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## Opening the Courtroom Doors for Migrant Workers: The Need for a Nationwide Service of Process Amendment to the Migrant and Seasonal Agricultural Worker Protection Act

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**OPENING THE COURTROOM DOORS FOR MIGRANT WORKERS:  
THE NEED FOR A NATIONWIDE SERVICE OF PROCESS  
AMENDMENT TO THE MIGRANT AND SEASONAL  
AGRICULTURAL WORKER PROTECTION ACT**

I. INTRODUCTION

“I am a real migrant worker. I earned that name. I been knocked down with the bruise. I been kicked down with the bumps. I fell a lot. I rolled. Yes, I stumbled. I got my little nose scarred up. I got knocked in the head.”<sup>1</sup> This is the tale of the migrant farm worker. Migrant farm work is not easy by any stretch of the imagination.<sup>2</sup> Farm labor consists of hazardous activities and “consistently ranks with mining and construction work as one of the most dangerous occupations in the United States.”<sup>3</sup> Migrant workers must traverse this large nation in search of employment, and upon finding it, they are often uncertain how long the work will last, thus unsure of their continued ability to earn income.<sup>4</sup>

In America, the conditions of migrant farm work are rarely discussed, and, therefore, few Americans are aware of “the key role [migrant workers] play in our lives.”<sup>5</sup> Yet the United States government was, and is, well aware of the frequent mistreatment of migrant workers. This awareness led to federal legislation guaranteeing migrant workers protection from the detrimental activities affecting them.<sup>6</sup> What good are such federal rights, however, if they

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1. DANIEL ROTHENBERG, *WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY* 2 (1998) (presenting a migrant worker’s recollections of his work conditions).

2. See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 *HOFSTRA LAB. & EMP. L.J.* 575, 577-78 (2001).

3. *Id.*

4. *Id.* at 578.

5. ROTHENBERG, *supra* note 1, at 1.

6. See Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (2000) [hereinafter AWP].

[T]he purpose of [the Migrant and Seasonal Agricultural Worker Protection Act is] to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this [Act]; and to assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employers.

*Id.* § 1801.

cannot be asserted in courts of law?<sup>7</sup> This is the major threat facing migrant workers.

Imagine the following: A farm owner in state A, believing that he is in need of out-of-state workers because of a labor shortage in state A, hires employees from state B for temporary work on his farm in state A. Farm workers from state B then travel to state A and toil at their tasks in the fields. Suppose also that the farm owner in state A, disregarding federal legislation, takes advantage of the migrant workers.<sup>8</sup> Because it is highly unlikely that a migrant worker will seek legal recourse before his source of valuable income has been exhausted, the migrant worker will have to return to his home in state B before pursuing legal action. If he is aware that his rights were violated, he will then file a lawsuit in a court within the jurisdiction of forum state B. However, a major obstacle that the migrant worker will face is the very real possibility that the courts in forum state B will be unwilling to assert personal jurisdiction over the defendant farm owner because of a lack of minimum contacts.<sup>9</sup> Under this scenario, migrant workers' rights are of little value. It will be unlikely that they will be able to assert their rights in the courts of state B, and it is further unlikely that such a low-paid occupational group will be able to muster the resources to litigate a claim in the farm owner's state A.<sup>10</sup> This Comment focuses on the problems arising from this common scenario.

In April 2002, the Ninth Circuit Court of Appeals issued the most recent appellate decision regarding the issue of personal jurisdiction and migrant workers, *Ochoa v. J.B. Martin & Sons Farm, Inc.*<sup>11</sup> *Ochoa* involved a personal jurisdiction issue in a migrant worker context quite similar to the scenario detailed above. While the *Ochoa* decision allowed for the reasonable exercise of in personam jurisdiction by the court in Arizona over a New York farm owner, the *Ochoa* court relied on an agency theory between the labor contractor and the farm owner,<sup>12</sup> and, therefore, it would have been decided differently had such agency relationship not existed. More importantly, *Ochoa*

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7. See *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) (holding that "[t]he right to sue and defend in the courts" is a right in a society that is "conservative of all other rights, and lies at the foundation of orderly government").

8. Often this may be done by providing substandard housing or by failing to pay the migrant worker federal- or state-mandated minimum wages. The migrant worker feels as though no recourse is possible because of his "lack of opportunity in alternative occupations," thus leaving the worker with a sense of being "trapped" in his place of employment. See FARM LABOR IN THE UNITED STATES 13 (C.E. Bishop ed., 1967).

9. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (concluding that personal jurisdiction over a non-resident defendant is proper when the defendant has minimum contacts in the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

10. See *Holley*, *supra* note 2, at 580.

11. 287 F.3d 1182 (9th Cir. 2002).

12. *Id.* at 1189-92.

is an example of the unpredictable nature that exists with respect to asserting personal jurisdiction in the migrant worker cases. Lacking the foreseeability as to whether minimum contacts will be found to exist between the distant farm owner, the litigation, and the forum state will hamper the effectiveness of migrant workers asserting their federal rights in court.

To prevent the problem of unpredictability in constitutionally asserting personal jurisdiction over farm employers in the migrant worker context and to allow migrant workers better access to the courts of the United States in order to litigate their claims under federal law, this Comment will argue for an amendment to the Migrant and Seasonal Agricultural Worker Protection Act<sup>13</sup> (“AWPA”) allowing for nationwide service of process when a claim under the AWPA is brought in a federal district court. To protect the due process rights of the defendant farm owner from being unreasonably burdened by being forced to litigate in a distant forum, Congress should amend the AWPA to allow for service of process on non-resident defendants when such jurisdiction over the person would be reasonable, as similarly interpreted by the United States Supreme Court under the Fourteenth Amendment’s Due Process Clause.<sup>14</sup>

Although a *per se* reasonable nationwide service of process statute would eradicate any unpredictability in asserting personal jurisdiction—because personal jurisdiction would simply always exist—any amendment to the AWPA cannot trump a defendant’s Fifth Amendment Due Process rights,<sup>15</sup> which are, of course, of constitutional magnitude. Congress, however, should put the burden of proving an unreasonable assertion of personal jurisdiction upon the defendant, thereby presuming that personal jurisdiction will be constitutional, *per* the nationwide service of process amendment. In this case, the unpredictability in finding personal jurisdiction that has plagued the migrant worker cases will be greatly diminished, thus providing migrants greater access to the courts.

Part II of this Comment will analyze the AWPA, and introduce the provisions that protect migrant workers as well as the remedies available when

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13. 29 U.S.C. §§ 1801-1872 (2000).

14. The Fourteenth Amendment’s Due Process Clause provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. *See also infra* note 17.

15. The Fifth Amendment’s Due Process Clause states that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. It is the Fifth Amendment’s—not the Fourteenth’s—Due Process Clause that is implicated when Congress grants federal courts the power to assert personal jurisdiction over defendants in claims concerning federally-created rights, because the Fourteenth Amendment is a restriction on state jurisdiction while the Fifth Amendment is a restriction on federal jurisdiction. *See* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 463-64 (1985); *Horne v. Adolph Coors Co.*, 684 F.2d 255, 259 (3d Cir. 1982).

defendants in the farm community, such as farm owners, violate those provisions. Even though this Comment focuses on the procedural aspect of asserting the AWPA in court—not the substance of the AWPA itself—the AWPA is introduced because it is the primary federal statute that guarantees the rights of migrant workers.<sup>16</sup> Part III will analyze the United States Supreme Court’s personal jurisdiction doctrine by providing a chronological analysis of the minimum contacts doctrine. Additionally, the Court’s reasonableness of jurisdiction factors will be discussed alongside the minimum contacts analysis because the Court has stated that such an analysis is also of constitutional magnitude.<sup>17</sup> Next, Part IV narrows the focus of personal jurisdiction to the context of migrant workers by analyzing the four cases in this area that have made their way to the appellate level. These cases are *Ochoa v. J.B. Martin & Sons Farms, Inc.*,<sup>18</sup> *Rios v. Altamont Farms, Inc.*,<sup>19</sup> *Chery v. Bowman*,<sup>20</sup> and *Aviles v. Kunkle*.<sup>21</sup> This Part demonstrates that a nationwide service of process amendment to the AWPA is necessary in order to prevent migrant workers from being barred procedurally from bringing suits against farm owners. The discussion in Part IV also points out the

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16. Most cases adjudicating the substantive rights of migrant workers focus on the AWPA. *See, e.g.*, *Medrano v. D’Arrigo Bros. Co. of Cal.*, 125 F. Supp. 2d 1163 (N.D. Cal. 2000); *Herrera v. Singh*, 118 F. Supp. 2d 1120 (E.D. Wash. 2000).

17. In addition to the minimum contacts analysis, the Supreme Court has held that courts must, in considering the assertion of personal jurisdiction, examine:

“the burden on the defendant,” “the forum State’s interest in adjudicating the dispute,” “the plaintiff’s interest in obtaining convenient and effective relief,” “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,” and the “shared interest of the several States in furthering fundamental substantive social policies.”

*Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). *See also infra* Part III.

It is clear that such an analysis of the Fourteenth Amendment’s Due Process Clause can never be narrowed to a bright line rule including only minimum contacts because the Court has held that the factors regarding the reasonableness of a constitutional assertion of personal jurisdiction over a non-resident defendant are, in fact, dependant upon the outcome of the minimum contacts test. *See Burger King*, 471 U.S. at 477 (holding that the five factors of the reasonable fair play and substantial justice test may “serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required”). This issue also highlights the underlying theme in this Comment that a personal jurisdiction analysis can never be a rigidly applicable test, but, rather, it must be an evolving constitutional standard that adapts to a changing society. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819) (finding that the interpretation of the Constitution must be adaptable to the times in order for it to truly be a living document—“[W]e must never forget that it is a *constitution* we are expounding.”).

18. 287 F.3d 1182 (9th Cir. 2002).

19. 476 N.E.2d 312 (N.Y. 1985).

20. 901 F.2d 1053 (11th Cir. 1990).

21. 978 F.2d 201 (5th Cir. 1992).

unpredictable nature of the appellate courts' analyses in determining the issue of personal jurisdiction in migrant worker cases. Part V discusses the legal justifications for allowing Congress to enact nationwide service of process statutes.<sup>22</sup> The Court has yet to determine the constitutionality of serving process on a nationwide basis since its decision in *International Shoe Co. v. Washington*.<sup>23</sup> If Congress amends the AWPA to allow for such a form of service of process, it must do so constitutionally. Part VI will analyze migrant workers' socio-economic conditions and suggest the reasons why Congress must amend the AWPA to include service of process on a nationwide basis. This Part will place a special emphasis on migrant workers' poverty and their lack of education. Furthermore, it will analyze the problems migrant workers face in finding legal counsel to assist them in their claims, giving additional support for Congress to remedy the procedural problem that migrant workers face. Finally, this Comment offers a brief conclusion regarding the need to help migrant workers effectively apply federal laws to their benefit. If the AWPA is to benefit migrant workers to its fullest extent, the workers must be able to assert personal jurisdiction over non-resident farm owners via nationwide service of process.

## II. THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

Beginning in the middle of the twentieth century, the American public began to hear about the mistreatment that migrant agricultural laborers encountered from farm labor contractors.<sup>24</sup> Common abuses included fraudulent transportation charges billed to the workers, underpaying workers for their labor, supplying workers with horrifically substandard housing, and

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22. It is true that nationwide service of process and personal jurisdiction are not equivalent in the mathematical sense; however, "[s]ervice of process is the vehicle by which the court may obtain jurisdiction." *Driver v. Helms*, 577 F.2d 147, 155 (1st Cir. 1978), *rev'd on other grounds sub nom.* *Stafford v. Briggs*, 444 U.S. 527 (1980) (quoting *Aro Mfg. Co., Inc. v. Auto. Body Research Corp.*, 352 F.2d 400, 402 (1st Cir. 1965)). The distinction, however, is relevant when federal subject matter jurisdiction is predicated solely upon diversity jurisdiction under 28 U.S.C. § 1332 (2000). A claim under the AWPA will involve federal question subject matter jurisdiction, and, therefore, this Comment will equate service of process with personal jurisdiction. *See Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997) ("When a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction" (citing *Chase & Sanborn Corp. v. Granfinanciera*, 835 F.2d 1341, 1344 (11th Cir. 1988), *rev'd on other grounds sub nom.* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989))); *Driver*, 577 F.2d at 155 n.23 (recognizing that "[t]he distinction [between service of process and personal jurisdiction] is most important . . . in diversity cases"); *see also Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) (concluding that the nationwide service of process provision of a federal statute creates a valid assertion of personal jurisdiction in federal court).

23. 326 U.S. 310 (1945).

24. *See* S. REP. NO. 88-202, at 1 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3690, 3690.

misrepresenting to the workers the nature and availability of work.<sup>25</sup> Congress felt the need to help the struggling migrant workers by enacting the Farm Labor Contractor Registration Act of 1963<sup>26</sup> (“FLC”). To understand why the AWP— which replaced the FLC—exists today, the FLC must be briefly analyzed.

A. *The Farm Labor Contractor Registration Act*

Congress’s purpose in enacting the FLC<sup>27</sup> was to remove the restraints on interstate commerce caused by the “irresponsible [labor] contractors”<sup>28</sup> in their treatment of migrant workers.<sup>29</sup> All farm labor contractors were required to register with the Secretary of Labor before engaging in agricultural recruitment work.<sup>30</sup> In fact, if a farm owner intended to rely on a third party to recruit labor, the farm owner must have first made certain that the third party was registered with the Labor Department.<sup>31</sup> Through this registration, enforcement agencies would have documentation to track labor contractors if mistreatment and abuse accusations from migrant workers were to arise.

In addition to mandating registration of labor contractors, Congress also forced all farm labor contractors to disclose to migrant workers at the time of recruitment: (1) the place of employment; (2) the crops involved; (3) any transportation and housing that would be provided; (4) the wages offered; (5) the charges the labor contractor would make in offering his services (recruitment); (6) the length of the job; (7) the existence of any strikes at the place of employment; and (8) the existence of arrangements made by labor contractors with retail businesses in the area of employment from which the

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25. See S. REP. NO. 88-202, at 2-3, reprinted in 1964 U.S.C.C.A.N. 3690, 3692.

26. 7 U.S.C. §§ 2041-2055 (1976), repealed by AWP, 29 U.S.C. §§ 1801-1872 (1982). The FLC is examined in W. Gary Vause, *The Farm Labor Contractor Registration Act*, 11 STETSON L. REV. 185 (1982).

27. Congress enacted the FLC under the Commerce Clause. 7 U.S.C. § 2041(a), repealed by AWP, 29 U.S.C. §§ 1801-1872. “Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

28. 7 U.S.C. § 2041(b), repealed by AWP, 29 U.S.C. §§ 1801-1872. “The term ‘farm labor contractor’ means any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports migrant workers (excluding members of his immediate family) for agricultural employment.” *Id.* § 2042(b).

29. See *id.* § 2041(b). The FLC defined migrant workers to include: “individual[s] [that have] primary employment . . . in agriculture . . . or [those that] perform[] agricultural labor . . . on a seasonal or other temporary basis.” *Id.* § 2042(g). For a comparison of this definition of migrant workers with the definition under the AWP, see *infra* note 45.

30. See 7 U.S.C. § 2043(a), repealed by AWP, 29 U.S.C. §§ 1801-1872.

31. See *id.* § 2043(c).

contractor would receive a commission from sales made by the businesses to the migrant workers.<sup>32</sup>

Violations of the FLC by the labor contractors gave migrant workers the right to civil damages.<sup>33</sup> Unfortunately, the FLC was not very effective in preventing migrant workers from facing abuses. Litigation in this area almost always centered on the FLC's labor contractor exemption from liability schemes,<sup>34</sup> and only very rarely considered the protections of the workers.<sup>35</sup>

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32. *See id.* § 2045(b). These obligations of the farm labor contractor are similar to those under the AWP. *See* AWP, 29 U.S.C. § 1821(a) (2000).

33. 7 U.S.C. § 2048(b), *repealed by* AWP, 29 U.S.C. §§ 1801-1872.

34. Under the FLC, the following were not considered farm labor contractors and, therefore, were not liable for violations:

(1) any nonprofit charitable organization, public or nonprofit private educational institution, or similar organization;

(2) any farmer, processor, canner, ginner, packing shed operator, or nurseryman who personally engages in any such activity for the purpose of supplying migrant workers solely for his own operation;

(3) any full-time or regular employee of any entity referred to in (1) or (2) above who engages in such activity solely for his employer on no more than an incidental basis;

(4) any person who engages in any such activity (A) solely within a twenty-five mile intrastate radius of his permanent place of residence and (B) for not more than thirteen weeks per year;

(5) any person who engages in any such activity for the purpose of obtaining migrant workers of any foreign nation for employment in the United States if the employment is subject to—

(A) an agreement between the United States and such foreign nation; or

(B) an arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for and the enforcement thereof is provided for through the United States by an instrumentality of such foreign nation;

(6) any full-time or regular employee of any person holding a certificate of registration under [the FLC];

(7) any common carrier or any full-time regular employee thereof engaged solely in the transportation of migrant workers;

(8) any custom combine, hay, harvesting, or sheep shearing operation,

(9) any custom poultry harvesting, breeding, debeaking, sexing, or health service operation, provided the employees of the operation are not regularly required to be away from their domicile other than during their normal working hours; or

(10) any person who would be required to register solely because the person is engaged in any such activity solely for the purpose of supplying full-time students or other persons whose principal occupation is not farmwork to detassel and rogue hybrid seed corn or sorghum for seed and to engage in other incidental farmwork for a period not to exceed four weeks in any calendar year: *Provided*, That such students or other persons are not required by the circumstances of such activity to be away from their permanent place of residence overnight: *Provided further*, That such students or other persons, if under 18 years of age, are not engaged in providing transportation in vehicles caused to be operated by the contractor.

7 U.S.C. § 2042(b) (1976 & Supp. II 1979), *repealed by* AWP, 29 U.S.C. §§ 1801-1872.



Many statutory exemptions allowed “possible labor contractors” to escape any sort of punishment under the FLC, and, therefore, they had free reign to mistreat migrant workers and abuse their rights. As enforcement agencies became more preoccupied with technical legal disputes than with seeing that migrant workers were treated fairly, farm workers rightly envisioned little hope in securing their federal rights under the FLC.<sup>36</sup> Congress took note of the fact that migrant workers’ conditions had not improved and responded again by repealing the FLC and enacting the AWP.<sup>37</sup>

*B. The Migrant and Seasonal Agricultural Worker Protection Act*

The AWP overhauled the federal regulatory protection scheme for migrant workers.<sup>38</sup> The most important change was that worker protection requirements were enforced regardless of whether the defendant was a labor contractor or a farm employer.<sup>39</sup> In fact, the AWP was the first federal labor statute designed exclusively to regulate the employee-employer relationship in the agricultural industry.<sup>40</sup> It is clear, therefore, that Congress’s purpose in enacting the AWP was to allow the migrant worker greater legal leverage

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35. See, e.g., *Donovan v. Heringer Ranches, Inc.*, 650 F.2d 1152 (9th Cir. 1981); *Marshall v. Silver Creek Packing Co.*, 615 F.2d 848 (9th Cir. 1980); *DeLeon v. Ramirez*, 465 F. Supp. 698 (S.D.N.Y. 1979); *Usery v. Golden Gem Growers, Inc.*, 417 F. Supp. 857 (M.D. Fla. 1976). Congress noted that case law regarding litigation of the FLC, concerning the labor contractor obligations, involved “exclusion from coverage” provisions. See H.R. REP. NO. 97-885, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4548.

36. See H.R. REP. NO. 97-885, at 2-3 (1982), reprinted in 1982 U.S.C.C.A.N. 4547, 4548-49 (noting that the FLC and its 1974 amendments were futile in preventing abuses of migrant workers).

37. Congress heard testimony, during the legislative sessions regarding the enactment of the AWP, to the effect that the FLC was “largely ignored and not adequately enforced.” H.R. REP. NO. 97-885, at 2, reprinted in 1982 U.S.C.C.A.N. 4547, 4548. For the definitional difference between a migrant and seasonal worker, see *infra* note 45.

38. For protections regarding the migrant worker, see 29 U.S.C. §§ 1821-1823 (2000). For protections regarding seasonal workers, see *id.* §§ 1831-1832.

39. Under the AWP, an agricultural employer may be liable to the farm workers for statutory violations. *Id.* § 1854(a). The AWP defines an agricultural employer as “[a]ny person who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed or nursery, or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural worker.” *Id.* § 1802(2). Thus, the AWP is broader than the FLC, which allowed suits to be brought against only the labor contractor. See, e.g., *Flores v. Ignacio*, No. 78 Civ. 5017, 1981 WL 2283, at \*4 (S.D.N.Y. Jan. 15, 1981) (citing S. REP. NO. 93-1295 (1974), reprinted in 1974 U.S.C.C.A.N. 6441) (noting that Congress was explicit in differentiating labor contractors from farm owners); *Marshall v. Heringer Ranches, Inc.*, 466 F. Supp. 285, 287 (E.D. Cal. 1979) (same); *Salinas v. Amalgamated Sugar Co., Inc.*, 341 F. Supp. 311, 316 (D. Idaho 1972) (holding that the FLC extended only to actors having personal contact with laborers).

40. See Marion Quisenberry, *A Labor Law for Agriculture: The Migrant and Seasonal Agricultural Workers’ Protection Act*, 30 S.D. L. REV. 311 (1985).

over the farm owner. Furthermore, by adopting the joint-employer doctrine, the AWPAs sharply diminished the value of the independent contractor rule that had been used in the past to circumvent federal protections.<sup>41</sup> The FLC originally construed the definition of “employer” too narrowly, and, as such, it limited the prospective defendants to only the independent labor contractor.<sup>42</sup> By choosing to incorporate the joint-employer doctrine as a central measure of the AWPAs, however, Congress took notice of the unique labor and employment co-existence between the migrant worker and the farm owner present in the agricultural context. It is the farm owner’s land on which the migrant worker works, and the farm owner who typically pays the worker. Congress recognized that the farm owner was not a passive party in the abuses of migrant workers. Under the AWPAs, a farm labor contractor who has supplied a crew and the farmer on whose farm the work is being performed are potential joint-employers, and both may be sued by the migrant worker for civil violations.<sup>43</sup>

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41. A federal regulation provides:

The term *joint employment* means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a joint employment situation does not exist.

29 C.F.R. § 500.20(h)(5) (2002). Moreover, as the House Education and Labor Committee commented:

[W]here an agricultural employer or association asserts that the agricultural workers in question are the sole employees of an independent contractor . . . [and the] labor contractor is found to be a bona fide independent contractor, [such] status does not as a matter of law negate the possibility that an agricultural employer or association may be a joint employer of the harvest workers and jointly responsible for the contractor’s employees.

H.R. REP. NO. 97-885, at 7, reprinted in 1982 U.S.C.C.A.N. 4547, 4553.

42. See *supra* note 34 and accompanying text.

43. See *supra* note 39. Section 1802(3) reads: “The term ‘agricultural employment’ means employment in any service or activity includ[ing] . . . the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.” 29 U.S.C. § 1802(3). For the definitional difference between a migrant worker and a seasonal worker, see *infra* note 45. For further information on the use of the joint-employer doctrine under the AWPAs, see 29 C.F.R. § 500.20(h)(4). For cases concerning the issue of joint-employment see, for example, *Haywood v. Barnes*, 109 F.R.D. 568, 584-92 (E.D.N.C. 1986); *Maldonado v. Lucca*, 629 F. Supp. 483, 487 (D. N.J. 1986). For an examination of the joint-employer doctrine in the migrant farm worker context, see Marc Linder, *The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLINE J. PUB. L. & POL’Y 321, 321 (1989) (“The [House] Committee’s adoption of the ‘joint employer’ doctrine was deliberately made for it presented the best means by which to insure that the purposes of [the AWPAs] would be fulfilled.”). This Comment focuses on

### 1. Protections Afforded Farm Workers Under the AWP

The AWP separates the protections afforded migrant workers from those afforded the seasonal agricultural workers.<sup>44</sup> The main difference between a migrant worker and a seasonal worker is where the worker resides while employed on a farm.<sup>45</sup> The migrant worker is afforded slightly more protection than the seasonal worker; however, this difference is irrelevant for purposes of this Comment, which considers only the migrant worker.<sup>46</sup> A major protection granted to the migrant worker is that the farm employer must disclose—in writing—information relating to the job at the time the laborer is recruited for employment.<sup>47</sup> This information includes: (1) where the farm

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suits by migrant workers against the non-resident farm owner and does not attempt to cover causes of actions against the labor contractors.

44. See *supra* note 38; see *infra* note 46.

45. See 29 U.S.C. § 1808(8)(A), (10)(A). “[T]he term ‘migrant agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.” *Id.* § 1802(8)(A). Exempt from the status of migrant workers are “any immediate family member[s] of an agricultural employer or a farm labor contractor.” *Id.* § 1802(8)(B)(i). Further exemptions apply to “any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States.” *Id.* § 1802(8)(B)(ii). In contrast, “the term ‘seasonal agricultural worker’ means an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence.” *Id.* § 1802(10)(A). The same exemptions that apply to the definition of migrant workers also apply to seasonal workers. *Id.* § 1802(10)(B)(i)-(iii). This Comment is concerned with only the migrant agricultural worker. In fact, the issue of lack of personal jurisdiction over a farm owner would rarely be an issue in a suit initiated by a seasonal agricultural worker because the seasonal worker would most likely reside in the same forum as the defendant farm owner. Furthermore, for a comparison of the definition of migrant workers under the AWP with that of the definition under the FLC, see *supra* note 29.

46. Section 1821(c) requires that farm employers post housing conditions offered to the migrant workers. 29 U.S.C. § 1821(c). This provision is not included in the seasonal worker protection provisions. See *id.* § 1831. This is because the seasonal worker does not reside at the farm. See *id.* § 1802(10)(A).

47. See *id.* § 1821(a); see also *Sanchez-Calderon v. Moorhouse Farms*, 995 F. Supp. 1098, 1105 (D. Or. 1997) (holding the AWP requires that farm owners provide workers with accurate information relating to employment terms, and does not only apply to future terms, conditions, and existence of employment); H.R. REP. NO. 97-885, at 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4562 (noting that a farm owner’s responsibility to provide information begins at recruitment and continues until records are no longer needed). Under 29 U.S.C. § 1821(d)(1), the records must be kept for at least three years. These informational requirements are great protections because they provide migrant workers with knowledge of their rights so that they are aware when such rights are being violated. This Comment, however, is not concerned with the actual substantive rights afforded to migrant workers, but rather is only concerned with the procedural problems of asserting these rights in courts of law. To be complete, the AWP does offer additional protections to the migrant workers. Farm owners are required to meet statutory criteria in paying migrant workers their wages earned. *Id.* § 1822(a)-(c) (stating protections for migrant agricultural workers). This section provides, as follows:

work is to take place;<sup>48</sup> (2) the wage that the migrant worker will be paid;<sup>49</sup> (3) what type of work the migrant worker will be involved in;<sup>50</sup> (4) the length of time that the migrant worker will be required to work on the farm;<sup>51</sup> (5) what benefits other than wages the workers will receive;<sup>52</sup> (6) whether the migrant workers are being recruited to work at a farm that is currently witnessing a strike;<sup>53</sup> (7) “the existence of any arrangements with any owner or agent of any establishment in the area of employment under which the [farm employer] is to receive a commission or any other benefit resulting from any sales by such establishment to the workers”;<sup>54</sup> and (8) information relating to insurance policies available for the workers.<sup>55</sup> Because of the joint-employer doctrine, the farm owner must transmit this information, which is a major change from the FLC. These written disclosures given to the migrant worker provide support in litigation arising from later violations concerning the terms of the work agreement. The protections also give migrant workers a fair chance to determine whether employment will best suit their needs, and it does not leave the migrant workers at the mercy of finding out the nature of their jobs when they are hundreds of miles from their homes.

Another provision of the AWPA requires farm owners to place, in a conspicuous location, a poster outlining the rights and protections offered to the farm workers.<sup>56</sup> Such posters must explicitly inform the workers of their

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Wages, supplies, and other working arrangements

(a) Payment of wages

Each farm labor contractor, agricultural employer, and agricultural association which employs any migrant agricultural worker shall pay the wages owed to such worker when due.

(b) Purchase of goods or services by worker

No farm labor contractor, agricultural employer, or agricultural association shall require any migrant agricultural worker to purchase any goods or services solely from such farm labor contractor, agricultural employer, or agricultural association.

(c) Violation of terms of working arrangement

No farm labor contractor, agricultural employer, or agricultural association shall, without justification, violate the terms of any working arrangement made by that contractor, employer, or association with any migrant agricultural worker.

*Id.* Also, migrant workers must be provided housing—if such housing is offered—that complies with safety and health measures. *Id.* § 1823(a)–(c).

48. 29 U.S.C. § 1821(a)(1) (2000).

49. *Id.* § 1821(a)(2).

50. *Id.* § 1821(a)(3).

51. *Id.* § 1821(a)(4).

52. *Id.* § 1821(a)(5).

53. 29 U.S.C. § 1821(a)(6).

54. *Id.* § 1821(a)(7).

55. *Id.* § 1821(a)(8).

56. *Id.* § 1821(b). The Labor Secretary has the responsibility to provide these posters to the farm employers. 29 C.F.R. § 500.75(c) (2002). The posters must be displayed during the full course of employment. *Id.* § 500.75(g) (“If the terms and conditions of occupancy are disclosed

rights to request the statutorily mandated information from the employer.<sup>57</sup> Furthermore, the AWPA requires the farm owner to place, in a conspicuous area, a poster regarding the housing terms and conditions offered to the workers, if such offers are made and accepted.<sup>58</sup> Moreover, the farm owner is responsible for preserving records relating to the amount of wages paid to the workers, the number of hours worked by the migrants, and the net payments that the migrant workers receive.<sup>59</sup> The farm owner has a duty to provide workers with a written statement that itemizes the required information for each pay period.<sup>60</sup> This itemization requirement is another tool that the workers will find useful if disputes as to proper pay or hours worked arise during or after the course of the migrant laborers' employment. Finally, all of the information that the employer is required to give must be in writing and "in English or, as necessary and reasonable, in Spanish or other language common to migrant agricultural workers who are not fluent or literate in English."<sup>61</sup>

## 2. Private Right of Action Under the AWPA<sup>62</sup>

Because the AWPA holds farm owners—not simply the labor contractor—responsible for statutory violations, it provides for more expansive use by migrant workers than the FLC allowed, with the result being that the AWPA is better able to remedy violations.<sup>63</sup> Although the AWPA addressed the limited scope of the FLC,<sup>64</sup> it is only effective to private rights of actions if it can be properly employed in the judicial system. In other words, to ensure the effectiveness of the AWPA, migrant workers must be able to assert personal jurisdiction over the non-resident farm owner.

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to the worker through a statement (rather than through a posting), such statement shall be provided to the worker prior to occupancy.”).

57. See 29 U.S.C. § 1821(b). The information that must be disclosed to the migrant workers, if they request such information, is that listed under 29 U.S.C. § 1821(a). See *supra* notes 48-55 and accompanying text.

58. 29 U.S.C. § 1821(c).

59. *Id.* § 1821(d)(1).

60. *Id.* § 1821(d)(2). Such information relating to the pay period that must be itemized is enumerated in the AWPA. See *id.* § 1821(d)(1). Moreover, the AWPA requires that wages are to be paid to the worker at the time they are due. *Id.* § 1822(a); 29 C.F.R. § 500.81 (2002) (the farm owner must pay the worker at least semi-monthly).

61. 29 U.S.C. § 1821(g).

62. The AWPA provides for criminal and administrative penalties as well. See *id.* §§ 1851, 1853. A farm owner that “willfully and knowingly” refuses to abide by the provisions of the AWPA may be fined up to \$1,000, or imprisoned up to one year, or both. *Id.* § 1851(a). Subsequent violations of the AWPA may result in a fine up to \$10,000 or imprisonment up to three years in jail, or both. *Id.* Anyone violating the provisions of the AWPA may also be civilly penalized an amount up to \$1,000 per violation. *Id.* § 1853(a)(1).

63. See 7 U.S.C. § 2048(a)-(c) (1976), *repealed by* AWPA, 29 U.S.C. §§ 1801-1872 (1982).

64. See Linder, *supra* note 43, at 321-22.

As for a private right of action, the AWPA allows aggrieved parties to file suit in any district court having subject matter jurisdiction.<sup>65</sup> Although the AWPA is federal legislation, compliance with supplemental state law is still mandated by the statute, and no individual may be excused from complying with such state laws.<sup>66</sup> A claim under the AWPA will be successful against a farm employer if the court finds that the employer intentionally violated the provisions of the statute.<sup>67</sup> The plaintiff migrant worker may receive damages, including actual damages, and statutory damages not exceeding “\$500 per plaintiff per violation,” or other fair remedies.<sup>68</sup> In determining damages, the court may take notice of whether or not the parties to the case attempted to settle their disputes prior to filing suit.<sup>69</sup> The total amount awarded to the aggrieved party must, as a policy objective, be enough to encourage workers to assert their rights by litigating violations of the AWPA.<sup>70</sup>

Where a migrant worker has coverage under a state worker’s compensation plan, however, the worker’s compensation scheme is the sole remedy that the migrant worker may obtain if he dies or suffers bodily harm on the job.<sup>71</sup> Finally, Congress has provided that the statute of limitations for bringing a private right of action under the AWPA is tolled for the period during which the state worker’s compensation claim is pending.<sup>72</sup>

The AWPA clearly evinces Congress’s intent to strengthen migrant workers’ rights, but it does not have its full intended effect because the AWPA does not allow personal jurisdiction to be asserted through nationwide service of process. Under the AWPA, lawsuits may be filed only in district courts that have jurisdiction over the parties.<sup>73</sup> Thus, migrant workers with legitimate claims under the AWPA will often find themselves at the steps of closed courtroom doors if personal jurisdiction cannot be asserted over the defendant farm owner.

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65. 29 U.S.C. § 1854(a) (2000). The AWPA does not require that the aggrieved party exhaust all administrative remedies before filing a federal suit. *Id.*

66. *Id.* § 1871.

67. *Id.* § 1854(c)(1).

68. *Id.*

69. *Id.* § 1854(c)(2).

70. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332-33 (5th Cir. 1985) (applying policy objective to FLC).

71. 29 U.S.C. § 1854(d)(1).

72. *Id.* § 1854(f).

73. *Id.* § 1854(a).

### III. THE SUPREME COURT'S PERSONAL JURISDICTION DOCTRINE<sup>74</sup>

The current personal jurisdiction analysis is nearly sixty years old. The history of the Court's personal jurisdiction cases displays the extent to which the Court has left that doctrine in confusion. Section A details the historical progression of the Court's personal jurisdiction cases, while Section B discusses some of the problems with applying the Court's personal jurisdiction doctrine.

#### A. *Historical Analysis of the Court's Personal Jurisdiction Cases*

The issue of the constitutionality of a forum state's assertion of personal jurisdiction over a defendant derives from the Fourteenth Amendment's Due Process Clause.<sup>75</sup> The Due Process Clause disallows a state from "mak[ing] binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."<sup>76</sup> *International Shoe Co. v. Washington*<sup>77</sup> is the seminal case laying the foundation of the modern personal jurisdiction inquiry. In *International Shoe*, the Supreme Court took a major turn from its prior personal jurisdiction doctrine by abrogating the rigid rule that required a defendant to be physically present within the territorial

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74. This section deals only with the issue of specific personal jurisdiction and not general personal jurisdiction. The Supreme Court has defined general personal jurisdiction as "[w]hen a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.9 (1984). In contrast, the Court has defined specific personal jurisdiction as "when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.8. In the hypothetical problem underlying this Comment, *supra* Part I, general jurisdiction rarely will be asserted over the defendant because the defendant is almost always unattached from the forum state apart from the contacts related to the cause of action. In fact, in no case regarding personal jurisdiction in the migrant farm worker context did a court determine whether general jurisdiction was applicable. *See, e.g.*, *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182 (9th Cir. 2002); *Aviles v. Kunkle*, 978 F.2d 201 (5th Cir. 1992); *Chery v. Bowman*, 901 F.2d 1053 (11th Cir. 1990); *Gonzalez Moreno v. Milk Train, Inc.*, 182 F. Supp. 2d 590 (W.D. Tex. 2002); *Villalobos v. N.C. Grower's Ass'n, Inc.*, 42 F. Supp. 2d 131 (D.P.R. 1999); *Astorga v. Connleaf, Inc.*, 962 F. Supp. 93 (W.D. Tex. 1996); *Or. Harvesting, Inc. v. Villarreal*, No. 91-215-DA, 1991 WL 575856 (D. Or. Nov. 20, 1991); *Moncevoir Hyppolite v. Gorday*, No. 89-1843-CIV-NESBITT, 1990 WL 80684 (S.D. Fla. Mar. 22, 1990); *Lopez-Rivas v. Donovan*, 629 F. Supp. 564 (D.P.R. 1986) (holding personal jurisdiction issue moot for lack of subject matter jurisdiction); *Rios v. Altamont Farms, Inc.*, 476 N.E.2d 312 (N.Y. 1985); *de la Cerda v. Hutchinson*, No. 93-1743, 1994 WL 255873 (Tex. County. Ct. Mar. 8, 1994); *Orchard Mgmt. Co. v. Soto*, 463 S.E.2d 839 (Va. 1995); *Surrillo v. Drilake Farms, Inc.*, 411 S.E.2d 248 (W. Va. 1991).

75. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 313 (1945). *See supra* notes 14, 17.

76. *Int'l Shoe*, 326 U.S. at 319.

77. *Id.* at 310.

boundaries of the forum state before it could assert in personam jurisdiction.<sup>78</sup> The Court concluded that the “terms ‘present’ or ‘presence’ [were] used merely to symbolize those activities of [a] corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.”<sup>79</sup> The Court found that the activities of a non-resident defendant that have been “continuous and systematic” as well as that “give rise to the liabilities sued on,” as opposed to “conduct of a single or isolated items of activities in a state” not connected to the cause of action, will yield a constitutional assertion of personal jurisdiction, regardless of the physical presence of the defendant.<sup>80</sup> According to the Court, “the boundary line between those activities which justify the subjection of a [defendant] to suit, and those which do not, cannot be . . . mechanical or quantitative.”<sup>81</sup> The Due Process Clause would not be offended if the non-resident 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.’”<sup>82</sup> The personal jurisdiction doctrine announced by the Court allowed for a flexible, but vague, constitutional standard.<sup>83</sup>

In 1957, the Supreme Court reevaluated the personal jurisdiction doctrine in *McGee v. International Life Insurance Co.*<sup>84</sup> The Court in *McGee* noted the continuing expansion of the reach of a state’s long-arm statute.<sup>85</sup> The Court

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78. See *id.* at 317. The Supreme Court broadened the territorial boundary test laid down in *Pennoyer v. Neff*, 95 U.S. 714, 725 (1877). Such an analysis by the Court, in leaving the rigid test of *Pennoyer* and choosing to allow a flexible standard of minimum contacts, is a prime example of the notion that personal jurisdiction is a constitutional doctrine that has adapted to the changing times. See Joelle Lee A. Nicol, Note, *Given an Opportunity to Redefine the Gray Area of “Minimum Contacts,” the Court in Prince v. Urban Chose to Remain in the Dark*, 25 W. ST. U. L. REV. 313, 316 (1998) (stating that “[s]ociety had become much more mobile since the *Pennoyer* decision” and thus the Court found a basis to re-adjust its personal jurisdiction analysis).

79. *Int’l Shoe*, 326 U.S. at 316-17.

80. *Id.* at 317.

81. *Id.* at 319.

82. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

83. See *id.* at 323 (Black, J., concurring in the judgment) (criticizing the majority for “engag[ing] in an unnecessary discussion . . . which . . . has announced [a] vague Constitutional criteria”). Justice Black argued that by announcing a “minimum contacts” standard for personal jurisdiction, the Court had “depriv[ed] a State’s citizens of due process by taking from the State the power to protect them . . .” *Id.*

84. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957). In *McGee*, the petitioner had recovered a judgment against the International Life Insurance Co. in California, and the petitioner then attempted to enforce such judgment in a Texas state court under the Full Faith and Credit Clause. *Id.* at 221. The Full Faith and Credit Clause of the Constitution states: “Full Faith and Credit shall be given in each State to . . . every other State.” U.S. CONST. art. IV, § 1.

85. *McGee*, 355 U.S. at 222 (finding historical development of personal jurisdiction doctrine as displaying “a trend [that] is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents”). For a treatment on the need for evolution in the determination of minimum contacts, see Nicol, *supra* note 78.



found that such an expansion of the permissible scope of personal jurisdiction was “attributable to the fundamental transformation of [the] national economy.”<sup>86</sup> In a functionalist opinion, the Court concluded that “[i]t is sufficient for purposes of due process that the suit was based on a contract which had [a] substantial connection with [the forum].”<sup>87</sup> The majority carefully considered the fact that if such an allowance of personal jurisdiction were not satisfied in the case, the petitioner and others in similar positions would be “at a severe disadvantage if they were forced to follow the [defendant] to a distant State in order to hold it legally accountable.”<sup>88</sup> In essence, by expanding the reach of personal jurisdiction, the Court ensured the result that the non-resident defendant would not be shielded from judgment whenever bringing suit in the defendant’s forum would be cost-prohibitive to the plaintiff.<sup>89</sup>

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Notwithstanding the many disparate approaches that the courts use to determine the existence or absence of personal jurisdiction, one common theme emerges: the facts of a given case cannot be analyzed in a vacuum but must instead be examined against a backdrop of changing societal and technological mores. Thus the concept of personal jurisdiction is not static; rather it is a construct whose dynamics are continually evolving in response to ever changing stimuli.

Any court not recognizing or responding to the imperatively evolutionary nature of the personal jurisdiction concept runs the risk of applying outdated standards and imposing injustice.

*Id.* at 313.

Along similar lines of expanding the reach of personal jurisdiction were the proposals to allow nationwide jurisdiction in personam in federal question cases. See Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1620 (1992) (concluding that in federal question cases, “state courts can constitutionally exercise jurisdiction to adjudicate state causes of action over alien defendants who have minimum contacts with the United States as a whole,” and further that “Congress may . . . have the power under section five of the Fourteenth Amendment to enact measures eliminating the necessity for the International Shoe inquiry [of minimum contacts] in all cases”). Moreover, a state’s long-arm statute is a means by which the forum court may assert personal jurisdiction over the non-resident defendant. Although the state may enumerate the manner in which a non-resident may be subject to suit in the state, the long-arm statute must be in constitutional harmony with the Fourteenth Amendment’s Due Process Clause, as interpreted by the Court. *Burnham v. Superior Court*, 495 U.S. 604, 639 n.14 (1990) (Brennan, J., plurality).

86. *McGee*, 355 U.S. at 222.

87. *Id.* at 223. A functionalist opinion is a decision that is based on the “spirit” that the law espouses and is readily adapted to a changing society. See Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 582 (1992).

88. *McGee*, 355 U.S. at 223.

89. *Id.*

One year after *McGee*, the Court returned to molding the personal jurisdiction doctrine in *Hanson v. Denckla*.<sup>90</sup> In *Hanson*, the Supreme Court held that Florida could not constitutionally assert personal jurisdiction over a Delaware trust company.<sup>91</sup> In reaching its conclusion, the Court furthered the due process analysis by adding two standards to the personal jurisdiction doctrine: (1) “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot” be considered a minimum contact necessary for personal jurisdiction; and (2) “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>92</sup> In this sense, the Court narrowed the acceptable reach of a state’s long-arm statute over non-resident defendants.<sup>93</sup> If a case were to allow for the exercise of personal jurisdiction without a finding of these additional criteria, the non-resident defendant would be subject “to litigation in a distant forum, the selection over which the nonresident had no control.”<sup>94</sup>

In 1980, the Court, in *World-Wide Volkswagen Corp. v. Woodson*, redefined its personal jurisdiction doctrine by addressing the concept of foreseeability.<sup>95</sup> The Court severely limited the use of the mere foreseeability of a chattel entering the territorial boundaries of the forum as a conclusive basis for minimum contacts for fear that “[e]very seller of chattels would in effect appoint the chattel his agent for service of process.”<sup>96</sup> Such a notion

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90. 357 U.S. 235 (1958). In *Hanson*, a settlor of a trust from Pennsylvania had appointed a trust company from Delaware to be the trustee of assets from such trust established in Pennsylvania. *Id.* at 238. The trust settlor then moved from Pennsylvania to Florida and executed a power of appointment over her trust. *Id.* at 239. Following the death of the trust settlor, the executrix of the trust attempted to obtain a judgment over the trust company in a Florida state court. *Id.* at 239-41.

91. *Id.* at 256.

92. *Id.* at 253. See *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978) (holding that the unilateral act of a plaintiff, in moving from New York to California and then enforcing judgment over her divorced husband who was a resident of New York, after defendant ex-husband sent their child to live with the plaintiff mother in California, did not give a California court personal jurisdiction over defendant ex-husband because he did not purposefully avail himself of the benefits and protections of California laws).

93. The Court narrowed the sense of “minimum contacts” again by restricting such determinative contacts to the relationship between “the defendant, the forum, and the litigation.” *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (discussing a quasi-in rem proceeding). The *Shaffer* Court also noted the underlying theme of the personal jurisdiction doctrine as that of being an adaptable and flexible standard. See *id.* at 212 (concluding that the Due Process Clause “can be . . . readily offended by the perpetuation of ancient forms that are no longer justified”).

94. Nicol, *supra* note 78, at 319.

95. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

96. *Id.* at 296.

would offend due process.<sup>97</sup> Furthermore, the Court held that the Fourteenth Amendment's Due Process Clause is not offended if the non-resident defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."<sup>98</sup>

Although the Court was secure in applying a minimum contacts analysis to find that personal jurisdiction over the defendants would offend due process, the Court noted in dicta that personal jurisdiction centers on the *reasonableness* of a forum state's assertion of power over the defendant. The Court maintained that the defendant's burden from litigating in a distant forum was of primary interest in determining whether personal jurisdiction would be valid. The Court also stated that the reasonableness of asserting personal jurisdiction should include: (1) "the forum State's interest in adjudicating the dispute"; (2) "the plaintiff's interest in obtaining convenient and effective relief"; (3) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (4) "the shared interest of the several States in furthering fundamental substantive social policies."<sup>99</sup> The Court found that minimum contacts is not the sole criteria upon which personal jurisdiction would be decided. Rather, specific contexts may call for finding personal jurisdiction when the weight of the reasonableness factors is sufficiently heavy to find in favor of such power. In evaluating the constitutionality of a forum state's exercise of in personam jurisdiction over a non-resident defendant, the inquiry is whether the defendant's contacts with the forum and litigation should have led him to "reasonably [have] anticipate[d] being haled into court" in the distant forum.<sup>100</sup>

*Burger King Corp. v. Rudzewicz*<sup>101</sup> was the Court's next major case regarding the reasonableness inquiry of asserting personal jurisdiction. In finding that personal jurisdiction existed in *Burger King*, the Court noted that "an individual's contract with an out-of-state party *alone*" cannot "automatically establish sufficient minimum contacts in the other party's home forum."<sup>102</sup> Additionally, the Court affirmed that, in appropriate cases, the reasonableness factors, previously stated in dicta in *World-Wide Volkswagen*, must be taken into consideration.<sup>103</sup> According to the Court, the

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97. *Id.* (noting that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause"). See *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 507 (4th Cir. 1956) (criticizing the application of the foreseeability method to find minimum contacts later rejected in *World-Wide Volkswagen* because its use would result in a "serious threat and deterrent to the free flow of commerce between the states").

98. *World-Wide Volkswagen*, 444 U.S. at 298.

99. *Id.* at 292 (citations omitted); see also *supra* note 17.

100. *World-Wide Volkswagen*, 444 U.S. at 297.

101. 471 U.S. 462 (1985).

102. *Id.* at 478.

103. *Id.* at 477.

reasonableness factors would establish personal jurisdiction over the defendant even where minimum contacts seem attenuated.<sup>104</sup> Inverting this reasoning indicates that a defendant with minimum contacts sufficient to have purposefully benefited from the laws of the forum still may not be subject to personal jurisdiction if, for example, the burden to litigate in a distant forum would be too great a hardship. *Burger King* separated the issue of personal jurisdiction into two discrete tests—one of minimum contacts and the other of the reasonableness of asserting personal jurisdiction over the non-resident—with each having a certain level of influence over the other.<sup>105</sup>

The last major case that the Supreme Court decided regarding the issues of fair play and reasonableness with respect to the personal jurisdiction doctrine was *Asahi Metal Industry Co. v. Superior Court*.<sup>106</sup> Although the Court issued only a plurality opinion regarding the issue of minimum contacts,<sup>107</sup> it came to

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104. *Id.*

105. For an analysis this issue, see Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q., 441 (1991); see also Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 938 (2000) (criticizing the Court's development of its personal jurisdiction test as "car[ing] more about constitutional theory than outcome"). Heiser argued that the Court wishes to reach an answer compatible with its interpretation of the Due Process Clause under the Fourteenth Amendment, and not to reach an answer that is equitable. *Id.*

106. 480 U.S. 102 (1987).

107. Although the Court clearly agreed on an outcome, the analysis demonstrated the Justices' diverging views regarding minimum contacts. Four Justices, led by Justice O'Connor, found that in cases where a product has entered a forum through a stream of commerce and thereby caused an injury should not lead to personal jurisdiction. *Id.* at 108-116. An assertion of personal jurisdiction over a non-resident defendant in a suit regarding that product would be contrary to the defendant's Due Process guarantees unless additional conduct by the defendant toward the forum existed. *Id.* The O'Connor plurality determined that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 112. Justice O'Connor concluded that additional conduct on the part of a defendant such as: "designing [a] product" geared toward the state, "advertising" within the state, "establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" as possible examples of a defendant "purposefully direct[ing]" acts toward the state if the defendant was aware "that the stream of commerce may or will sweep the product into the forum State . . ." *Id.* Justice Brennan, on the other hand, wrote for another four justice plurality when he stated that "[a]s long as a participant in [the stream of commerce] is aware that the final product is being marketed in the forum State," such participant should reasonably anticipate the possibility of being sued in that forum state. *Id.* at 117. Brennan argued that someone who puts goods into the stream of commerce will benefit economically from the product being sold in the forum state. *Id.*

a unanimous decision regarding the ultimate outcome of the case—denial of personal jurisdiction.<sup>108</sup>

After applying the reasonableness factors, the Court determined the exercise of personal jurisdiction over the alien defendant company was unreasonable.<sup>109</sup> The Court found the international context of the dispute to be a significant reason for finding personal jurisdiction unreasonable. Forcing the defendant to litigate an indemnification suit so far from its home forum—especially when the home forum is a different country—was too burdensome. The Court, therefore, refused to find that a constitutional assertion of personal jurisdiction existed.<sup>110</sup>

### B. *Personal Jurisdiction Problems Today*

As it currently exists, the Court's personal jurisdiction doctrine is not well-defined.<sup>111</sup> Deciding at what level minimum contacts are sufficiently established is not an easy task. Although this Comment does not attempt to argue that the minimum contacts rationale should be abandoned entirely, there

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108. *See id.* at 116 (denying personal jurisdiction based on the unreasonableness of haling a Japanese party into a California state court to litigate an indemnity suit against a Taiwanese party because of “the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State”). The situation of the suit at issue in *Asahi* is quite intriguing. A California resident sued a Taiwanese motorcycle tire tube manufacturer in a products liability suit in a California state court. *Id.* at 105-06. The Taiwanese company, in turn, sought indemnification from the manufacturer of the tube's valve, a Japanese party. *Id.* at 106. Later, the original plaintiff to the suit settled his case out of court leaving two alien parties, one Taiwanese, the other Japanese, to litigate across an ocean in California. *Id.*

109. *Id.* at 114. *See supra* note 17 (discussing the Court's unreasonableness of personal jurisdiction standard); *see also supra* text accompanying note 99.

110. *Asahi*, 480 U.S. at 116. Of particular relevance in *Asahi* is the concurring opinion of Justice Stevens. Stevens argued that the fractured Court should not even bother to perform a minimum contacts analysis because the Court had already determined an assertion of personal jurisdiction over the Asahi Corporation to be unreasonable. *Id.* at 121 (“An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional.”) (Stevens, J., concurring). Seemingly, Stevens implicitly stated that the minimum contacts analysis is not even applicable as a constitutional standard. The Court always starts with an examination of minimum contacts and then decides the reasonableness factors. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (concluding that the “constitutional touchstone [of personal jurisdiction] remains whether the defendant purposefully established ‘minimum contacts’ in the forum” (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))). If, however, Stevens were to argue for starting with a determination of reasonableness before minimum contacts, one could possibly arrive at the paradoxical conclusion that jurisdiction in personam would comport with fair play and substantial justice, but at the same time not be valid because of a lack of minimum contacts. In this case, the conclusion one could draw from Justice Stevens's reasoning is that only the reasonableness factors of *Burger King* be examined, and minimum contacts be disregarded.

111. For a severe criticism of the Court's personal jurisdiction approach and a proposed “minimum interest” method for determining personal jurisdiction, see Heiser, *supra* note 105.

is reason to question the validity and benefits of its application.<sup>112</sup> Even though the Court has asserted that the minimum contacts test is met when the defendant has “reasonably anticipated” being haled into court, applications of the personal jurisdiction doctrine are not so easily conducted. For example, what does it actually mean for the cause of action to arise out of the defendant’s contacts? On this issue, the Supreme Court has seemingly left the circuit courts in disagreement.<sup>113</sup> This uncertainty has resulted in a voluminous amount of litigation concerning minimum contacts.<sup>114</sup> Furthermore, the issue of personal jurisdiction may be raised after the trial court has rendered its decision, thus draining appellate resources. This indicates that judicial resources may be more efficiently utilized with a clearer standard guiding courts.<sup>115</sup>

Although the current personal jurisdiction doctrine needs revision, this Comment does not intend to delve into the possible remedies to this situation, but rather focuses on the narrow issue of the necessity for nationwide service of process for claims brought under the AWP. The very fact, however, that the Court’s personal jurisdiction analysis is vague<sup>116</sup>—and possibly unworkable—gives added strength to the argument that the AWP be given a nationwide service of process amendment.

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112. See Kevin C. McMunigal, *The Craft of Due Process*, 45 ST. LOUIS U. L.J. 477, 483 (2001) (“Typically, new factors [to the minimum contacts test] have been added [by the Court] without acknowledgment or justification of departure from past practice and with little if any attempt to integrate innovations with prior cases.”).

113. See Michael J. Neuman & Assocs. v. Florabelle Flowers, Inc., 15 F.3d 721, 725 (7th Cir. 1994) (making no reference to purposeful availment standard in personal jurisdiction analysis, but rather simply concluding that because defendant’s representative made periodic visits to the forum, jurisdiction was satisfied). Compare *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000) (employing “but for” test), and *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988) (concluding that purposeful availment is met through the “but for” test), with *Pizarro v. Hoteles Concorde Int’l, C.A.*, 907 F.2d 1256, 1260 (1st Cir. 1990) (employing “legal or proximate cause” test), and *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 231 (6th Cir. 1972) (finding personal jurisdiction when consequences in the forum were “made possible” by defendant’s contacts and actions).

114. Russel J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531-32, 531 n.5 (1995) (finding more than 2,000 cases litigated on the minimum contacts test between 1990-1995).

115. See Partick J. Borchers, *Jurisdictional Pragmatism: International Shoe’s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 583 (1995) (stating that “[t]he realistic chance of reversal generated by the confusing and unstable [personal jurisdiction] doctrine invites appeals”).

116. The problems in effectively using the personal jurisdiction analysis devised by the Court dates back to the very beginning of the minimum contacts analysis. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 323 (1945) (Black, J., concurring in the judgment) (“The Court has not chosen to [provide a workable standard], but instead has engaged in an unnecessary discussion [of minimum contacts] in the course of which it has announced [a] vague Constitutional criteri[on].”).

#### IV. PERSONAL JURISDICTION OVER THE DEFENDANT FARM OWNER— SUBSTANTIVE CASE LAW

As discussed above, the Court's personal jurisdiction doctrine is the source of a number of problems. Several of these problems have been reflected in the migrant farm worker context. This Part will analyze four appellate-level cases—three from the federal courts of appeals and one from New York's highest court—dealing with the issue of whether personal jurisdiction may be asserted over the non-resident defendant farm owner. As shown below, these cases often contain flaws or stretch legal theories to find personal jurisdiction. Alternatively, contacts are often simply too attenuated to satisfy due process. In either situation, these cases demonstrate that whether migrant workers can bring suit against farm owners will be uncertain, because of the Court's personal jurisdiction doctrine.

##### A. *Cases Finding Personal Jurisdiction*

###### 1. The Ninth Circuit: *Ochoa v. J.B. Martin & Sons Farms, Inc.*

In April 2002, the Ninth Circuit decided, in a functionalist approach, *Ochoa v. J.B. Martin & Sons Farms, Inc.*<sup>117</sup> In this case, a farm owner residing in New York requested the help of a Texas-based labor contractor in recruiting migrant workers to help for the upcoming cabbage and squash harvests.<sup>118</sup> The labor contractor, knowing of an existing surplus of farm workers in Arizona, agreed to recruit and transport migrant workers from Arizona to New York.<sup>119</sup> The workers were orally promised their rights under employment, including wage rates and housing conditions.<sup>120</sup> The migrant workers, however, alleged that while working on the New York farm, the farm owner, Martin Farms, provided substandard housing and failed to pay wages due.<sup>121</sup> Upon returning to Arizona, the migrant workers filed suit in a federal district court in Arizona claiming Martin Farms violated the AWPAs.<sup>122</sup> Unfortunately, the migrant workers found the courtroom doors closed when the district court determined that personal jurisdiction could not be asserted over Martin Farms consistent with the Fourteenth Amendment's Due Process Clause.<sup>123</sup>

On appeal, the Ninth Circuit decided the issue of personal jurisdiction based upon whether an agency relationship had existed between the Texas

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117. 287 F.3d 1182 (9th Cir. 2002). For an understanding of a functionalist opinion, see *supra* note 87.

118. *Ochoa*, 287 F.3d at 1186.

119. *Id.*

120. *Id.* at 1187.

121. *Id.*

122. *Id.* at 1186-87.

123. *Ochoa*, 287 F.3d at 1187.

labor contractor and Martin Farms.<sup>124</sup> The court found that because the labor contractor had purposefully directed his activities toward the state of Arizona,<sup>125</sup> personal jurisdiction could be asserted over the farm owner if an *agency* relationship existed between the labor contractor and Martin Farms. This was a form of vicarious personal jurisdiction.<sup>126</sup> Ultimately, the court held that the labor contractor was an agent—not an independent contractor—of Martin Farms, and that the activities of the agent could count as minimum contacts sufficient to assert personal jurisdiction over the principal Martin Farms.<sup>127</sup>

In deciding that an agency relationship existed between the farm owner and labor contractor, the court stretched to satisfy the requirements for finding agency. For example, the court considered eight factors to determine whether an agency relationship existed under Arizona law.<sup>128</sup> Those factors included: (1) the farm employer's level of control over the labor contractor; (2) the "distinct nature" of the labor contractor's business; (3) the particular skills and specialization of the labor contractor; (4) the materials and work location involved; (5) the length of time the labor contractor was employed by the farm owner; (6) the method with which the farm employer paid the labor contractor; (7) "the relationship of work done to the regular business of the employer"; and (8) the belief of the farm owner and the labor contractor as to whether an agency relationship actually existed.<sup>129</sup> The Court found that Martin Farm's ability to exercise control over the labor contractor, the labor contractor's lack of specialization and skills, and the relationship of the work to the regular business of Martin Farms all pointed in the direction of an agency relationship.<sup>130</sup>

Upon closer examination, one will note that the balance between those factors tending to prove an agency relationship and those tending to prove that the labor contractor was an independent contractor was fairly even—until the court considered the fourth (the materials and place of work)<sup>131</sup> and first (Martin Farms' level of control over the labor contractor)<sup>132</sup> factors. As for the fourth factor, the court noted that because Martin Farms supplied tools for the migrant farm workers and controlled the migrant workers' work area, an

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124. *Id.* at 1189-92.

125. *Id.* at 1189.

126. *Id.*

127. *Id.* at 1192.

128. *Ochoa*, 287 F.3d at 1190-92.

129. *See id.* at 1189; *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

130. *Ochoa*, 287 F.3d at 1189-91.

131. *Id.* at 1191.

132. *Id.* at 1190.



agency relationship likely existed between it and the labor contractor.<sup>133</sup> This proposition, however, establishes a relationship between the farm owner and the *migrant workers*. The labor contractor is not even considered in this factor, yet the court still uses it to find that an agency relationship existed between the farm owner and the *labor contractor*. This inconsistency may be explained by recognizing that were the court to find no agency, it would have necessarily resulted in affirmation of the district court's decision—a result the court likely believed to be inequitable. The court focused the reasonableness standard of personal jurisdiction on the fact that the migrant workers were “of very limited means,” citing national statistics regarding the poverty levels of migrant workers to support the fact that jurisdiction was reasonable.<sup>134</sup> It is unclear, however, why national statistics of migrant workers should impact the reasonableness test of *Burger King*; after all, they do not directly concern the parties involved.<sup>135</sup>

As for the first factor—Martin Farms' level of control over the labor contractor—the court stated explicitly, “Martin Farms exercised very little day-to-day control over [the labor contractor's] recruitment and management of the . . . migrant workers.”<sup>136</sup> Nevertheless, the court decided that Martin Farms had the ability to give instructions to the labor contractor and expect that such instructions be carried out.<sup>137</sup> The court explicitly concluded that little control over the labor contractor existed, yet it still maintained that this factor contributed to an agency relationship.

The court was clearly persuaded to find jurisdiction consistent with due process in this case because of the extreme hardship and problems—in light of their financial conditions—that the migrant workers would face litigating their claim in New York. In finding personal jurisdiction based upon the minimum

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133. *Id.* at 1191. Finding an agency relationship based on the fourth factor—the materials and work location involved—is quite a stretch because it is the labor contractor that must be supplied tools and designated a controlled work area, not the migrant worker, for a finding of agency with the *labor contractor* to exist. One possibility is that the court was simply sympathetic to the plight of the migrant workers and therefore stretched the rules of law to “open the courtroom doors” to hear their claim.

134. *Id.* at 1192 & n.6 (citing that only 10% of migrants are provided vacation benefits and over 60% live in poverty). For a more in-depth analysis of the socio-economic conditions of migrant workers, see *infra* Part VI.A-C.

135. See *supra* note 17. The reasonableness factors in determining personal jurisdiction over the defendant are directed toward the defendant involved in the litigation, and not to a hypothetical defendant as portrayed through national statistics. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (“Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* . . . with the forum State.”).

136. *Ochoa*, 287 F.3d at 1190.

137. *Id.*

contacts standards of the Supreme Court, the Ninth Circuit manipulated the determination of the agency relationship to help the workers.<sup>138</sup>

A minimum contacts analysis conducted by the Supreme Court would clearly point to the fact that the farm employer did not *himself* benefit from the protections of Arizona's laws. He benefited only vicariously through the labor contractor; however, the Ninth Circuit's manipulation of the first and fourth factors obscures whether such a form of vicarious personal jurisdiction even existed through the *Ochoa* agency analysis. The problem that results from such an analysis is that determining whether personal jurisdiction will exist in the migrant worker cases becomes much too unpredictable.

## 2. The Court of Appeals of New York: *Rios v. Altamont Farms, Inc.*

In 1985, the highest court of New York dealt with the issue of personal jurisdiction over a non-resident farm employer in *Rios v. Altamont Farms, Inc.* (*Rios II*).<sup>139</sup> *Rios II* involved migrant workers in Puerto Rico trying to enforce Puerto Rican default judgments against New York apple growers in the forum of New York.<sup>140</sup> The defendants in this case delivered clearance order forms (that is, job offers) to the Department of Labor's Interstate Clearance System, requesting farm labor help.<sup>141</sup> The Labor Department, in turn, distributed the defendant's job offers to various forum states as well as Puerto Rico.<sup>142</sup> At no time did the New York defendants request that Puerto Ricans be hired for employment, and at no time before employment did the New York defendants have any contact with the Puerto Rican migrant workers.<sup>143</sup> The defendants were contacted by the Labor Department regarding the Puerto Rican workers' acceptance of employment, and the migrant workers began work on the New

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138. Such a construction of the agency analysis is commendable for its recognition of the need to protect the low-income migrant workers. The price paid, however, is straying from the law—the defendant's due process guarantees. One must remember Chief Justice Marshall's powerful statement that "there must be [a] rule of law to guide the court in the exercise of its jurisdiction." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803). Although *Marbury* concerned an issue of proper subject matter jurisdiction of the Court, as opposed to personal jurisdiction, the need for the "rule of law" should be equally applicable in all legal contexts.

139. 476 N.E.2d 312 (N.Y. 1985) (hereinafter *Rios II*).

140. *Rios v. Altamont Farms, Inc.*, 475 N.Y.S.2d 520, 521 (N.Y. App. Div. 1984), *rev'd*, 476 N.E.2d 312. The Court of Appeals of New York adopted the dissenting opinion from the New York Supreme Court, Appellate Division's case as its official opinion. *Rios II*, 476 N.E.2d at 312. For the sake of clarity, this Comment labels the opinion issued by the Court of Appeals of New York as *Rios II*, and it labels Justice Levine's dissenting opinion in the Supreme Court, Appellate Division's case as *Rios*. The facts of *Rios II* were taken directly by the Court of Appeals from *Rios*. See *id.*

141. *Rios*, 475 N.Y.S.2d at 521. The Interstate Clearance System is the mechanism that farm employers must engage in when they wish to hire alien workers. For an understanding of the use of this mechanism, see *infra* note 165.

142. *Rios*, 475 N.Y.S.2d at 522.

143. *Id.*

York farms.<sup>144</sup> Problems, however, between the workers and the employers ensued, and the plaintiffs left New York to return home.<sup>145</sup>

Following the termination of their employment, the migrant workers filed suit against the defendants in the Superior Court of Puerto Rico, where the court granted default judgment.<sup>146</sup> The migrant workers then attempted to enforce the judgment in the courts of New York, but the defendants argued that the Puerto Rican forum did not originally have personal jurisdiction over them.<sup>147</sup> The Supreme Court of New York held that personal jurisdiction existed, but the Supreme Court, Appellate Division reversed the trial court. Adopting the dissenting opinion of Justice Levine,<sup>148</sup> the Court of Appeals of New York reversed, finding that the defendants had indeed established minimum contacts in Puerto Rico, and an assertion of personal jurisdiction would comport with fair play.<sup>149</sup>

In concluding that a constitutional assertion of personal jurisdiction over the New York defendants existed in Puerto Rico, Justice Levine relied heavily on the fact that the defendants “were made aware that the job orders were physically delivered to Puerto Rican employment offices . . . well before the date [of employment] was to commence.”<sup>150</sup> Levine found that the defendants had received information regarding not only the number and names of workers that were to report to work in New York, but also health records and other administrative information submitted during the application process.<sup>151</sup> Upon examining the totality of circumstances, Levine concluded that the defendants had, in fact, established minimum contacts with Puerto Rico.<sup>152</sup> He declared that the defendants had “purposefully sent [the clearance orders] into the stream of interstate commerce,”<sup>153</sup> and were fully aware that the clearance orders could have the potential of being acted upon in Puerto Rico. Thus, the defendants were believed to have “deliberately set in motion the job

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144. *Id.*

145. The plaintiff's allegations were that the defendants breached their contract and committed torts. *Id.* The causes of action were not based upon violations of the AWPA because the AWPA had not yet been enacted. This is of little consequence, however, since this Comment is concerned not with the substantive law of the AWPA, but rather with the procedural aspects of asserting the AWPA in court.

146. *Id.* The migrant workers alleged that the defendant farm owner had violated the Wagner-Peyser Act and the Immigration and Nationality Act of 1952. *Id.* at 521.

147. *Rios*, 475 N.Y.S.2d at 522.

148. *Rios II*, 476 N.E.2d at 312 (reversing the order of the Supreme Court, Appellate Division “for [the] reasons stated in the dissenting opinion by Justice Howard A. Levine”).

149. *Rios*, N.Y.S.2d at 528 (Levine, J., dissenting).

150. *Id.* at 525.

151. *See id.*

152. *Id.* at 526.

153. *Id.* at 526.

recruitment machinery of the interstate clearance system.”<sup>154</sup> From this stream of commerce rationale, the minimum contacts between the forum, the litigation, and the defendant were established.

As for the reasonableness inquiry of personal jurisdiction, Justice Levine was heavily influenced by the burden that the Puerto Rican plaintiffs would encounter litigating their claim in New York.<sup>155</sup> After comparing the relative burdens that the migrant workers and the defendant employers would face in litigating in New York and Puerto Rico, respectively, Levine concluded:

[F]air play and justice *demand* that plaintiffs be permitted validly to litigate their claims in their home forum. Plaintiffs here are impoverished, English-illiterate farm workers. Economic and logistical realities render them totally incapable of obtaining legal redress for their complaints in the courts of New York. Defendants, on the other hand, are ongoing business entities. They have already demonstrated their willingness to act collectively and share the costs of litigation in the Federal courts, as well as in the New York courts in the matter now before us. It may reasonably be assumed that the common defense to all of the claims asserted by these plaintiffs would basically entail testimony from a few supervisory employees concerning defendants’ justification for discharging plaintiffs. Imposing the burden of producing such witnesses in Puerto Rico hardly amounts to a denial of due process, when a converse ruling effectively would confer total immunity from suit upon defendants.<sup>156</sup>

The economic realities facing the migrant workers would have made the defendants “judgment proof” had the defendants been forced to go to New York.<sup>157</sup> This is because the migrant workers would not be economically capable of litigating an entire case so far away from home.

In adopting the dissenting opinion of Justice Levine, the Court of Appeals of New York erred. Justice Levine’s reasoning is not in accord with the foreseeability that a chattel will enter the stream of commerce rationale laid out by the Supreme Court in *World-Wide Volkswagen*. As Justice White declared only five years before the decision in *Rios II*, “the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state.”<sup>158</sup> The *Rios II* defendants merely were aware of the

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154. *Rios*, 475 N.Y.S.2d at 526 (Levine, J., dissenting).

155. *See id.* at 525-28.

156. *Id.* at 528.

157. *See id.*; *see also* *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

158. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). *Rios II* was decided before the Supreme Court’s plurality split in *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987). Justice Brennan opined that “[so] long as a participant in [the stream of commerce] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” *Id.* at 117 (Brennan, J., concurring). Nevertheless, the weight of the cases seems to be in favor of the “stream of commerce plus” theory. *See supra* note 107. For cases arguing that the “mere likelihood” that a product enters the stream of

fact that the interstate clearance orders would enter the stream of commerce by the unilateral act of the Department of Labor and be carried into Puerto Rico. Importantly, the defendants did not “purposefully [avail themselves] of the privilege of conducting activities within [Puerto Rico].”<sup>159</sup>

Additionally, Levine’s reasoning is contrary to the rationale supporting of the Court’s *McGee* decision.<sup>160</sup> Unlike the facts in *McGee*, where the defendant was fully aware with whom it was contracting before the insurer accepted the insurance, the defendants in *Rios II* did not know who the migrant workers were *before* the offers of employment were accepted.<sup>161</sup> Minimum contacts should not have been established in Levine’s dissenting opinion, and therefore the New York high court erred in adopting Levine’s opinion.<sup>162</sup>

## B. Cases Finding Lack of Personal Jurisdiction

### 1. The Eleventh Circuit: *Chery v. Bowman*

In 1990, the Eleventh Circuit Court of Appeals decided the case *Chery v. Bowman*.<sup>163</sup> *Chery* involved a suit under the AWPFA in a Florida federal court between the plaintiff migrant workers from Florida and the Virginian defendant farm owner Bowman.<sup>164</sup> After deciding that he would need foreign agricultural workers to help on his farm, Bowman complied with the Department of Labor’s requirement of submitting clearance order forms to the Interstate Clearance System to ensure job opportunities went to U.S. migrant workers before foreign workers.<sup>165</sup> The Department of Labor distributed the

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commerce is not enough to establish minimum contacts, see *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (holding that non-resident defendant’s “awareness that the [injury-causing product] might end up in [forum]” was not enough for minimum contacts); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 376 (8th Cir. 1990) (holding that the “placement of a product [by defendant] into the stream of commerce, without more,” is not enough for minimum contacts).

159. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

160. *McGee*, 355 U.S. at 220.

161. *See id.*; *Rios*, 475 N.Y.S.2d at 522, *rev’d*, 476 N.E.2d 312 (N.Y. 1985).

162. Levine’s reasoning, however, regarding the reasonableness of jurisdiction provides useful support for this Comment’s position that the AWPFA should be amended to include a nationwide service of process statute when asserting personal jurisdiction would be reasonable. Justice Levine pointed out that fair play and justice “demand” that the defendant be haled into the migrants’ home forum, mainly due to the poor conditions of migrants, as analyzed *infra* Part VI. *See Rios*, 475 N.Y.S.2d at 528 (Levine, J., dissenting), *rev’d*, 476 N.E.2d 312.

163. 901 F.2d 1053 (11th Cir. 1990).

164. *Id.* at 1053-54.

165. *See id.* at 1054. For an understanding of how the Interstate Clearance System functions through the Wagner-Peyser Act, the law requiring the use of the Interstate Clearance System, see 20 C.F.R. § 655.201 (2001). This regulation provides that:

An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by

clearance orders to employment offices in states where there was an excess supply of farm labor, including Florida.<sup>166</sup> Thereafter, a plaintiff farm worker from Florida drove to Virginia seeking agricultural work.<sup>167</sup> At a Virginia employment office, the plaintiff telephoned Bowman's agent in order to set up possible employment for the plaintiff and his crew.<sup>168</sup> The plaintiff told Bowman that his crew would be comprised of workers from Florida.<sup>169</sup> Although the clearance orders that Bowman filed with the Labor Department stated that the plaintiff would be reimbursed for travel fees, neither Bowman nor his agent supported the plaintiffs in their journey to Virginia.<sup>170</sup> After only a few days of work, Bowman fired the workers who, in turn, filed suit in a Florida federal court claiming that Bowman violated the AWPAs.<sup>171</sup>

The Eleventh Circuit began its analysis of the case by stating that, although the AWPAs create federal rights and allow for a private right of action, the personal jurisdiction analysis must be conducted in accordance with the Fourteenth Amendment's minimum contacts test because the AWPAs do not contain a provision for nationwide service of process.<sup>172</sup> The court followed

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filing, or by having an agent file, in duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

*Id.* § 655.201(a)(1). The regulation further mandates that:

Every temporary labor certification application shall include . . . [a] copy of the job offer which will be used by the employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer.

*Id.* § 655.201(b)(1). *See also* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 594-96 (1982) (concluding that the purpose of the Interstate Clearance System is to give preference regarding jobs to domestic workers over foreign workers, to make sure that the working conditions of domestic workers are not affected negatively by the entering of foreign workers into the employment stream, and to prevent any discrimination of domestic workers in favor of the alien hired hands).

166. *Chery*, 901 F.2d at 1054.

167. *Id.*

168. *Id.*

169. *Id.* at 1054-55.

170. *Id.* at 1055.

171. *Chery*, 901 F.2d at 1055.

172. *Id.* at 1055 & n.2. Because no service of process provision or statute was present, the federal court could only exercise personal jurisdiction over defendants who would be subject to the jurisdiction of the courts of the forum state in which the court was located. *See* FED. R. CIV. P. 4(k)(1)(A) (2000) ("Service of a summons . . . is effective to establish [personal jurisdiction over a defendant] who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located."); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 107-08 (1987) (refusing to make an inference that nationwide service of process might exist when Congress had not explicitly enacted such a provision). The court in *Chery* only focused on whether an assertion of personal jurisdiction would be compatible with due process as interpreted by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its

the Supreme Court's personal jurisdiction standard by concluding that Bowman did not establish the minimum contacts with Florida necessary to have "reasonably anticipate[d] being haled into court there."<sup>173</sup> The only contact that the court found to exist between Bowman, the Florida forum, and the litigation was the forwarding of clearance orders by the Labor Department to the Florida employment office.<sup>174</sup> The court noted that Bowman only knew of the fact that Florida had received the clearance orders; at no point, however, did he request that such orders be delivered there.<sup>175</sup> Thus, the unilateral activity of the Department of Labor could not create sufficient minimum contacts to warrant the exercise of personal jurisdiction.<sup>176</sup> The court further noted that, even if the dispersal of clearance order forms could be considered a contact, the single transmission of Bowman's orders to Florida was too attenuated to satisfy the minimum contacts requirement.<sup>177</sup>

The court in *Chery* rightly decided the issue of minimum contacts.<sup>178</sup> There was no showing whatsoever that Bowman had purposefully directed his activities toward the Florida forum. Bowman did not benefit from any of the privileges and protections of the laws of Florida. In fact, the migrant workers did not even accept the employment offers from Bowman in Florida; rather, they accepted the offers in Virginia.<sup>179</sup> The circumstances of the job offers in *Chery* were far removed from the purposefully directed activity of the defendant negotiating a contract to be governed by Florida laws in *Burger*

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progeny because it was unsure as to how the Florida long-arm statute was different from the due process standards required by the Fourteenth Amendment. *Chery*, 901 F.2d at 1055 n.2.

173. *Chery*, 901 F.2d at 1056 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

174. *Id.*

175. *Id.*

176. *Id.* at 1057. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Because the Department of Labor distributed the clearance orders to Florida by itself—a unilateral activity—that contact with Florida could not be a minimum contact established by the *defendant*. *Chery*, 901 F.2d at 1056-57.

177. *Chery*, 901 F.2d at 1056-57.

178. In fact, trial courts that decided the issue in favor of personal jurisdiction when the Interstate Clearance System was involved usually found more contacts by the defendant than just the dispersal of the clearance forms. See, e.g., *Nezil v. Williams*, 543 F. Supp. 899, 904 (M.D. Fla. 1982) (finding that farm employer sent clearance order to Department of Labor and specifically named a forum labor contractor to recruit in that forum); *Garcia v. Vasquez*, 524 F. Supp. 40, 42 (S.D. Tex. 1981) (finding that farm employer sent clearance orders, made telephone calls to the employment office in the forum state, and provided workers traveling expenses through the employment office in the forum state). But see *Villalobos v. N.C. Growers Ass'n, Inc.*, 42 F. Supp. 2d 131, 140 (D.P.R. 1999) (finding that farmers and association that submitted clearance orders "reasonably should have known recruitment was likely to take place" in a forum traditionally known for a surplus of migrant workers).

179. *Chery*, 901 F.2d at 1057.

*King*.<sup>180</sup> Because minimum contacts could not be established in *Chery*, the court did not inquire as to whether an assertion of in personam jurisdiction would be reasonable.<sup>181</sup>

## 2. The Fifth Circuit: *Aviles v. Kunkle*

In 1992, the Fifth Circuit considered the issue of personal jurisdiction within the migrant worker context in *Aviles v. Kunkle*.<sup>182</sup> In *Aviles*, families of migrant farm workers filed suit in a federal district court in Texas alleging, inter alia, that the record keeping requirement of the AWPA had been violated by their Ohio farm employers, two brothers named Kunkle and their Florida foreman, Felix.<sup>183</sup> The plaintiffs alleged that several of them worked on the Kunkles' farm in Ohio during the 1982 harvest and many accepted positions for the following year.<sup>184</sup> In early 1983, a representative of Felix made a call from Florida to one of the migrant workers, who was still in Texas, informing her of the start date for the harvest.<sup>185</sup> An unknown individual then wrote to another migrant worker on behalf of Felix requesting the worker to report to the Ohio farm by early summer.<sup>186</sup> The migrant workers receiving these contacts from Felix's representatives shared the information among other migrant workers in Texas.<sup>187</sup> The migrant workers arrived for work in Ohio on time, but they were delayed from beginning the harvest because of certain crop failures.<sup>188</sup> The district court in Texas found personal jurisdiction over the non-resident defendants on these limited contacts and held them to be sufficient to meet the Fourteenth Amendment's due process requirements.<sup>189</sup>

Like the Eleventh Circuit, the Fifth Circuit began its discussion in *Aviles* by noting that, because the AWPA made no mention of service of process, the boundary of personal jurisdiction in federal court was limited to that of the state court where the federal court is located.<sup>190</sup> Because the Texas long-arm statute allowed for personal jurisdiction to be asserted co-extensively to the limits allowed by the Fourteenth Amendment's Due Process Clause, the court decided the case based upon the Supreme Court's personal jurisdiction

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180. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 466 (1985) (finding sufficient contacts when the defendant entered into a contract with the plaintiff that established a franchise relationship in Miami "governed by Florida law, and call[ed] for payment of all required fees and forwarding of all relevant notices to the Miami headquarters").

181. See *Chery*, 901 F.2d at 1057.

182. 978 F.2d 201 (5th Cir. 1992).

183. *Id.* at 203 & n.1.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Aviles*, 978 F.2d at 203.

188. *Id.*

189. *Id.*

190. *Id.* at 203-04.



doctrine.<sup>191</sup> The court noted that the trial court had prefaced its assertion of personal jurisdiction on the limited findings of “the partial performance of a contract in Texas, the partial commission of a tort in Texas, and the recruitment of Texas residents in Texas for employment outside the state.”<sup>192</sup> The Fifth Circuit, however, concluded that the migrant workers’ cause of action did not arise out of any of the contacts in Texas, but rather arose out of the activities of the parties in Ohio. The court decided that the violation of the AWP “arose out of [the migrant workers’] employment at the Kunkles’ Ohio farm during the 1983 . . . harvest, [and] not out of any contacts upon which the district court predicated its exercise of personal jurisdiction.”<sup>193</sup> Contacts consisting of one telephone call and one letter that occurred with the Texas forum were not enough to establish that the defendants should have “reasonably anticipate[d] being haled into court”<sup>194</sup> in Texas because there was not sufficient evidence that the defendants “purposefully avail[ed] [themselves] of the privilege of conducting activities” within the state.<sup>195</sup> The Fifth Circuit vacated the judgment of the trial court, and the migrant farm workers were barred from continuing their suit in the courts of Texas.<sup>196</sup>

The Fifth Circuit’s determination that personal jurisdiction was lacking rested on its interpretation that the cause of action did not arise out of the contacts between the defendant, litigation, and the forum state.<sup>197</sup> If the Supreme Court were to approve such a narrow interpretation of the “arises out of” element of specific personal jurisdiction, it is unclear whether any rights violated under the AWP will ever arise out of the contacts between the non-resident defendant and the migrant workers’ forum. Violations of the AWP will necessarily take place in the forum state of the farm *owner*. Because the migrant workers’ rights will not be violated until they have begun work—in the forum of the farm owner—the farm owner never has reason to make employment decisions that would violate the AWP anywhere outside of his own forum. Furthermore, the reasoning in *Aviles* is at odds with the Supreme Court’s decision in *McGee*.<sup>198</sup> In that contract-based claim, a narrow reading of the “arises out of” element would lead to the conclusion that the refusal of the insurance company to pay the premium to the plaintiff arose out of the

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191. *Id.* at 204. See *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990) (reasoning that the Texas long-arm statute is sufficiently broad enough that it collapses into the due process standard of the Fourteenth Amendment).

192. *Aviles*, 978 F.2d at 204 (footnotes omitted).

193. *Id.* at 205.

194. See *id.*; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

195. See *Aviles*, 978 F.2d at 205; *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

196. *Aviles*, 978 F.2d at 205.

197. This is one area of the Supreme Court’s personal jurisdiction analysis that was noted for its vagueness. See *supra* Part III.B; see also *supra* note 113.

198. *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957).

activities of the insurance company in its home state of Texas because the decision not to pay was effectuated at the office. Such a strict interpretation, however, cannot be in accord with the notion of personal jurisdiction as an evolving standard.<sup>199</sup> Like the Supreme Court's interpretation of the actions of the defendant in *McGee*, the actions of the defendants in *Aviles* should have been interpreted broadly, thus fitting more closely with the evolving standard of personal jurisdiction.

### C. *The Migrant Worker–Personal Jurisdiction Cases Are Unpredictable*

The cases analyzed in the above Section display the problems of predicting whether an assertion of personal jurisdiction over non-resident farm owners will be constitutional. When courts find personal jurisdiction to exist, their analyses contain flaws or stretch legal theories to reach decisions that are sympathetic to the plight of the migrant workers.<sup>200</sup> In other cases, the contacts between the defendant, the forum, and the litigation are simply too attenuated to conclude that minimum contacts have been established consistently with the Fourteenth Amendment. Because the outcomes of *Ochoa* and *Rios II*, and perhaps even *Aviles*, should have come out differently, these opinions display the problems that migrant workers will face in asserting personal jurisdiction by following the Supreme Court's minimum contacts test—namely, being unsure whether a suit against the farm owner will be viable in the courts.

As previously noted, Congress has the power to amend the AWPA in order to allow for migrant workers to serve process on defendant farm owners on a nationwide basis. Part V details Congress's ability in doing so.

## V. ANALYSIS OF NATIONWIDE SERVICE OF PROCESS

Given the socio-economic conditions of migrant workers<sup>201</sup> and the lack of predictability in asserting personal jurisdiction over non-resident farm owners, amending the AWPA to allow for nationwide service of process<sup>202</sup> when

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199. *See supra* note 85.

200. *See Rios v. Altamont Farms, Inc.*, 475 N.Y.S.2d 520, 528 (N.Y. App. Div. 1984) (Levine, J., dissenting) (asserting that “fair play and justice demand that [the migrant workers] be permitted validly to litigate their claims in their home forum”), *rev'd*, 476 N.E.2d 312 (N.Y. 1985). Never after *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), did the Supreme Court hold that personal jurisdiction existed without minimum contacts, except in the case of transient personal jurisdiction, as evidenced in *Burnham v. Superior Court*, 495 U.S. 604 (1990). *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (holding that the “constitutional touchstone [of personal jurisdiction] remains whether the defendant purposefully established ‘minimum contacts’ in the forum State” (citing *Int'l Shoe Co.*, 326 U.S. at 316)). *But see supra* note 110.

201. *See infra* Part VI.A-C.

202. “Congress has provided for nationwide service of process on a number of occasions, and it undeniably has the power to do so . . . .” Note, *Alien Corporations and Aggregate Contacts: A*

jurisdiction over the defendant would be reasonable<sup>203</sup> would strengthen migrant workers' access to justice. Section A of this Part details Congress's power in enacting nationwide service of process legislation and the judicial interpretation of the constitutionality of such provisions. Section B will discuss the reasonableness of haling a non-resident defendant to litigate in a foreign forum through use of nationwide service.

A. *Legal Analysis Regarding Nationwide Service of Process Statutes*

Traditionally, Congress has had broad power to extend the long-arm jurisdiction throughout the United States without much restriction by the Fifth Amendment's Due Process Clause.<sup>204</sup> This application of personal jurisdiction under the Fifth Amendment's Due Process Clause was derived in some notion from the Fourteenth Amendment's bar to personal jurisdiction outside of the territorial boundaries of a forum.<sup>205</sup> Under the Fifth Amendment's Due Process Clause, the limit on a federal court's reach on personal jurisdiction is at the borders of the United States. Under this construction of the Fifth Amendment's limitation of reach, Congress has the ability to grant to federal courts the right to assert personal jurisdiction over any defendant regardless of whether the defendant has any contacts with the precise state in which the federal court sits. After all, the federal court will naturally be within the boundaries of the nation.<sup>206</sup>

Although the Court has maintained that minimum contacts test is the test to determine whether a particular forum state may assert power over a non-resident defendant, per the Fourteenth Amendment, the Court has yet to

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*Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 482 (1981). See also AM. L. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 437 (1969); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1587-88 (4th ed. 1996) [hereinafter HART & WECHSLER]. Congress may also authorize worldwide service of process, see *Blackmer v. United States*, 284 U.S. 421 (1932), but such a discussion is beyond the scope of this Comment.

203. See *supra* note 17.

204. The Fifth Amendment's Due Process Clause states that: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. See, e.g., *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 442 (1946); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622 (1925); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

205. See *Pennoyer v. Neff*, 95 U.S. 714, 725 (1877); HART & WECHSLER, *supra* note 202, at 1587-88.

206. The Supreme Court's minimum contacts test has, nevertheless, played an influential role in such an analysis of nationwide personal jurisdiction. Thus, federal courts have often continued to operate similarly to the Court's traditional Fourteenth Amendment Due Process doctrine of minimum contacts by asserting personal jurisdiction over the defendant only if the defendant has minimum contacts with the United States, instead of a particular forum state within the United States. See, e.g., *Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 720 (1st Cir. 1991); *Duckworth v. Med. Electro-Therapeutics, Inc.*, 768 F. Supp. 822, 826 (S.D. Ga. 1991).

determine whether nationwide service of process statutes are constitutional under the Fifth Amendment since *International Shoe Co. v. Washington*.<sup>207</sup> The only direction the Court has offered in this area comes from Justice Stewart's dissenting opinion in *Stafford v. Briggs*.<sup>208</sup> Stewart maintained that due process in the personal jurisdiction analysis requires that minimum contacts be present "between the defendant and the sovereign that has created the court."<sup>209</sup> He accepted the minimum contacts analysis from *International Shoe* when applied to the nationwide service of process statute in question, but he did not apply that analysis in the same way that the Court had previously interpreted due process.<sup>210</sup> Stewart interpreted the minimum contacts test in *Stafford* to be those contacts that the defendant has in connection with the United States as a nationwide forum.<sup>211</sup> The forum in this analysis, therefore, is not the state in which the district court sits, because *Stafford* was not a case under the Fourteenth Amendment—a restriction on the power of states. Rather, *Stafford* involved the Fifth Amendment's Due Process Clause—a restriction on the federal government. Consequently, Stewart found that when nationwide service of process is made on a United States resident, no Fifth

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207. 326 U.S. 310 (1945). In a case involving the Clayton Act, the Court sidestepped the issue of whether nationwide service would be constitutional. *United States v. Scophony Corp. of Am.*, 333 U.S. 795, 804 n.13 (1948). See 15 U.S.C. § 22 (2000). The service of process provision of the Clayton Act provides that:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

*Id.* § 22.

208. 444 U.S. 527, 545 (1980) (Stewart, J., dissenting). The majority of the Court in *Stafford* held that a statute providing for nationwide service in limited situations did not apply to the cases that were before the Court. See *id.* at 553 (discussing the petitioner's due process claim). The Court in *Stafford* consolidated two court cases. *Id.* at 530-33. The statute in question (Mandamus and Venue Act of 1962) provided that in "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority" the suit may be brought against the defendant "in any judicial district in which . . . a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(e) (2000). Service of "[t]he summons and complaint in such an action . . . may be made by certified mail beyond the territorial limits of the district in which the action is brought." *Id.* Although the Court in *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987), discussed the issue of nationwide service of process, it did so only to conclude that such a form of service of process was not relevant in the case. See *id.* at 106 (concluding that nationwide service of process cannot be found to exist implicitly because Congress is aware of how to authorize such a type of service of process, and therefore when it failed to do so, it was the intention of Congress to not allow such a means of service).

209. *Stafford*, 444 U.S. at 554 (Stewart, J., dissenting).

210. *Id.*

211. *Id.*

Amendment due process problem would exist.<sup>212</sup> Stewart was content in disregarding a consideration as to the unfairness of requiring a defendant to litigate in an unreasonably distant forum when the Fifth Amendment was at play.<sup>213</sup> According to the lone Justice that has considered the constitutionality of nationwide service of process statutes (albeit over twenty years ago), Congress has absolute power to grant federal courts the power to hale a defendant into the court to litigate when hearing issues dealing with federally-created rights, so long as the nationwide minimum contacts test is met. In any case, it would be fairly evident that the defendant would have established sufficient minimum contacts with the sovereign of the United States when the defendant is, in fact, located in the United States. The issue of nationwide contacts would only be relevant when the defendant is an alien party, or when he lives overseas.

*B. Reasonableness of Personal Jurisdiction Under the Fifth Amendment Due Process Clause*

Clearly, the historical notion that Congress may grant nationwide service of process unfettered by the constitutional limitations of due process under the Fourteenth Amendment is at odds with the fifty-plus years of the Court's evolving personal jurisdiction analysis. Although Justice Stewart's dissent in *Stafford* did not delve into a detailed analysis of why unreasonably burdening a defendant in traveling far from his home would not affect the constitutionality of personal jurisdiction, *Stafford* (1980) was decided before the Court headed in the direction of the "reasonableness" factors that it relied upon in *Burger King* (1985) and *Asahi* (1987).<sup>214</sup> Thus, if the same issue was contested today, the inquiry would be different.

The Fourteenth Amendment places constitutional restrictions on states from unreasonably burdening a defendant by forcing him to litigate in a distant forum. It seems counterintuitive, therefore, to allow Congress, simply because it is constrained by the Fifth Amendment, to impose those very same burdens

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212. *Id.*

213. *Id.* Justice Stewart did consider whether a defendant being unduly burdened in litigating in a distant forum would still have legal recourse to remedy the problem. *See id.* at 554. Stewart noted that federal district courts will "look sympathetically upon a motion for a change of venue in any case where [the defendant] could show that he would be substantially prejudiced if the suit were not transferred to a more convenient forum." *Id.* Federal district courts have this venue transfer power under 28 U.S.C. § 1404(a) (2000). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*; *Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956, 959 (1st Cir. 1984) (concluding that the fairness concern is addressed by forum non conveniens); *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989, 991 (4th Cir. 1984) (concluding that the fairness concern is dealt with by federal venue requirements).

214. *See supra* note 17.

that the Fourteenth Amendment seeks to prevent. Proposals that the Fifth Amendment restrict Congress in similar ways to the Fourteenth Amendment's restriction on a state's right to assert personal jurisdiction have developed.<sup>215</sup> One federal Court of Appeals has focused on allowing the reasonableness standard of the Court's personal jurisdiction doctrine—developed to prevent the defendant from an unreasonable burden of litigation—to play a key role in restricting the federal courts from asserting personal jurisdiction under the Fifth Amendment.<sup>216</sup> Furthermore, some commentators have viewed the Fifth Amendment's due process standard to be that of general fairness to the parties test as opposed to a "contacts test."<sup>217</sup>

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215. See FED. R. CIV. P. 4(k)(2) advisory committee's note. See also Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 805 (1981). In the migrant worker context, a farm employer residing and owning his farm in the United States will always have minimum contacts with the United States by the very presence of his farm production in the United States because the direct and proximate causes of action under the AWPA will arise out of events on that farm. This is because the migrant workers are working on farms in the United States.

216. See *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 945-46 (11th Cir. 1997) (concluding that the reasonableness standard under the Fourteenth Amendment's Due Process Clause is included in the Fifth Amendment's governing standard allowing for federal nationwide service of process); see also *Lescs v. Martinsburg Police Dep't*, No. 02-5062, 2002 WL 1998177, at \*1 (D.C. Cir. Aug. 29, 2002) (concluding that although nationwide service of process statute exists, haling West Virginians into federal court in Washington, D.C., was unconstitutional because "the ends of justice [would] not [be] served"). But see *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) (stating that when federal question subject matter jurisdiction has been established, the Constitution is no bar to nationwide service of process). The Court has not decided the issue of whether the Fourteenth Amendment's Due Process Clause has any effect when personal jurisdiction is established per nationwide service of process. The philosophy of two of the Court's cases may be integral if the Court should ever choose to hear the issue. Compare *Burnham v. Superior Court*, 495 U.S. 604, 610-11 (1990) (asserting that personal jurisdiction over a defendant served with process while physically in the forum state is traditionally and historically reasonable) (Scalia, J., plurality), with *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest."). If the Court takes the view of Justice Scalia's plurality opinion in *Burnham* over that of the "liberty interest" rationale in *Insurance Corporation of Ireland*, minimum contacts may have no application in a Fifth Amendment due process analysis, just like it did not in Scalia's analysis in *Burnham*. *Burnham*, 495 U.S. at 610-11 (Scalia, J., plurality).

217. See, e.g., *Casad*, *supra* note 85, at 1601-02 (discussing the view that the Fifth Amendment's Due Process Clause should account for an overall fairness test as opposed to a national contacts test). For cases indicating, however, that even where a nationwide service of process statute applies, the defendant must still have contacts with the forum state as the Fourteenth Amendment mandates, see *Doll v. James Madison Martin Assocs. (Holdings) Ltd.*, 600 F. Supp. 510, 518 (E.D. Mich. 1984); *Smith v. Montgomery Ward & Co., Inc.*, 567 F. Supp. 1331, 1336-37 (D. Colo. 1983).

It is crucial at this juncture to remember that the Fourteenth Amendment's Due Process Clause is a restriction on the assertion of personal jurisdiction by a particular forum state over a non-resident of *that* state. In federal question cases in federal court involving nationwide service of process, however, the Fourteenth Amendment applies only when the defendant is not a resident of the United States.<sup>218</sup> When considering, therefore, the fairness of the forum into which the defendant is being dragged, the Court's interpretation of the reasonableness factors is not completely on point. Such an interpretation is one well-suited for state court jurisdictional issues, but not for federal court jurisdictional issues under nationwide service of process.<sup>219</sup> One legal scholar has proposed that the Court examine a broad view of the parties in determining whether personal jurisdiction would be reasonable in nationwide service of process cases. Factors included would be a realization that the congressional purpose in providing for nationwide service is to provide for a convenient forum for the plaintiff (putting less emphasis on the defendants' rights), the particular transaction underlying the lawsuit and its relationship to the forum, and the nature of the litigation and its relationship to the forum.<sup>220</sup>

It is quite inefficient, however, to put aside the Court's reasonableness factors when determining the fairness/reasonableness inquiry of personal jurisdiction in nationwide service cases. After all, the factors are already set out by the Court and are ready for use. Because the Court has not explicitly decided the constitutionality of nationwide service of process statutes, and given the fact that the Court has left the reasonableness factors of *Burger King* alone for over fifteen years, it seems very likely that Congress would have the power to enact a nationwide service of process statute based on a nationwide minimum contacts analysis. In addition, the burden of persuasion in the unconstitutionality of jurisdiction, due to extreme hardship to the defendant, would rest upon the defendant.

#### VI. MIGRANT WORKERS AND THE NEED FOR A NATIONWIDE SERVICE OF PROCESS AMENDMENT TO THE AWPA

A nationwide service of process amendment to the AWPA will not only diffuse the unpredictability that exists in asserting personal jurisdiction over farm owners, but it will also help migrant workers to assert their rights in courts located close to the security of their personal residences. When migrant

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218. See generally *Leasco Data Processing Equip. Corp., v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

219. For a discussion on construing a reasonableness standard for personal jurisdiction cases under nationwide service of process statutes, see the very thorough analysis in Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988).

220. See *id.* at 40.

workers' socio-economic conditions are considered, amending the AWPA provides migrant workers with a useful tool to better their lives on an aggregate level.

This Part is subdivided into five Sections that portray the difficulties migrant workers will face in trying to understand, let alone use, the complex legal system. Section A will set forth a brief overview of the general lifestyle of a migrant worker. Section B will detail the problem of poverty that has stricken migrant workers. Section C will discuss the migrant worker's lack of education, which makes them more vulnerable to farm owners taking advantage of them. All three Sections give substantial support for allowing migrant workers to litigate their claims under the AWPA near the security of their homes. Section D will consider the problem of finding legal representation in the farm employer's state. This lack of legal assistance is a major justification for a nationwide service of process amendment to the AWPA. Finally, Section E suggests the application of a nationwide service of process amendment to the AWPA.

#### A. *The Migrant Worker's Lifestyle*

Today's migrant workers are arguably worse off with respect to economic and social progress than they were in previous decades.<sup>221</sup> The conditions that migrant workers face during the course of their sporadic employment is unquestionably harsh.<sup>222</sup> Migrant workers are often "subjected to . . . unsafe equipment, unhealthy sprays and pesticides, crude and unsanitary living conditions, exploitation in infinite ways by their . . . employers, [and] lack of care of any kind by anyone."<sup>223</sup> As such, the migrant workers truly are pitted at the lowest levels of the American social hierarchy. The migrant workers in America feed this nation, yet few are accustomed to the American lifestyle. Migrant workers "arrive where they're needed . . . by necessity and, at times, desperation."<sup>224</sup> Migrant workers accept the hardships of their daily toil because they have little else to rely upon. "The powerlessness of farmworkers breeds dependence, which serves to marginalize and isolate" them from other possible advantages and opportunities available to others in society.<sup>225</sup> Notwithstanding congressional recognition of the problems facing migrant workers, the problems and abuses confronting migrant farm workers have not been resolved.<sup>226</sup> With little help from government enforcement of federal

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221. See ROTHENBERG, *supra* note 1, at x.

222. For a specific account of migrant work life in Texas, see Viviana Patino, *Migrant Farm Worker Advocacy: Empowering the Invisible Laborer*, 22 HARV. C.R.-C.L. L. REV. 43 (1987).

223. RONALD L. GOLDFARB, *MIGRANT WORKERS: A CASTE OF DESPAIR* 4 (1981).

224. ROTHENBERG, *supra* note 1, at 2.

225. *Id.* at 25.

226. *Id.* at 50.



statutes such as the AWPAs, migrant workers have resorted to last-ditch efforts of pleading their case to the consumers who purchase the fruits of their labor.<sup>227</sup>

The generally harsh and uncomfortable lifestyle of migrant workers is made even worse by the troubling factor that migrant workers are not able to treat most health defects that may arise from their employment. Assurance of ample health care is sometimes impossible for migrant workers to obtain. They tend to suffer from diseases more often than the mainstream population.<sup>228</sup> The average migrant worker lives on this planet for less than fifty years.<sup>229</sup> “The infection and parasitic disease rates of migrants are 200-500 percent higher than the national averages.”<sup>230</sup> The atrociously substandard environment that migrant workers endure breeds infections and diseases, and coupled with low income levels, they simply do not have the advantages of medical care that mainstream Americans take for granted.<sup>231</sup> Little support for remedying migrant workers’ health problems is found in the general population, thus questioning the effectiveness that pleading their case to the public will actually have.<sup>232</sup> Moreover, the farm owners are often leading advocates against health protections for migrant workers. The only person, other than a possible labor contractor, that the migrant workers regularly encounter during their employment simply does not care about them.<sup>233</sup> Legal woes aside, the day-to-day life of a migrant worker in the field can be a struggle merely to stay alive.

#### B. *Migrant Workers—The Impoverished Class (Low Wages)*

As mentioned above, agricultural fieldwork is not typically desirable employment.<sup>234</sup> Long hours, instability in length of employment, and low wages are all contributing factors that make the life of a migrant worker

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227. See John Nicols, *Migrant Farm Workers Take Their Case to the Court of Public Opinion*, MARKET TO MARKET: THE WKLY. J. OF RURAL AM. (May 10, 2002), at <http://www.iptv.org/mtom/feature.cfm?Fid=108>.

228. Nat’l Ctr. for Farm Worker Health, Inc., *Fact Sheets About Farmworkers: Profile of a Population with Complex Health Problems*, at [http://www.ncfh.org/factsheets\\_02.shtml](http://www.ncfh.org/factsheets_02.shtml) (last visited Mar. 21, 2003) (“The on-going battle to improve the health status of farmworkers has not been easy, and is being lost.”).

229. See GOLDFARB, *supra* note 223, at 34.

230. See *id.*

231. See *id.* (finding that “only 8 percent of migrant farm workers [see] a doctor each year”).

232. See *id.* at 38-39 (“Migrants are viewed as outsiders, as beneficiaries of . . . unnecessary federal protection, [and] cause . . . drains on the overall local economy.”).

233. See *id.* at 39.

234. See generally DEMETRIOS G. PAPADEMETRIOU & MONICA L. HEPPEL, *BALANCING ACTS: TOWARD A FAIR BARGAIN ON SEASONAL AGRICULTURAL WORKERS* (1999) (hereinafter *BALANCING ACTS*).

difficult.<sup>235</sup> A 1997 survey indicated that farm workers receive a weekly pay rate of about \$277, less than half of the median American worker.<sup>236</sup> In fact, the median *annual* income of migrant workers is usually capped near a devastatingly low \$5,000.<sup>237</sup> Furthermore, it is unlikely that migrant workers will have sufficient skills to obtain other forms of employment. This is especially true when one considers the fact that farm work is only available in sporadic cycles, making employment in non-agricultural settings fairly complicated, because few employers outside of agriculture are willing to allow workers to work only at sporadic time intervals.<sup>238</sup> The unfortunate reality facing the migrant worker is that little of his already limited income may be feasibly saved. Debts incurred during the off work cycles coupled with the fact that payment is needed for rent, clothes, and food undoubtedly leave the migrant worker in a state of despair.<sup>239</sup>

A U.S. Department of Labor study conducted in March 2000 found that nearly one-tenth of migrant workers were working at an hourly wage rate below the federal minimum of \$5.15 per hour.<sup>240</sup> To exacerbate the problem, real purchasing power of migrant workers in the United States has also been declining.<sup>241</sup> This low level of income has defined migrant workers “as the poorest of American workers.”<sup>242</sup>

Aside from measuring the low flow variable of income, migrant workers fare much worse than mainstream Americans when accounting for their stock of wealth. Nearly one-third of migrant workers have no assets to call their own. While the most common asset that a migrant farm worker owns is a vehicle,<sup>243</sup> half of all migrant workers do not have one. The fact that migrant

235. See *id.* at 10-11; GOLDFARB, *supra* note 223, at 3 (finding that for migrant farm workers, “[t]he work day is long . . . and with little rest”).

236. BALANCING ACTS, *supra* note 234, at 10. See U.S. Dep’t of Labor, *Findings from the National Agricultural Workers Survey (NAWS) 1997-1998: A Demographic and Employment Profile of United States Farmworkers*, at 33 (Mar. 2000), at [http://www.dol.gov/asp/programs/agworker/report\\_8.pdf](http://www.dol.gov/asp/programs/agworker/report_8.pdf) [hereinafter *Findings from the NAWS*] (finding that the average reported hourly wage of farm workers is \$5.94).

237. U.S. Dep’t of Labor, *National Agricultural Workers: Income and Poverty*, at <http://www.dol.gov/asp/programs/agworker/report/ch3.htm> [hereinafter *National Agricultural Workers: Income and Poverty*] (last visited Mar. 21, 2003). “Three-fourth’s [of migrant workers earn] less than \$10,000 annually.” *Id.* Over 60% of migrant workers live below the national poverty level. *Id.* This percentage has increased from 50% reported a decade ago, thus indicating that the conditions of migrant workers are still deteriorating. *Id.*

238. *Id.* (asserting that three-fourths of migrant workers engage in farm work only).

239. See STEPHEN H. SOSNICK, *HIRED HANDS: SEASONAL FARM WORKERS IN THE UNITED STATES* 68-69 (1978); see also ROTHENBERG, *supra* note 1, at 24-25 (concluding that migrant workers “are forced to bear the burden of virtually all of the costs associated with” their work).

240. See *Findings From the NAWS*, *supra* note 236, at 33.

241. *Id.*

242. ROTHENBERG, *supra* note 1, at 24.

243. See *National Agricultural Workers: Income and Poverty*, *supra* note 237.

workers must—of necessity—travel to wherever work is available intensifies the traveling expenses that the workers are likely to encounter.<sup>244</sup>

It is more than evident that migrant workers are, generally, poverty-stricken individuals. Entry into the legal system to remedy violations of personal rights is complicated by the obstacle of financial woes. The procedural problem of personal jurisdiction is only one more problem that migrant workers must face. Congress can alleviate some of the difficulties of litigating violations under the AWPAs by amending the federal statute to allow for nationwide service of process when personal jurisdiction would be reasonable. This would eliminate the need for the Court's minimum contacts test, which is too often unpredictable.

### C. *Migrant Workers' Lack of Education*

In addition to the financial difficulties facing migrant workers face, their lack of education weakens their ability to understand and use the legal system to their benefit. In some sense, migrancy breeds migrancy. Education is a useful key to unlocking closed doors blocking the path of migrant workers. Migrant children, however, are at a severe disadvantage when it comes to obtaining an effective education that could take them out of the migrant environment.<sup>245</sup> Because a migrant family is always on the move, it is very rare for a migrant child to remain in one school and develop meaningful educational qualities like children in mainstream America. The lack of financial resources imposes a significant burden on migrant children from obtaining the proper supplies necessary for a useful education. At home, parents typically work long days in the field, which leaves the children with little parental guidance and little hope that education will be garnered in the home.<sup>246</sup>

The median education level of migrant workers is at about the sixth grade.<sup>247</sup> Furthermore, one-fifth of workers have not even completed more than three years of formal education.<sup>248</sup> Although the *great* majority of migrant workers do not own English as a native language, but rather Spanish,<sup>249</sup> 85% of farm workers report that they “would have difficulty

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244. *Id.*

245. See GOLDFARB, *supra* note 223, at 46. For a proposal of migrant educational reform, see Michelle Holleman's thorough Comment on the problems of the current educational workings in place for migrant children. Michelle R. Holleman, Comment, *All Children Can Learn: Providing Equal Educational Opportunities For Migrant Students*, 4 SCHOLAR 113 (2001) (footnote omitted).

246. See GOLDFARB, *supra* note 223, at 46.

247. *Findings From the NAWS*, *supra* note 236, at 13.

248. *Id.*

249. *Id.*

obtaining information from printed materials in any language.”<sup>250</sup> To make matters worse, migrant workers are so preoccupied with their day-to-day struggles that the value of a meaningful education does not take precedence. For example, as one migrant worker from Michigan stated, “Migrants only think about today. They don’t think about what tomorrow might bring. That’s why there’s lots of migrant parents that don’t take education seriously. They can’t justify an education over having their kids be providers for the family.”<sup>251</sup>

It is therefore not surprising that “[m]igrant students are . . . the most educationally disenfranchised group of students in [the] schooling system.”<sup>252</sup> The problem with having an entire social class of children that remains unable to obtain a meaningful education is that the social class necessarily will fail to better itself. Migrant children usually grow to be migrant adults, and the vicious cycle continues.<sup>253</sup> The poor education of migrant workers will make it difficult for the workers to understand the complex legal system designed to protect them, let alone recognize that such rights as the AWPA exist.

#### D. *The Problem of Finding Meaningful Legal Assistance*

Because migrant workers as a class of individuals are some of the poorest people in society, problems arise in simply finding competent attorneys that are willing and able to assist them. Because of the lack of education in the migrant communities, migrants without lawyers will have little hope in litigating claims that they will not even be able to understand.

Equal justice for all is a fundamental concept embedded in this country’s view of fairness. The quality of our judicial process is valued largely by the service provided to those in poverty.<sup>254</sup> Millions of Americans, however, lack any access to the legal system at all, and an overwhelming majority of those in poverty lack access to civil legal necessities.<sup>255</sup> The problem that exists for

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250. *Id.* at 16.

251. ROTHENBERG, *supra* note 1, at 274 (interviewing Jose Martinez, a migrant worker from Lawrence, Michigan). The failure to encourage migrant children to become educated is at the root of the educational problem plaguing migrant workers. Migrant workers born into the system grow up believing that what they have is all they can obtain out of life. *See id.* at 276; *see also* Patino, *supra* note 222, at 46. Moreover, migrant children often face a hostile environment at school, from not only peers, but also from teachers and administrators. *See* GOLDFARB, *supra* note 223, at 47.

252. Ablerado Villarreal & Anita Tijerina Revilla, *Creative Educational Opportunities for Migrant Students*, INTERCULTURAL DEV. RES. ASS’N NEWSLETTER (Feb. 1998), at <http://www.idra.org/Newsltr/1998/Feb/Lalo.htm>.

253. ROTHENBERG, *supra* note 1, at 3 (including a migrant worker’s statement about the fact that he is such a worker: “See . . . you is you. You got that thing. You can’t be nobody else. That’s why this name, migrant worker, stands tall.”).

254. Lewis J. Liman, *The Quality of Justice*, 17 YALE L. & POL’Y REV. 287, 287 (1998).

255. *See, e.g., Access to Justice Development Campaign 2000: The Case for Support*, 79 MICH. B.J. 370, 370 (2000); Alan W. Houseman, *Civil Legal Assistance for the Twenty-First*

those in poverty, like migrant workers, is simply being able to find a lawyer who is willing and able to provide legal assistance.<sup>256</sup> Unlike many other industrialized countries,<sup>257</sup> the United States has never provided a guaranteed right to legal assistance in civil cases.<sup>258</sup> This is seemingly contrary to the Supreme Court's position in *Griffin v. Illinois*,<sup>259</sup> where the Court noted "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>260</sup> Furthermore, "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>261</sup> Because migrant workers will not be guaranteed a right to assistance of counsel in litigating their claims under the AWPA, and because it is highly unlikely that migrant workers will be able to litigate themselves, due to their extreme poverty and lack of education, they will necessarily turn to civil public interest organizations, namely the Legal Services Corporation<sup>262</sup> (LSC) for help. The connection between personal jurisdiction in the migrant worker context and the use of the LSC by the workers has its origins in the congressional restrictions placed on the LSC. These restrictions impact on the

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*Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 402 (1998). For one judge's proposal that the United States implement a "Civil Gideon," see Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998). "Civil Gideon" refers to the proposed right to counsel in civil lawsuits. *Id.* at 503.

256. Patino, *supra* note 222, at 46 (noting that although legal protections for migrant workers exist, "few legal advocates know how to use them").

257. Great Britain, France, Germany, Switzerland, Austria, Spain, Greece, and the European Court of Human Rights all have recognized the right to counsel in civil cases. See Sweet, *supra* note 255, at 504.

258. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27 (1981) (asserting that the right to appointed counsel only exists when the defendant "may be deprived of his physical liberty"). For a summary of court cases that refuse to intervene to help financially downtrodden parties in civil matters, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16-35 to -52 (2d ed. 1988).

259. 351 U.S. 12 (1956).

260. *Id.* at 19.

261. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

262. Congress established the LSC "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a) (2000). Congress noted that justice is best promoted when all have access to legal services. See *id.* § 2996(3). The primary method for providing legal assistance and services to the poor is through the LSC. See Douglas S. Eakeley, *Role of The Legal Services Corporation in Preserving Our National Commitment to Equal Access to Justice*, 1997 ANN. SURV. AM. L. 741, 743-44. LSC serves clients in every state and county in the United States, as well as Puerto Rico, Guam, the Virgin Islands, and Micronesia. See Legal Servs. Corp., *Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress*, at 1 (Apr. 30, 2000), at [www.lsc.gov/pressr/EXSUM.pdf](http://www.lsc.gov/pressr/EXSUM.pdf). The LSC was specially funded for assisting the plight of the migrant workers. *Id.* Because this Comment is centered on the issue of personal jurisdiction in the migrant worker context, an in-depth analysis into the workings of the LSC is not warranted.

forum in which migrant workers will be forced to sue their farm employer under the AWPAs.

In 1996, the United States Congress imposed certain restrictions on the LSC. In addition to restricting the financial support that the LSC receives, Congress enacted legislation restricting LSC attorneys from: (1) undertaking class action lawsuits;<sup>263</sup> (2) challenging state or federal welfare reform legislation or regulations;<sup>264</sup> (3) legislative lobbying;<sup>265</sup> (4) participating in administrative rulemaking proceedings;<sup>266</sup> (5) representation of certain

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263. 45 C.F.R. § 1617.1 (2002). “*Class action* means a lawsuit filed as, or otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.” *Id.* § 1617.2. For the federal requirements necessary for classification as a class action in federal court, see FED. R. CIV. P. 23(a). Rule 23(a) reads:

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

*Id.*

264. 45 C.F.R. § 1639.3 (2002) provides:

[Legal Service Corporation] recipients may not initiate legal representation, or participate in any other way in litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system. Prohibited activities include participation in:

- (a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system.
- (b) Rulemaking involving proposals that are being considered to implement an effort to reform a Federal or State welfare system.
- (c) Lobbying before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of an effort to reform a Federal or State welfare system.

*Id.*

This prohibition on LSC attorneys representing clients in challenging the welfare reform laws was recently held to be unconstitutional viewpoint discrimination under the First Amendment. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001). The Court in *Velazquez* did not determine the constitutionality of the other restrictions placed on the recipients of Legal Services Corporation. *See* Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts?: Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873, 876 (2002). Abel and Udell argue that Congress erred in restricting the LSC because doing so “interfere[s] with [the] core functions of the courts.” *Id.* at 874.

265. 45 C.F.R. § 1612.1 (2002).

266. *Id.* § 1612.1. Another regulation provides:

[Legal Service Corporation] recipients shall not attempt to influence:

- (1) The passage or defeat of any legislation or constitutional amendment;
- (2) Any initiative, or any referendum or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body acting in any legislative capacity;

aliens;<sup>267</sup> (6) representation of incarcerated persons in federal and state prisons;<sup>268</sup> and (7) representation of persons convicted or accused of illegal drug activities in certain public housing eviction proceedings.<sup>269</sup>

These restrictions on the LSC have had devastating effects on the funding available to legal aid lawyers. With respect to the financial effect of the 1996 federal restrictions, two commentators stated:

Over \$780 million in funds are dedicated annually to the provision of civil legal services nationwide. Several hundred million dollars come from federal funding allocated to LSC, and hundreds of millions of additional dollars come from federal, state and local governments, IOLTA funds, and private donations (including those of foundations, corporations, bar associations, and lawyer fund drives). The federal restrictions applicable to LSC funding encumber approximately \$329.3 million in 2002. These funds finance advocacy in more than 200 legal services offices spread throughout the fifty states and several federal territories. These offices provide representation in roughly one million matters annually. The LSC restrictions also encumber almost \$300 million of the resources that LSC grantees receive annually from federal, state and local governments, IOLTA funds, and various private sources. An additional \$62 million in non-LSC funds carries an independent set of restrictions, imposed in most instances by state or local governments or IOLTA governing structures. In total, approximately \$660 million in scarce legal services funding is

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(3) Any provision in a legislative measure appropriating funds to, or defining or limiting the functions or authority of, the recipient or the Corporation; or,

(4) The conduct of oversight proceedings concerning the recipient or the Corporation.

*Id.* § 1612.3(a).

267. *Id.* § 1626.3 (providing that LSC “recipients may not provide legal assistance for or on behalf of an ineligible alien”).

268. *Id.* § 1637.3. This regulation states:

A recipient [of the Legal Services Corporation] may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.

*Id.*

269. *Id.* § 1633.3. This regulation states:

Recipients [of the Legal Services Corporation] are prohibited from defending any person in a proceeding to evict that person from a public housing project if:

(a) The person has been charged with or has been convicted of the illegal sale, distribution, or manufacture of a controlled substance, or possession of a controlled substance with the intent to sell or distribute; and

(b) The eviction proceeding is brought by a public housing agency on the basis that the illegal drug activity for which the person has been charged or for which the person has been convicted threatens the health or safety of other tenants residing in the public housing project or employees of the public housing agency.

*Id.*

encumbered each year by restrictions: this amounts to about eighty-five percent of all legal services funding.<sup>270</sup>

The encumbrances to funding caused by the federal restrictions are clearly enormous.

The restriction having the most significant impact on a migrant worker's choice of forum when suing a non-resident farm owner is the restriction on class action lawsuits.<sup>271</sup> It will be more costly to serve rural groups, such as migrant workers, with the increased emphasis on individual representation as opposed to class action lawsuits.<sup>272</sup> It is already the case that "civil legal services to the poor in rural areas is more costly than in urban areas."<sup>273</sup> Without the use of class action lawsuits, LSC attorneys will be unable to provide assistance to migrant workers on an individual basis, even when many migrants may complain of the same violations by the same farm employer. This is because the LSC will not have the financial capacity to accommodate so many individual lawsuits.

Class action lawsuits are integral if migrant workers are to use effectively the legal system. For example, migrant workers are likely to be geographically detached, thus causing havoc in coordinating every worker's individualized presence at one court.<sup>274</sup> The migrant class members will not necessarily be fluent in English, and, therefore, they will not understand the legal system on an individual basis.<sup>275</sup> The migrant workers will lack financial resources to take proper legal measures on their own.<sup>276</sup> Also, migrant workers' remedies

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270. Abel & Udell, *supra* note 264, at 881 (footnotes omitted). "IOLTA" stands for "Interest on Lawyers' Trust Accounts," and it provides financial support for legal aid to indigents incapable of mustering an attorney's fees to file a claim in court. See Tracy Daniel, *IOLTA Program Provides Access to Justice*, 63 ALA. LAW. 369, 369 (2002).

271. Because migrant workers at a similar job site are large in number, the migrant workers will file suit against the defendant farm employer together. This is usually done as a class action lawsuit. See generally *Irizarry v. Quiros*, 722 F.2d 869 (1st Cir. 1983); *Rodriguez v. Carlson*, 166 F.R.D. 465 (E.D. Wash. 1996); *Aragon v. Bravo Harvesting, Inc.*, No. CIV-89-1282-PHX-RCB, 1993 WL 432402 (D. Ariz. May 7, 1993); *Leyva v. Buley*, 125 F.R.D. 512 (E.D. Wash. 1989); *Haywood v. Barnes*, 109 F.R.D. 568 (E.D.N.C. 1986).

272. See Larry R. Spain, *The Opportunities and Challenges of Providing Equal Access to Justice in Rural Communities*, 28 WM. MITCHELL L. REV. 367, 374 (2001).

273. See *id.* Even pre-dating the Congressional funding restrictions on the LSC, different states conducting studies concluded that Legal Services attorneys were equipped to handle only up to 20% of the civil legal needs in their populations. See, e.g., Jessica Pearson & Nancy Thoennes, *Assessing the Legal Needs of the Poor in Colorado*, 20 CLEARINGHOUSE REV. 200 (1986).

274. See *Saur v. Snappy Apple Farm, Inc.*, 203 F.R.D. 281, 286 (W.D. Mich. 2001).

275. See *id.*

276. See *id.*



in pursuing a private right of action under the AWPAs are not sufficiently high to entice them to file suits on individual bases.<sup>277</sup>

The relationship between the prohibition on class action lawsuits with personal jurisdiction is best explained through a hypothetical.<sup>278</sup> Suppose migrant workers in state B decide that they want to sue a farm employer residing in state A in a class action suit<sup>279</sup> for violating the AWPAs. The migrants will have to sue the farm employer in state A if asserting personal jurisdiction over the farm employer in state B is not constitutional. The migrants, however, will still need to rely on LSC attorneys in state A to provide legal assistance, but the LSC attorneys in state A may be so limited in resources, and, of course, restricted in undertaking a class action lawsuit, that the state A attorneys will not be able to provide assistance in litigating the migrants' claims. To intensify the problem, the workers will not be able to comprehend the legal system they are engaged in (because of poverty and lack of education),<sup>280</sup> as well as having difficulty finding attorneys not associated with the LSC to represent them (because there is no "Civil Gideon").<sup>281</sup> The attorneys in state A will already be overburdened by their cases in state A, and the end result is that the courtroom doors in state A will be closed to the migrant workers. The migrants will be forced to litigate in their home state B, but an assertion of personal jurisdiction over the non-resident farm employer will be extremely unpredictable. Ultimately, it may be a lose-lose situation for the migrant worker.

Magnifying the problem of LSC attorneys not being able to partake in class action suits on behalf of the migrant workers is the likelihood that the attorneys will be hesitant in accepting migrant worker cases at all. Such attorneys—who are unable to finance resources necessary to represent the poor effectively—will be unwilling to accept migrant worker cases because they will be unsure whether courts in their home state will be able to exercise personal jurisdiction over the farm owner.<sup>282</sup> Instead of wasting scarce resources on claims that may be dismissed,<sup>283</sup> LSC attorneys will redirect their

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277. *See id.* The court in *Saur* stated that "few claims [under the AWPAs would] be litigated" without the use of class actions. *Id.* at 287 n.4.

278. This Comment's underlying hypothetical presented at *supra* Part I was that the migrant workers were abused in the farm employer's state after being hired by the farm employer, and the workers then wished to pursue a cause of action in their home state.

279. *See supra* note 271.

280. *See supra* Part VI.B-C.

281. *See Sweet, supra* note 255, at 503. "Civil Gideon" refers to the proposed right to counsel in civil lawsuits. *Id.* *See also supra* note 257.

282. *See supra* Part IV.

283. *See* FED. R. CIV. P. 12(b)(2) (stating that a party to a suit may, on motion to the court, assert that the court has a "lack of jurisdiction over the [party]").

limited resources to claims that are more predictable, thus isolating migrant workers further from the legal community.

*E. Applying the Nationwide Service of Process Amendment in the Migrant Worker Context*

The problems stemming from the lack of legal assistance available to migrant workers will be relieved by making it easier for migrant workers to use the legal system to their advantage.<sup>284</sup> If the migrant workers cannot get into the courtroom, then there is no opportunity that the AWPA will be effective in reducing the abuses such workers face. Congress must amend the AWPA to include a nationwide service of process provision so that the goals of the AWPA can be effectively reached.<sup>285</sup> More specifically, Congress should enact a federal nationwide service of process amendment to the AWPA that provides for any district court having subject matter jurisdiction under the AWPA to also have personal jurisdiction over the defendant. The amendment's wording should include such language that a presumption of constitutional personal jurisdiction would exist, but also that this presumption may be rebutted by the farm owner in the very rare instances when haling the farm owner into a distant state would be extremely burdensome.

Without a doubt, a certain level of unpredictability in determining personal jurisdiction will remain if a per se reasonable nationwide service of process amendment is not enacted. It is unlikely, however, that the Court would uphold such an amendment as constitutional. This is especially true after the long history of focusing on the defendant's rights that the personal jurisdiction doctrine under the Fourteenth Amendment has witnessed.

In most cases, however, it will be such that personal jurisdiction over the non-resident farm owner will be constitutional. The nationwide minimum contacts test will be met when the defendant is within the borders of the United States. In the migrant worker cases brought in federal district courts stemming under the AWPA (a federal statute), the farm owner will be present within the United States and will have conducted his farming activities that caused the harm in the United States as well. The nationwide minimum contacts will not really be relevant to the jurisdictional issue, but its presence in the constitutionality of the nationwide service statute will save an alien farm owner from an unfair assertion of a court's jurisdiction over him.

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284. The federal government has provided for funds to be allocated to the LSC so that its attorneys may "prepare complaints and fund lawsuits against state agencies, [labor] contractors, and [farm] growers." ROTHENBERG, *supra* note 1, at 229. Although protections under the law, such as the AWPA, exist for migrant workers, "few legal advocates know how to use" these laws effectively to help assert the rights of their migrant worker clients. Patino, *supra* note 222, at 46.

285. See H.R. REP. NO. 97-885, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4547 (stating that the purpose of the AWPA is to reach the "goal of fairness and equity for migrant workers").

As for the reasonableness of jurisdiction inquiry, the farm owner must “present a compelling” case that the reasonableness factors warrant a finding that jurisdiction is unconstitutional.<sup>286</sup> To assert that a non-resident farm owner would be per se forced to litigate in even the most burdensome forum would be repugnant to the notion that the Court has continually supported the due process rights of the defendant. As Judge Kravitch of the Eleventh Circuit stated in *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*:<sup>287</sup>

In order to evaluate whether the Fifth Amendment requirements of fairness and reasonableness have been satisfied, courts should balance the burdens imposed on the individual defendant against the federal interest involved in the litigation. As in other due process inquiries, the balancing seeks to determine if the infringement on individual liberty has been justified sufficiently by reference to important governmental interests.

... [C]ourts must engage in this balancing only if a defendant has established that his liberty interests actually have been infringed. Only when a defendant ... has “present[ed] a compelling case that ... would render jurisdiction unreasonable” should courts weigh the federal interests favoring the exercise of jurisdiction.

In determining whether the defendant has met his burden of establishing constitutionally significant inconvenience, courts should consider the factors used in determining fairness under the Fourteenth Amendment. Courts should not, however, apply these factors mechanically in cases involving federal statutes [because] ... “[t]he due process concerns of the fifth and fourteenth amendments are not precisely parallel.”<sup>288</sup>

It is unlikely, therefore, that the Court will simply disregard the fairness rights of the farm owner because Congress is acting through the Fifth Amendment.<sup>289</sup>

## VII. CONCLUSION

Congress has the power to enact a nationwide service of process statute for federally-created rights litigated in federal courts. Only the Fifth Amendment’s Due Process Clause limits this power. Such an assertion of personal jurisdiction would, therefore, not be tested against the Supreme

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286. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); *see also Asahi Metal Indus. Co., Ltd. v. Superior Court*, 440 U.S. 102, 116 (1987) (Brennan, J., concurring) (noting that only in “rare cases” will an inconvenience to the defendant in litigating in the particular forum “defeat the reasonableness of jurisdiction”).

287. 119 F.3d 935 (11th Cir. 1997).

288. *Id.* at 946 (citations omitted).

289. *See Lesco v. Martinsburg Police Dep’t*, No. 02-5062, 2002 WL 1998177, at \*1 (D.C. Cir. Aug. 29, 2002) (holding that, although a nationwide service of process statute existed, forcing the non-resident defendant into the forum of the district court was unfair and unconstitutional).

Court's minimum contacts analysis of due process under the Fourteenth Amendment.

Determining whether minimum contacts will even exist in the migrant worker context can prove to be unpredictable. Furthermore, under the Supreme Court's jurisprudence, it is clear that not obtaining minimum contacts over farm owners will force migrant workers to travel to a distant location that does have such contacts. Given the social conditions of migrants, this will not happen. Although a nationwide service of process amendment to the AWPA may seem like a small procedural device, it is essential to allow migrant workers effective access to the courtroom.

It is unlikely that migrant workers will be financially capable of litigating a suit hundreds, or even thousands, of miles from their home, given their highly impoverished status and the federal restrictions on LSC attorneys from partaking in class action suits. Moreover, migrant workers will not be willing to sue their employer during the course of their employment. With the meager income and unstable availability of work, migrant workers will fear that suing the farm owner while employed only will result in the quick termination of employment.<sup>290</sup> When a migrant worker is forced to choose between suing his employer or remaining in the fields so that he can feed his hungry family, the options quickly fade from two choices to just one. Unless migrant workers have access to the courts near the security of their personal homes, it is unlikely that they will invoke their private right of action for violations stemming under the AWPA.

Qualifying the nationwide service of process amendment to allow for a rebuttable presumption of a constitutional assertion of personal jurisdiction will assure non-resident farm owners that they will not be unreasonably forced to litigate in distant forums. Unfortunately, the unpredictability of determining personal jurisdiction will still hang over migrant workers' heads because personal jurisdiction under the AWPA will not be per se constitutional. The unpredictability, however, in determining the existence of personal jurisdiction will be the exception instead of the rule. The weight of the *Burger King* factors<sup>291</sup> will typically balance in favor of constitutionally asserting personal jurisdiction because of the extremely poor conditions migrant workers are positioned in, as Justice Levine pointed out in *Rios*. A fair balance between farm owner's Fifth and Fourteenth Amendment due process rights can be harmonized through this service of process amendment. Moreover, such a combination fits well within the Supreme Court's interpretation of the personal

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290. ROTHENBERG, *supra* note 1, at 275 (interviewing Jose Martinez, a migrant worker from Lawrence, Michigan: "A lot of [employers] view migrants as disposable labor. When they want workers, they bring them up, and when they don't want them anymore, they send them back to . . . wherever they're from.").

291. *See supra* note 17.

jurisdiction doctrine as being that of an “evolving” standard.<sup>292</sup> In this respect, the AWPAs amendment is a subset of the evolving nature of the Court’s view of personal jurisdiction. By allowing migrant workers the procedural tool of nationwide service of process, migrant workers will be given a chance to assert their rights under federal law, and therefore be given at least the opportunity to enter through the courtroom doors.

SUNIL BHAVE\*

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292. *See supra* note 85.

\* J.D. Candidate, Saint Louis University School of Law, 2004. I would like to thank Assistant Professor David Sloss for providing me with many different angles to attack the procedural problem plaguing migrant workers. Also, I would like to thank Amanda Altman and Bill Hof for doing such a wonderful job editing this Comment. Finally, I would like to say “thank you” to Assistant Professor Melissa Cole, my first year Civil Procedure teacher, who reaffirmed my belief that all the knowledge we gain in life is meaningless unless we use it to help those who need help the most.