

THE OTHER SIDE OF THE RABBIT HOLE: RECONCILING  
RECENT SUPREME COURT PERSONAL JURISDICTION  
JURISPRUDENCE WITH JURISDICTION TO TERMINATE  
PARENTAL RIGHTS

by  
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*This Essay contrasts the jurisdictional regime followed in termination of parental rights and other child custody cases with the regime that has dominated recent Supreme Court personal jurisdiction cases. Jurisdiction in child custody cases has long been based upon the connection of the child, not the defendant parent, to the jurisdiction. Recent Supreme Court cases, on the other hand, have focused nearly exclusively on the defendant's connection to the forum state. This Essay argues that the Supreme Court cases betray a failure of the Court to provide a consistent constitutional justification for the jurisdictional limitations it has imposed. The Essay suggests that the regime followed in child custody cases can be reconciled with the various justifications that the Court has offered for limiting the scope of personal jurisdiction and further suggests that the child custody jurisdictional regime provides a useful example of a constitutionally permissible jurisdictional regime based upon the interest of the forum state in resolving the dispute and the connection of the litigation to the forum state.*

“If you’re reading this tribute, chances are that you, too, are a jurisdiction junkie at some level. If you’re a Civil Procedure person like me, the attachment to jurisdiction (no pun intended) seems obvious and natural. But the same can be said for the faithful followers of Family Law, who inhabit their own world of jurisdictional madness on the other side of the rabbit hole.”<sup>1</sup>

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<sup>1</sup> Steven S. Gensler, *A Tribute to Robert Spector: “It Started With Jurisdiction,”* 63 OKLA. L. REV. v, v (2011). Professor Robert Spector is the Reporter for the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA, discussed below) for the National Conference of Commissioners on Uniform State Laws. *Id.* at vi.

In recent decades the Supreme Court has handed down dozens of opinions attempting to define the limitations imposed by the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution on the exercise of judicial jurisdiction. The Court's jurisprudence has suffered from an inability of the Justices to agree on the fundamental rationale for the limitations it has imposed.<sup>2</sup> At times, the Court has invoked federalism as a rationale, seeing the limitations on jurisdiction as a function of the limitations on the sovereign power of the states.<sup>3</sup> The Court has also sometimes suggested that its limitations are, in part, based upon concerns about international comity and rapport.<sup>4</sup> In other opinions, the Court has rejected the sovereignty rationale in favor of a focus on the fairness of forcing an unwilling litigant to defend in an inconvenient forum—in effect, offering a procedural due process rationale for its jurisdictional limitations.<sup>5</sup> In recent years, the Supreme Court has increasingly insisted that its personal jurisdiction jurisprudence is intended to protect defendants by requiring a substantial connection between the defendant and the forum state. As Justice Thomas observed for a unanimous Court in *Walden*,

[T]he relationship must arise out of contacts that the “defendant *himself*” creates with the forum State. Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties. We have consistently rejected attempts to satisfy the defendant-focused “minimum contacts” inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum state.<sup>6</sup>

The plurality in *J. McIntyre Machinery, Ltd. v. Nicaastro*<sup>7</sup> was even more explicit about the defendant-protective nature of the Court's recent jurisprudence.<sup>8</sup> In the plurality opinion in that case, Justice Kennedy opined that “[t]he Due Process Clause protects an individual's right to be deprived of life, liberty, or property only by the exercise of lawful power.”<sup>9</sup> In what might be characterized as a substantive due process rationale, the plurality opinion went on to assert that lawful power required

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<sup>2</sup> See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

<sup>3</sup> See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Hanson v. Denckla*, 357 U.S. 235, 249–50 (1958).

<sup>4</sup> See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 762–63 (2014).

<sup>5</sup> See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–74 (1985).

<sup>6</sup> *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (citations omitted). Justice Thomas is not completely correct here, he overlooks the Court's decision in *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See discussion *infra* note 46.

<sup>7</sup> 131 S. Ct. 2780 (2011).

<sup>8</sup> *Id.* at 2785. For a critical analysis of *Nicaastro*, see John T. Parry, *Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicaastro*, 16 LEWIS & CLARK L. REV. 827 (2012).

<sup>9</sup> *Nicaastro*, 131 S. Ct. at 2786.

that the defendant “submit to” a state’s authority.<sup>10</sup> In Justice Kennedy’s words, “[t]he question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct.”<sup>11</sup>

In its recent jurisprudence, the Court has made no reference to a jurisdictional doctrine that has allowed state courts all over the country to enter orders affecting defendants who have had no contact with the forum state. It is accepted practice in family law cases for state courts to enter orders concerning child custody and parental rights based upon the presence of the child in the jurisdiction, even when one of the parents affected by the order has never “submitted to the state’s authority.”<sup>12</sup> This accepted practice, which dates back many decades, is now codified in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),<sup>13</sup> which has been adopted in forty-nine states.<sup>14</sup> This well-established and successful legislation provides a model for a different and more coherent approach to structuring limitations on state court jurisdiction.

The main outlines of the Court’s personal jurisdiction jurisprudence are familiar and need be sketched only briefly. *Pennoyer v. Neff* was the first Supreme Court case to tie limitations on state court exercises of personal jurisdiction to the then-new Due Process Clause of the Fourteenth Amendment.<sup>15</sup> Interestingly, the Court did not derive the jurisdictional limitations from the text or history of the adoption of the Fourteenth Amendment. Instead, the *Pennoyer* Court found the limitations in what it described as “well-established principles of public law,” which it derived primarily from international law treatises.<sup>16</sup> Those principles, the *Pennoyer* Court held, prevented a state court from exercising direct jurisdiction over persons and property outside the state, but did permit a state to indirectly affect out-of-state persons and property through its exercise of jurisdiction over in-state persons or property.<sup>17</sup> The Court went on to observe that the newly enacted Due Process Clause provided a mechanism for litigants to directly challenge and resist the enforcement of judg-

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<sup>10</sup> *Id.* at 2787–89.

<sup>11</sup> *Id.* at 2789.

<sup>12</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

<sup>13</sup> UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, 9(1A) U.L.A. 649 (1997) [hereinafter UCCJEA].

<sup>14</sup> See The National Conference of Commissioners on Uniform State Laws, *Acts: Child Custody Jurisdiction and Enforcement Act*, UNIFORM LAW COMMISSION (2015), <http://uniformlaws.org/Act.aspx?title=Child+Custody+Jurisdiction+and+Enforcement+Act> for information concerning the adoption of the UCCJEA, including an Enactment Status Map showing forty-nine states, plus the Virgin Islands and the District of Columbia, have adopted the UCCJEA, and noting that a bill to do so has been introduced in the Massachusetts legislature this year.

<sup>15</sup> *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

<sup>16</sup> *Id.* at 722–23.

<sup>17</sup> *Id.*

ments entered in violation of the principles of public law laid out earlier in the opinion.<sup>18</sup>

The reasoning of *Pennoyer* has created problems ever since. Because it grounded the limitations it imposed on state court jurisdiction not in the text or purpose of the Due Process Clause, but rather in a distinct body of public law, the *Pennoyer* Court paved the way for the doctrinal instability that persists to this day. The Court in *Pennoyer* did not discuss at great length the rationale for the principles it identified but the rationale it did offer was clearly grounded in concerns about infringements on state sovereignty by sister states.<sup>19</sup> Those concerns are not generally understood to be the concerns underlying the Due Process Clause.<sup>20</sup>

The *Pennoyer* Court also seemed to recognize that its focus on jurisdiction based upon in-state presence or property was inadequate even then to account for the jurisdictional landscape. Accordingly, the opinion concluded with a number of caveats, suggesting, for example, that a state could condition certain in-state activities by non-residents on consent to jurisdiction.<sup>21</sup> Most significantly for our purposes, the *Pennoyer* Court specifically addressed the power of a state court to enter judgment determining the status of a non-resident at the behest of a resident plaintiff. “The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory.”<sup>22</sup>

In the years following *Pennoyer*, the Court struggled to accommodate its framework to a rapidly modernizing and expanding nation. Relying in part on legal fictions extending the concept of in-state persons and property and the concept of consent, it approved the exercise of jurisdiction in many cases involving interstate transactions and events. In *International Shoe Co. v. Washington*, the Court took the opportunity to harmonize its existing precedent, offering a new test for the scope of state courts’ *in personam* jurisdiction over out-of-state corporations.<sup>23</sup> The Court, in its famous formulation, held that

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”<sup>24</sup>

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<sup>18</sup> *Id.* at 733.

<sup>19</sup> *Id.* at 720.

<sup>20</sup> See Leonard G. Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U. L. REV. 363, 364–66 (1980).

<sup>21</sup> *Pennoyer*, 95 U.S. at 735.

<sup>22</sup> *Id.* at 734.

<sup>23</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>24</sup> *Id.*

The Court in *International Shoe* was focused on justifying the expansion of jurisdiction in the decades following *Pennoyer*. The Court therefore concentrated on its justification for permitting the exercise of jurisdiction over out-of-state defendants, and did not offer much explanation for its statement later in the opinion that “[the Due Process C]lause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.”<sup>25</sup>

Support can be found in the opinion for various theories, which were developed in the decades following *International Shoe*.<sup>26</sup> For example, support can be found in the Court’s reference to “the context of our federal system of government,”<sup>27</sup> for the proposition that the limits on jurisdiction are premised on federalism concerns.<sup>28</sup> *Hanson v. Denkla* and *World-Wide Volkswagen v. Woodson* both relied in part on this proposition in prohibiting the exercise of jurisdiction even in cases where the defendant could show no inconvenience and the forum state had a strong interest in the litigation.<sup>29</sup> Later opinions, particularly *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, reject the federalism argument.<sup>30</sup> As the Court in *Compagnie des Bauxites* observed,

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.<sup>31</sup>

Even setting aside the federalism justification, there remains debate within the Court about the justification for the limitations on jurisdiction. *International Shoe*’s reference to “fair play” and later to the “inconveniences” of litigating away from home suggests that the justification for jurisdictional limits is the same as other procedural due process limits on

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<sup>25</sup> *Id.* at 319.

<sup>26</sup> Of course, the theories are not mutually exclusive and some scholars have argued that a combination of different rationales explain the Court’s jurisprudence. See, e.g., Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on International Shoe and Its Progeny*, 28 U.C. DAVIS L. REV. 965 *passim* (1995); Parry, *supra* note 8, at 831–32.

<sup>27</sup> *Int’l Shoe*, 326 U.S. at 317.

<sup>28</sup> See generally Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983). For an argument that personal jurisdiction limitations should be conceptualized as “a manifestation of horizontal federalism,” see Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 7 (2010).

<sup>29</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

<sup>30</sup> *Ins. Corp. of Ir., v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

<sup>31</sup> *Id.* at 702 n.10.

procedures which unfairly burden litigants.<sup>32</sup> Something of this view is reflected in Justice Brennan's opinion for the Court in *Burger King Corp. v. Rudzewicz*<sup>33</sup> and in his dissent in *World-Wide Volkswagen v. Woodson* and *Rush v. Shavchuk*.<sup>34</sup> Pre-suit contacts with the forum can be understood, on this reading, as serving a notice function by allowing the defendant to plan in advance for the possibility of litigation in the forum.<sup>35</sup> The procedural due process justification also informed the Court's opinion in *Asahi Metal Industry Co. v. Superior Court*, which relied on a multi-factor test to reject California's attempt to exercise jurisdiction over a claim for indemnification by a Taiwanese corporation against a Japanese corporation.<sup>36</sup>

Another understanding of limitations the Court has imposed on the exercise of jurisdiction is grounded, not in procedural due process, but rather in substantive due process.<sup>37</sup> That argument might be traced back to *International Shoe's* reference approving the exercise of jurisdiction over defendants who had the "benefits and protection" of the forum state,<sup>38</sup> which in turn may give rise to the obligation to defend in that forum.<sup>39</sup> There are echoes of that formulation in *Walden*,<sup>40</sup> but even more emphatically in the *Nicastro* plurality, with its emphasis on the need to show that the defendant had voluntarily submitted to the power of the sovereign.<sup>41</sup>

The Court's failure to provide a full justification for its jurisdictional jurisprudence leads to disagreement among the Justices and to uncertainty for litigants and lower courts.<sup>42</sup> It also has permitted the Court to avoid the necessity of explaining how its jurisdictional decisions fit within the larger landscape of procedural and substantive due process law. If limitations on jurisdiction are a matter of procedural due process, then arguably the *Mathews v. Eldridge* test,<sup>43</sup> with its cost-benefit balancing analysis, should be taken into account in assessing the permissibility of asser-

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<sup>32</sup> *Int'l Shoe*, 326 U.S. at 316–17.

<sup>33</sup> *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 472–74 (1985).

<sup>34</sup> *World-Wide Volkswagen*, 444 U.S. at 299–300. Justice Brennan wrote a single dissent from both *World-Wide* and *Rush*.

<sup>35</sup> *World-Wide Volkswagen*, 444 U.S. at 297.

<sup>36</sup> *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113–16 (1987).

<sup>37</sup> A number of scholars have characterized the Court's limits on jurisdiction as grounded in substantive due process. For a recent example, see Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 572 (2007). For an entertaining earlier discussion, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479 (1987).

<sup>38</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

<sup>39</sup> See Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 539–40 (1991) for a discussion of this line of argument.

<sup>40</sup> *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014).

<sup>41</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. at 2787–88 (2011).

<sup>42</sup> See Erbsen, *supra* note 28, at 3.

<sup>43</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

tions of jurisdiction.<sup>44</sup> Similarly, if the limitations are a matter of substantive due process, the elaborate structure the Court has constructed, requiring different levels of justification for state intrusions into different protected interests, should be relevant.<sup>45</sup> Either way, the Court's larger due process jurisprudence suggests that the liberty interest of the defendant being protected by cases like *Walden* and *Daimler* is not absolute but is subject to defeasance under certain circumstances. Nevertheless, in most of the Court's personal jurisdiction due process cases going back to *Hanson* and including *Walden* and *Daimler*, it is hard to find any acknowledgment that the need for defendant's "own affiliation with the state" can be overcome for any reason.<sup>46</sup>

The jurisdiction regime followed by family courts around the country, in termination of parental rights cases as well as other custody cases, is completely different. The defendant's affiliation with the state is neither necessary nor sufficient for jurisdiction.<sup>47</sup> Instead, under the UCCJEA, jurisdiction in the vast majority of cases is premised on a finding that the forum state is the "home state" of the child.<sup>48</sup> If the child lacks a home state, jurisdiction will ordinarily be based upon a substantial

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<sup>44</sup> See Patrick J. Borchers, *Jones v. Flowers: An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343 (2007) for an elaboration of how the Court's personal jurisdiction cases could be harmonized with its general procedural due process jurisprudence.

<sup>45</sup> Rocky Rhodes discusses at length the various substantive due process tests that might be used to determine when a state can overcome a defendant's liberty interest. See Rhodes, *supra* note 37, passim. Stephen Goldstein argues for a retreat from the Court's "maximalist substantive due process approach" in favor of a "minimalist approach" in Goldstein, *supra* note 26, at 998.

<sup>46</sup> There are a handful of exceptions. *Mullane v. Central Hanover Bank* upheld the exercise of jurisdiction over a group of trust beneficiaries, some of whom had no connection with the forum state, holding that "the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). See also *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985) (upholding state court jurisdiction over absent plaintiff class members without minimum contacts, as long as procedural due process protections were provided). The Court has also explicitly reserved decision on whether the doctrine of jurisdiction by necessity can overcome the need for minimum contacts, at least where defendant has property in the forum. See *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977). Justice Black argued against such a requirement in his *Hanson* dissent, *Hanson v. Denckla*, 357 U.S. 235, 258–59 (1958), and in his *World-Wide/Rush* dissent, Justice Brennan urged the abolition of the defendant's "unjustified veto power over certain very appropriate fora." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 312 (1980). John Parry places Justice Ginsburg's dissent in *Nicastro* in this category. See Parry, *supra* note 8, at 849.

<sup>47</sup> UCCJEA, *supra* note 13, § 201(c) ("Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.")

<sup>48</sup> *Id.* § 201(a)(1).

connection of the child and at least one parental figure with the forum.<sup>49</sup> The UCCJEA also contains provisions permitting the action to be moved to a state that has been determined to be a more convenient forum,<sup>50</sup> and provisions for the exercise of temporary emergency jurisdiction where necessary to protect children present in the state.<sup>51</sup>

Although the UCCJEA is relatively new, having been approved by the National Conference of Commissioners on Uniform State Laws in 1997,<sup>52</sup> it has long been the case that jurisdiction over child custody matters turned on the child's connection to the forum state. The first *Restatement of Conflicts*, published in 1934, took the position that the forum in which a child was domiciled had jurisdiction to decide on custody.<sup>53</sup> It also provided that a court had jurisdiction to order removal of a child from an unfit custodian, as long as the child was present in the forum state.<sup>54</sup>

Over time, state courts began to depart from the traditional rule, reflected in the first *Restatement*, that the forum of the child's domicile had exclusive jurisdiction to determine custody.<sup>55</sup> Some states based jurisdiction on the presence of the child in the state, some on the court's *in personam* jurisdiction over the parents, and some recognized the possibility that all three bases of jurisdiction might be permissible.<sup>56</sup> In an influential decision authored by Justice Traynor, the California Supreme Court took the latter view,<sup>57</sup> and the drafters of the second *Restatement of Conflicts* eventually followed the California court's lead, permitting the exercise of jurisdiction based upon *in personam* jurisdiction over the parties to the controversy, but not requiring it when the child was either domiciled or present in the state.<sup>58</sup>

Over the course of the twentieth century, as Americans became more mobile and divorce became more common, the jurisdictional approaches used by courts and reflected in the second *Restatement of Conflicts* came under increasing criticism from family law scholars and other interested observers.<sup>59</sup> Estranged parents were taking their children across state

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<sup>49</sup> *Id.* § 201(a)(2) (subsection (a)(2) also requires that substantial evidence concerning the child be available in the forum state).

<sup>50</sup> *Id.* §§ 201(a)(3), 207.

<sup>51</sup> *Id.* § 204.

<sup>52</sup> UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (Nat'l Conf. of Comm'rs on Unif. State Laws) (Proposed Official Draft 1997), [http://www.uniformlaws.org/shared/docs/child\\_custody\\_jurisdiction/uccjea\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf).

<sup>53</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 145–46 (1934).

<sup>54</sup> *Id.* § 148.

<sup>55</sup> For a survey of cases, see *Sampsell v. Superior Court*, 197 P.2d 739, 748–50 (Cal. 1948) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 reporter's note (1971).

<sup>56</sup> *Sampsell*, 197 P.2d at 748–50.

<sup>57</sup> *Id.*

<sup>58</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

<sup>59</sup> See Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1210–16 (1969).

lines, sometimes in defiance of an existing custody decree, in the hope of receiving a more favorable ruling in a new state.<sup>60</sup> The ability of a state court to base custody jurisdiction on the in-state presence of the child, combined with the traditional understanding that a custody decree was subject to modification in the rendering court and in any other court with jurisdiction, encouraged parental defiance of custody decrees.<sup>61</sup> It also risked frequent changes of child custody, which had come to be seen as damaging to the children involved.<sup>62</sup>

In 1968, following lengthy study,<sup>63</sup> the National Conference of Commissioners on Uniform State Laws approved the Uniform Child Custody Jurisdiction Act (UCCJA).<sup>64</sup> The Act was intended to centralize most decisions related to custody in a single court that had access to relevant evidence about the child and the family and to insure that the custody court's decisions were recognized and enforced in other states.<sup>65</sup>

Like the UCCJEA, the UCCJA provided for jurisdiction in the child's home state, or in the state where the child and at least one parental figure has a substantial connection.<sup>66</sup> Unlike the UCCJEA, the earlier Act did not give priority to the home state forum.<sup>67</sup> Both Acts also contained provisions for emergency jurisdiction based on the presence of the child, although they differed in the scope of that jurisdiction and both contained an inconvenient forum provision.<sup>68</sup> The UCCJA, like the UCCJEA, provided for jurisdiction without the need for *in personam* jurisdiction over the parties.<sup>69</sup> Like the UCCJEA, the UCCJA was adopted by states across the country.<sup>70</sup>

The concerns which led to the drafting of the UCCJA also led to congressional action. In 1980, Congress adopted the Parental Kidnap-

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<sup>60</sup> *Id.* at 1215–17; see Ratner, *supra* note 20, at 384.

<sup>61</sup> See, e.g., New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947) (allowing modification of Florida custody decree by a New York court after child was removed to New York by father).

<sup>62</sup> Bodenheimer, *supra* note 59, at 1208–09.

<sup>63</sup> For a description of the process leading to the enactment of the UCCJA, see Bodenheimer, *supra* note 59, at 1216–18 and Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 847–51 (1992).

<sup>64</sup> Bodenheimer, *supra* note 59, at 1207 n.1.

<sup>65</sup> UNIF. CHILD CUSTODY JURISDICTION ACT § 1, 9(1A) U.L.A. 271 (1999).

<sup>66</sup> *Id.* § 3(a)(1)–(2).

<sup>67</sup> *Id.* § 3.

<sup>68</sup> *Id.* § 3(a)(3)–(4).

<sup>69</sup> *Id.* § 12. It should be noted that the UCCJEA provision for jurisdiction to make child custody determinations, UCCJEA § 201, is described in the comment to the section as providing for subject matter jurisdiction and that the Act provides that personal jurisdiction over a party is not necessary. UCCJEA § 201(c). This declaration, in and of itself, surely does not resolve the question of the UCCJEA's constitutionality under current Supreme Court doctrine.

<sup>70</sup> See Goldstein, *supra* note 63, at 849.

ping Prevention Act<sup>71</sup> (hereinafter PKPA), which was intended, among other things, to require courts in most circumstances, to recognize and enforce one another's custody decrees.<sup>72</sup> PKPA was intended to complement the provisions of the UCCJA, and accordingly it conditioned the requirement of recognition and enforcement on the custody decree having come from a court that had jurisdiction based upon the home state of the child, or failing that, the other jurisdictional provisions recognized in the UCCJA.<sup>73</sup>

Although PKPA was intended to complement the UCCJA, there were some differences between the two schemes.<sup>74</sup> Experience had also revealed some problems with interpretation and implementation of the UCCJA.<sup>75</sup> A desire to correct the problems led to the adoption of the UCCJEA.<sup>76</sup>

Regardless of the changes which have occurred over the past several decades, one theme has remained constant: Congress, state legislatures, most state courts, and many scholars believe that courts can render custody decrees, including decrees terminating parental rights, based upon the connection of the child, not the defendant parent, with the forum state. Various explanations have been offered to justify this conclusion.

One argument sometimes advanced was that the presence of the defendant's child in the forum state was itself a contact within the meaning of *International Shoe*, which would justify jurisdiction over the defendant in disputes involving the relationship between the child and the defendant parent.<sup>77</sup> In *Kulko v. Superior Court*, the Supreme Court rejected that argument.<sup>78</sup> It held that California could not constitutionally exercise jurisdiction over an out-of-state father in a child support action.<sup>79</sup> The Court held that any benefits the child received from California were not attributable to her father, and that simply agreeing to the child's resi-

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<sup>71</sup> Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611 §§ 6-10, 94 Stat. 3568 (1980) (codified in scattered sections of 28 and 42 U.S.C.).

<sup>72</sup> See *id.* § 8(a), 94 Stat. 3569-71 (codified at 28 U.S.C. § 1738A).

<sup>73</sup> 28 U.S.C. § 1738A(c) (2012).

<sup>74</sup> Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 FAM. L.Q. 267, 269-73 (1998).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 301-02 (1999).

<sup>77</sup> See, e.g., Ann Bradford Stevens, *Is Failure to Support a Minor Child in the State Sufficient Contact with that State to Justify In Personam Jurisdiction?*, 17 S. ILL. U. L.J. 491 (1993).

<sup>78</sup> *Kulko v. Superior Court*, 436 U.S. 84, 93-94 (1978).

<sup>79</sup> *Id.* As a result of *Kulko* and the UCCJEA provisions, there are times when a parent seeking child custody and child support will have to bring suit in two different jurisdictions. In *Kulko* itself the plaintiff had sought both custody and support. The defendant did not contest the California court's jurisdiction to determine custody. *Kulko*, 436 U.S. at 88.

dence in California was not sufficient to establish minimum contacts.<sup>80</sup> It seems quite clear after *Kulko* that the jurisdiction courts exercise in custody and termination cases must be justified on some theory other than the traditional minimum contacts approach first formulated in *International Shoe* and most recently employed by the Court in *Walden*.<sup>81</sup>

It is often contended that custody decisions are status determinations.<sup>82</sup> Support can be found in Supreme Court case law for this proposition. *Pennoyer* itself, as mentioned above, alluded in dicta to a state's power to determine the status of its citizens, giving as an example actions for divorce.<sup>83</sup> In *Williams v. North Carolina*,<sup>84</sup> the Court, relying on the status exception, held that Nevada had jurisdiction to enter a divorce on behalf of a Nevada domiciliary, in the absence of any connection between the defendant and the forum.<sup>85</sup>

Three years later, the Court decided *International Shoe*, ushering in the modern era of personal jurisdiction jurisprudence. Since that time, it has not directly addressed the status exception. In *Shaffer v. Heitner*, the Court, in the course of rejecting the proposition that the presence of a defendant's property in the state was sufficient to permit jurisdiction, opined that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."<sup>86</sup> Taken at face value, this claim would suggest that the status exception was no longer constitutionally viable. However, with little explanation, the *Shaffer* Court stated in a footnote that "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness."<sup>87</sup>

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<sup>80</sup> *Id.* at 94–95.

<sup>81</sup> *But see* Div. of Youth & Family Servs. v. M.Y.J.P., 823 A.2d 817, 837 (N.J. Super. Ct. App. Div. 2003) (finding absent parent had minimum contacts when she requested that N.J. child welfare agency not return the child to her in Haiti, but keep the child in its custody in New Jersey).

<sup>82</sup> *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 54, 57 (1934); Brigitte M. Bodenheimer & Janet Neeley-Kvarme, *Jurisdiction over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C. DAVIS L. REV. 229, 239–241 (1979).

<sup>83</sup> *Pennoyer v. Neff*, 95 U.S. 714, 734–735 (1898).

<sup>84</sup> *Williams v. North Carolina*, 317 U.S. 287, 297–302 (1942). ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders."). In the course of its discussion, the Court rejected the proposition that divorce proceedings were proceedings in rem.

<sup>85</sup> The Court later held that *Williams* did not permit a court to exercise jurisdiction to enter judgments concerning property division or alimony based on plaintiff's status. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418–19 (1957); *Kreiger v. Kreiger*, 334 U.S. 555, 556–57 (1948); *Estin v. Estin*, 334 U.S. 541, 548–49 (1948). These holdings led to the phenomenon of the divisible divorce.

<sup>86</sup> *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

<sup>87</sup> *Id.* at 208 n.30 (citing Roger Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 660–61 (1959)).

In spite of the *Shaffer* footnote, there is some doubt that the status exception justifies the jurisdictional provisions of the UCCJA and the UCCJEA.<sup>88</sup> First, because the Court has never been entirely clear about the rationale for its insistence that jurisdiction requires the defendant's "own affiliation with the State," it is not clear how the status exception might be reconciled with the Court's personal jurisdiction jurisprudence.<sup>89</sup> It seems in some respects to hale back to the sovereignty rationale rejected in *Compagnie des Bauxites* and other recent cases.<sup>90</sup>

Second, there is some disagreement about whether the status exception can and should be extended beyond the divorce context to determinations of child custody and terminations of parental rights.<sup>91</sup> They involve very different considerations and the absent defendant arguably has more at stake in cases involving his relationship with his child than he does in cases involving his relationship with an estranged spouse.<sup>92</sup>

Another difficulty with relying on the status exception is the Supreme Court's puzzling opinion in *May v. Anderson*.<sup>93</sup> *May* involved a situation where a husband and wife had separated. The couple and their three children had been domiciled in Wisconsin, but the wife and the children left for Ohio following the separation. The husband remained in Wisconsin and there obtained a decree granting him a divorce and custody of the children.<sup>94</sup> Sometime later, after the children overstayed a visit with their mother in Ohio, the father sought a writ of habeas corpus from the Ohio court ordering their return. The Ohio court, believing that the Full Faith and Credit Clause of the U. S. Constitution required it to give effect to the Wisconsin decree, ruled for the father.<sup>95</sup> The Supreme Court reversed in an opinion by Justice Burton, holding that, without having *in personam* jurisdiction over the mother, Wisconsin could not cut off her "immediate right to the care, custody, management and

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<sup>88</sup> It should also be noted that the provisions of the Uniform Acts, while they rely on the forum state's connection to the child as a basis for jurisdiction, differ from the traditional status exception, found in the FIRST RESTATEMENT, which referred to the child's domicile. See Barbara Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 376–84 (1991).

<sup>89</sup> *Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014).

<sup>90</sup> See *supra* note 30 and accompanying text.

<sup>91</sup> Atwood, *supra* note 88, at 376–84 (rejecting the status-exception rationale for the UCCJA in favor of a reliance on "territorial jurisdiction" premised on child-centered contacts with the forum); Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 742–43 (1982); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 816–19 & n.15 (1995) (reviewing the scholarship on both sides of this debate).

<sup>92</sup> Coombs, *supra* note 91, at 745–51.

<sup>93</sup> *May v. Anderson*, 345 U.S. 528 (1953).

<sup>94</sup> The Court stated that the lower court "gave weight" to the father's contention that the children were domiciled in Wisconsin at the time of the decree, but found it unnecessary to determine that question. *Id.* at 534. The Court further noted that the mother's domicile was stipulated to be Ohio at the time of the decree. *Id.* at 534 n.7.

<sup>95</sup> *Id.* at 529.

companionship of her minor children.”<sup>96</sup> Justice Burton’s opinion in *May* cast doubt on the traditional approach to custody jurisdiction based upon the child’s domicile and was the subject of serious criticism.<sup>97</sup> It seemed to suggest that the entry of the custody decree by the Wisconsin court violated *May*’s due process rights.<sup>98</sup> Justice Frankfurter, in his concurrence, wrote separately to urge that the Court held only that Ohio was not *required* under the Full Faith and Credit Clause to give effect to the Wisconsin decree, but that it would not offend the Due Process Clause if it chose to do so.<sup>99</sup>

Although the status exception provides some support for the current jurisdictional regime, the regime can be justified on other grounds, which taken together should lead the Court to recognize that under certain circumstances, the need for a defendant’s own, voluntary affiliation with the forum can properly be dispensed with.<sup>100</sup>

First, to the extent that the foundation of the Court’s restrictions on state court jurisdiction is procedural due process, the Act contains a number of protections for out-of-state defendants and in many jurisdictions, additional procedural protections are furnished in certain categories of cases, such as terminations. The Act provides for notice to the defendant parent and an opportunity to be heard.<sup>101</sup> It also contains mechanisms that facilitate the long-distance participation of an absent parent.<sup>102</sup> It provides mechanisms for the testimony of out-of-state parties and other witnesses to be taken in their home state, either by deposition or through an evidentiary hearing.<sup>103</sup> Finally, the Act contains a provision permitting forum non conveniens dismissal when a court determines that a court of another state is a more appropriate forum.<sup>104</sup>

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<sup>96</sup> *Id.* at 533.

<sup>97</sup> See Geoffrey C. Hazard, Jr., *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959). As his title suggests, Hazard didn’t pull any punches in his critique. His conclusion begins, “*May v. Anderson* was decided on grounds unnecessary under the facts presented, untenable in the precedents decided, and uncomprehending of the consequences possibly to follow.” *Id.* at 406. See also Ratner, *supra* note 20, at 382–85.

<sup>98</sup> *May*, 345 U.S. at 537 (Jackson, J. dissenting).

<sup>99</sup> *May*, 345 U.S. at 535–36 (Frankfurter, J., concurring). The drafters of the Uniform Acts concluded that Frankfurter’s opinion was the controlling opinion in *May* because his vote was necessary to the majority. See Bodenheimer, *supra* note 59, at 1232. For a criticism of this view, see Atwood, *supra* note 88, at 386.

<sup>100</sup> I don’t mean to suggest that the UCCJEA regime is immune from constitutional challenge. There may be circumstances where the exercise of jurisdiction under the Act should be struck down. See *infra* notes 124–125 and accompanying text. I am arguing that the UCCJEA’s general jurisdictional approach should be upheld.

<sup>101</sup> UCCJEA, *supra* note 13, § 106.

<sup>102</sup> *Id.* § 111–12.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* § 207. See Ratner, *supra* note 20, at 385–90 (arguing that the UCCJA satisfied procedural due process by implementing “effective-litigation values”).

In some cases additional procedural protections may be available to the parties. For example, parents may be entitled to appointed counsel in abuse and neglect proceedings and in termination-of-parental-rights proceedings.<sup>105</sup> Questions have been raised about the adequacy of the representation provided in some jurisdictions,<sup>106</sup> and representation of absent defendants is likely to be particularly challenging. Nevertheless, in these cases the states are providing a safeguard that the Supreme Court has held not to be constitutionally required—a safeguard that has the potential to significantly reduce the burden on the most vulnerable out-of-state defendants.<sup>107</sup> In cases involving children who are citizens of foreign countries, the Vienna Convention on Consular Relations provides for consular notification of the proceeding.<sup>108</sup> Once notified, the consulate can provide substantial assistance, for example in helping to locate the absent parent, in gathering, translating and transmitting evidence from abroad, and in helping caseworkers coordinate with their counterparts overseas.<sup>109</sup>

Next, the UCCJEA responds to the Court's concern that "the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."<sup>110</sup> By its terms, it provides for cooperation<sup>111</sup> and communication<sup>112</sup> between courts in different fora which have a potential interest in the matter. Moreover, the statute is an expression of the enacting state's particularized interest in exercising jurisdiction in these cases and the Court has from time to time suggested that such targeted expressions of interest are entitled to weight in the assessment of constitutionality.<sup>113</sup> Even more significant to the territoriality analysis, the adoption of the UCCJEA in forty-nine states represents a consensus expression of the states' understanding of their shared responsibility for fairly adjudicating the custody of the "interstate child."<sup>114</sup> It is difficult to see how the exercise of jurisdiction

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<sup>105</sup> ASTRA OUTLEY, REPRESENTATION FOR CHILDREN AND PARENTS IN DEPENDENCY PROCEEDINGS 7 (Pew Charitable Trs. 2004), [http://www.law.yale.edu/rcw/rcw/jurisdictions/am\\_n/usa/united\\_states/us\\_pew\\_report.pdf](http://www.law.yale.edu/rcw/rcw/jurisdictions/am_n/usa/united_states/us_pew_report.pdf).

<sup>106</sup> *Id.* at 7–9.

<sup>107</sup> *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24, 26–27 (1981).

<sup>108</sup> Multilateral Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 37(b), Apr. 24, 1964, 500 U.N.T.S. 95.

<sup>109</sup> See Ann Laquer Estin, *Global Child Welfare: The Challenges for Family Law*, 63 OKLA. L. REV. 691, 701 (2011); Robert G. Spector, *The Vienna Convention on Consular Relations: The Most Neglected Provision of International Family Law*, 22 TRANSNAT'L L. & CONTEMP. PROBS. 643, 650 (2013).

<sup>110</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>111</sup> UCCJEA, *supra* note 13, §§ 111, 112, 306.

<sup>112</sup> *Id.* §§ 204, 206, 207, 307.

<sup>113</sup> *Kulko v. Superior Court.*, 436 U.S. 84, 98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977); Carol S. Bruch, *Statutory Reform of Constitutional Doctrine*, 28 U.C. DAVIS L. REV. 1047, 1052–53 (1995).

<sup>114</sup> This term is Albert Ehrenzweig's. See Albert A. Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralittigious Proceedings*, 64 MICH. L. REV. 1 (1965).

under the UCCJEA by the courts of one state could be seen to infringe on the sovereignty of a sister state when that state had agreed to the “infringement” in adopting the legislation that deprived its courts of jurisdiction.

It is also worth noting that the jurisdictional approach of the UCCJEA is mirrored in the federal legislation, the PKPA, governing the circumstances under which custody decrees are entitled to full faith and credit.<sup>115</sup> That statute shares the UCCJEA’s focus on concentrating child-custody jurisdiction in the child’s “home state,” whether or not the defendant parent has significant connections with the state.<sup>116</sup> Congress, of course, enjoys constitutional authority to legislate with respect to the effect of state court judgments, and hence its action should be entitled to some weight in the consideration of whether the exercise of UCCJEA jurisdiction is constitutional.

The Court has also expressed comity concerns, from time to time, in cases involving jurisdiction over foreign nationals.<sup>117</sup> The UCCJEA takes into account these concerns. It provides for enforcement of foreign decrees made under circumstances in conformity with the standards of the Act and it requires that courts defer to the jurisdiction of foreign states with closer ties to the child, just as they must defer to courts of sister states.<sup>118</sup>

The third justification for the Court’s restrictions is the substantive due process justification. On this understanding, the defendant’s right to be free from the jurisdiction of a state with which he has not voluntarily affiliated is a liberty interest protected by the Fourteenth Amendment. Although the cases are not very clear, they can be read to suggest that this liberty interest may be separate and apart from any liberty or property interest that the defendant has in the object of the litigation.<sup>119</sup> If this is indeed a proper understanding, the question then becomes what level of justification, if any, can overcome the defendant’s interest. If the right is

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<sup>115</sup> Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611 § 8(a), 94 Stat. 3569–71 (1980) (codified at 28 U.S.C. § 1738A).

<sup>116</sup> *Id.*

<sup>117</sup> *Daimler AG v. Bauman*, 134 S. Ct. 746, 762–63 (2014); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115–16 (1987).

<sup>118</sup> UCCJEA, *supra* note 13, § 105. See D. Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 547 (2004). The Act also attempts to harmonize state law in this area with the United States’ obligations under various international instruments, including the Convention on the Civil Aspects of Child Abduction. *Id.* at 548. The Convention has been controversial and the rich literature of that controversy is beyond the scope of this paper. It is fair to observe, however, that the Court might not be in the best position to dictate what comity demands in the area of international child custody determinations.

<sup>119</sup> The parent’s interest in the object of the litigation—his or her relationship with her child—is a fundamental right, *Santosky v. Kramer*, 455 U.S. 745, 753–59 (1982), but the parent’s interest in avoiding the jurisdiction of a particular state’s courts may not be. See *infra* notes 120–121 and accompanying text.

fundamental, strict scrutiny would normally apply.<sup>120</sup> If not, a rational basis for state intrusion should be adequate justification.<sup>121</sup>

In the context of child-abuse and neglect cases and termination-of-parental-rights cases, the need for courts with jurisdiction over the child to be able to proceed, even when a parent is absent from the state, is compelling. In many circumstances, the cases involve children in the custody of child welfare agencies. Whether the children have been allowed to remain at home or removed to foster care, the agency, with court oversight, will spend months or more working to permit the return of the children to the parent's custody or, failing that, to bring the case to completion through a termination proceeding.<sup>122</sup> The need for ongoing court oversight and the involvement of public agencies as parties to the proceeding make the possibility of litigating these cases in more than one jurisdiction practically impossible. Of course, if traditional minimum contacts were required, a court overseeing a case involving an in-state parent and an out-of-state parent could exercise jurisdiction to terminate the rights of the in-state parent but decline to act as to the absent parent. In that case, however, the child would be left in limbo, with no legal relationship with the parent who was likely most involved with the child before the termination but without the ability to be adopted because of the court's inability to terminate the rights of the absent parent. The need to avoid that outcome is surely a compelling state interest. Several state courts have addressed the constitutionality of the exercise of jurisdiction to terminate the parental rights of an absent parent and for the most part they have concluded that the exercise of jurisdiction was permissible.<sup>123</sup>

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<sup>120</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 792–94 (3d ed. 2006).

<sup>121</sup> *Id.* John Parry points out that “the Court has never indicated that personal jurisdiction implicates a fundamental right,” and suggests that rational basis is the correct standard to apply to the substantive due process analysis in personal jurisdiction cases. Parry, *supra* note 8, at 853. Parry, it should be noted, believes that procedural due process and federalism also play a role in the Court's decisions limiting the jurisdiction of state courts. *Id.* at 853 n.123.

<sup>122</sup> For a brief overview of the process, see CHILD WELFARE INFO. GATEWAY, UNDERSTANDING CHILD WELFARE AND THE COURTS (2011), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf>.

<sup>123</sup> *See, e.g.*, *J.D. v. Tuscaloosa Dep't of Human Res.*, 923 So.2d 303, 308 (Ala. Civ. App. 2005); *In re Appeal in Maricopa Cty. Juvenile Action No. JS-734*, 543 P.2d 454, 460 (Ariz. Ct. App. 1975); *In re Interest of M.L.K.*, 768 P.2d 316, 319 (Kan. App. 1989); *Wenz v. Schwartze*, 598 P.2d 1086, 1092 (Mont. 1979); *Div. of Youth and Family Servs. v. M.Y.J.P.*, 823 A.2d 817, 836–38 (N.J. Super. Ct. App. Div. 2003) (requiring minimum contacts in termination but finding them in mother's acquiescence to N.J. child welfare agency's custody of child); *Graham v. Copeland (In re Adoption of Copeland)*, 43 S.W.3d 483, 487 (Tenn. Ct. App. 2000); *In re M.S.B.* 611 S.W.2d 704, 706 (Tex. Civ. App. 1980); *State ex rel. W.A. v. State*, 63 P.3d 607, 611 (Utah 2002); *In re R.W.*, 39 A.3d 682, 700 (Vt. 2011); *In re Thomas J.R.*, 663 N.W.2d 734, 736 (Wis. 2003). *But see In re Doe*, 926 P.2d 1290, 1292, 1295 (Haw. 1996); *In re Vernon R.V.*, 991 P.2d 986, 986 (N.M. Ct. App. 1999).

I don't mean to suggest that the UCCJEA jurisdictional regime resolves all due process and sovereignty concerns successfully, as written or as applied. Arguments could be made that the procedural protections afforded absent parents are not sufficient and that additional efforts should be required to allow full participation by those defendants.<sup>124</sup> It might also be argued that, at least in cases pitting two parents against each other, more consideration should be given to dismissing in favor of the courts of the residence of the defendant parent, in cases where the child's interest can be protected and evidence made available in that forum.<sup>125</sup> Similarly, although the UCCJEA does take into account the interest of foreign states and of foreign parents, it may be that, as the international law of custody evolves, Congress, the drafters of the UCCJEA, and the state legislatures will need to reexamine how United States jurisdiction law can best be harmonized with international law.<sup>126</sup> However, even in light of these concerns, on balance the UCCJEA regime has been successful and should be permitted to continue, with adjustments as needed.

The UCCJEA, particularly in its application to termination of parental rights cases, provides a counter-example to prevailing jurisdictional doctrine. It represents a vigorous assertion of the interests of the states in a jurisdictional regime that provides for exclusive jurisdiction over all parties in a termination case in a single jurisdiction. The basis for jurisdiction is the connection of the forum with the child whose interests are the central concern of the litigation, not the connection of the defendant with the forum. The justification for the jurisdictional regime is found in the forum's compelling need to protect children subject to its jurisdiction and to the degree possible to provide them with a stable and permanent home. The UCCJEA represents an example of a constitutional regime of jurisdiction that once seemed to be within reach—a regime focused on the interest of the state in resolving the dispute and the connection of the litigation to the forum.<sup>127</sup> As some of the other contribu-

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<sup>124</sup> See, e.g., *In re R.W.*, 39 A.3d at 700–04 (Dooley, J., concurring) (discussing the trial court's failure to protect the absent father's right to participate and suggesting additional protections that should be afforded on remand).

<sup>125</sup> See Wasserman, *supra* note 91, at 867–92, 891.

<sup>126</sup> See Estin, *supra* note 109, at 715–22 and Robert G. Spector, *Memorandum: Accommodating the UCCJEA and the 1996 Hague Convention*, 63 OKLA. L. REV. 615 (2011) for a discussion of recent efforts to coordinate with the Hague Child Protection Convention. As the UCCJA, the UCCJEA, and related international conventions have evolved over time, concerns about their impact on domestic violence victims and their children have been expressed and to some extent addressed, although concerns remain that the issues have not been fully resolved. See, e.g., Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases*, 38 FAM. L.Q. 529 (2004); Joan Zorza, *The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes*, 27 FORDHAM URB. L.J. 909 (2000).

<sup>127</sup> See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281–82; Traynor, *supra* note 87, at 660–61; Arthur T. von Mehren & Donald T.

tors to this symposium have persuasively argued, it may be time for the Court to reconsider the desirability of that regime.<sup>128</sup>

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Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 101 HARV. L. REV. 1121, 1126 (1966).

<sup>128</sup> See, e.g., Stanley E. Cox, *Personal Jurisdiction for Alleged Intentional or Negligent Effects, Matched to Forum Regulatory Interest*, 19 LEWIS & CLARK L. REV. 725 (2015) and John T. Parry, *Rethinking Personal Jurisdiction After Bauman and Walden*, 19 LEWIS & CLARK L. REV. 607 (2015) (both arguing that a forum's regulatory interest should presumptively support jurisdiction); Cassandra Burke Robertson and Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 671 (2015) (discussing the need for input from the political branches in formulating court access doctrine).