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A shareholder in Greyhound Corporation, a Delaware corporation, brought a derivative action against corporate officers and directors alleging that certain actions by the defendants in Oregon had caused substantial harm to the corporation. The suit was initiated in a Delaware state court with jurisdiction based only on the statutory presence of property in that state. The defendants contested this attempt to assert quasi in rem jurisdiction on due process and other grounds.

1. A shareholder's derivative suit allows a shareholder to sue on behalf of the corporation. The corporation is, in effect, the plaintiff, and it and its stockholders will be the beneficiaries if the suit is successful. See, e.g., H. HENN, CORPORATIONS § 358 (2d ed. 1970). The shareholder in this case owned one share of Greyhound stock. Shaffer v. Heitner, 433 U.S. 186, 189 (1977).

2. The allegations arose from a judgment against Greyhound in a private antitrust suit, Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977), cert. granted, 46 U.S.L.W. 3436 (1978) (No. 77-598) (judgment of $13,146,090), and a fine levied against the corporation in a criminal contempt action, United States v. Greyhound Corp., 508 F.2d 529 (7th Cir. 1974) (fines totalling $600,000).

3. This note is primarily concerned with due process limitations on state court jurisdiction. See U.S. CONST. amend. XIV. Thus, when the word "jurisdiction" is used, it should be understood to exclude such concepts as subject matter jurisdiction, competence, forum non conveniens, venue, and the like. The word "jurisdiction" is used in this note in the same manner as the phrase "judicial jurisdiction of the state" is used in 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note at 100-01 (1971). A state has jurisdiction (as the term is here used) when the state possesses the legal power to exercise authority through its courts. This note also focuses on individuals, not corporations.

4. The property consisted of Greyhound stock, options, warrants, and other rights of the defendants worth over $1,200,000. Shaffer v. Heitner, 433 U.S. 186, 192 nn. 7 & 8 (1977). The stock certificates were not physically present in Delaware, but Delaware law provides that "[f]or all purposes of . . . jurisdiction . . . the situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . shall be regarded as in this State." DEL. CODE tit. 8, § 169 (1975). Delaware is the only state which, having adopted the Uniform Commercial Code, has not adopted U.C.C. § 8-317(1), which provides that "[n]o attachment or levy upon a security . . . shall be valid until the security is actually seized . . ." [1977] 5D U.C.C. SERVICE (Bender) § 8-317, at T-135 (1975) (table of state variations). Thus, in nearly all states, the situs of stock for purposes of attachment is the location of the certificate of ownership. The court could have struck down this artificial situs but chose instead a broader ground of decision. See note 5 infra.

5. The defendants argued that the stock could not be attached because it was present in Delaware only by virtue of a Delaware statute. See note 4 supra. The defendants also contended that the attachment procedure was not in accord with the procedural due process requirements of notice and opportunity to be heard enunciated in Snidich v. Family Fin. Corp., 395 U.S. 337 (1969), and succeeding cases. See generally Zammit, Quasi-in-Rim Jurisdiction: Outmoded and Unconstitutional?, 49 St. John's L. REV. 668, 677-82 (1975). The defendants' last contention was that the due process clause was violated because the defendants "did not have sufficient contacts with Dela-
but their arguments were rejected by the trial court and the Delaware Supreme Court. The United States Supreme Court reversed. Held: The minimum contacts test developed in *International Shoe Co. v. Washington* must be applied to evaluate the assertion of jurisdiction by a state court; the contacts in this case were insufficient to sustain the court’s jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

ware to sustain the jurisdiction of that State’s courts.” *Shaffer v. Heitner*, 433 U.S. 186, 193 (1977). This contention was based on the minimum contacts doctrine developed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and succeeding cases. See note 7 and text accompanying notes 27-37 infra.

The Supreme Court agreed with the defendants on the latter issue and decided the case on that basis. 433 U.S. at 212. Deciding the case by invalidating the statutory stock situs would have resulted in a much narrower holding than the one actually reached by the Court.


Quasi in rem jurisdiction is defined at note 16 infra.

7. 326 U.S. 310 (1945). The minimum contacts test is applied to an out-of-state defendant to determine whether the local court can obtain personal jurisdiction over the defendant. The test considers whether or not the defendant has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ” *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The local (forum) court cannot obtain personal jurisdiction over the defendant unless the requisite minimum contacts are present.

It can be quite difficult to determine precisely what constitutes sufficient contact in a particular case. A large number of factors have been taken into consideration by the courts. See notes 27-37 and accompanying text infra.

8. *Shaffer v. Heitner*, 433 U.S. 186, 189-212 (1977). “It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer [v. Neff*, 95 U.S. 714 (1878)] and *Harris [v. Balk*, 198 U.S. 215 (1905)] to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled.” 433 U.S. at 212 n.39.

9. 433 U.S. at 213-17. In response to *Shaffer v. Heitner*, Delaware enacted a statute that treats acceptance of a directorship in a Delaware corporation as consent to jurisdiction in that state over any cause of action arising from the director’s corporate activities. 61 Del. Laws ch. 119, § 1 (1977) (codified at DEL. CODE tit. 10, § 3114 (Supp. 1977)). In part to avoid a similar suit under the new statute, the Greyhound board of directors voted to change the company’s state of incorporation from Delaware to Arizona, the location of the corporate headquarters. Consent Statement from Greyhound Corp. to Stockholders, at 4-5 (January 3, 1978) (on file with the Washington Law Review).

Arizona permits [shareholder derivative actions] but provides that the plaintiff may be required to give security for the expenses which the suit will cause the corporation, including attorneys’ fees, unless the plaintiff or plaintiffs own shares having a market value in excess of $25,000 or comprising 5% or more of a class of stock . . . .

[M]anagement believes such a provision to be to a minor degree in the best interests of the Company and its stockholders as a whole.

*Id.* at 4.

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Shaffer v. Heitner marks a change from a formal to a nonformal decisionmaking process when the presence of the defendant's property in the forum is offered as the basis for jurisdiction. This change in methodology is important in itself because many suits make use of property-based jurisdiction. It could be even more important if Shaffer v. Heitner foreshadows a general shift in methodology extending the nonformal decisionmaking process to two more frequently invoked bases for jurisdiction—defendant's physical presence and defendant's domicile.

This note examines the change in methodology and concludes that, despite some drawbacks, it is an improvement over the former rules of property-based jurisdiction. However, extension of the nonformal decisionmaking process to other bases of jurisdiction is not a logical requirement of Shaffer v. Heitner and, in fact, would not be desirable. The formal decisionmaking process currently in use should be retained when a plaintiff seeks to base jurisdiction on the defendant's presence or domicile.

It is not clear why the fictional implied consent imposed by the new statute would make it constitutional for Delaware to exercise jurisdiction over corporate directors. The statute might be said to give directors better notice that they may be haled before Delaware courts, but the extensive past history of Delaware's use of quasi in rem jurisdiction in derivative actions gave the same type of notice to the Greyhound directors in Shaffer. 433 U.S. at 227 nn.5 & 6 (Brennan, J., concurring and dissenting). Surely the statute is not required as evidence of Delaware's interest. Courts have often divined a state's interest without specific statutes. See note 33 infra.

Nonetheless, the Shaffer Court broadly hinted that a consent statute like the one Delaware subsequently did enact would be sufficient to give that state jurisdiction over corporate directors: "If Delaware perceived its interest in securing jurisdiction over corporate fiduciaries to be as great as Heitner suggests, we would expect it to have enacted a statute more clearly designed to protect that interest." 433 U.S. at 214–15.

"Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State." Id. at 216 (footnote omitted).

10. See note 23 and accompanying text infra (formal); note 24 and accompanying text infra (nonformal).

11. This note does not consider a number of other bases for jurisdiction (e.g., consent). See Restatement (Second) of Conflict of Laws §§ 24–79 (1971) (cataloguing various jurisdictional bases).

12. This note does not examine several questions raised by Shaffer v. Heitner. For example, will the holding of Shaffer be limited to certain kinds of property? See note 20 infra. Will the holding be limited to quasi in rem jurisdiction in which the property is not related to the cause of action? See note 16 infra. After Shaffer, will a court ever be barred from entering an in personam type judgment in a case in which the defendant's only contact with the forum consists of the presence of property? Id. See generally Casad, Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory?, 26 Kan. L. Rev. 61 (1977); The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 152 (1977).
I. BACKGROUND AND COURT'S REASONING

For over thirty years the due process clause has been interpreted to bar any court from obtaining personal jurisdiction over an out-of-state defendant unless the minimum contacts test was satisfied. That test evaluates the relationships between the parties, the cause of action, and the forum to determine whether or not it would be fair to take jurisdiction over the defendant. If the defendant owned property within the forum, however, jurisdiction could be based solely on the presence of the property with no other contact required.

13. In this note, the phrase "out-of-state" will be applied to a defendant who is not present or domiciled in the forum state.
15. See note 7 supra.
16. A court exercising property-based jurisdiction may, if necessary, gain control over the property by means of attachment or a similar procedure. The court then adjudicates the merits of the cause of action and disposes of the property accordingly. Several types of jurisdiction are based on the presence of property. An in rem proceeding (e.g., a condemnation action) adjudicates the rights of all the world in the property. A quasi in rem action deals only with the rights of certain persons in the property. Quasi in rem proceedings can be further divided into controversies which are related to the property (e.g., a quiet title action against specified persons) and those which are not related to the property (e.g., a tort action in which the property is unrelated to the tort). Each type of jurisdiction can involve real or personal, tangible or intangible property. 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Notes at 102–05, 190–91 (1971).

The present case is an example of quasi in rem jurisdiction in which the property is not related to the underlying cause of action. It is coincidental that the stock seized was Greyhound rather than the stock of any other Delaware corporation. Stock is generally categorized as personal, intangible property. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.15 (2d ed. 1977).

The major difference between jurisdiction over the person of the defendant (in personam or personal jurisdiction) and jurisdiction based on the presence of property is the differing effect of judgments rendered in each situation. A court with personal jurisdiction has the power to render a judgment that is enforceable against any of the defendant’s property. A court exercising property-based jurisdiction only has power to affect the defendant’s interests in that property. 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Introductory Note at 191 (1971). After Shaffer v. Heitner, it is not clear to what extent this difference will remain.

17. A number of lower courts anticipated the Shaffer holding by requiring that the minimum contacts test be met in property-based jurisdiction cases. See, e.g., cases cited in Shaffer, 433 U.S. at 205. The Washington Supreme Court applied the minimum contacts test to a quasi in rem jurisdiction case in Ace Novelty Co. v. M.W. Kasch Co., 82 Wn. 2d 145, 508 P.2d 1365 (1973). In assessing the effect of the Ace Novelty Co. case, one commentator noted, More likely, however, the case represents the opening wedge for the general application of International Shoe (and its progeny) standards of due process to quasi in rem cases, with the eventual demise of . . . quasi in rem jurisdiction in general to be expected. Should this be so, then, while the opinion may be subject to some technical criticism . . ., on the more important plane of its impact on jurisdictional concepts, it is to be commended.

In holding that this property-based jurisdiction may violate the due process clause, the Shaffer Court reasoned that jurisdiction over property is, in reality, jurisdiction over the interests of persons in the property. Since it is the interests of persons that are at stake, the test that applies to personal jurisdiction—the minimum contacts test—should also apply to jurisdiction based on the presence of property. In applying the minimum contacts test to the facts of this case, the Court found that the defendants "have simply had nothing to do with the State of Delaware." The judgment of the Delaware Supreme Court sustaining jurisdiction was, therefore, reversed.

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18. 433 U.S. at 207. Referring to the property-based jurisdiction doctrines, the Court stated,

It is true that the potential liability of a defendant in an in rem [or quasi in rem] action is limited by the value of the property [see note 16 supra], but that limitation does not affect the argument. The fairness of subjecting a defendant to state-court jurisdiction does not depend on the size of the claim being litigated. Id. at 207 n.23.

19. Id. at 216.

20. Justice Marshall wrote for the majority; in addition, three other Justices wrote opinions.

Justice Powell joined the majority opinion, but reserved judgment on whether jurisdiction based on the presence of certain types of property, especially real property, should be subjected to the minimum contacts test. Id. at 217 (Powell, J., concurring).

Justice Stevens also concurred in the judgment, but grounded his reasoning on the due process requirement of fair warning that an activity (in this case, the purchase of stock in a Delaware corporation) may subject a person to the jurisdiction of a foreign state. Justice Stevens agreed with Justice Powell in reserving judgment on the question of jurisdiction based on the presence of real property. Id. at 217-19 (Stevens, J., concurring).

Justice Brennan agreed that the proper standard to apply was the minimum contacts standard, but he disagreed with the Court's application of the standard. He argued that the Court should not have applied the minimum contacts test to the facts of the case at all because no adequate factual record existed and the lower court had not applied the test. Id. at 219-22 (Brennan, J., concurring and dissenting). "In my view, a purer example of an advisory opinion is not to be found." Id. at 220. Nonetheless, because the majority had decided the question, he also applied the minimum contacts test to the facts of the case. In contrast to the majority, he found sufficient contact to sustain this particular assertion of jurisdiction. Id. at 222-28. Justice Brennan's application of the minimum contacts test considered the state interest in the outcome of the suit. He found that Delaware has an interest both in providing restitution for an injured local corporation and in regulating its affairs.

Justice Brennan also argued that Delaware should be able to take jurisdiction over the defendants because choice-of-law principles would probably result in the application of Delaware internal law, whatever the forum. Finally, he found that the defendants' voluntary association with Delaware as officers and directors of a Delaware corporation invoked the benefits and protection of Delaware law and thus supported jurisdiction. He identified the type of contact that has resulted in successful assertion of jurisdiction in the past. See, e.g., Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (Illinois' interest in providing restitution for an injured local tort victim supported jurisdiction). His argument is thus quite persuasive. The weaknesses in the argument arise from Delaware's unique position in the corporate world. Many businesses, including Greyhound, are incorporated in
II. THE CHANGE IN METHODOLOGY

A. Formal Versus Nonformal Decisionmaking

The characteristic that distinguishes a formal from a nonformal decision is the amount of relevant information a decisionmaker takes into account in reaching the decision. Information is relevant if, weighing it in light of all the policies and purposes to be furthered in making the decision, it tends to support a particular result. A formal decision uses only a part of the relevant information. For a number of reasons, a formal decisionmaker has chosen not to use some information that would be considered relevant in determining what the proper outcome should be. On the other hand, a nonformal decisionmaker uses all relevant information, weighing it in light of the policies and purposes at work in the area of law under consideration, to reach a proper result.

Prior to Shaffer v. Heitner, whether a court could properly invoke in rem or quasi in rem jurisdiction was decided by a formal rule. If the decisionmaker determined that the property was located in the Delaware because of favorable local law even though their primary corporate activities occur elsewhere. See, e.g., H. Henn, CORPORATIONS § 93 (2d ed. 1970). Thus, some of Justice Brennan's suggested contacts do not seem very strong. For example, Delaware's interest in providing restitution is diminished because the effects in Delaware of injury to Greyhound are largely theoretical.

Justice Brennan's analysis would be more likely to prevail if the business were incorporated in a state where major corporate activities occurred. However, in such cases, that analysis would often be unnecessary because frequently the corporate managers and, less frequently, the corporate directors would be present or domiciled there.


22. Note the similarity to the definition of relevancy in the law of evidence. See, e.g., C. McCormick, EVIDENCE § 185 (2d ed. 1972). For a discussion of the policies at work in the field of jurisdiction, see Part II–B infra.

23. See Powers, supra note 21, at 29–30; notes 50 & 66 and accompanying text infra. This does not make formal decisions inherently inferior to nonformal decisions.

A rulemaker might consider all relevant facts and policies when determining the content of a formal rule so that it mandates results that approximate the results of nonformal decisions. A rule is formal because once it is adopted, it alone, rather than the policies which generated it, becomes the source of decision.

Powers, supra note 21, at 28.

24. "A formal decision uses less than all available relevant information by following a rule which screens from the decisionmaker's consideration all information not specifically invoked by the rule... In contrast, a nonformal decisionmaker reaches a 'proper' result without first screening any information from consideration." Id.
state and owned by the defendant, the court could properly take jurisdiction. Other facts, such as where the cause of action arose, were ignored. Even facts that would be very persuasive in favoring or opposing jurisdiction in the particular case were not used in the decisionmaking process.

The new process is much less formal. In the future, meeting a jurisdictional objection will require inquiry into an extremely large base of facts. In addition to situs and ownership of the property, all the considerations that are part of the minimum contacts test as applied to in personam jurisdiction will be used in determining whether jurisdiction is proper. The added factors include (1) the location of the acts that gave rise to the suit, (2) the location of foreseeable consequences of the acts, (3) the parties' other (perhaps unrelated) contacts with the forum state, (4) the multistate nature of the parties;

25. Ownership and situs of property are not always easy to determine. Situs has been especially troublesome in several situations. See, e.g., Texas v. New Jersey, 379 U.S. 674 (1965). When the situs is not clear, the seemingly rigid formal rule is difficult to apply and is subject to manipulation, which can allow a court to achieve a proper result using other relevant information. In such cases, the decisionmaking process, although nominally formal, will more closely resemble a nonformal process. This type of manipulation would have occurred in Shaffer v. Heitner if the Supreme Court had covertly applied the minimum contacts test, found the contacts inadequate, and then simply stated, without revealing its minimum contacts analysis, that the stock in question was not located in Delaware.

26. "Some limitations may be imposed by the Constitution upon the power of a State of the United States to exercise judicial jurisdiction against chattels within its territory that are in transit in interstate or foreign commerce." Restatement (Second) of Conflict of Laws § 56, Comment a (1971). Courts usually decline jurisdiction if fraud or coercion is used to bring the property within the territory of the court. Id. § 60, Comment d.

27. E.g., Hanson v. Denckla, 357 U.S. 235, 251 (1958) ("The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State."); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) ("[t]he contract was delivered in California, the premiums were mailed from there").

28. E.g., Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761, 766 (1961) (in a tort action involving a product manufactured in Ohio, incorporated into a water heater in Pennsylvania, and sold to an Illinois consumer, the court noted that the product was "presumably sold in contemplation of use here").

29. E.g., Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447 (1952) (Ohio had jurisdiction over a foreign corporation even though "the cause of action arose from activities entirely distinct from [the corporation's] activities in Ohio"); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969) (sales to unrelated third party).

30. McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (defendant insurance company did business in at least two states; plaintiff was a resident of California with no apparent multistate activity); Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871, 875 (1959) (court compared the position of a mail-order sales business that accepts orders from all over the country with the position of an individual customer who presumably would engage in no similar multistate activities).
(5) the initiator of the transaction leading to the suit,\(^{31}\) (6) the inconvenience of litigating in a remote forum,\(^{32}\) (7) the forum state's interest in the suit\(^{33}\) and the nature of the interest,\(^{34}\) (8) the benefits received from the contacts with the forum state,\(^{35}\) (9) the availability of an alternative forum,\(^{36}\) and (10) the possibility of multiple conflicting suits.\(^{37}\)

The new process is not, however, completely nonformal. Some facts that in the past have not been used under the minimum contacts test presumably will still be excluded. For example, the distance from the defendant's residence to the forum will not be considered, yet an argument could easily be made that it should be part of the minimum contacts analysis. An out-of-state defendant living close to the forum will generally find it less burdensome to litigate there than a defen-

\(^{31}\) E.g., Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871, 874 (1959) ("[i]t is important to bear in mind that it was not the defendant Utah resident who took the initiative by going into Illinois to transact business").

\(^{32}\) E.g., International Shoe Co. v. Washington, 326 U.S. at 317 ("An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection.").

\(^{33}\) E.g., McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 62, 80 Cal. Rptr. 113, 118 (1969) ("[the forum state] also has an interest, from the standpoint of the orderly administration of the laws, in assuming jurisdiction in cases . . . where prevailing choice of law principles dictate the application of local law"). The latter state interest has been the subject of debate. Compare, e.g., Shaffer, 433 U.S. at 215 with id. at 224-26 (Brennan, J., concurring and dissenting).

\(^{34}\) E.g., Hanson v. Denckla, 357 U.S. 235, 252 (1958). The Court considered California's interest in the earlier case of McGee v. International Life Ins. Co., 355 U.S. 220 (1957), noting that the insurers in that case "engaged in an activity that [California] treats as exceptional and subjects to special regulation." That interest was contrasted to the presumably lesser interest that Florida had in the case under consideration. "The first relationship Florida had to the agreement was years later . . . ." Hanson, 357 U.S. at 252.

\(^{35}\) E.g., International Shoe Co. v. Washington, 326 U.S. at 319 ("To the extent that a corporation exercises the privileges of conducting activities within a state, it enjoys the benefits and protection of the laws of that state.").

\(^{36}\) It seems likely that the Court, in Hanson v. Denckla, 357 U.S. 235 (1958) (Florida judgment reversed for lack of jurisdiction; Delaware judgment in a case involving the same facts affirmed), was influenced by the ready availability of Delaware as an alternate forum. Id. at 259 n.3 (Black, J., dissenting). The only obvious alternate forum in Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), was the Philippines. This may have influenced the Court to vacate the Ohio judgment which struck down that state's jurisdiction.

\(^{37}\) E.g., Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960, 966 (1957) ("evil of exposing the obligor to actions to enforce the same obligation in two jurisdictions with the attendant risk of double liability"). Similarly, if multiple defendants are involved, each could avoid liability by pointing to the other if separate actions in different states are required.
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dant residing a great distance from the forum.\textsuperscript{38} Another example could be posed in terms of a hypothetical lawsuit involving an out-of-state defendant whose sister is a lawyer living next door to the forum courthouse. The existence of the sister might substantially reduce the inconvenience of defending an action in the remote forum, but most would agree that this fact should be excluded from the determination of jurisdiction. Perhaps the discomfort that most would feel in using such a personal fact to arrive at a legal decision reveals the underlying formal nature of law. Almost by definition, a rule of law must be somewhat general in application and therefore somewhat formal.

B. A “Correct” Result

As the term is used in this note, a “correct” result in a particular decision is the result the decisionmaker would reach by considering all relevant information.\textsuperscript{39} However, relevance has been defined by reference to the policies and purposes at work in the area of law under consideration.\textsuperscript{40} Thus, in order to determine what constitutes a “correct” result in a jurisdictional dispute, it is necessary to analyze the policies which are to be furthered by the concept of jurisdiction.

Fundamental fairness is the purpose articulated by modern courts in applying jurisdictional concepts to out-of-state defendants.\textsuperscript{41} It is a policy of recent origin\textsuperscript{42}—older cases dealt with jurisdiction in a more

\textsuperscript{38} Federal courts may join certain parties living within 100 miles of the court without regard to intervening state boundary lines. Fed. R. Civ. P. 4(f). "In light of present-day facilities for communication and travel, the territorial range of the service allowed . . . can hardly work hardship on the parties summoned." Fed. R. Civ. P. 4(f), Advisory Committee Notes on 1963 Amendments.

\textsuperscript{39} Note that the “correct” result is the result which is obtained by applying a totally nonformal decisionmaking process.

\textsuperscript{40} See text accompanying note 22 supra. Disagreement over policy, which can be viewed as disagreement as to what information is relevant, will produce disagreement over what constitutes a “correct” result.

\textsuperscript{41} E.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945) ("traditional notions of fair play and substantial justice"). Fairness to the defendant is not a well-focused purpose or policy. Presumably one purpose of all legal concepts is fairness to the parties. A definition of fairness in jurisdictional disputes, however, would simply amount to a recitation of the numerous factors taken into account in the minimum contacts test, and thus would not be useful. See notes 27–37 and accompanying text supra. The Restatement considers whether taking jurisdiction would be “reasonable,” Restatement (Second) of Conflict of Laws § 24 (1971), but “reasonableness” resembles “fairness” in its lack of focus.

\textsuperscript{42} Fairness was firmly fixed in jurisdictional doctrine in International Shoe Co. v. Washington, 326 U.S. 310 (1945).
mechanistic manner. Earlier courts emphasized that the states are sovereign entities that could rightfully exercise control through their courts over people and property within their boundaries. An attempt to control people and property in another state, however, was considered an infringement of that state's sovereignty.

This view of jurisdiction retains some validity today, especially with respect to presence and domicile as jurisdictional bases, even after the decision in *Shaffer v. Heitner*. The *Shaffer* Court did not hold that jurisdiction based on the presence or domicile of the defendant must be subjected to the minimum contacts test. The Court

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44. States were analogized to nations. A nation can control people and property within its borders because the nation has the physical power to do so. For example, a defendant can be physically seized, arrested, and put in jail. But repeated attempts by one nation to control people and property in another nation would generally lead to hostility between nations.
45. In a case decided recently, the Supreme Court relied in part on concepts of sovereignty in striking down a state court order restraining pretrial publicity. "The territorial jurisdiction of the issuing court is limited by concepts of sovereignty . . . ." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 565 (1976) (citing Pennoyer v. Neff, 95 U.S. 714 (1878)).
46. In defining when a state may properly take jurisdiction, the Restatement often reflects the fundamental fairness policy by requiring reasonableness. *Restatement (Second) of Conflict of Laws* §§ 27-52, 59-68 (1971). But the Restatement does not require reasonableness when the jurisdictional basis is presence, id. § 28, or domicile, id. § 29.

With respect to presence, the *Restatement* notes that "[i]t can also be contended that the rule [that physical presence is a basis for jurisdiction] is inconsistent with the basic principle of reasonableness which underlies the field of jurisdiction." *Id.* § 28, Comment a. The *Restatement* does not explain why presence should not be subject to a requirement of reasonableness. Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (defendant flying over the state in an airplane considered "present" in the state for jurisdictional purposes) is an example of a valid exercise of jurisdiction based on presence that would not have passed a reasonableness test.

With respect to domicile, the *Restatement* simply states that "[a] person's domicil in a state is a fair and reasonable basis upon which to ground his amenability to suit there." *Restatement (Second) of Conflict of Laws* § 29, Comment a (1971). But cases can be imagined in which this would not be true. Assume, for example, that New York was a person's domicile of origin. Assume further that the person had spent the last 20 years traveling up and down the west coast (never staying long in one place) and was therefore prevented from acquiring a domicile of choice. New York would be the person's domicile in such a case and it would probably be unfair for a New York court to base jurisdiction on the person's domicile. (The hypothetical case, although somewhat far fetched, is not much more so than the actual facts of *Grace v. MacArthur*).
47. The Court's statement that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny," 433 U.S. at 212 (footnote omitted), would support an argument to the contrary, but such an argument would be unsound. The various bases of jurisdiction are certainly well-known to the Court. Although one section of the majority opinion is devoted to the historical development of jurisdiction in general, 433 U.S. at 196-206, the facts of the case involved only jurisdiction based on the presence of property. More impor-
held only that the minimum contacts test must be used when a plain-
tiff seeks to base jurisdiction on the presence of property.

Thus a “correct” result in a dispute over jurisdiction is a result
which is consistent with considerations of both fairness and sover-
eignty. This understanding will aid in evaluating whether or not the
change in methodology in *Shaffer v. Heitner* is an improvement over
previous methodology.

C. The Detriments of the Formal Rule

There are two ways in which application of a formal rule can lead
to “incorrect” results. First, a formal rule can, in an individual case,
yield a result which is inconsistent with the policies that were origi-
nally at work when the formal rule was developed. This can happen
because the formal rule excludes relevant information.

An example of this problem would occur in the present context if
the rules of property-based jurisdiction gave a result inconsistent with
the notions of sovereignty that gave rise to the rules. Although the
Court did not analyze *Shaffer v. Heitner* in these terms, it could be
argued that a decision to sustain Delaware’s jurisdiction would have
violated sovereignty considerations. To uphold Delaware’s assertion
that it can take jurisdiction over any case in which the defendant owns
stock in a Delaware corporation would give the courts of that state an
enormous reach not enjoyed by other state courts.

48. The problem of “incorrect” results noted in the text of this section is the
major detriment that arises from the application of formal rules, but other detriments
exist. For example, “the mechanical application of formal rules can be perceived as
an undignified, subservient task.” Powers, *supra* note 21, at 32.

49. This has been termed the “mapping problem.” *Id.* at 30. “[R]ules do not
always translate (map) perfectly the policies which generated them into results in
individual cases.” *Id.* at 31.

50. “By its very nature, a formal rule excludes relevant information from the
decisionmaking process, raising the possibility that the rule will produce a result in
an individual case contrary to that supported by the policies which underlie the rule.”
*Id.*

51. One way to eliminate mapping problems is to discard the formal decision-
making process and adopt a nonformal process. Nevertheless, the “incorrect” result
reached by the lower courts in *Shaffer v. Heitner* could have been corrected by re-
taining the formal property-based rules of jurisdiction but invalidating the statutory
The second way in which formal rules can lead to "incorrect" results occurs when the values of the society change over time. Rules based on the policies of an earlier time may not reflect the policies considered important today. A decision that was "correct" by yesterday's standards may seem "incorrect" by today's standards. The formal rules of in rem and quasi in rem jurisdiction were clearly subject to this problem. The present policy of fairness to defendants was not recognized as a primary consideration when the rules of property-based jurisdiction were being developed. The Shaffer Court concluded that, by today's standards, application of the formal rules of quasi in rem jurisdiction would yield an "incorrect" result. The consequences of this "incorrect" conclusion prompted the Court to change to the nonformal minimum contacts test.

The severity of the problem caused by the recognition of a new societal value, namely, fairness to the defendant, is amplified by other changes in society which have occurred since the time of Pennoyer v. Neff. Courts did not have to scrutinize fairness to the defendant too closely at the time of Pennoyer because the number of cases in which application of the formal rules of in rem and quasi in rem jurisdiction yielded an unfair result was relatively small. However, increasing mobility and an increase in the amount and variety of movable property make the potential for unfair results under the formal rules much greater today than it was 75 or 100 years ago.

D. The Benefits of the Formal Rule

One advantage of formal rules is that they are more likely to be...
predictable than their nonformal counterparts.\textsuperscript{59} In the field of jurisdiction, predictability is very important to both plaintiffs and defendants. A plaintiff generally does not come into court to litigate jurisdictional matters; her goal is to resolve the underlying claim. The delay caused by a jurisdictional challenge can work a substantial hardship on a plaintiff with a valid cause of action. In addition, if the jurisdictional decisionmaking process is not predictable, a plaintiff may be caught in the following unpleasant predicament. A plaintiff prosecutes an action to final judgment only to find out later that the court did not have jurisdiction over the defendant.\textsuperscript{60} The judgment is useless and, in addition to the time and money wasted by the plaintiff and the court, the plaintiff's cause of action may be lost forever by reason of the statute of limitations.\textsuperscript{61} Only plaintiffs who can predict the outcome of a jurisdictional challenge can select an initial forum with confidence.

Predictability is important to defendants, too. If a defendant does not know whether a remote forum can properly obtain jurisdiction over him, prudence dictates that he litigate the question in the remote forum.\textsuperscript{62} Even if the defendant prevails and the court does not take jurisdiction, his victory will be costly. Indeed the very evil that the concept of jurisdiction was designed to prevent—litigation in an unfairly remote forum—will have occurred. It is the unpredictable na-

\textsuperscript{59} Predictability is important to allow planning of conduct prior to litigation (perhaps to avoid the litigation) and to enable parties to plan during litigation. \textit{Id.} at 29.

\textsuperscript{60} This situation can arise because judgments are subject to attack if the court granting the judgment lacked jurisdiction. \textit{Restatement (Second) of Conflict of Laws} § 104 (1971). The concept of res judicata prevents successful attack if the jurisdictional question has been previously adjudicated either in the original court or in some other court. Baldwin \textit{v. Iowa State Traveling Men's Ass'n}, 283 U.S. 522 (1931). By appearing in the original court to contest the merits of the cause of action, the defendant, in effect, waives jurisdictional (as the term is used in this note—see note 3 \textit{supra}) objections. \textit{Restatement (Second) of Conflict of Laws} § 33 (1971).

\textsuperscript{61} Practically speaking, a statute of limitations can be a factor in several situations: If the action is commenced shortly before the statute runs, if the statute of limitations in the original state is longer than the statutes in other states, or if the plaintiff delays in attempting to enforce the original judgment. The clogged court system might often impose delays that could make the statute of limitations an important factor, especially if an appeal is involved in deciding the collateral attack on jurisdiction.

\textsuperscript{62} If the defendant stays home and does not litigate the jurisdictional question, the court may enter a default judgment against him on the merits of plaintiff's cause of action. That judgment can be attacked by arguing that the court rendering the judgment was without jurisdiction. But if the attack fails (i.e., it is determined that jurisdiction was proper), the defendant has lost any defense he might have had on the merits of the claim. R. \textit{Weintraub, Commentary on the Conflict of Laws} 69–70 (1971).
ture of the decisionmaking process that makes this unjust result possible. Only defendants who can predict with some certainty that a remote forum's jurisdiction will not be upheld can safely ignore a summons from that forum.63

The formal property-based rules generally lead to quite predictable jurisdictional decisions, but this is not always true. Intangible property creates problems in applying the rules. Disputes over what constitutes attachable property64 and where certain property is located65 decrease the predictability of the rules.

Another benefit of formal rules is that they can simplify the task of the court and the parties. Trial or appeal is generally easier under a formal rule than under a nonformal counterpart because the formal rule operates on fewer facts.66 Ownership and situs are the only facts used in the formal property-based rules, whereas the minimum contacts test takes many factors into account.

E. Formal Property-Based Rules Versus the Nonformal Minimum Contacts Test

What is at stake in a jurisdictional conflict is quite fundamental. By definition, an “incorrect” decision results in unfairness to the defendant, violations of sovereignty considerations, or both. An “incorrect” decision may force a person to defend a suit that she would not otherwise have to defend.67 More often, however, an “incorrect” decision

63. Even a predictable rule would require some defendants to travel to other states (those who can predict that the other state may properly assert jurisdiction), but a frequently unpredictable process based on identical policies would require even more defendants to travel (those described above plus those who are unable to predict).

64. The conclusion of New York courts that an insurer's obligation to defend the insured is a debt subject to attachment, Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), was certainly somewhat unexpected and has been subject to criticism. E.g., R. Weintraub, supra note 62, at 147.

65. See note 25 supra.

66. “[Formal rules] are easier to apply because the limited scope of information is more manageable.” Powers, supra note 21, at 29. One commentator has traced the burden placed on the courts when complex decisionmaking processes replace simpler rules. J.P. Frank, American Law: The Case for Radical Reform 85-110 (1969).

67. An example of such a situation would occur if the state that improperly took jurisdiction (State A) is the only state that recognizes the cause of action in question. A more pragmatic example would occur if the plaintiff would not sue in any state other than State A for reasons of cost, convenience, or unfavorable substantive or procedural law. (Note that plaintiff's cost or inconvenience does not justify jurisdiction in State A. Assuming that State A's decision to take jurisdiction is “incorrect”
only places the suit in the wrong forum, one in which litigation unfairly burdens the defendant.  

A court properly applying the minimum contacts test will come to fewer "incorrect" results than a court applying the property-based rules in jurisdictional disputes because the minimum contacts test takes nearly all relevant facts into account. In addition, as has been noted, the nature of modern society makes it likely that formal rules will yield "incorrect" results. This consideration weighs quite heavily in favor of using the nonformal process.

On the other hand, under the minimum contacts test it will sometimes be very difficult to predict the outcome of a jurisdictional challenge. In addition, applying the test can be a complex task. The type of facts involved makes the property-based rules simpler and more predictable than the minimum contacts analysis. Ownership and, with some exceptions, situs of property are "hard" facts, relatively easy to prove. But proving a state's interest or foreseeability can be much more difficult. Such facts are "soft" facts, in themselves the source of much disagreement. Two other aspects of the minimum contacts test contribute to its lack of predictability and simplicity: the large number of facts that are considered and the ever-present possibility that a court will discover that a new type of fact is important.

means that, even with those factors taken into account, it would be unfair to subject the defendant to the jurisdiction of State A.  

The defendants in Shaffer v. Heitner may well have to defend against the same claim in another state. The possible states that may be able to assert jurisdiction over the defendants include Oregon (the location of the alleged misconduct), Arizona (the location of Greyhound's corporate headquarters), and the states where the defendants are domiciled or present. If the plaintiff persists, the defendants' victory in Shaffer may be only temporary. But the next suit might be brought in a forum more convenient to the defendants or the plaintiff might run short of attorney's fees.

From the defendants' point of view, there are other ill effects (beyond inconvenience and cost) that could be caused by an "incorrect" decision. The procedural or substantive law applied by the wrong forum could be less favorable than the law in the right forum.

But see text accompanying note 38 supra.

See notes 56–57 and accompanying text supra.

The difference of opinion among the Justices in the application of the minimum contacts test to the facts of Shaffer v. Heitner is a good example. See note 20 supra.


See, e.g., cases cited at notes 33–34 supra (state interest) and noté 28 supra (foreseeability).

Decisions based on "soft" facts are also more subject to manipulation by the decisionmaker. See note 25 supra.

See text accompanying notes 27–37 supra.

The International Life Insurance Company was probably surprised to find the Supreme Court relying, in part, on California's interest in providing a forum for
The balance between the formal and nonformal processes seems to be much closer than the Court indicated in its brief analysis of the question; nonetheless, the Court's result seems correct. On balance, the simplicity and predictability offered by formal rules do not outweigh the fewer "incorrect" results offered by the nonformal process. Elimination of formal rules of property-based jurisdiction leaves other bases of jurisdiction—physical presence and domicile, for example—still subject to formal rules. Thus a plaintiff with a case that might be unpredictable under the minimum contacts test can eliminate that unpredictability by suing in a state where the defendant is present or domiciled.

In addition, courts and parties have presumably acquired some skill in applying and predicting the results of the minimum contacts test by using it over the past thirty years to determine in personam jurisdiction over out-of-state defendants. Furthermore, society has been coping with the detriments of the nonformal test in that portion of the field of jurisdiction for a long period of time. To the extent that in personam jurisdiction over out-of-state defendants has gained importance in recent years, a decision to retain the formal rules of in rem and quasi in rem jurisdiction would not produce all the benefits formal rules offer.

its insured in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). Now insurers know that this state interest is part of the minimum contacts calculus, but they may wonder what the next surprise will be.

77. The Court stated, "It might also be suggested that allowing in rem [and quasi in rem] jurisdiction avoids the uncertainty inherent in the International Shoe standard.... We believe, however, that the fairness standard of International Shoe can be easily applied in the vast majority of cases. Moreover, when the existence of jurisdiction in a particular forum under International Shoe is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of "fair play and substantial justice." That cost is too high."

433 U.S. at 211 (footnote omitted).

78. See note 47 and accompanying text supra; notes 83–84 infra.

79. There is, however, no analogous mitigation of the defendant's predictability problem under the minimum contacts test.

80. The Court did not consider alternatives to the minimum contacts test. Perhaps a change in the formal rules could have avoided some of the "incorrect" results while at the same time retaining the advantages of formality. For example, the Court could have changed the rules so that property given an artificial situs could not be used as a basis for jurisdiction. See note 4 supra. The Court could have eliminated only quasi in rem jurisdiction in which the property is unrelated to the cause of action, leaving the rest of the property-based rules intact. Note, however, that frequent change in a formal rule reduces its predictability. Although in many situations other mechanisms can operate to reduce the occurrence of "incorrect" results within the context of the formal rules (e.g., the forum non conveniens doctrine and the transfer provisions of
III. THE FUTURE OF PRESENCE AND DOMICILE AS JURISDICTIONAL BASES

Many will see in Shaffer v. Heitner an indication that the nonformal minimum contacts test will soon be applied to other formal jurisdictional bases.\(^8\) Two of the most frequently used jurisdictional bases—defendant's physical presence and defendant's domicile—currently make use of formal rules. If these rules are supplanted by a minimum contacts analysis, virtually all the remaining benefits of formal rules will be lost in the field of jurisdiction and little will be gained by way of compensation.\(^8\) In this Part, presence and domicile are analyzed simultaneously because, for methodological purposes, they exhibit some similarities. It must be noted that each type of jurisdictional basis should (and presumably will) be analyzed separately in future court opinions.

Currently, the defendant's presence or domicile in a state automatically gives that state jurisdiction over the defendant.\(^8\) The decision-making process in these cases clearly makes use of formal rules.\(^8\)

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\(^8\) U.S.C. § 1404(a) (1970)), such mechanisms are ineffective without the cooperation of the court.

\(^8\) The mere presence of the defendant . . . is probably insufficient to support jurisdiction over claims unrelated to his activities within the forum . . . ." The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 160 (1977). The quoted statement should be interpreted as a prediction of a future holding rather than a description of the holding of Shaffer v. Heitner because, by itself, Shaffer should not be read to impose the minimum contacts test on jurisdiction based on presence or domicile. See notes 46–47 and accompanying text supra.

\(^8\) One could envision a minimum contacts test in which presence and domicile are simply added to the already long list of factors that go into the decisionmaking process. See notes 27–37 and accompanying text supra. In such a test, presence or domicile would be just another contact, although probably an important contact.

\(^8\) Restatement (Second) of Conflict of Laws §§ 28–29 (1971).

\(^8\) In a case involving physical presence, the factual inquiry is extremely limited and simple. If a person is within the boundaries of the state, the state may properly take jurisdiction over her. Id. § 28 (1971). Courts generally decline jurisdiction if fraud or coercion is used to obtain presence within the territory of the court or if the defendant claims an immunity or privilege recognized by the court. Id. §§ 82–83.

Domicile as a basis for jurisdiction is slightly more complex because it may depend on the person's state of mind. Id. § 18. However, domicile is defined using a very high level of formality. Id. §§ 11–23. Thus, in most cases it is easy to determine a person's domicile. But compare In re Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601 (1934), aff'd sub nom. Dorrance v. Martin, 116 N.J.L. 362, 184 A. 743 (per curiam), cert. denied, 298 U.S. 678 (1936), with In re Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932).

Note that courts could have made the determination of a person's domicile a more nonformal process. For example, domicile could have been defined as the place (any place?) where a person has certain minimum contacts that make it fair to consider the person domiciled there. Such a definition of domicile would turn domicile as a
Because the presence and domicile rules are formal, they exhibit some of the same detriments that formal rules of property-based jurisdiction exhibited. In particular, although the rules decide most cases in accordance with the policy of fairness, they decide some cases "incorrectly." However, they probably decide fewer cases "incorrectly" than did the formal property-based rules. It is possible but quite difficult to imagine a case in which it would be unfair to sue a defendant in the state of his domicile. It is easier to imagine a case in which it would be unfair to base jurisdiction on defendant's presence, but it is not at all clear that more than a very few such cases occur in practice.

Similarly, the previously discussed benefits associated with formal rules also apply to the presence and domicile rules. But again, the benefits of these rules are greater than the benefits observed in the formal rules of property-based jurisdiction. The presence and domicile rules approach the ideal for simplicity and predictability. It is very important for plaintiffs to have the opportunity to choose a jurisdictional basis that is predictable. Retaining the presence and domicile rules in their present formal state always will allow plaintiffs to pick a forum in which there is no possibility of successful jurisdictional challenge.

It seems clear that the presence and domicile rules, unlike the property-based rules, are superior to their nonformal counterparts. Thus, a court that is asked to apply the minimum contacts test to a jurisdictional dispute in which the plaintiff seeks to base jurisdiction on presence or domicile would do well to decline the invitation in favor of retaining the formal rules.

jurisdictional basis into a nonformal decisionmaking process even though domicile would still automatically trigger proper jurisdiction in the domiciliary state.

85. See Part II-C supra.
86. Id.
87. See note 46 supra.
89. See note 59 and accompanying text supra.
90. "This basis of jurisdiction [domicile] assures the existence of a place in which a person is continuously amenable to suit." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 29, Comment a (1971).
91. Opposition to the use of a nonformal decisionmaking process in a particular context must not be confused with opposition to the policies and purposes that the nonformal process seeks to further. A formal rule can often be designed to further those policies and purposes. See note 23 supra. In the present context, all would agree with the policy of fairness to defendants, but it is believed that the occasional results

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IV. CONCLUSION

The rules of property-based jurisdiction (as they existed before *Shaffer v. Heitner*) and the rules that physical presence and domicile are valid jurisdictional bases are formal rules, quite closely related in the sense that they all are used to resolve the same general issue. Nonetheless, it should come as no great surprise that a methodological analysis demonstrates that the property-based rules should be discarded whereas the presence and domicile rules should be retained. It is not possible to state, in the abstract, that nonformality is inherently better or worse than formality in making decisions. Each has advantages and disadvantages. Instead, one must consider the case of a particular type of decision that is to be made, find out what is at stake, examine the various facts that could be used in making the decision, determine the policies presently at work in the area, and weigh the benefits of each proposed level of formality against the detriments. If the Court employs this mode of analysis when next confronted with the possibility of extending the minimum contacts test, it will be more likely to choose the level of formality appropriate for making the decision before it.

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that do not further that policy are outweighed by the benefits of the formal methodology.

92. The foregoing analysis of jurisdictional rules has considered two levels of formality—the very formal rules and the very nonformal minimum contacts test. Other levels of formality could be imagined. For example, one could modify the presence rule to exempt persons who are flying over the state. The resulting rule would still be quite formal, but it would be less formal than the current rule because it would take one more fact into account.

93. It is, of course, essential to balance all the benefits and detriments of formality against those of nonformality. It is especially tempting to compare all the benefits of nonformality with only some of the benefits (and all the detriments) of formality. In the present context, it has been argued that “efficient civil process may not be bought at the expense of unfairness to particular parties.” *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 160 (1977). This argument has a certain appeal, but it fails to take into account the major benefit of formal jurisdictional rules—their predictability. Although the formal rules may result in some unfairness, the use of a nonformal decisionmaking process will also result in unfairness due to the unpredictability of the process. The best that can be done is to strike a balance between formality and nonformality, taking into account all the benefits and detriments of each.

94. Note that the weighing process in choosing between levels of formality is itself a nonformal process.