, a resident of Virginia, sued defendants, nonresidents of Virginia, for libel allegedly arising out of the publication in Virginia of certain letters written and mailed by defendants outside of Virginia. Jurisdiction was asserted under Virginia's long-arm statute, which provides:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) Transacting any business in this State;
(2) Contracting to supply services or things in this State;
(3) Causing tortious injury by an act or omission in this State;
(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State (emphasis added);73

* * * *

The court found that section (4) was the only one having potential applicability to an outside-the-state act causing tortious injury within the state, then determined that section (4) was inapplicable to the specific case because the complaint failed to allege facts which would support the conclusion that the "contacts" required by the italicized portion of that section existed. Thus, the court found that plaintiff's case was without the coverage of the long-arm statute. One might suppose that that finding would have led to the granting of defendants' motion to dismiss. It did not. The court determined that the long-arm statute did not describe the metes and bounds of constitutionally permissible jurisdiction; rather, it determined that the limits of such jurisdiction depended upon the due process clause. The court viewed the long-arm statute as "merely legislative approval for the exercise by the courts of that state of their inherent jurisdictional power at least to the limits set out in the statute . . . . [T]his does not restrict the courts and prohibit them from extending their jurisdiction to the limits of due process even if such an assumption of latent power is not expressly authorized by the statute."74 Thereupon, the court found that assertion of jurisdiction over the nonresident defendants in the circumstances of the case did not violate due process.

The court's treatment of Virginia's long-arm statute as "merely legislative approval" for the exercise of a portion of a greater inherent jurisdiction, and, thus, not restrictive of that greater inherent jurisdiction, is dubious at best. It would seem a fair assumption that the legislature in enacting the statute intended to describe the permissible scope of jurisdiction which Virginia courts were to assert over nonresident defendants. It may well be true that the restrictions imposed by section (4) were thought by the legislature to be required by due process. It may also be true that the legislature was unduly restrictive in its determination of the scope of jurisdiction permissible under due process. Both of these as-

74. 250 F. Supp. at 152.
Assumptions, however, fall short of supporting the conclusion that the statute does not define the limits of jurisdiction available to Virginia courts. That conclusion is supportable only to the extent that state courts enjoy jurisdiction absent legislative grant and beyond legislative grant where such a grant exists. Inherent jurisdiction absent statutory grant is probably a supportable position. The creation of a court by state constitution or legislative enactment probably creates some inherent jurisdiction on the part of the court. Even if statutes specifically grant to the court jurisdiction over certain matters and are silent as to other matters, jurisdiction over those other matters may be arguable. However, where the legislature specifically defines the extent of jurisdiction in a particular context, e.g., jurisdiction over nonresident defendants not served within the forum, it would seem extremely difficult, if not impossible, to support a broader jurisdiction within that context. To do so, would amount to "judicial legislation," a practice expressly disavowed by the court in St. Clair. It would amount, also, to the reading of statutory language as precatory only, and not mandatory; such judicial disregard of legislative enactments would seem improper. Consequently, while the inherent jurisdiction relied upon by the St. Clair court might be appropriate absent legislation on the point, its creation in the face of contrary legislation directly in point seems inappropriate. Nonetheless, the case does present a set of facts wherein the assertion of jurisdiction over nonresident defendants would be constitutionally appropriate, but the state's long-arm statute, if utilized, would preclude such jurisdiction. Although some of those factors relied on by the court to justify jurisdiction constitutionally—infliction of injury within the forum, purposeful mailing into the forum, and probable application of the forum's dispositive law—go beyond the author's suggestion that plaintiff's residence within the forum state offers adequate constitutional justification for the assertion of jurisdiction over a nonresident defendant, because of the propriety of imposing the burden of a foreign court upon defendant rather than upon plaintiff, be accepted, virtually all of the long-arm statutes have a restrictive, rather than enlarging, effect upon such jurisdiction.

What, then, should be done in those states which have long-arm statutes and which desire to have their courts enjoy the maximum jurisdi-

75. Id. "(The court expresses no opinion with regard to the situation where a legislature has expressly stated that the courts of that state are not to exercise jurisdiction beyond the limits defined in the statute, as that is not the case here.)"

76. Id. at 154-155.
tion permissible under due process, as that jurisdiction is herein described? Two courses of action suggest themselves: first, repeal the long-arm statutes after creating a legislative history sufficient to indicate the purpose of repeal; and, second, and probably preferable, amend the long-arm statutes to provide for jurisdiction over nonresident defendants in all transitory causes of action brought by resident plaintiffs. In those jurisdictions without long-arm statutes, two analogous approaches could be taken. Absent any legislative action, the courts could determine that they enjoy inherent jurisdiction over nonresident defendants in actions brought by resident plaintiffs to the extent permissible under due process. Assuming due process permits such jurisdiction in all such transitory actions, the courts could exercise it. The second, and seemingly preferable, approach would be enactment of a long-arm statute expressly providing for such jurisdiction.

In each circumstance, it has been suggested that the existence of a long-arm statute expressly providing for such jurisdiction would be preferable to a judicial exercise of such inherent jurisdiction absent statutory enactment. That conclusion arises from an examination of the functions of long-arm statutes and the judicial treatment afforded those statutes.

Certain of those functions seem not very critical. For example, while it may be said that enactment of such statutes would serve to make residents aware of the scope of jurisdiction available to them in their courts more readily than would judicial decisions, the assertion is not very persuasive. Whether the broader jurisdiction here suggested arises from statutory or decisional law, it will become known rather quickly to the practicing bar, and it is the bar which, in fact, will make it known generally to residents having claims against nonresidents. Similarly, it might be asserted that enactment of the statute might provide effective notice to nonresidents who might be or become potential defendants in plaintiff's local forum, so that judicial exercise of such jurisdiction does not “take them by surprise.” But that assertion is not very persuasive either. Judicial exercise of such jurisdiction absent statutory authority would “surprise” only the first defendant subjected to it. Like any innovation or change resulting from decisional law, it would become generally known rather quickly. Moreover, even the first defendant subjected to such jurisdiction by judicial decision rather than legislative enactment would be able to “cushion” or delay the surprise by challenging the asserted jurisdiction in court. While this delay would come too late to affect that conduct of defendant which gave rise to the cause of action, assuming that conduct is readily affected by a subsequent assertion of jurisdiction, it would permit defendant to make present plans for trial at the foreign court. And, it should be remembered, even this cushioned surprise will affect only the first defendant subjected to such jurisdiction. Should it be suggested that the assertion of such jurisdiction over the first nonresident
defendant—or any nonresident defendant who had not contemplated it—violates due process in that defendant could not have anticipated such jurisdiction at the time the operative facts occurred, the suggestion may be negated by language of the Court in *McGee*, specifically directed to California's statute but equally applicable to the assertion of inherent jurisdiction:

The statute was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent. At the same time respondent was given a reasonable time to appear and defend on the merits after being notified of the suit. Under such circumstances it had no vested right not to be sued in California.\(^7\)

That which seems to make statutory enactment of such jurisdiction preferable to judicial creation is a very practical consideration. Despite the apparent overzealousness of the *St. Clair* court, recent history demonstrates a judicial dalliance with "minimum contacts" and its many and diverse "equivalents"—intent, substantial use and consumption, conduct regulation, dispositive law application—which suggests that if the broader scope of jurisdiction permissible under due process suggested here is to be realized in the near future, legislative action is likely to be the more effective stimulus. Legislative fashioning of such a long-arm statute seems to pose no serious problem. In fact, New Jersey's existing court rule could serve as a model:

[Whenever] an individual cannot be served in this state . . . , then, consistent with due process of law, service may be made by . . . registered mail . . . to his . . . usual place of abode.\(^8\)

It will be noted that the language of the rule would appear applicable not only to actions commenced in New Jersey by New Jersey plaintiffs against nonresident defendants, but also to actions commenced in New Jersey by nonresident plaintiffs against nonresident defendants. That potential applicability, along with a sense of logic and good order, suggests an examination and analysis of the constitutional propriety of such jurisdiction. To this point, it has been submitted that due process would not be offended in any instance where a resident plaintiff brought a transitory cause of action in his home forum against a nonresident defendant. Would due process tolerate the bringing of such an action by a nonresident plaintiff against a nonresident defendant in some other forum of the plaintiff's choosing?

\(^8\) *N.J.R.R.* 4:4-4(j).
Three of the cases noted hereinabove involved the bringing of such action by a nonresident plaintiff against a nonresident defendant: Williams, Elkhart, and Rosenblatt. In the latter two cases the assertion of jurisdiction was approved; in Williams, it was disapproved only because of plaintiff's failure to assert facts wholly unrelated to his residence. In each of those cases, however, a significant portion of the operative facts occurred in the forum state. In each, the asserted jurisdiction was predicated, at least in part, upon that state's interest in providing a forum for cases arising out of wrongful acts committed within its borders. The jurisdiction contemplated here is one asserted in a forum state in which, conceivably, none of the operative facts occurred. To attempt to determine the propriety of such jurisdiction, it would be appropriate to examine Williams, Elkhart, and Rosenblatt to determine (1) how significant the forum's interest is where the wrongful act occurred within its borders, and (2) why the plaintiffs chose a forum other than their resident forums.

In Williams, that which occurred in the forum state was the explosion of a heater and plaintiff's consequent injury. The nonresident defendant which challenged the court's jurisdiction was a corporation which had contributed to the manufacturing of the heater. Its alleged culpable conduct occurred outside the forum state. To the extent that jurisdiction is to be limited by the situs of defendant's activity, the corporation's activity did not justify the forum's contemplated jurisdiction. Of course, the court assumed, arguendo and temporarily, a contract between the corporation and the local motel owner, and it was that contract which served as the potential basis of jurisdiction. One might assert that by exercising jurisdiction in such circumstances, the court acquired some capacity to regulate the corporate activity which preceded the contract or the contract itself. Frankly, it is difficult to imagine that Bastion-Morely's activities in making heaters or selling heaters would be much affected by the assertion of jurisdiction over Bastion-Morely by a court sitting in Minnesota. This is not intended as an adverse reflection upon those courts sitting in Minnesota; the same could be said of courts sitting in any state. Rather, it is intended to suggest that the assertion of jurisdiction by any court over Bastion-Morely is not likely to have much impact upon that company's manufacturing or marketing methods. The possibility of successful litigation against the company might affect its business operations, but that possibility exists regardless of which forum entertains the litigation. It is the economic impact of a money judgment which may persuade a company to amend certain of its business practices, not the assertion of jurisdiction over the company.

79. It could be argued that the significance of the assumed contract was to afford the court a reason for providing a local forum for defendant motel owner against his warrantor, Bastion-Morely. As between those two parties it would be appropriate to characterize the motel owner as a local plaintiff and Bastion-Morely as a nonresident defendant. Jurisdiction
How significant is it that the consequences of the company's allegedly culpable conduct were suffered in the forum state? Bearing in mind that plaintiff was a nonresident, the interest of a state in providing a convenient local forum for the redress of grievances suffered by its residents is lacking. It could be asserted that Minnesota had an appropriate interest in providing a forum for the litigation in order to make any recovery realized by the injured plaintiff more readily available to those Minnesota residents who had provided him with the medical and related services necessitated by his injuries. Plaintiff may have received such services from Minnesota doctors, hospitals, ambulance operators, pharmacists, and, possibly, therapeutic device suppliers. Would such Minnesota residents require that protection of their fees which might be afforded by litigation in Minnesota? First, it should be noted that, even assuming a need for such protection, that need provides at best only a secondary and rather limited interest on the part of the state in asserting jurisdiction in the primary case. Certainly the secondary claims of resident medical and service suppliers should not dominate a decision as to the propriety of asserting jurisdiction over a nonresident defendant in an action brought by a nonresident plaintiff. More specifically, so far as hospitals are concerned, experience indicates that they need no assistance in the form of local litigation of the injured plaintiff's case to collect their bills for services rendered. Evidence of appropriate hospitalization insurance or payment in full is virtually a condition precedent to discharge. As for the physicians and the medical or medication suppliers, protection seems equally unnecessary, although for other reasons. To the extent that physicians and medical suppliers have not been paid in full, they possess a very practical means of effecting payment or assurance of payment. Plaintiff's counsel, in the preparation of his case, will require bills from each and medical reports from the physicians. Common practice dictates that if the physicians are to cooperate with counsel they are to receive assurance of payment in full of any unpaid fees from any judgment or settlement achieved for plaintiff. Cooperation from the physicians is a requisite to adequate preparation and successful trial of plaintiff's case. While medical suppliers may not be as essential to plaintiff's case as the physicians, it would be a foolhardy lawyer who risked their displeasure by failing to assure them of payment. The same could be said of anyone providing services necessitated by plaintiff's injury. Thus, practical considerations suggest that litigation of plaintiff's case in the state where plaintiff suffered injury is not necessary to protect the interests of unpaid local residents who rendered services to the plaintiff.

Since neither conduct regulation nor protection of local service sup-
pliers seems to explain the court's near willingness to assert jurisdiction in *Williams*, it may prove helpful to determine why the nonresident plaintiff chose the Minnesota forum. Perhaps the question may be put more specifically by inquiring why plaintiff chose to sue in Minnesota rather than his home state, California. Although California has no long-arm statute in the modern sense of that phrase, it has treated its classic "doing business" statute as permitting jurisdiction over foreign corporations to the maximum extent permissible under due process, *i.e.*, where there are sufficient minimum contacts between defendant and forum so that the assertion of jurisdiction does not offend traditional notions of fair play and substantial justice.\(^{80}\)

In *Williams*, California's only "contact" may have been plaintiff's residence there. It has been submitted earlier herein that that fact alone should be deemed sufficient to justify the assertion of jurisdiction over the nonresident defendant. If that submission be accepted, is there any justification for permitting the plaintiff to select some forum other than his or the defendant's home forum? Again, the reasons underlying plaintiff's selection of the Minnesota forum may prove helpful in answering that question. It is probably a fair assumption that one of the most substantial of those reasons was the availability in Minnesota of witnesses, lay and expert. Those witnesses, necessary for plaintiff to sustain his evidentiary burden of proving liability and damages, presumably were for the most part residents of Minnesota. The availability of those witnesses in Minnesota, a marked convenience to the plaintiff, may have outweighed the convenience of trial at plaintiff's residence, even if California were to assert jurisdiction in such a case. Since it was convenience to the presumably wronged plaintiff which led to the earlier conclusion that the assertion of jurisdiction over the nonresident defendant by a court in plaintiff's home state should be deemed constitutionally appropriate, a greater convenience to the plaintiff arising out of trial in some other forum ought to be considered in determining the constitutional propriety of the assertion of jurisdiction by that other forum. In *Williams*, the convenience accorded plaintiff by trial in California would be the avoidance of those burdens inherent in litigation in a foreign court; the convenience accorded plaintiff by trial in Minnesota would be the avoidance of the burden of getting the Minnesota lay and expert witnesses to California. It would seem that the plaintiff (still the presumably wronged party) should be permitted to determine which of those alternative burdens he wishes to avoid. Convenience to the plaintiff, the factor found to be most basic to the assertion of jurisdiction over the nonresident defendant under existing long-arm statutes and under the more liberal reading of due process earlier suggested as justifying the assertion of jurisdiction over the nonresident defendant by plaintiff's home forum in all transitory causes of action, suggests further that plaintiff be permitted

\(^{80}\) Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal. 2d 855, 323 P.2d 437 (1958), construing CAL. CODE CIV. PRO. § 411(2).
to have his action heard in a forum other than his (or defendant’s) home forum.

In Elkhart, as in Williams, it would seem appropriate to conclude that the assertion of jurisdiction by the court in Alabama was not compelled by a conduct-regulating motive. Although the court stated that “it is apparent that a state has a substantial interest in providing a forum to redress tortious injuries committed within its borders by non-residents,” the court saw fit to negate explicitly the Hess emphasis on “dangerous” activities:

We do not feel that this interest is limited to torts arising from dangerous activities. The concept of what is “dangerous” is a slippery one at best, and in our view, the due process clause does not require such nice distinctions. By eliminating the necessity of “dangerous” activity as a basis for jurisdiction over the nonresident defendant, the court presumably diminished the need for conduct regulation by the forum. If the conduct within the forum is not dangerous, the forum’s interest in regulating that conduct should be reduced. If the activity within the forum is not dangerous, and if the plaintiff is a nonresident of the forum, just what is the interest of the forum in asserting jurisdiction over the nonresident defendant? It is submitted that the basic interest lies in providing the plaintiff—resident or nonresident—with a convenient forum. In Elkhart, as in Williams, the plaintiff saw fit to choose a forum other than his home forum. Why? Again, one must conclude that, assuming plaintiff’s home forum (Wisconsin) would have asserted jurisdiction over defendant, plaintiff elected to bear the inconvenience of a foreign court rather than the inconvenience of securing the presence of witnesses to the Alabama airplane crash at a trial in Wisconsin.

In Rosenblatt, the plaintiff, a Maine corporation, saw fit to bring suit against defendant, a United States citizen apparently residing in Rome, in New York pursuant to that state’s long-arm statute. Why New York and not Maine? First, Maine has no long-arm statute. Consequently, plaintiff’s choice of forums was between Italy and some state forum in the United States which would assert jurisdiction. New York’s long-arm statute was by its terms applicable to the facts, since that was where the alleged tort occurred. Moreover, because New York was the situs of the tort, presumably plaintiff’s witnesses would be more readily accessible to a court sitting in New York than one in any other state. Once more, the

81. Elkhart Engineering Corp. v. Dornier Werke, 343 F.2d 861, 868 (5th Cir. 1965).
82. Id.
selection of a forum other than plaintiff's home forum seems to have been suggested by convenience—plaintiff's convenience. Despite Mr. Justice Goldberg's assertion that the relative convenience (or inconvenience) to plaintiff or defendant did not "relate . . . to jurisdiction in a constitutional sense," it is difficult to discover any other appropriate basis for New York's assertion of jurisdiction. As noted earlier, such jurisdiction was not a requisite to regulation of conduct in New York, since any court which heard the action would apply New York's dispositive law to the extent justified by New York's interest therein. Since the plaintiff was a Maine corporation, New York had no interest in providing a local forum for a resident plaintiff, and no such interest was suggested by Mr. Justice Goldberg despite plaintiff's "substantial plant in New York." The "interest" served by New York's assertion of jurisdiction seems not to have been an interest of New York, but rather of the plaintiff—convenience. And, it is submitted, that interest should be deemed to justify constitutionally the assertion of jurisdiction over the nonresident defendant.

That conclusion may be fortified by considering a hypothetical situation somewhat different from the operative facts alleged in Rosenblatt. Assume that defendant had never entered New York; rather, his alleged part in the conspiracy was carried out wholly in Italy. Assume, too, that plaintiff, a Maine resident, had no plant or other facility in New York, and the biological cultures and confidential information allegedly stolen had been taken from plaintiff's facility in Maine. Were plaintiff to sue defendant in Maine, the assertion of jurisdiction over defendant would be constitutionally appropriate pursuant to the due process test opted for earlier in this article: the forum would have an appropriate interest in providing a convenient forum for its resident plaintiff allegedly injured by the nonresident defendant. Certainly Maine would be a more convenient forum for plaintiff than would Italy. What if plaintiff elected to sue defendant in New York instead of Maine? Such a selection on the part of plaintiff would indicate that for one or more reasons plaintiff considered New York a more convenient forum than Maine. If providing plaintiff a convenient forum is the basic reason for asserting jurisdiction over a nonresident defendant (and it has been suggested herein that it is), plaintiff should be permitted to select the forum he deems most convenient from among New York, Maine, and Italy.

It was submitted earlier that plaintiff's convenience justified the assertion of jurisdiction by plaintiff's home forum over a nonresident defendant in any transitory cause of action. It is suggested now that plaintiff's

84. Even as early as International Shoe, the Court expressed some concern over convenience and inconvenience in determining the constitutional propriety of the assertion of jurisdiction over a nonresident defendant: "An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection." International Shoe Co. v. State of Washington, 326 U.S. 310, 317 (1945).
convenience justifies the assertion of jurisdiction by any state court selected by plaintiff over a nonresident defendant in a transitory cause of action. It is suggested, too, that the forum selected by plaintiff need not be the state in which defendant's conduct occurred, or, indeed, a state having any contact with the cause of action other than its selection by plaintiff. Of course, in many cases, plaintiff's convenience may lead to the selection of a forum in the state where defendant's conduct or the immediate consequences thereof occurred, as in *Williams, Elkhart*, and *Rosenblatt*. However, since it has been determined that the state wherein such conduct or consequences occurred has no overriding interest in asserting jurisdiction, it is submitted that plaintiff's selection of a forum should not be so limited constitutionally.

If plaintiff is permitted to select a forum of convenience, what adverse consequences may be imposed upon defendant? Plaintiff might select a forum which imposes undue inconvenience upon defendant in terms of the availability of defendant's witnesses, of the possibility of a view of a critical area (if such a need seems likely), or of the docket condition of the court selected. In such a case, defendant would have available the relief of a forum non conveniens motion to dismiss or transfer, depending upon whether the court were state or federal. 86

Plaintiff might select a forum having a body of dispositive law uniquely favorable to plaintiff's asserted claim. But selection of such a forum will not necessarily result in the application of that dispositive law. Rather, the forum, by the selection or creation of its own appropriate indicative laws, will apply the dispositive law of that state having the paramount interest in each of the issues of the case. 86 It might be asserted that the forum would avoid the application of the dispositive law of sister states by (1) labeling that law "procedural" rather than "substantive," (2) finding that law to be offensive to a basic public policy of the forum, or (3) simply refusing to afford recognition to such law.

Should the forum attempt to avoid application of sister state law by labeling it "procedural," the court's determination would be subject to validation in several ways. The "substance-procedure" dichotomy, tenuous at best, is not likely to be sustained if it results in a withholding of effect from otherwise applicable sister state law likely to affect the outcome of the litigation in a manner not within the control of the parties or their counsel after the operative facts have occurred. The full faith and credit clause is available as protection against such a result. 87 Moreover,

86. See text and cases cited at note 69 supra.  
if the forum is, indeed, without any contacts with the operative facts, it is unlikely to feel any compulsion to supplant applicable foreign law with the forum's own law. The court's disinterest in the facts and the constitutional mandate of full faith and credit would seem to militate effectively against an improper evasion of applicable law of a sister state, with a consequent change in outcome. To the extent that the foreign law is "procedural" in the sense that it lacks substantial potential to affect the outcome of the case or lends itself to the control of parties and their counsel, its avoidance by the forum imposes no substantial adverse effect upon defendant. 88

If the forum attempts to avoid application of sister state law on the ground that it is offensive to a public policy of the forum, the court's effort will invite a constitutional argument. Should the court so refuse to recognize otherwise applicable law of a sister state which would be available as a defense to defendant, its refusal would violate both the full faith and credit and due process clauses. 89 Should the court so refuse to recognize otherwise applicable law of a sister state essential to plaintiff's cause of action, its refusal might well violate full faith and credit; 90 perhaps even more significant, a forum having such a public policy is not very likely to be selected by plaintiff. Its selection certainly would not jeopardize defendant. If the plaintiff should attempt to avoid a basic public policy of the state having the most significant interest in some issue of the case by selecting a forum lacking such a policy, his effort would prove fruitless once the forum looked to an appropriate indicative law to determine which dispositive law should decide the issue; the forum's indicative law will refer the court to the dispositive law (including the basic public policy) of that state having the most significant interest in that particular issue.

Should the forum simply refuse to afford recognition to applicable law of a sister state, its refusal without justification would violate the full faith and credit clause. 91 And, once more, bearing in mind that the forum

88. Apparently, such a characterization of "procedural law" would pass muster now even under the relatively restricted view of procedural law imposed on federal courts exercising diversity jurisdiction. Hanna v. Plumer, 380 U.S. 460 (1965).


91. For the proposition that the clause is applicable to decisional as well as statutory law, see Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943); Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 12 (1945); Kramer, Interests and Policy Clashes in Conflict of Laws, 13 Rutgers L. Rev. 523, 549, n.86 (1959); Seidelson, supra note 89, at 465; but cf. Nadelmann, Full Faith and Credit to Judgments and Public Acts—A Historical Analytical Reappraisal, 56 Mich. L. Rev. 33, 75 (1957).
is without contacts with the operative facts of the case, there would seem to be no apparent motive for a groundless refusal to apply the appropriate law of a sister state.

Of course, plaintiff might select a forum having an indicative law which would refer the court to some dispositive law favorable to plaintiff’s case. As an example, suppose that plaintiff sues defendant for injuries received while plaintiff was riding as a guest in defendant’s automobile. Suppose, too, that the injuries were suffered in State X, a state having a guest statute. In determining whether or not the guest statute was applicable, some courts might utilize *lex loci delicti* as the indicative law and look to the law of State X, while other courts might favor an indicative law which referred them to the dispositive law of the state where the host-guest relationship was entered into or where defendant’s automobile is normally garaged and insured, some state other than State X and one having no guest statute. Obviously, if he is able, plaintiff will select a forum utilizing the latter indicative law, thus obviating the necessity of proving that defendant’s degree of culpability exceeded negligence. Should that kind of freedom of selection be deemed violative of defendant’s due process rights? It is submitted that it should not. So long as the forum’s indicative law is bottomed on an appropriate contact with or interest in the particular issue involved on the part of that state whose dispositive law is selected to resolve the issue—for example, the state where the relationship arose or the automobile is insured—application of the dispositive law of that state indicated by the forum’s indicative law violates no constitutional right of the defendant. After all, application of that same dispositive law by a court sitting in defendant’s home state, in plaintiff’s home state, or in State X, would do no violence to due process. Admittedly, allowing plaintiff to select his forum may enhance substantially the likelihood that the forum will eschew *lex loci delicti* in favor of a more interest oriented indicative law in the hypothetical situation posed. But so long as that indicative law results in the application of the dispositive law of a state having a legitimate interest in the issue, defendant will not have suffered a deprivation of due process. Should the forum’s indicative law result in the application of the dispositive law of a state having no legitimate interest in the issue, application of that state’s law would offend due process whether the forum be in defendant’s home state, plaintiff’s home state, State X, or any other state.

Consequently, one is led to the conclusion that permitting the plaintiff to select a forum of convenience will not result in undue “inconvenience” to the defendant, as that word would be contemplated in a forum non

conveniens motion—otherwise the motion would be granted—or the application of a body of law uniquely and improperly favorable to plaintiff's cause of action. What other "undue" hardships might be visited upon the defendant?

It is certainly conceivable that plaintiff would select a forum of convenience in which verdicts in causes of action such as his tend to be high. Does this possibility lead to the conclusion that permitting the selected forum to assert jurisdiction over the nonresident defendant violates due process? First, there is some authority for the proposition that selection of a forum wherein jurors "live on terms of intimacy" with large verdicts may be subject to a forum non conveniens motion by defendant. To the extent that such a motion would be granted on that ground, defendant is afforded the opportunity of protection against the "high verdict" forum. Frankly, the author is not persuaded that such a ground justifies a forum non conveniens transfer or dismissal. Selection of a forum based on past jury verdicts in similar cases is, at best, a calculated gamble. The reaction of a jury as measured in dollars is necessarily subject to the unique facts in each case, the individual jurors hearing the case, and the ability of counsel representing the litigants.

Some thought might be given to why one area would be considered a "low verdict" jurisdiction, and another, a "high verdict" jurisdiction. Probably most lawyers would tend to regard rural or semi-rural areas as low-verdict areas, and urban areas as high-verdict areas. Why? Frequently it is said because those residing in rural areas are not accustomed to thinking in terms of large dollar amounts. To the extent that this may be so, it probably reflects a lower cost of living in rural areas than exists in urban areas. Presumably, then, a rural plaintiff suffering physical injury will incur a lower dollar amount of "specials" than would an urban plaintiff similarly injured. If the rural plaintiff is permitted to have his case heard by an urban jury in a forum of his choice, that jury will receive evidence of those smaller losses. That evidence—different from that likely to be presented by the urban plaintiff—may be anticipated to result in a different and lower verdict.

Finally, the potential of plaintiff's selection of a high-verdict forum should be kept in proper perspective. The situation under consideration here is one in which plaintiff resides in one state and defendant in another. Under existing law, plaintiff may bring his action in defendant's home state, where, presumably, defendant is amenable to personal service. Defendant's home state may be a high verdict area. In addition, under existing long-arm statutes, plaintiff may bring his action in his home state if it has a long-arm statute applicable to the facts of the case and if defendant has "minimum contacts" with the

state, or in some other state having a long-arm statute applicable to the facts and with which defendant has "minimum contacts." Any one or more of those states may be high-verdict areas. Consequently, permitting plaintiff to bring his action in a forum of convenience of his choice, in many cases, may not provide plaintiff with a unique opportunity of trial in a high-verdict area. In those cases where it may, plaintiff will be compelled to choose from among his home forum, the most likely forum of convenience, the state in which witnesses are available, a likely forum of convenience, or the high-verdict state. Selection of the high-verdict state, a speculative gamble at best, would be made at the cost of sacrificing the convenience of trial at home or where the witnesses, lay and expert, are readily available. Moreover, plaintiff's selection of the high-verdict state would be subject to challenge by defendant through a forum non conveniens motion based on appropriate grounds. Two such grounds suggest themselves. First, if the selected forum should prove to be a consistently high-verdict forum, it will probably become an extremely popular forum of choice. That very popularity, resulting in an unusually congested court docket, would provide a basis for a forum non conveniens transfer or dismissal. Second, if plaintiff's selection can be justified on no basis of convenience other than the convenience of a high-verdict forum, and defendant is inconvenienced by the selection, it may be fair to presume that defendant's forum non conveniens motion will be received sympathetically by the court. The potential of trial in a high-verdict state seems neither so likely to be realized nor so certain to impose adverse consequences on the defendant to justify the conclusion that it would offend due process.

It is submitted that convenience to the plaintiff is the basic justification for the assertion of jurisdiction over the nonresident defendant. In most cases, that convenience will best be served by permitting plaintiff to sue defendant in plaintiff's home forum. In cases where that convenience would best be served by permitting plaintiff to sue defendant in some other forum, plaintiff should be permitted the forum of his choice. Plaintiff's selection of the forum should be conclusive evidence of his forum of convenience, subject only to an appropriate forum non conveniens motion by defendant. In this manner, plaintiff's convenience will be properly accommodated, and defendant will be afforded the opportunity of litigation before a competent court without having imposed upon him undue inconvenience as that phrase is understood in the context of a forum non conveniens motion. It is suggested that this view of the constitutional propriety of the assertion of jurisdiction over nonresident defendants in transitory causes of action is consonant with the essential reason for such jurisdiction—plaintiff's

95. See, e.g., Gulf Oil Corp. v. Gilbert, supra note 94.
convenience—and lends itself to ready application in varying factual situations. Moreover, it does not in fact deprive the defendant of liberty or property without due process of law. Thus, substantive due process should be deemed satisfied in any case wherein plaintiff and defendant are residents of different states, the cause of action is transitory, and plaintiff's selection of a forum is capable of withstanding a forum non conveniens motion.