PLAINTIFF DUE PROCESS RIGHTS IN ASSERTIONS OF PERSONAL JURISDICTION

R. D. REES*

Personal jurisdiction proceedings formally focus on the defendant's liberty interest in avoiding the reach of an overextending court. In this Note, R. D. Rees argues that such an approach may fail to provide the plaintiff due process. The laws of various jurisdictions convert a single set of underlying facts into distinct causes of action, and the Supreme Court understands these statutory programs to create property interests. Although a plaintiff may not have a substantive right to a cause of action in a given jurisdiction, she does have the procedural right to have her interests considered before dismissal for lack of jurisdiction finally destroys her property claim. Since the defendant-centered nature of the "minimum contacts" test does not appear to allow for such consideration, Rees proposes a modest adjustment to the current test that would weigh plaintiff interests among the totality of the circumstances.

"A right of action is property."[1]
—Justice Benjamin Cardozo

INTRODUCTION

The United States judicial system has long defined the scope of a court's jurisdiction as a constitutional issue.[2] Yet the text of the Constitution gives no specific guidance on the extent of a court's personal jurisdiction.[3] The Supreme Court has judicially constructed a limiting

* A.B., 1997, Dartmouth College; J.D. Candidate, 2003, New York University School of Law. I would like to express my appreciation to Amy Adler, Noah Feldman, Larry Kramer, David Shapiro, Linda Silberman, and Richard Stewart for their contributions to this Note and to my legal education. I am also deeply grateful to Merry Jean Chan for her guidance, support, and brilliance. This Note is dedicated to my uncle David Honegger and my aunt Carol Rees. Their lives were lost during my time at law school. Their generous, exuberant, and vital spirits continue to flourish in all of us whose lives they still touch.

1 Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

2 See Pennoyer v. Neff, 95 U.S. 714, 733 (1877). The importance of personal jurisdiction is evident, if for no other reason, from the judicial rhetoric it has spawned. For example, the Supreme Court once dubbed an attempt to expand state law beyond acceptable boundaries as "an illegitimate assumption of power . . . [that must be] resisted as mere abuse." Id. at 729. Nevertheless, some courts have dismissed the subject altogether: "[T]he legal issues raised in these cases are rather dull. If Judge Wapner had to worry about personal jurisdiction, 'The People's Court' would not be on television." Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214, 215 (7th Cir. 1985).

3 This Note primarily considers jurisdiction over American citizens in United States courts, both state and federal. Jurisdiction over noncitizens of the United States is more challenging, as traditional understandings of sovereignty render a court's actual power and

theory of personal jurisdiction based upon the Due Process Clauses:[4] Defendants have a due process liberty interest shielding them from overreaching fora. As a result, a court's[5] personal jurisdiction generally extends only to people within the relevant forum's borders,[6] and to people and entities with whom the forum has "minimum contacts."[7] Under this traditional and long-accepted doctrine, the outcome of the due process inquiry—whether based on "tag" jurisdiction or on the minimum contacts test—is determined solely with reference to the defendant.[8]

However, this traditional formulation is problematic. As recognized by the Supreme Court, plaintiffs have constitutionally protected property rights to their causes of action.[9] These property rights should not be ignored simply because a defendant challenges the assertion of jurisdiction. Two separate interests are involved in a jurisdictional proceeding—*both* the defendant's liberty interest *and* the plaintiff's property interest. Yet under current jurisprudence, courts may consider the defendant's interests only. In this way, a doctrine designed to protect defendants' due process rights serves paradoxically to deny due process to plaintiffs. To a plaintiff at a jurisdictional

---

legitimacy far more suspect. See, e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."). For more on the considerations of power involved in state court assertions of jurisdiction over United States citizens, see infra note 86.

[4] U.S. Const. amends. V, XIV; see *Pennoyer*, 95 U.S. at 733. See generally Geoffrey C. Hazard, Jr., A General Theory of State-Court Jurisdiction, 1965 Sup. Ct. Rev. 241; Philip B. Kurland, The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From *Pennoyer* to *Denckla*: A Review, 25 U. Chi. L. Rev. 569 (1958); Developments in the Law—State-Court Jurisdiction, 73 Harv. L. Rev. 909 (1960).

[5] For simplicity, this Note ignores the distinction between state courts and federal courts in the personal jurisdiction context. The jurisdictional limits of state courts are judicially limited by the Due Process Clause, see supra note 4 and accompanying text, and in most cases the jurisdiction of federal courts is limited by administrative rule to the jurisdiction of the courts of the state in which it sits. See Fed. R. Civ. P. 4(k)(1)(A) (stating that personal jurisdiction is established over defendants "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located"). But see Fed. R. Civ. P. 4(k)(1)(B)-(D) (providing limited instances of nationwide service of process). Also, federal courts in a particular state can transfer a case to a more appropriate venue if they do not have personal jurisdiction over the claim. Nevertheless, the result is the same: If a state court is deemed not to have personal jurisdiction to hear a cause of action, it likely cannot be heard in that state.

[6] See, e.g., Burnham v. Superior Court, 495 U.S. 604, 628 (1990) (holding that personal jurisdiction obtained through service of process to defendant while voluntarily in state does not offend Due Process Clause).

[7] See, e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[8] See infra Part II.A.

[9] See infra Part I.A.

proceeding, "[i]t [is] like saying to a party, Appear, and you shall be heard; and, when [s]he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard."[10]

This note seeks to identify and resolve this troubling aspect of personal jurisdiction jurisprudence. Part I argues that a cause of action is constitutionally protected property, and, consequently, that plaintiff due process rights are at stake in jurisdictional proceedings. Part I.A demonstrates that a cause of action is a property interest that cannot be denied without due process of law. Part I.B characterizes this right as being procedurally, rather than "substantively," protected. Part I.C maintains that this property right is adjudicated at a jurisdictional proceeding and addresses two objections to this assertion.

Part II argues that plaintiffs currently may not receive adequate process at personal jurisdiction proceedings. Part II.A examines the minimum contacts test, the current procedure utilized at jurisdictional proceedings. It concludes that the decision whether to assert personal jurisdiction primarily considers defendants' interests but fails to take plaintiffs' interests into account. Part II.B rejects the minimum contacts test as inadequate due process for plaintiffs' property interests.

Part III looks for possible solutions to the problem. Part III.A explores the "merits" of plaintiffs' claimed property rights and what might amount to adequate process for plaintiffs in the personal jurisdiction context. Part III.B suggests that a modest adjustment to current doctrine, one weighing the totality of the circumstances, would cure the current constitutional difficulties while continuing to protect defendants from unreasonable assertions of jurisdiction.

I

PLAINTIFF DUE PROCESS RIGHTS TO CAUSES OF ACTION

The Fourteenth Amendment to the Constitution bars states from depriving "any person of life, liberty, or property without due process of law."[11] The Fifth Amendment imposes the same limitations on the federal government.[12] Denial of procedural consideration, then, is only problematic if plaintiffs have a property interest in a cause of action.[13] Otherwise, plaintiffs generally would have no right meriting

[10] Windsor v. McVeigh, 93 U.S. 274, 278 (1876). For clarity's sake, this Note uses the feminine pronoun for the plaintiff and the masculine pronoun for the defendant throughout.

[11] U.S. Const. amend. XIV, § 1.

[12] See U.S. Const. amend. V.

[13] For purposes of this Note, cases dealing with plaintiff property rights to causes of action are used interchangeably with those regarding plaintiff rights to court access in the

constitutional protection. Part I.A demonstrates that the right to a cause of action, as created and defined by the states, is indeed a constitutionally protected property right. Part I.B considers but ultimately rejects the argument that there is a "substantive" due process right to maintain a cause of action, concluding instead that courts must only supply adequate process before dismissing a complaint. Part I.C argues that jurisdictional proceedings necessarily adjudicate plaintiffs' property rights and examines two possible objections to this claim.

A. A Cause of Action as Constitutionally Protected Property

Our national conception of property has expanded greatly over the last half-century. In the past, property was some concrete "thing" or "entity" one could hold, see, or divide.[14] Today, property is understood as a "bundle of rights" with respect to something far more ephemeral and not always an "entity."[15] When Justice Brennan quoted Charles A. Reich's seminal article, "The New Property,"[16] in *Goldberg v. Kelly*,[17] our judicial system ushered in this expanded notion of property. For example, courts have "unambiguously extended constitutional safeguards to advantageous relations with govern-

---

first instance. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), confronted the question of whether a plaintiff could bring a claim in the first instance. The plaintiff filed a discrimination claim with a state board, which failed to act within 120 days, thereby extinguishing his claim. See id. at 426-27. The Court ruled that the state must consider the merits of his complaint, for "[a] claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of the evidence." Id. at 431. The *Logan* Court further stated that right-to-access jurisprudence provided an "analogous method of analysis supporting our reasoning" and characterized both its decision and Boddie v. Connecticut, 401 U.S. 371 (1971) (addressing plaintiff right-to-access), as holding that "having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Logan*, 455 U.S. at 430 n.5. Thus, in *Logan*, the Court essentially dismissed any distinction between cases dealing with the right to a cause of action and those dealing with court access. Additionally, under *Logan*'s reasoning, access to the courts pursuant to a statutorily defined cause of action must be an entitlement subject to procedural protections since the underlying cause of action is "assessed under a . . . 'for cause' standard." Id. at 431.

14 See, e.g., D.F. Libling, The Concept of Property: Property in Intangibles, 94 Law Q. Rev. 103, 104 (1978) ("Intangibles cannot be property in the same way as chattels or land.").

15 See, e.g., Stephen R. Munzer, A Theory of Property 22-36 (1990); J.E. Penner, The "Bundle of Rights" Picture of Property, 43 UCLA L. Rev. 711, 712-24 (1996).

16 Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964).

17 397 U.S. 254, 262 n.8 (1970).

ment."[18] We now recognize that some government "entitlements [are] more like 'property' than a 'gratuity.'"[19]

Nevertheless, not every entitlement is properly understood as property. For instance, in order to "have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. [Sh]e must have more than a unilateral expectation of it. [Sh]e must, instead, have a *legitimate* claim of entitlement to it."[20] In the governmental benefits context, "'property' interest[s are] . . . created and defined by statutory terms."[21]

A plaintiff's ability to bring a cause of action clearly is "created and defined by statutory terms."[22] Therefore, under current, uncontroverted Supreme Court doctrine, a potential plaintiff has a property right to a cause of action.[23] Indeed, the Supreme Court has "held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause."[24]

The first indication that access to the courts was a property right came in *Mullane v. Central Hanover Bank & Trust Co.*[25] In that case, a trustee wished to settle a large number of trust accounts whose beneficiaries were scattered across the country. The trustee published notification of the impending settlement action in a local newspaper.[26] The Court found this limited publication insufficient to satisfy the Due

---

18 Stephen G. Breyer et al., Administrative Law and Regulatory Policy 798 (5th ed. 2002).

19 *Goldberg*, 397 U.S. at 262 n.8.

20 Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (emphasis added).

21 Id. at 577-78 ("Thus, the welfare recipients in *Goldberg v. Kelly* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.").

22 Id. at 578.

23 See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

24 Id. Causes of action long have been recognized as a form of property. See, e.g., Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) ("A right of action is property."). Yet it was not until after the *Goldberg* revolution that the Supreme Court specifically so held. See *Logan*, 455 U.S. at 428. Thus, a cause of action as a property interest is best understood within this "new property" framework. Under this rubric, the Supreme Court's holding appears inevitable. The ability to bring a cause of action is created by laws defining when an action commences. Many state statutes use language such as "[a]n action is commenced by filing a summons and complaint or summons with notice." N.Y. C.P.L.R. 304 (McKinney 1990). A "plaintiff" is generally defined as the "petitioner"—the one who files the complaint. See, e.g., N.Y. C.P.L.R. 105 (McKinney 1990). Occasionally, states impose modest conditions on the filing of a complaint, like a filing fee. See, e.g., Conn. Gen. Stat. Ann. § 52-259 (West 1991 & Supp. 2002). But substantive restrictions on complaint filing are essentially nonexistent. The most obvious substantive limitation—restricting courts to state citizens or residents—would plainly be unconstitutional. See U.S. Const. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

25 339 U.S. 306 (1950).

26 See id. at 309-10.

Process Clause. It "cut off [beneficiaries'] *rights* to have the trustee answer for negligent or illegal impairments of their interests" without constitutionally acceptable notice and hearing procedures.[27]

In 1980 the Court went a step further, claiming that a cause of action is "[a]rguably . . . a species of 'property' protected by the Due Process Clause."[28] Just two years later, that assertion was no longer arguable, but "was affirmatively settled."[29] For "having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme."[30]

Thus, in the new property framework, state statutory schemes create a potential property right to a cause of action. This potential property vests when a plaintiff "accepts" the state's offer by properly filing a complaint. In this way, a cause of action is quite similar to the welfare benefits at stake in *Goldberg*. In each case, the state "offers" something of value by statute. That "offer" becomes procedurally protected property once a claimant properly "accepts" it by filing her claim.

B. Procedural Versus Substantive Due Process Protections

When the property right to a cause of action is jeopardized, the Due Process Clauses apply because they "protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."[31] However, there are two classes of due process rights: "procedural" and "substantive." Each limits the ability of the government to extinguish protected rights, but each imposes a different level of protec-

---

[27] Id. at 313, 315 (emphasis added).

[28] Martinez v. California, 444 U.S. 277, 281-82 (1980) (holding that statute immunizing parole officials from wrongful death suits did not deprive plaintiffs of property right to bring cause of action).

[29] *Logan*, 455 U.S. at 428. Procedural protections for access to courts in the first instance have their roots in older cases dealing with dismissals of actions without opportunity for hearing. See, e.g., Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209-12 (1958) (holding that Due Process Clause was violated when Swiss corporation's complaint was dismissed because of inability under Swiss law to comply fully with pretrial order); Hovey v. Elliott, 167 U.S. 409, 418-20 (1897) (ruling that Due Process Clause was violated when defendant's answer was struck because of refusal to obey court order pertinent to suit); cf. Hammond Packing Co. v. Arkansas, 212 U.S. 322, 347 (1909) (upholding as constitutional default judgment against defendant who refused to produce documents since "reasonable showing of an inability to comply would have satisfied the requirements . . . [of] the order").

[30] *Logan*, 455 U.S. at 430 n.5.

[31] Id. at 429.

tion. The right to bring a cause of action is best understood as a procedurally protected right as opposed to a substantive right.

The Fifth and Fourteenth Amendments, read literally, are guarantees of process rather than result.[32] This holds true in general, for as long as there is a reasonable opportunity to be heard, states may deprive citizens of life,[33] liberty,[34] or property.[35] Thus, despite its status as property, on the whole, a state need only provide an adequate hearing before terminating a cause of action. By their terms, the Due Process Clauses generally do not confer substantive rights requiring courts to reach the merits of the underlying claim.

Certain fundamental rights receive a higher level of protection under the Due Process Clauses, a concept known as substantive due process.[36] Although a higher level of constitutional protection is not essential to this Note's argument, one might assert that such a right is fundamental and cannot be denied except when necessary and compelling.

There is some support for this claim. For example, Chief Justice Marshall stated in *Marbury v. Madison*[37] that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [s]he receives an injury. One of the first duties of government is to afford that protection."[38] Subsequent cases often dealt with the Privileges and Immunities Clause and the idea that a state cannot give its own citizens preferential access to

---

32 While courts continue to recognize some substantive due process rights, the Due Process Clauses long have been understood to confer only limited substantive protections. See, e.g., Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (noting that Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field" (internal citations omitted)); Nebbia v. New York, 291 U.S. 502, 525 (1934) (holding that Due Process Clause "demands only that the law shall not be unreasonable, arbitrary, or capricious"). In fact, John Hart Ely described "substantive" due process as a "contradiction in terms—sort of like 'green pastel redness.'" John Hart Ely, Democracy and Distrust 18 (1980).

33 See, e.g., Gregg v. Georgia, 428 U.S. 153, 178 (1976) (stating "that capital punishment is not invalid per se" so long as adequate procedures are followed).

34 See, e.g., United States v. Batchelder, 442 U.S. 114, 123 (1979) (declaring that incarceration does not violate Due Process Clause so long as "criminal provisions clearly define the conduct prohibited and the punishment authorized").

35 See, e.g., Mathews v. Eldridge, 424 U.S. 319, 332, 349 (1976) (allowing disability-benefit property right to be terminated so long as parties "are given a meaningful opportunity to present their case").

36 See, e.g., Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) (stating that "'substantive due process' scrutiny" requires "'sufficiently compelling' governmental interest").

37 5 U.S. (1 Cranch) 137 (1803).

38 Id. at 163.

its courts. The Supreme Court noted, for example, that "the [Privileges and Immunities C]lause plainly and unmistakably secures and protects the right of a citizen . . . to maintain actions in the courts of the State."[39] Without a judicial system of some kind, grievances among citizens likely would be settled by means of force, a consideration that has not escaped the Court's attention: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . ."[40]

Boddie v. Connecticut[41] marked the first time that the Court squarely addressed the question of whether plaintiffs have substantive due process rights to court access. In *Boddie*, an indigent couple sought a divorce in Connecticut but could not afford the filing fee.[42] The Court held this violated the Due Process Clause because there was no state concern "sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages."[43] The *Boddie* Court recognized that access to the judicial system and the Due Process Clauses are intimately related: "It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, [the authors of the Fifth and Fourteenth Amendments] recognized the centrality of . . . due process in the operation of this system."[44]

Although courts often overlook plaintiffs' rights to access the judicial system,[45] the *Boddie* Court determined that the fees imposed on the litigants violated a substantive right conferred by the Due Process Clauses.[46] However, the *Boddie* decision is narrow, going "no further than necessary to dispose of the case"[47] and declining to "decide that

---

[39] Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870); see also Blake v. McClung, 172 U.S. 239, 252 (1898) ("[T]he privileges and immunities which the citizens of the same state would be entitled to under like circumstances . . . includes the right to institute actions."); Cole v. Cunningham, 133 U.S. 107, 113-14 (1890) ("The intention of [the Privileges and Immunities Clause] was to confer on citizens of the several States a general citizenship . . . and this includes the right to institute actions.").

[40] Chambers v. Balt. & Ohio R.R. Co., 207 U.S. 142, 148 (1907).

[41] 401 U.S. 371 (1971).

[42] See id. at 372.

[43] Id. at 381.

[44] Id. at 375.

[45] See id. at 375 ("[Due Process Clause] litigation has . . . typically involved rights of defendants—not, as here, persons seeking access to the judicial process in the first instance.").

[46] See id. at 380-81.

[47] Id. at 382.

access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual."[48] The Court relied upon this caveat in both *Ortwein v. Schwab*[49] and *United States v. Kras*,[50] where it ruled that court filing fees generally do not violate the Due Process Clauses.[51] *Boddie*, then, is perhaps more properly read as protecting the right to a divorce rather than a more general right to court access.[52]

Thus, access to courts is not likely a fundamental right subject to substantive due process guarantees and the constraints of "strict scrutiny."[53] Court access is not guaranteed to the extent "that its exercise may not be placed beyond the reach of any individual."[54] Instead, the protections surrounding plaintiffs' court-access rights are almost purely procedural. In this way, they differ from the fundamental rights of defendants to be beyond the reach of certain states.[55]

This Note does not argue that plaintiffs have an underlying substantive right to have the particulars of their cases adjudicated in a given forum. Courts may, and do, legitimately dismiss plaintiffs' claims.[56] Nonetheless, because plaintiffs have property rights to main-

---

[48] Id.

[49] 410 U.S. 656 (1973) (per curiam).

[50] 409 U.S. 434 (1973).

[51] See *Ortwein*, 410 U.S. at 660 (welfare benefits); *Kras*, 409 U.S. at 450 (bankruptcy).

[52] In cases such as *Ortwein* and *Kras*, the Court essentially held that "the legislative determination provides all the process that is due" to those who were denied court access. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982). *Boddie* came out differently because states hold a monopoly on creating and dissolving marriages. It was not the fee that was a problem in *Boddie*. Rather, imposition of the fee ensured that there was no way that the Boddies could get divorced—they would be "stuck" together. Thus, the state was required to waive the fee only with respect to the Boddies and those similarly situated.

[53] Note that there may be alternative constitutional grounds supporting a fundamental right of access to the courts. In antitrust cases, the Court has found a right to court access under the First Amendment's Petition Clause. See U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) ("Petitioners, of course, have the right of access to the agencies and courts . . . [and t]hat right . . . is part of the right of petition protected by the First Amendment."). This has been expanded to the labor context in dicta. See Bill Johnson's Rest., Inc. v. NLRB, 461 U.S. 731, 741 (1983) ("We should be sensitive to these First Amendment values . . . in the present context."). For an argument that this line of reasoning holds the key to increased access to courts, see Carol Rice Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L.J. 557 (1999).

[54] *Boddie*, 401 U.S. at 382.

[55] See infra text accompanying notes 87-88.

[56] States dismiss causes of action all the time. These dismissals are assessed based upon the underlying statutory and common law rules governing civil trials. Dismissals pursuant to these rules are not problematic in this context, for the plaintiff has an opportunity to present evidence of her claim of entitlement. For example, in a dismissal on statute of limitation grounds, both the plaintiff and the defendant may present evidence that the

tain causes of action,[57] states should not dismiss these actions without providing procedural due process.

C. *Plaintiff Property Rights and Personal Jurisdiction Proceedings*

If a cause of action is property, procedural protections should extend to jurisdictional proceedings where a court necessarily must determine whether to extinguish that property. Nevertheless, one might argue that the property right to bring a cause of action simply cannot exist until jurisdiction over the defendant is established. If this were true, plaintiffs' property rights would not be implicated at a jurisdictional proceeding. There are two major avenues of support for this argument: state statutory limitations and constitutional limitations on state power. Upon examination, however, neither is convincing.

1. *Statutory Limitations: Lack of "Long-Arm" Authority*

First, state statutory schemes establishing causes of action may intend to confer this entitlement only when there is proper jurisdiction over the defendant. State long-arm statutes arguably serve as substantive limitations on the statutory entitlement to bring a cause of action.[58] These statutes may be read to limit causes of action involving out-of-state defendants by explicitly restricting the jurisdiction of courts to hear such claims.[59] If a long-arm statute expressly excludes jurisdiction, a plaintiff may have no claim of entitlement despite whatever property rights the general statutory scheme otherwise might grant.

Nevertheless, state long-arm statutes are difficult to interpret as substantive limitations in any real sense. For example, California permits the "exercise [of] jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[60] Similarly, Illinois allows the exercise of jurisdiction "on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States."[61] Pennsylvania simply and broadly confers ju-

---

complaint was or was not filed in time. Jurisdictional proceedings, though, differ in a fundamental respect: They adjudicate the right to bring a cause of action, and under the current minimum contacts test, the plaintiff's voice is simply not heard. In other words, she fails to receive the process due to her. See infra Part II.B.

57 See supra Part I.A.

58 Long-arm statutes are state laws defining the extent of their own courts' jurisdiction. They are called long-arm statutes because they generally bestow broad extraterritorial reach.

59 See, e.g., Cal. Civ. Proc. Code § 410.10 (West, WESTLAW through 2002 Reg. Sess.); N.Y. C.P.L.R. 302 (McKinney 1990).

60 Cal. Civ. Proc. Code § 410.10 (West, WESTLAW through 2002 Reg. Sess.).

61 735 Ill. Comp. Stat. Ann. 5/2-209(c) (West 1992).

risdiction "to the fullest extent allowed under the Constitution of the United States."[62]

From these representative examples, it is apparent that states grant extremely broad rights to bring causes of action. So long as a plaintiff meets certain procedural requirements, such as properly filing a complaint, her claims encompass all named defendants to the maximum possible extent.[63] There is no question that the Constitution, as interpreted by the Supreme Court, acts as an absolute restriction on state-imposed jurisdiction. However, it seems clear that these states intend to grant jurisdiction over as many defendants as possible—there is no evidence that they seek to "cap" a plaintiff's ability to bring a cause of action. As an analogy, consider a will that bequeaths "my entire estate" to a spouse. There is an external limit on how much of that estate will actually go to the spouse—some of the estate necessarily must go to the government as taxes. But the phrase "my entire estate" does not suggest that if tax rates were lowered, the spouse should not receive the windfall. Similarly, these state long-arm statutes should not be read as substantive limitations, imposed by the states, on the right to bring a cause of action.

There are some states without such broad jurisdictional mandates. For example, New York specifically enumerates a certain class of actions upon which personal jurisdiction over nondomiciliaries is proper.[64] Nevertheless, the breadth of defendant action covered by its statute is substantial. It includes defendant transactions of "any business within the state, or contract[ing] anywhere to supply goods or

---

62 42 Pa. Cons. Stat. Ann. tit. 5322(b) (West 1981).

63 Many of these statutes were enacted or amended against the backdrop of the Supreme Court's minimum contacts jurisprudence. One might argue that states intend to condition a cause of action upon a showing of defendant minimum contacts as currently understood by the Supreme Court. Yet, to the extent that legislative intent can ever be deciphered, the plain meaning of a statute nearly always trumps. See Antonin Scalia, A Matter of Interpretation 29-37 (1997). It is difficult to contend that these statutes, by their plain terms, do anything other than allow courts to impose jurisdiction over the largest possible number of defendants. Further, the fact that state courts *do* assert jurisdiction over such a broad range of defendants suggests that they intend to push the limits of minimum contacts jurisprudence. See, e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (overturning state court assertion of jurisdiction over foreign defendant); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (overturning state court assertion of jurisdiction over out-of-state defendant). Finally, this understanding of long-arm statutes would effectively "freeze" the current conception of the minimum contacts test. It would oddly suggest that an expansion or contraction of minimum contacts jurisprudence may not be implemented without an amendment to even the most broadly worded long-arm statute. It is doubtful, then, that any court would so read these statutes under generally accepted principles of statutory interpretation.

64 N.Y. C.P.L.R. 302 (McKinney 1990).

services in the state."[65] Moreover, jurisdiction extends to a defendant who allegedly committed "a tortious act without the state causing injury to person or property within the state," as long as he "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."[66]

Perhaps New York plaintiffs do not have as broad an entitlement to bring a cause of action as California plaintiffs. Still, both states grant an extremely expansive statutory right.[67] In each of the examples above—indeed, in all states—plaintiffs have broad interests "created and defined by statutory terms."[68] These property rights to maintain causes of action may be hindered by jurisdictional constraints as a practical and constitutional matter. But the plain terms of most state long-arm statutes serve to limit or even eliminate these constraints as much as legitimately possible.

2. *Constitutional Limitations: Lack of State Power*

Even if states intend to confer property rights to plaintiffs to the maximum extent possible, there may be a more fundamental objection. Perhaps there can be no property right when there is no jurisdiction. Regardless of intent, it may be that states simply lack the power to grant a right to a cause of action when they do not have jurisdiction over a potential defendant.[69]

While this argument may have an intuitive appeal, it does not reflect how the judicial system operates. First, the Supreme Court rejected a similar contention in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[70] where a trial court asserted jurisdiction over a defendant as a discovery sanction.[71] The defendant argued that the imposition of personal jurisdiction differed from other discovery sanctions because "a party need not obey the orders of a court until it is

---

[65] Id.

[66] Id.

[67] It is difficult to read even this more limited New York statute as intending to limit causes of action based on the current minimum contacts test. It both excludes some defendants who would otherwise have minimum contacts and appears to include some defendants lacking minimum contacts with the state. See supra note 63.

[68] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 578 (1972).

[69] One commentator conceives of personal jurisdiction purely as a notion of state power, believing this holds the key to clarifying the jurisprudence. He finds that attempts "to justify jurisdictional limits without reference to the allocation of power between states have produced an illogical doctrine that is difficult to apply consistently." See Allan R. Stein, Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction, 65 Tex. L. Rev. 689, 690 (1987).

[70] 456 U.S. 694 (1982).

[71] Id. at 699.

established that the court has personal jurisdiction over that party."[72] The Court rejected this argument, holding that it incorrectly "assumes that there is something unique about the requirement of personal jurisdiction, which prevents it from being established or waived like other rights."[73] As properly understood, the ability to avoid jurisdiction is an individual right—*not* a substantive limitation on state power. The personal jurisdiction requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[74] Thus, a jurisdictional proceeding is not a special hearing to establish the existence of a cause of action. Rather, it is simply a process instituted in order to maintain or dispose of individual rights.[75]

Further, the Supreme Court explicitly has approved the following definition: "A civil action is commenced by *filing a complaint with the court*."[76] Federal courts generally grant substantive rights to plaintiffs immediately upon filing, and if not then, upon service of process.[77] Likewise, nearly every state confers substantive rights to plaintiffs, such as the tolling of statutes of limitations, upon either filing of a complaint or service of process.[78] Therefore, the cause of action—and

---

[72] Id. at 706.

[73] Id.

[74] Id. at 702.

[75] An analogous case is Hanna v. Plumer, 380 U.S. 460 (1965). *Hanna* involved a diversity action in federal court where process was served pursuant to Federal Rules of Civil Procedure 4 but was not properly delivered to the defendant under state law. See *Hanna*, 380 U.S. at 461-62. The defendant argued that since process had not been served correctly within the statute of limitations, the cause of action had simply ceased to exist and the entire controversy was a nullity. See id. The Court held that although the cause of action could not "exist" in the state's courts, the federal courts could entertain the claim. See id. at 463-64. Judge-made equitable extensions such as laches have long carved out similar substantive rights to bring suit although the law technically bars the action. See, e.g., Gardner v. Panama R.R. Co., 342 U.S. 29, 30-31 (1951) ("Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well."). In other words, that a claim no longer "exists" under law does not necessarily mean that a plaintiff may not pursue—and even succeed in maintaining—her right to bring a cause of action.

[76] Fed. R. Civ. P. 3 (emphasis added). See, e.g., Walker v. Armco Steel Corp., 446 U.S. 740, 750-51 (1980) (holding that Rule 3 must be taken on its face and is not intended to toll state statute of limitation).

[77] See, e.g., *Hanna*, 380 U.S. at 470-74 (holding that federal definition of service of process controlled even when in direct conflict with state service of process, allowing cause of action in federal court that otherwise could not have existed in state court).

[78] See, e.g., 735 Ill. Comp. Stat. Ann. 5/2-201(a) (West 1992) ("Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint."); Cal. Civ. Proc. Code § 350 (West, WESTLAW through 2002 Reg. Sess.) ("An action is commenced, within the meaning of this Title, when the complaint is filed."); N.Y. C.P.L.R. 203(a)-(b) (McKinney 1990) ("The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the

thus the plaintiff's property interest—exists immediately upon filing of the complaint and/or service of process.

Finally, while it could be argued that there is a theoretical distinction between property actually existing and property potentially existing, the Due Process Clauses protect one's right to be heard either way. For this reason, it seems odd to require plaintiffs to establish firmly the existence of their property rights in the face of a jurisdictional challenge. The right to due process has never been contingent upon a successful outcome.[79] If a defendant claims to have adversely possessed land from which he is ejected, the court hears him upon his claimed right even if it later determines that he never lived on the property.[80] Likewise, even when potential welfare recipients have "not yet shown that they [a]re within the statutory terms of eligibility," the Due Process Clauses require that "they ha[ve] a right to a hearing at which they might attempt to do so."[81] Thus, the potential existence of a cause of action should be enough to trigger procedural protections against its termination.

The judicial system recognizes that a "right of action is property."[82] This property right, which generally vests upon filing of a complaint, has no real substantive limitations and is "protected by the . . . Due Process Clause[s]."[83] While a jurisdictional proceeding might result in the denial of the plaintiff's property right, it is not a proceeding where the property right is established. Rather, a jurisdictional proceeding merely serves to adjudicate the defendant's individual liberty interest to remain free of overreaching fora. What has been overlooked is that a second individual right—the plaintiff's property right to maintain her cause of action—is necessarily adjudicated at the same time. The Due Process Clauses should adequately protect both rights.

---

cause of action accrued to the time the claim is interposed. . . . [A] claim asserted in the complaint is interposed against the defendant . . . when . . . the summons is served upon the defendant . . . .").

79 See, e.g., Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (citing Goldberg v. Kelly, 397 U.S. 254 (1970), in which welfare recipients had right to hearing despite lack of previous showing of eligibility).

80 See, e.g., Doswell v. De La Lanza, 61 U.S. (20 How.) 29, 32 (1857) ("There is nothing in the facts of the case which conduce to show an entry under it by the defendants, or that they entered under any claim of title.").

81 *Roth*, 408 U.S. at 577.

82 Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

83 Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

II
PLAINTIFF DUE PROCESS AND THE MINIMUM CONTACTS TEST

Currently, the Supreme Court applies the minimum contacts test to determine whether a court's jurisdiction constitutionally extends to a given cause of action. The minimum contacts test serves as a means of protecting defendants' individual liberty interests. Accordingly, Part II.A demonstrates that it focuses almost entirely on the defendant. Because the plaintiff's property right to a cause of action is almost assuredly extinguished if the court rules that the defendant does not have minimum contacts, Part II.B argues that the minimum contacts test likely does not amount to adequate process to protect plaintiffs' property interests.

A. The Defendant-Centered Minimum Contacts Test

Even before ratification of the Fourteenth Amendment, the Supreme Court relied on its Due Process Clause to limit state court assertions of personal jurisdiction over defendants.[84] Originally, personal jurisdiction was founded upon a "state power" theory.[85] While the state power theory of jurisdiction is no longer valid,[86] similar results remain: Though perhaps not beyond a state's inherent power, overbroad jurisdictional impositions violate defendants' individual due process rights.[87] In other words, defendants have *substantive* due process rights to stay out of certain courts.[88]

Since *Pennoyer*, the Supreme Court has interpreted a defendant's presence in a given state as an indication that he has submitted to that state's laws for jurisdictional purposes.[89] The presence of defendant

---

[84] See Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

[85] See id. at 722-23.

[86] See, e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (conceding that historic theory of jurisdiction based on power over person has given way to more modern view). One commentator argues that a change in political ideology led to the abandonment of the "state power" theory, claiming that "the rise of mid-twentieth century liberalism was reflected in changes in substantive law," including post-*International Shoe* personal jurisdiction doctrine. Kenneth J. Vandevelde, Ideology, Due Process and Civil Procedure, 67 St. John's L. Rev. 265, 267 (1993). Vandevelde notes further that this trend may be reversing: "Using arguments characteristic of their late nineteenth century counterparts, the late twentieth century conservatives have halted and, to some extent, reversed the liberal transformation of the prior decades." Id. at 267-68. At least one scholar believes we should return to the older, power-based conception of personal jurisdiction. See Stein, supra note 69, at 689 ("[A]ssertions of jurisdiction, as exercises of power, ought to reflect the general limits on state sovereignty inherent in a federal system.").

[87] *Pennoyer*, 95 U.S. at 733.

[88] Id.

[89] See, e.g., Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (upholding so-called "transient" jurisdiction).

property in a state has had a more complicated history. At the very least, a state normally has the ability to adjudicate the rights of individuals with respect to property located within its borders.[90]

These principles are more difficult to administer when the defendant is a corporation rather than a person. Due to the practical and conceptual difficulty in defining corporate "presence," the Court developed the minimum contacts test to determine when corporate entities are subject to a court's jurisdiction.[91] This familiar test, laid down in *International Shoe Co. v. Washington*, requires "a defendant to . . . have certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[92] Because the phrase "minimum contacts" is not self-defining, the vast majority of personal jurisdiction cases since *International Shoe* have attempted to develop its meaning.[93]

Yet its very wording makes clear the one-sidedness of this jurisdictional test: It asks whether the *defendant* had certain "minimum contacts."[94] Nothing on its face suggests that the minimum contacts test even considers the plaintiff and whether *dismissal* of the case would offend "traditional notions of fair play and substantial justice."[95]

Supreme Court jurisprudence confirms this intuition: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him"[96]—"even if the forum State has a strong interest in apply-

---

[90] See, e.g., Shaffer v. Heitner, 433 U.S. 186, 208 (1977) (noting that "jurisdiction over many types of actions which now are or might be brought in rem would not be affected by" abolishing quasi in rem jurisdiction).

[91] See *Int'l Shoe*, 326 U.S. at 316-17 (explaining that due process requirements are met when corporation has contacts with state which make it reasonable to demand that corporation defend itself there).

[92] Id. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[93] See, e.g., R. Lawrence Dessem, Personal Jurisdiction After *Asahi*: The Other (International) Shoe Drops, 55 Tenn. L. Rev. 41, 45 (1987) (noting that in establishing minimum contacts test, "[t]he Court gave little guidance concerning when constitutionally sufficient minimum contacts would be found to exist").

[94] See, e.g., *Int'l Shoe*, 326 U.S. at 316.

[95] One author posits that the test has two major concerns, neither of which is the plaintiff: First, "[i]t protects the defendant against the burden of litigating in a distant or inconvenient forum," and second, "it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by fcns]the due process clause to haul defendants into the forum for suits unrelated to their contacts there." Stanley E. Cox, Comment, Giving the Boot to the Long-Arm: Analysis of Post-*International Shoe* Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the "Minimum Contacts" Test, 75 Ky. L.J. 885, 909 (1987) (emphasis omitted).

[96] Hanson v. Denckla, 357 U.S. 235, 251 (1958).

ing its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause . . . may sometimes act to divest the State of its power to render a valid judgment."[97] Most pointedly, a defendant must "'purposefully avail[ ] himself'" of a state's laws in order to stand trial in its courts.[98] The defendant-centered nature of the test achieves sharpest focus through its inquiry into the relationship between three elements: "the defendant, the forum, and the litigation."[99] Notably absent from these factors is consideration of the plaintiff.

Despite such strong language, some cases do mention the plaintiff and her interests. For example, in *McGee v. International Life Insurance Co.*,[100] a California resident sued a Texas insurance company for recovery on a life insurance policy.[101] The Court upheld jurisdiction in California in part because its residents "would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable."[102] Although this language refers to an interest of a state, rather than of a plaintiff,[103] *McGee* has been interpreted to require some consideration of plaintiff interests.[104] However, any such consideration appears to differ substantially from the focus on the defendant.[105]

This is so because "plaintiff consideration," as described by *McGee*, actually does not enter the minimum contacts calculus at all. First, it is generally assumed that the ability of the plaintiff to choose where to file her complaint serves adequately to protect any interests

---

97 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

98 Kulko v. Superior Court, 436 U.S. 84, 89 (1978) (quoting Kulko v. Superior Court, 564 P.2d 353, 358 (Cal. 1977)).

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

100 355 U.S. 220 (1957).

101 See id. at 221.

102 Id. at 223.

103 See id. ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents . . . .").

104 See Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (citing *McGee* for assertion that "the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are, of course, to be considered").

105 At least one commentator believes plaintiff interests in convenience and effective relief are factors in the minimum contacts analysis. See Kevin C. McMunigal, Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction, 108 Yale L.J. 189, 193 fig.1 (1998). However, these interests are conceptually distinct from the plaintiff interest with which this Note is concerned. McMunigal believes plaintiff factors are prospective considerations, based "on the interests of society rather than on the rights or responsibilities of individuals." Id. at 194 fig.2, 200. The Due Process Clauses protect individuals' particularized interests in specifically claimed rights. See infra Part III.A. Societal-based, prospective considerations of generalized plaintiffs cannot suffice to protect the individual whose rights may be deprived without a hearing.

she might have.[106] Yet, there is a distinction between selecting where to file the complaint and selecting which jurisdiction will hear the case. The "advantage" of choosing where to file carries little meaning because the plaintiff's ability to pick the *jurisdiction* is entirely dependent upon the *defendant's* relationship with the forum—a relationship over which the plaintiff usually has little or no control.[107] If there is more than one possible forum, a plaintiff may choose from among them.[108] But that choice is limited to those jurisdictions the defendant has made available to her.

Second, explicit consideration of a plaintiff's interest is granted only *after* minimum contacts have been established and may serve only to *limit* jurisdictional assertions. In *Asahi Metal Industry Co. v. Superior Court*,[109] for example, the Court emphasized that the "fair play and substantial justice" prong of the minimum contacts analysis has bite. It suggested that even when a certain level of defendant contact is present, jurisdiction nevertheless might be unreasonable because the plaintiff does not have sufficient interest in bringing suit.[110] "'[T]raditional notions of fair play and substantial justice'"[111] do include "the plaintiff's interest in obtaining relief,"[112] but the Court only applies these considerations "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State."[113] Thus, plaintiff interest—to the extent it is ever considered—appears not to be a part of the standard minimum contacts analysis.[114]

Though the minimum contacts test seems entirely defendant centered, there is dicta from Justice Brennan's opinion in *Burger King*

---

106 See, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (commenting that plaintiff interests are generally "adequately protected by the plaintiff's power to choose the forum"); see also infra Part III.B.

107 See, e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 109 (1987) ("[M]inimum contacts must be based on an act of the defendant."); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) ("Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.").

108 Of course, declaratory judgments serve to deny plaintiffs even this choice.

109 480 U.S. 102 (1987).

110 See id. at 113-16.

111 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

112 *Asahi*, 480 U.S. at 113.

113 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985).

114 "Plaintiff interest" does not appear to play a role in the less well-defined doctrine of general jurisdiction either. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-18 (1984) (failing to mention plaintiff in litany of reasons why general jurisdiction was found lacking).

Corp. v. Rudzewicz[115] that lends support to the notion that plaintiff interests should matter. Justice Brennan claimed that plaintiff "considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[116] If this were true, courts could examine the merits of plaintiffs' property rights to bring causes of action—providing doctrinal support for this Note's suggestion that plaintiffs' interests deserve adequate procedural protections in jurisdictional proceedings.[117] Unfortunately, however, it is not well grounded in personal jurisdiction doctrine. While Justice Brennan cited three cases,[118] none of them seem to support his proposition.

Justice Brennan first cited *Keeton v. Hustler Magazine, Inc.*[119] But *Keeton* stands for the proposition that a plaintiff's contacts with the forum are essentially meaningless.[120] It held that so long as a defendant has minimum contacts with a forum, plaintiff contacts are irrelevant.[121] Contrary to Justice Brennan's proposition, this bolsters the idea that the minimum contacts analysis simply does not require consideration of the plaintiff's interest in bringing suit in a given forum.

Calder v. Jones[122] lends no more support to Justice Brennan's claim. *Calder* added an "effects test" to jurisdictional inquiries in cases of intentional activity.[123] The effects test grants jurisdiction in fora where defendants, by their *intentional* conduct, cause harm.[124] Yet, even this "exception" to the general rule of minimum contacts fails to take the plaintiff truly into account. In *Calder*, the Court found that the defendant "though remaining in Florida, knowingly cause[d] the injury in California."[125] Once again, it is the defendant's actions and state of mind that submit him to jurisdiction, for whether a defendant did or did not intend to cause injury is an inquiry entirely

---

115 471 U.S. 462 (1985).

116 Id. at 477. Justice Brennan's statement repeats a claim made without citation in Calder v. Jones, 465 U.S. 783, 788 (1984) (asserting that plaintiff contacts "may be so manifold as to permit jurisdiction when it would not exist in their absence").

117 See infra Part III.B.

118 *Burger King*, 471 U.S. at 477 (citing Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), Calder v. Jones, 465 U.S. 783 (1984), and McGee v. International Life Insurance Co., 355 U.S. 220 (1957)).

119 465 U.S. 770 (1984).

120 See id. at 779.

121 See id. (declining to require "a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant").

122 465 U.S. 783 (1984).

123 See id. at 790.

124 See id.

125 Id.

centered upon him. Note further the *Calder* Court's conclusion on the issue: "In sum, California is the focal point both of the [allegedly libelous] story and of the harm suffered."[126] Presumably, Justice Brennan believed that because the plaintiff had suffered the alleged harm in California, the plaintiff's interest must be aligned with the state's. However, the focus of California as the place of injury would remain whether or not the plaintiff wished to bring suit there. Thus, the *Calder* Court does not appear to refer to the *plaintiff's* interest in bringing her claim. Rather, the reference more accurately pertains to the *state's* interest, as the locus of the harm, in adjudicating the claim.

McGee,[127] the final case Justice Brennan cited, confirmed this point. Like *Calder*, *McGee* asserts a state, as opposed to a plaintiff, interest: "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents . . . ."[128] In many cases, the state's interest might overlap with that of the plaintiff.[129] But this is not necessarily so.[130]

Thus, Justice Brennan's claim that plaintiff interests can sometimes lower the minimum contacts threshold is only partly, if ever, true. It seems to apply merely to the extent that plaintiff interests independently overlap with those of "the defendant, the forum, [or] the litigation."[131] While a plaintiff's contacts with a particular forum are not "completely irrelevant to the jurisdictional inquiry,"[132] they are only useful to the extent that they demonstrate a defendant's intentional action towards, contact with, or purposeful availment of a forum.[133]

The minimum contacts test appears to be an exclusively defendant-dependent inquiry. In those rare circumstances when considerations other than the defendant enter into the equation, they arise either as factors that limit jurisdiction or as interests of the forum state. Thus, courts may not consider directly a plaintiff's interest in entertaining suit in a given forum.

---

126 Id. at 789.

127 355 U.S. 220 (1957).

128 Id. at 223.

129 See id. (noting disadvantage to residents if California's interest in having claim brought there is denied).

130 See, e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished.").

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

132 Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 (1984).

133 See, e.g., id. ("[P]laintiff's residence in the forum may, because of *defendant's* relationship with the plaintiff, enhance *defendant's* contacts with the forum." (emphasis added)).

B. Minimum Contacts as Plaintiff Due Process

Even if courts treat a cause of action as a property interest that is procedurally protected by the Due Process Clause, it might be argued that the minimum contacts test for jurisdiction, no matter how defendant-oriented, provides adequate "process" to plaintiffs. But the minimum contacts test is so focused on the defendant's liberty interests—a separate and distinct constitutional claim—that it seems unlikely to provide due process to the plaintiff's property interests.

Perhaps the plaintiff is indeed heard on her claimed right—a right substantively defined by the minimum contacts test. Property rights to causes of action must have substantive guidelines, and "the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether."[134]

But the minimum contacts test is not statutory. Rather, it is an interpretation of the defendant's rights under the Due Process Clause. It seems odd to maintain that one's right is heard by presenting evidence of someone else's entirely distinct right. Under the minimum contacts test, courts ignore any claims of right by the plaintiff—only "the defendant, the forum, and the litigation" may be considered.[135] It is one thing to say that defendants have a right, both substantive and procedural, not to be hauled into inappropriate fora. It is quite another to assert that evidence pertaining purely to that right serves adequately to dispose of the plaintiff's competing, procedurally protected property right. What the minimum contacts test appears to overlook is that jurisdictional proceedings necessarily adjudicate two separate and distinct claims of right. Further analysis demonstrates why the minimum contacts test cannot protect plaintiff property interests sufficiently.

The Supreme Court long has recognized that adjudicators must provide parties with the opportunity to be heard on the merits of each claim of right.[136] If plaintiffs do indeed have a property interest in bringing a cause of action, we are left with the question of how much process is due to dispose of it. While "due process is flexible and calls for such procedural protections as the particular situation de-

---

134 Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982).

135 See *Shaffer*, 433 U.S. at 204 (noting that "relationship among the defendant, the forum, and the litigation [are] . . . the central concern of the inquiry into personal jurisdiction").

136 See, e.g., The Mary, 13 U.S. (9 Cranch) 126, 146 (1815) (holding that no decision may stand "in which the person to be affected by the sentence" does not have "a full opportunity to assert his rights").

mands,"[137] the *Mathews v. Eldridge*[138] test provides a framework with which to answer this question. The amount of due process hinges on three separate factors: (1) "the private interest that will be affected by the official action,"[139] (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"[140] and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[141]

The current structure of jurisdictional proceedings does not appear to satisfy the strictures of this test. The first factor, the private interest at stake, simply is not addressed by the minimum contacts test: A plaintiff's interest in bringing suit is treated as irrelevant at a jurisdictional proceeding.[142] Further, the risk of erroneous deprivation seems quite high when the question of the plaintiff's property interest is not reached. And at least some consideration of the interest at stake is more probative than no consideration. Finally, because jurisdictional proceedings already adjudicate defendants' liberty interests, the additional governmental cost of hearing plaintiffs' interests at the same time likely would be quite low.[143]

Beyond this *Mathews*-test argument, there is precedent reversing failures to consider distinct constitutional rights during the pleading and discovery phase of litigation. The Supreme Court has held "that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."[144] As early as 1897 the Court was confronted with the issue in *Hovey v. Elliot*.[145] In *Hovey*, the defendants were found to be in contempt for failure to comply with an order to pay a fine.[146] As punishment, the trial court struck their answer and rendered a default judgment

---

137 Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

138 424 U.S. 319 (1976).

139 Id. at 335.

140 Id.

141 Id.

142 See supra Part II.A.

143 Alternative procedures would be ineffective anyway: "[I]t is not meaningful to discuss the possibility of a post-termination hearing, because the property interest here is destroyed when the case is terminated." Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 n.8 (1982).

144 Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958).

145 167 U.S. 409 (1897).

146 Id. at 411.

against them.[147] The Court ruled that declining to hear the merits of the defendant's case as a penalty for an unrelated infraction violated the Due Process Clause: "If the court had power to [adjudicate property rights] by denying the right to be heard[,] . . . what plainer illustration could there be of taking property . . . without hearing or without process of law?"[148] Not even courts, it held, have "the power to violate the fundamental constitutional safeguards"[149] protecting all citizens.

The Court extended these same protections to plaintiffs in *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*.[150] In *Rogers*, the plaintiff's complaint was dismissed under Rule 37[151] "because of [its] inability, despite good-faith efforts, to comply with a pretrial production order."[152] The Court considered this a denial of the plaintiff's due process rights, ruling that because of the "serious constitutional question[ ] . . . we think that Rule 37 should not be construed to authorize dismissal of this complaint."[153]

In *Logan v. Zimmerman Brush Co.*,[154] decided nearly a century after *Hovey*, the Court assembled these precedents, holding that "it has become a truism that '*some* form of hearing' is required before the owner is finally deprived of a protected property interest."[155] In *Logan*, the plaintiff filed a discrimination suit with a state commission.[156] It failed to convene within 120 days, thereby extinguishing the plaintiff's claim.[157] The Supreme Court ruled that this violated his due process rights.[158] Specifically, the plaintiff was "entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim."[159]

Thus, it is likely unconstitutional for a court to dismiss a plaintiff's cause of action without giving her the opportunity to be heard. A plaintiff must be able to present the "merits" of her claim of right—not the merits of the underlying complaint, but rather the merits of

147 Id. at 411-12.
148 Id. at 419.
149 Id.
150 357 U.S. 197 (1958).
151 Fed. R. Civ. P. 37(b)(2) (allowing court-imposed sanctions for discovery violations).
152 *Rogers*, 357 U.S. at 210.
153 Id. at 212.
154 455 U.S. 422 (1982).
155 Id. at 433 (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 n.8 (1972)).
156 See id. at 426.
157 See id. at 426-27.
158 See id. at 437.
159 Id. at 434.

her claimed right to bring a cause of action in that court.[160] In the jurisdictional context, however, courts consider only one party's interests—the defendant's—when deciding whether to dismiss a claim.[161] This is problematic *not* because plaintiffs have a substantive right to impose jurisdiction—the Due Process Clauses require nothing more than process here.[162] Rather, it is problematic because the plaintiff's interests are simply not heard. In the Court's own words, "[t]o put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to *present* [her] claim of entitlement."[163] Yet the defendant-centered nature of the minimum contacts test denies plaintiffs this constitutionally required opportunity to present their claims of entitlement.

III
THE PROCESS DUE TO PLAINTIFFS

Thus far, this Note argued that courts should provide plaintiffs with process before dismissing their property right to bring a cause of action. It then demonstrated that the minimum contacts test considers only the defendant's interests in avoiding personal jurisdiction—a test that does not offer adequate process to protect the plaintiff's property interest. This Part outlines the merits of a plaintiff's property right to maintain a cause of action, and what process might better serve constitutionally to protect it. Part III.A offers considerations that are relevant to the merits of plaintiffs' claims. Part III.B suggests that some modest adjustments to current doctrine should solve the inherent constitutional tension.

A. The Merits of the Plaintiff's Claim

The "merits" of the plaintiff's property right to bring a cause of action should include the right to demonstrate her interest in bringing suit. One of the most important aspects of the plaintiff's interest in bringing suit centers on her level of contact with the selected forum.

The importance of plaintiff contact with a given forum may not be obvious. From a practical standpoint, perhaps dismissing a cause of action for lack of jurisdiction does not pose a serious problem because the plaintiff can go to another state to sue. In other words,

---

160 See, e.g., Fuentes v. Shevin, 407 U.S. 67, 83 (1972) ("Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the *plaintiff's* position." (emphasis added)).

161 See supra Part II.A.

162 See supra Part I.B.

163 *Logan*, 455 U.S. at 434 (emphasis added).

while a plaintiff may have a due process right to bring a cause of action, it might be that she does not have the right to bring that cause of action in a particular forum.

Consideration of the forum in which the claim is brought, however, *is* important because the right to bring a cause of action there is intimately connected to the question of whether the property right exists at all.[164] State law creates and defines causes of action.[165] Once a court dismisses a claim for lack of jurisdiction, it is highly unlikely that that particular cause of action—the procedurally protected property at issue—can ever be brought anywhere else.

For example, one study "found a clear [almost ninety percent] correlation . . . between the party who prevailed on jurisdiction and the victor on the merits."[166] Dismissal of a case on jurisdictional grounds generates a good probability that the plaintiff will not be able to avail herself of *any* cause of action anywhere.[167]

Further, while tort actions for negligence are similar in every state, each state does have specific controlling law on the subject. These various statutes necessarily define distinct causes of action—an action for negligence in California is entirely separate and distinct from an action for negligence in New York.[168] Theoretically, despite a lack of jurisdiction, one state's cause of action may continue to exist in another. For example, jurisdiction could exist in New York but not in California, while New York's conflict of laws doctrine might apply

---

164 That jurisdictional proceedings are litigated so fervently gives some indication of the importance of the issue to both parties.

165 This Note puts aside federally created causes of action to simplify the analysis. Nevertheless, the analysis is often the same because the jurisdiction of both state and federal courts is generally circumscribed in the same way. See supra note 5. While plaintiffs may have less compelling reasons to bring a federal claim in a particular forum, justice may better be served when a judge at least hears the merits of every claim.

166 Christopher D. Cameron & Kevin R. Johnson, Death of a Salesman?: Forum Shopping and Outcome Determination Under *International Shoe*, 28 U.C. Davis L. Rev. 769, 780 (1995).

167 This does not mean the plaintiff has a right to win the case. It only means that, because of this risk, her interests in bringing suit *in that forum* should be considered before jurisdictional dismissal.

168 For example, in New York, if one voluntarily undertakes a duty, there is an absolute duty to exercise prudent care. See, e.g., Wolf v. City of New York, 349 N.E.2d 858, 860 (N.Y. 1976) ("Where a person voluntarily assumes the performance of a duty, he is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task."). In California, such a duty may not be absolute and may only arise under certain conditions. See, e.g., Williams v. State, 664 P.2d 137, 139 (Cal. 1983) (holding that volunteer is "under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking").

California, rather than New York, law to the case.[169] But under modern approaches, it is highly unlikely that choice-of-law doctrine would utilize the law of a state that lacked jurisdiction to hear the claim.[170] Thus, when a court dismisses a case for lack of jurisdiction, the property right to that specific cause of action[171] is nearly always gone for good. Yet even if there is a chance that the cause of action still might exist somewhere else, this alone does not change the fact that the Due Process Clauses require a hearing. Under the *Mathews* test, procedure becomes more—not less—important when there is a high risk of deprivation.[172]

Moreover, there is little conceptual difference between forcing plaintiffs to "just go somewhere else" and forcing defendants to "just defend where the case is brought." Yet judges may not even *consider*

---

169 As a possible example, consider World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), where, although an allegedly negligently manufactured car caused an accident in Oklahoma, the Court determined that jurisdiction over the car dealer did not exist in Oklahoma. See id. at 288, 299. Yet, because it appears that choice of law constitutionally may hinge upon the place of injury, New York presumably could have applied Oklahoma law. See, e.g., Allstate Ins. Co. v. Hague, 449 U.S. 302, 316 n.22 (1981) ("[T]he place of the accident is a factor to be considered in choice-of-law analysis . . . .").

170 This is true for three reasons: First, modern choice-of-law jurisprudence generally utilizes "interest analysis," "center of gravity," or "grouping of contacts" tests in an attempt to apply the law of the state most directly interested in the litigation. See, e.g., In re Allstate Ins. Co., 613 N.E.2d 936, 938 (N.Y. 1993) (citing "interest analysis" as "preferred analytical tool" in tort conflict of law cases); Linda Silberman, *Shaffer v. Heitner*: The End of an Era, 53 N.Y.U. L. Rev. 33, 80 n.259 (1978) (describing interest analysis as "dominant mode of analysis in modern choice of law theory"). When a state lacks minimum contacts with a defendant sufficient to allow specific jurisdiction, it is unlikely that it has a direct interest in the litigation. Second, the test to determine whether application of a particular law is constitutional is quite similar to the minimum contacts test. See *Allstate Ins.*, 449 U.S. at 308 (holding that "the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction"). Finally, it is widely regarded that, pursuant to modern choice-of-law principles, courts usually opt for forum law. See, e.g., Anthony L. Ryan, Principles of Forum Selection, 103 W. Va. L. Rev. 167, 192 (2000) ("One feature of many modern approaches to the conflict of laws is a marked tendency to apply the law of the forum."); Michael E. Solimine, An Economic and Empirical Analysis of Choice of Law, 24 Ga. L. Rev. 49, 87-88 (1989) (presenting empirical evidence indicating that law of forum generally applies in modern choice-of-law approaches); Louise Weinberg, Choice of Law and Minimal Scrutiny, 49 U. Chi. L. Rev. 440, 467 (1982) (arguing that new approaches to choice of law generally result in application of forum law); Ralph U. Whitten, U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited), 37 Tex. Int'l L.J. 559, 560 (2002) ("Both the empirical evidence and the existing scholarly consensus . . . indicate that there is a strong tendency under all modern conflicts systems to apply forum law.").

171 Due process rights to the property interest still should attach even if there is ultimately no jurisdiction. See supra Part I.C.

172 See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding that high "risk of an erroneous deprivation of . . . interest through the procedures used" indicates that established procedures are inadequate).

evidence that the hardship to the plaintiff of litigating in an alternate forum outweighs the hardship to the defendant of staying put. Ignoring plaintiffs' interests in bringing a claim in a specific jurisdiction violates the principle that "[i]ssues cannot be resolved by a doctrine of favoring one class of litigants over another."[173] Thus, the right to bring a cause of action should not be separated from the right to bring that cause of action in a particular forum.

Still, perhaps the plaintiff's interest in litigating in her chosen forum does not bear on the merits of her property right to bring a cause of action. In other words, how does plaintiff residence in the forum, for example, relate to the property interest at stake?

From a normative standpoint, litigants in similar situations should be treated similarly.[174] The merits of defendants' rights to avoid jurisdictional assertions turn on their interest in avoiding suit, measured by their level of contact with the forum.[175] Likewise, the merits of plaintiffs' competing rights to bring a cause of action should include their interest in bringing suit in a given forum, again measured by the level of contacts they have there.[176] Otherwise, courts threaten to dispose of plaintiffs' interests without hearing both sides of the story.

There are additional reasons why plaintiff contact with a forum should be an essential aspect of the merits of the property right to bring a cause of action. First, a plaintiff's level of contact with a state is probative evidence of why a property interest should exist there. Many state property rights, such as welfare programs, vest upon a showing of claimant contact as demonstrated by residence.[177] Contacts with a state, then, should be an aspect of the similar state property right to bring a cause of action.

Further, the level of party contact with property serves in other contexts to help determine whether a property right exists. For example, the more "contact" the government has with a piece of someone else's property, the more likely that property will be deemed the gov-

---

173 Schlagenhauf v. Holder, 379 U.S. 104, 113 (1964).

174 See id.

175 See supra Part II.A.

176 This position is not inconsistent with *Keeton v. Hustler Magazine, Inc.*, which declined to require "a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant." 465 U.S. 770, 779 (1984). A state-created property right to bring a cause of action cannot be limited to the citizens of that state. See U.S. Const. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Thus, when defendants' liberty interests are no longer at stake, little reason remains to dismiss plaintiffs' property interests.

177 See, e.g., Cal. Welf. & Inst. Code § 11104 (West 2001) ("An alien shall only be eligible for aid if the alien has been lawfully admitted for permanent residence, or is otherwise permanently residing in the United States under color of law.").

ernment's.[178] Specifically, if the government affects a permanent, physical invasion of property—a very high level of contact indeed—it has "taken" it.[179] Litigant contacts are also often a dispositive factor in cases where property ownership is unclear. For instance, in the classic case of *Pierson v. Post*,[180] it was the level of litigant contact with the disputed property that determined the victor: The party that shot, killed, and retrieved the fox prevailed over the party that merely chased it.[181]

Because dismissal for want of jurisdiction essentially extinguishes the property right to a particular cause of action, the property right is deeply intertwined with the forum where the complaint is brought. Further, litigant contact with property usually serves to determine rights with respect to that property in similar contexts. Thus, proper adjudication of the merits of that claim should include consideration of the plaintiff's level of contact with the forum.

B. Towards a Constitutionally Sound Solution

At any given jurisdictional proceeding, plaintiffs' property rights to maintain a cause of action are in fundamental tension with defendants' liberty rights to escape the grasp of overreaching fora. The current minimum contacts test resolves this problem by simply ignoring one right in favor of the other. This is not the best solution; the Court has "rejected the view that the applicability of one constitutional [principle] pre-empts the guarantees of another."[182]

One answer would be to maintain the minimum contacts test, but grant the plaintiff at least a nominal opportunity to articulate her interests in maintaining suit in the forum. In other words, the minimum contacts analysis could include specifically a plaintiff-interest factor to provide due process but be applied such that no amount of plaintiff interest would affect its current outcome. A judge presumably would listen to all the plaintiff's evidence and simply dismiss her claim so long as the defendant lacked what is understood today to be minimum

---

178 See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-38 (1982) (holding that government action mandating permanent cable wire on plaintiff property by third party is taking requiring compensation.

179 See id. at 434-35.

180 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

181 See id. at 179.

182 United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993); see also Soldal v. Cook County, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn.").

contacts. This solution is unsatisfactory. It merely offers the gesture of process to cure the constitutional problems with the present system.

There is a better solution that accounts for the importance of defendants' liberty interests. In most cases, a lack of minimum contacts probably *should* preclude jurisdiction. But because two distinct rights are implicated, a balancing test is perhaps appropriate. The minimum contacts test is judicially created and is continually subject to refinement. A balancing test imposing jurisdiction in the face of strong plaintiff contacts and slightly less than what now might be considered defendant minimum contacts should not offend the Constitution.[183] This solution is similar to Justice Brennan's suggestion that plaintiff "considerations [should] sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[184]

Perhaps the current minimum contacts test should be reconsidered in this way, particularly in light of the strong countervailing interests at stake. First, as a legal matter, "the full scope of the liberty guaranteed by the Due Process Clause . . . is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[185] There is nothing "arbitrary" or "purposeless" in asserting jurisdiction over defendants in certain limited instances when constitutionally protected rights are defended in the process.

Second, as a normative matter, it makes sense to impose jurisdiction in certain cases where the plaintiff has strong forum contacts while the defendant has less than what are now minimum contacts. For example, imagine a plaintiff of limited means who has lived her entire life in Oklahoma. She decides to take the "trip of a lifetime" to New York. On her way home, she purchases a box of chocolates from "Tourists, Inc." inscribed with the phrase "I'm Not a New Yorker, But I Love New York." Back in Oklahoma, she is severely injured by a

---

183 The minimum contacts analysis simply attempts to assure that courts do "not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). It "is typically described in terms of 'reasonableness' or 'fairness.'" World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). Given these broad terms, and that due process considerations are "not a series of isolated points," some give and take in the test is contemplated. Poe v. Ullman, 367 U.S. 497, 543 (1961); cf. McMunigal, supra note 105, at 210 ("A more accurate statement of the function of the minimum contact tests is to distinguish defendants who are immunized from the burdens of out-of-state litigation from defendants who are not." (emphasis omitted)).

184 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

185 *Poe*, 367 U.S. at 543.

piece of glass in one of the chocolates. Under current minimum contacts jurisprudence, it is highly unlikely that Oklahoma could assume jurisdiction over the defendant.[186] This seems wrong for a number of reasons. First, the defendant had at least constructive knowledge that its product was headed to other states. Second, the injury actually occurred in Oklahoma. Third, the plaintiff's lifelong ties are to the state of Oklahoma. Finally, and perhaps most importantly, the monetary burden of litigating in a foreign state is far more difficult for the plaintiff to bear than for the defendant. Under circumstances such as these, a reasonable understanding of "traditional notions of fair play and substantial justice"[187] might favor suit in Oklahoma. Yet application of the minimum contacts test prevents a court even from considering the plaintiff's interests in bringing suit in her home state.

The balance, however, is delicate. A number of commentators have wrestled with the minimum contacts test, suggesting refinements such as a "proportionality requirement,"[188] or "a return to [a] simpler due process analysis."[189] Proposing a comprehensive theory such as one of these is better left for another day. Nevertheless, a test that explicitly considers plaintiff contacts with the forum should solve the constitutional problems with the current minimum contacts test. The burden on the plaintiff of going to another forum should receive real consideration, proportional to the burden on the defendant of remaining in a given forum. However, because liberty interests are generally thought to have more significance than property interests,[190] the burden of persuasion could rest with the plaintiff. Finally, a "threshold" level of contact with the forum could be established such that jurisdiction could never exist in a forum with which neither the plaintiff nor the defendant has contacts, nor in which no substantial part of the events or omissions giving rise to the cause of action arose.[191]

---

186 This imaginary case is factually similar to *World-Wide Volkswagen*, where the Court determined that Oklahoma did not have jurisdiction over a similarly situated corporate defendant.

187 *Milliken*, 311 U.S. at 463.

188 See McMunigal, supra note 105, at 191.

189 See Howard B. Stravitz, Sayonara to Minimum Contacts: *Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. Rev. 729, 731 (1988).

190 Cf. Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (holding that deprivation of liberty interest to raise child must be afforded more process "than any property right"). This is likely also true under the *Mathews v. Eldridge* test because the "private interest that will be affected," 424 U.S. 319, 335 (1976), is generally greater when that interest is liberty rather than property.

191 This factor borrows language from the current federal venue statute, 28 U.S.C. § 1391(b) (2000). Federal venue uses a balancing test to determine which federal district should hear a claim. See Bates v. C. & S. Adjusters, Inc., 980 F.2d 865, 867 (2d Cir. 1992) (commenting that "most courts have applied at least a form of the 'weight of contacts' test"). Predictably, however, venue jurisprudence considers the plaintiff's interest in bring-

A test based on these principles would provide both plaintiffs and defendants the right to a meaningful hearing on the merits of their respective claims of right. Given that both of these rights are necessarily adjudicated in jurisdictional proceedings,[192] due process is threatened by any test failing to consider each litigant's interests.

CONCLUSION

Personal jurisdiction proceedings adjudicate two separate and distinct individual rights: the defendant's liberty interest to remain free from overextending fora and the plaintiff's property interest in maintaining a cause of action. The current minimum contacts test considers only one of these interests—the defendant's—and explicitly ignores the plaintiff's claim of right. The defendant's liberty interest is important, but it is not the only right deserving of consideration. The plaintiff's property claim also should be afforded a hearing on its merits. Courts should never "identify[ ] as a preliminary matter [a] claim's 'dominant' character."[193] Rather, each and every constitutional right must be heard on its own terms. To do otherwise violates the commands of the Due Process Clauses. In this way, the current state of jurisdictional proceedings, adjudicated under the minimum contacts test, requires adjustment in order to vindicate equally the due process rights of all citizens.

---

ing suit in a given forum "not [to be] a relevant factor." Id. (citing Leroy v. Great W. United Corp., 443 U.S. 173, 183 (1979)).

[192] See supra Part III.A.

[193] Soldal v. Cook County, 506 U.S. 56, 70 (1992).