



10-1978

Leroy v. Great Western United Corp.

Lewis F. Powell Jr.

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DW 12/18/78

I'd grant this case even tho no conflict because of its importance.

Disenfranchisement & Grant on two issues: (1) whether in personam jurisdiction exists for suit vs Idaho officials in Texas. (This also includes venue issue, and (2)

Two questions of wide interest and importance are presented by this "tender offer" case.

on preemption issue. Also ask for views of SG

Appellee, a Del corp with principal office in Texas, made tender offer to holders of stock of Sunshine Mining Co., an Idaho corp.

State "Take-over" statute.

Idaho has a state "Take-over" statute. Idaho officials telephoned officials of Appellee in Dallas about complying with state law.

Appellee thereupon sued in DC in Dallas seeking declaration of invalidity of & injunction against Idaho act - claim preemption by Williams Act

Preliminary Memorandum

& burdening of interstate commerce.

January 5, 1978 Conference
List 5, Sheet 1

CA5 held that the "minimum contacts" of Idaho officials in Texas

No. 78-759

Appeal from CA5 (Wisdom, Clark; ~~Godbold~~ Godbold--dissenting) perplexed personnel juror. It also found preemption & burden on commerce.

KIDWELL, et al.
Idaho AG
v.

GREAT WESTERN UNITED CORP. Federal/Civil Timely

Del. corp with principal office in Texas. It made tender offer for shares of Sunshine Mining Company, an Idaho Co.

1. Summary: Appts, two Idaho officials, seek reversal of the Fifth Circuit's ruling that Idaho's corporate takeover statute is unconstitutional, as it is preempted by the Williams Act and places an unjustified burden on interstate commerce.

Sorry this is so long, but the case seems important to me. I would therefore not. Perhaps the views of the SG should be

Appts argue: (1) that the suit against them in Texas federal court was barred under the Eleventh Amendment and principles of federalism; (2) that the Texas court's assertion of personal jurisdiction over them violated due process, as interpreted in International Shoe Co. v. Washington, 326 U.S. 310 (1945); (3) that venue was improperly laid in Texas; (4) that the Idaho takeover statute does not contradict the purposes of the Williams Act; and (5) that the Idaho statute does not place an unacceptable burden on interstate commerce.

2. Facts and Prior Decisions: Appee is a nationally traded, Delaware corporation whose central offices are in Dallas, Texas. In early 1977, appee proposed a tender offer for two million common shares of the Sunshine Mining Company, a nationally traded, Washington company whose principal mining operation is located in Idaho. Immediately upon making the offer for the stock, appee's representatives filed a 13D disclosure statement with the SEC, as required under the Williams Act, 15 U.S.C. §§78m(d)&(e). At the same time, appee filed an information statement with the Idaho authorities, as required under the Idaho Corporation Takeover Law, Idaho Code §§30-1501 to 1513; appee also contacted officials in New York and Maryland concerning the possible application of those states' laws concerning the proposed purchase of Sunshine shares.

Four days after receipt of the information statement, appt McEldowney, the Director of Idaho's Department of Finance,

ordered appee's tender offer delayed and telephoned officials of appee in Texas to request more information concerning the nature of the offer. On March 28, 1977, appee filed the instant action in federal district court in the Northern District of Texas, seeking declaratory and injunctive relief against the enforcement of the Idaho takeover statute. The Idaho Attorney General (appt Kidwell) and appt McEldowney were the named defendants. After an initial skirmish over a preliminary injunction, the case was heard on May 23 and 24, 1977, and the district court issued its 40 page opinion on September 2.

The district court first considered appee's standing to object to Idaho's takeover statute. Thus, the court noted that in Piper v. Chris-Craft Industries, 430 U.S. 1 (1977), this Court ruled that the Williams Act does not give rise to a private cause of action for damages on behalf of a tender offeror, as the Act was intended for the benefit only of shareholders of target companies. The district court concluded that it nonetheless was "free to hold that the Congressional policy of even-handedness is probative of its intent to grant standing to tender offerors and target management for declaratory and injunctive relief under the Williams Act," as this Court specifically reserved the question of relief other than money damages in Piper.

Second, the district court ruled that any Eleventh Amendment protection of the State of Idaho from suit in federal court was not available to appts under Ex parte Young, 209 U.S.

123 (1908).

Third, the court concluded that it had personal jurisdiction over appts with respect to their enforcement of Idaho's takeover statute. As the Idaho statute prohibits appee from making a tender offer in Texas until Idaho law has been complied with, appts had minimum contacts with Texas under International Shoe, supra. The court indicated that its ruling would not extend in general to any state statute whose enforcement would have only a remote effect in other states. The Idaho statute is a unique form of state regulation, as it is intended to regulate commercial transactions occurring entirely outside the borders of Idaho. Under such circumstances, it comports with fundamental fairness for Texas courts to exercise personal jurisdiction over Idaho officials charged with enforcing

Fourth, the district court found that venue was properly laid in the Northern District of Texas, as §27 of the Securities and Exchange Act of 1934 provides that venue for any action brought to redress a violation of the Act may be brought "in any district...wherein any act or transaction constituting the violation occurred...." The court ruled that the violation here occurred in Texas because that was where the statute was being enforced.

merits

On the merits, the district court ruled that the Idaho takeover statute was unconstitutional under both the Supremacy Clause and the Commerce Clause. The court opined that the Idaho

statute had been preempted by the Williams Act because it conflicted with the basic purpose behind the federal act: to "balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids." Thus, the court noted that the Idaho statute requires more detailed disclosure than does the Williams Act, and that only the Idaho act provides a waiting period between disclosure and the consummation of the tender offer. These differences, the district court concluded, destroy the delicate balance provided for under the Williams Act.

In addition, applying the criteria set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), the district court ruled that the Idaho statute places an improper burden on interstate commerce. The court found the purpose of the Idaho statute to be the protection of incumbent management, a purpose the court considered to be improper. Moreover, the effect on interstate commerce of the Idaho law is great, as it purports to regulate all takeover transactions which affect Idaho business, not just sales of shares by Idaho shareholders. Accordingly, the district court declared the Idaho statute to be unconstitutional, and enjoined attempts from enforcing the statute's provisions.

On appeal, the Fifth Circuit affirmed in a 63 page opinion. Judge Wisdom, writing for the court, concurred in the district court's ruling that Ex parte Young does not require that actions against state officers be brought in federal courts

in the officers' home states. Moreover, the appeals court opined that the district court had personal jurisdiction over appts, as they had acted directly to affect commercial transactions in Texas, thereby establishing minimum contacts with that state. The court distinguished this Court's ruling in Kulko v. Superior Court, ___ U.S. ___, 98 S.Ct. 1960 (1978), saying that the effects in Texas of the Idaho statute's enforcement against a Texas corporation were substantially greater and more immediate than the effects in California of a father's consent for his children to live with their mother.

As for venue, Judge Wisdom wrote that there were two independent reasons why this action properly was brought in the Northern District of Texas. First, the court agreed with the district court that §27 of the '34 Act laid venue in the place where the violation occurred, and here the violation occurred in Texas, the place where the Idaho Act was enforced against appees. Second, the court opined that the general federal venue statute, 28 U.S.C. §1391(b) lays venue in Texas, as that was where the claim arose.

On the merits, the Fifth Circuit ruled that the Idaho takeover statute was unconstitutional under both the Supremacy and Interstate Commerce Clauses. Applying the standard this Court laid down in Hines v. Davidowitz, 312 U.S. 52, 67 (1940), the court concluded that the Idaho law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the Williams Act. In

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the court's view, the conflict between the two statutes lies in their different approaches to the protection of investors: The Williams Act is based on a "market approach," under which accurate information is placed before the shareholders of the target company and they are permitted to decide whether to accept the offer; The Idaho statute, on the other hand, is based on a "fiduciary approach," as the primary emphasis is upon placing before the directors of the target company the details of the offer and allowing them to decide whether or not to recommend that the stockholders accept the deal.

Like the district court, the court of appeals analyzed the Commerce Clause challenge to the Idaho statute in light of this Court's decision in Pike v. Bruce Church, Inc., supra. Unlike the district court, however, Judge Wisdom found two legitimate purposes that may underlie the Idaho law: the encouragement of responsible management, and protection of investors. Because the takeover statute has a severe impact upon interstate commerce, the court nonetheless ruled that the act violated the Commerce Clause, as it was not carefully tailored to promote these admittedly legitimate state interests.

Judge Godbold dissented with respect to personal jurisdiction only; with respect to venue, sovereign immunity, subject matter jurisdiction, and the merits, Judge Godbold agreed with the majority. The dissent argued that none of the traditional indices of personal jurisdiction are present here. Appts did not avail themselves of the benefits and protections

of Texas law. The minimum contacts between appts and Texas are of the most attenuated kind: the mere effect of the enforcement of a state law on residents of another state. Texas has no particular interest in supplying a forum for actions of this sort, which is neither tortious nor commercial. Finally, the dissent expressed concern that the majority's rule could not fairly be limited to state takeover statutes, but rather would extend the federal courts' personal jurisdiction to any state officer enforcing a statute with some effect upon a resident of the forum.

3. Contentions: Appts make four contentions. First, they argue that Ex parte Young should not be extended to permit suits against officers outside of the officers' states. Appts do not indicate that there is any conflict among the circuits concerning this point. Nonetheless, they contend that it is contrary to the basic principles of federalism represented by the Eleventh Amendment to permit such suits, and that the anomaly of Ex parte Young should be extended no further.

Second, appts argue that there was no personal jurisdiction over them in Texas, as they had no minimum contacts with Texas under International Shoe. Appts disagree with the Fifth Circuit's conclusion that this case is distinguishable from the decision last Term in Kulko v. Superior Court. Moreover, appts argue that it was fundamentally unfair to require them to travel to Texas to defend the propriety of their enforcement of an Idaho statute.

Third, appts argue that venue was not properly laid in Texas. Thus, they contend that, if the general provisions of 28 U.S.C. §1391(b) were construed to permit venue wherever the effects of a state statute were felt, then venue could be laid virtually anywhere in the United States. Furthermore, appts take issue with the Fifth Circuit's conclusion that the enforcement of a statute arguably preempted by the Williams Act constitutes a "violation" of the Securities Acts, as that term is used in §27 of the Securities and Exchange Act of 1934.

Finally, appts argue that their takeover statute should be found to be preempted by the Williams Act only if it would be impossible to comply with both the federal and state acts at the same time. Furthermore, even under the more liberal understanding of the Fifth Circuit concerning preemption, the Idaho statute is unobjectionable because it does not conflict with the purposes behind the Williams Act; indeed, it furthers the primary purpose of protecting the investor in the target company. The explicit language of §28(a) of the Exchange Act anticipates that states will be permitted to enact statutes such as that challenged here, as it provides that, "nothing in this chapter shall affect the jurisdiction of the securities commission...of any State over any security or any person insofar as it does not conflict with the provisions of this chapter."

As for the Commerce Clause challenge, appts contend that the Idaho statute places no onerous burden on interstate

commerce, and that the requests for additional information made by appts in this case were not unreasonable.

The States of California and Indiana have filed briefs as amicus curiae in support of appts' jurisdictional statement. In these briefs, the States urge the Court to give plenary consideration to this case to resolve the scope of federal courts' jurisdiction to entertain suits against officers of states other than the forum state.

In its motion to affirm, appee tracks the analysis of the Fifth Circuit.

4. Discussion: Appt's Ex parte Young claim raises no issue with respect to which there is a division among the circuits, and there is no self-evident reason why the Eleventh ^{OK} Amendment would restrict officers suits to being brought in federal courts within the state of the officer. Although the standing of a tender offeror to seek injunctive relief for Williams Act violations is an open question, there is no conflict, and appts only mention the point in their jurisdictional statement. There are, therefore, three issues of ^{These} substance here: (1) the personal jurisdiction of the Texas court over appts; (2) venue; and (3) the constitutionality of the Idaho statute.

(1) Personal Jurisdiction

There is no question that the Fifth Circuit applied the proper standards in determining whether the district court properly had exercised personal jurisdiction over appts.

*Just a
help me*

International Shoe and its progeny require that a court look to the fundamental fairness of the defendant being required to appear in a particular forum and defend an action. This fairness depends primarily upon the nexus between the action, the forum, and the parties. Moreover, it may be that the Fifth Circuit's decision fairly can be limited to "specific orders" issued to out of state residents under particularly onerous and extra-territorial statutes. Nonetheless, the result obtained by the courts below is troubling. The spectre Judge Godbold poses of state officials being called all over the country to defend their state statutes that have some extra-territorial effect seems a real danger under the Fifth Circuit's analysis here. The question of the application of International Shoe to officers suits outside the state whose statute is being challenged independently is worthy of the Court's plenary consideration, therefore.

you

you

(2) Venue

It is of course difficult to separate the question of venue from that of personal jurisdiction, as the danger of suits in far-off states can be taken care of by clever use of either device. Saying the claim here arose in Texas because the effect of the enforcement of the Idaho statute was felt in Texas seems tantamount to saying that venue could have been laid anywhere in the country--a rather extreme result. Moreover, it seems questionable whether Idaho's enforcement of its statute fairly could be characterized as a "violation" of the securities acts.

you

Trill

(3) Merits

The question of the constitutionality of state takeover statutes is an important one that has been discussed much in the literature. See, e.g., E. Aranow, Developments in Tender Offers for Corporate Control (1977); Note, State Takeover Statutes Versus Congressional Intent: Preempting the Maze, 5 Hofstra L. Rev. 857 (1977); Note Commerce Clause Limitations Upon State Regulation of Tender Offers, 47 S. Cal. L. Rev. 1133 (1974). It appears that the Fifth Circuit is the first to address the question, and therefore there is no conflict. Waiting for a conflict to develop may be unwise here, however, as the issue is of critical importance, and, as it now stands, Idaho is without a takeover statute. At the same time, the Court must consider that, if it notes this case, the jurisdiction and venue problems may preclude it from reaching the Williams Act or Commerce Clause questions.

There is a response and two amicus briefs. Jurisdiction will should be noted.

12/18/78

Westin Ops. of CA5 and DC in juris.state.

*may
not
reach
preemption
will*

Argued 19...
 Submitted 19...

Voted on 19...
 Assigned 19...
 Announced 19...

No. 78-759

KIDWELL, ATTY. GEN. ID

vs.

GREAT WESTERN CORP.

Also motion to affirm.

Issue is important

Noted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT			MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G		
Burger, Ch. J.												
Brennan, J.												
Stewart, J.				✓								
White, J.				✓								
Marshall, J.				✓								
Blackmun, J.				✓								
Powell, J.				✓								
Rehnquist, J.				✓								
Stevens, J.				✓								

Views of SG for note
 " " "
 Views of SG

Stone memo that may persuade me, though I know from experience that the Williams Act is a weak statute BB 4/6/79 that does not adequately protect shareholders of target co. But Idaho may have gone too far, especially by not limiting its Act to Idaho corps and in requiring approval by Idaho Commission.

As ^{to} the due process issue with respect to jurisdiction, I think care is quite close. The "contacts" with Texas were minimal, + resulted from appellee initiative in requesting a ruling on its offer.

BENCH MEMORANDUM

I'll discuss with Bruce

To: Mr. Justice Powell

Re: No. 78-759, Kidwell v. Great Western United Corp.

The various questions presented in this case may be assembled as two broad issues: the personal jurisdiction of the DC over the appellants, and the validity of the Idaho corporate takeover statute under the Commerce Clause, the Supremacy Clause, and the federal securities laws, particularly the Williams Act. The CA upheld the jurisdiction of the DC, and concluded that the Idaho law is repugnant to both the Commerce Clause and the Supremacy Clause. Part I of this memorandum deals with the jurisdictional issue, which comprises questions regarding Ex parte Young, personal jurisdiction, and venue in the Texas DC. Part II of this memorandum deals with the pre-emption question, concentrating on the relationship between the Williams Act and the Idaho statute.

Both the Attorney General and the Director of the

See also David's good cert memo.

When Act limited - 15

Department of Finance of the State of Idaho seek to appear as appellants in this case. But it is clear from the opinion of the CA below that the Idaho Attorney General did not appeal to that court from the decision of the DC. Accordingly, he is not a proper party to this appeal.

out of case

I

Personal Jurisdiction over the Appellants

The appellants, Idaho officials charged with the enforcement of that State's corporate takeover statute, make three arguments regarding the authority of the federal DC in Texas to try this case.

A. Ex parte Young *Not a bar to suit in Texas. I agree*

The appellants contend that a suit against a state official under Ex parte Young, 209 U.S. 123 (1908), can only be maintained within the district where the state official resides in his official capacity. In support of this contention, the appellants aver that every case in which the doctrine of Ex parte Young has been relied upon has been brought in the district in which the defendant state official resided. And they cite two district court cases which they claim were dismissed for want of personal jurisdiction because the plaintiffs there sought to found jurisdiction over officials of other States on Ex parte Young. Turner v. Baxley, 354 F.Supp.

963 (D.Vt. 1972); Idaho Potato Comm'n v. Washington Potato Comm'n, 410 F.Supp. 171 (D.Idaho 1976).

The appellee convincingly rebuts appellants arguments on this point. First, nothing in the theory of Ex parte Young supports the limitation that appellants suggest. A state official attempting to enforce an unconstitutional law is stripped of the immunity enjoyed by the State. Thereafter, he is treated as a private litigant. If jurisdiction over him in a federal DC in some other State is authorized by statute and consistent with constitutional constraints, then he is obliged to defend a suit brought against him in that district. Appellee points out that Turner v. Baxley, supra, turned on a determination that the nonresident state officials lacked sufficient minimum contacts with the forum to support personal jurisdiction, and that Idaho Potato Comm'n v. Washington Potato Comm'n, supra, rested on a similar finding.

B. Statutory and Constitutional Bases for Personal Jurisdiction

Under Federal Rule of Civil Procedure 4(d)(7), service of process to secure personal jurisdiction over an individual defendant "is ... sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held" The CA held that the DC in Texas acquired jurisdiction over the appellants under

jurisdiction in Texas is asserted on ~~two~~ two grounds: (1) Long Arm Statute, & (2) §27 of 34' Act

both the Texas long-arm statute and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa. The appellants attack each of these bases for jurisdiction.

The appellants first contend that they did not fall within the terms of the Texas long-arm statute. They acknowledge that the Texas courts have held repeatedly that the reach of the statute is coextensive with the federal constitutional limits on personal jurisdiction imposed by the due process clause. See, e.g., U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), cert. denied, 98 S.Ct. 1235 (1978). But they insist that the statute is not intended to reach defendants other than those who engage in commercial activity in Texas. Appellants base this argument on the language of the section of the long-arm statute relied upon by appellee and the lower courts, which subjects to service of process "[a]ny ... non-resident natural person that engages in business in this State" Because their only activity was not business but governmental regulation, the appellants contend, they did not fall within the terms of the statute.

The appellee briefly and convincingly refutes the appellants' statutory argument. First, both the DC and the CA 5 have agreed that the Texas statute extends its coverage to the appellants. There is little warrant for this Court to disagree with their construction of Texas law. Moreover, a careful reading of the Texas statute and related caselaw seems

I agree that the "doing business" language does not exclude an official of a foreign state

to indicate that the "doing business" terminology in the statute no longer has any particular commercial reference. The statute provides, in part

"For the purpose of this Act, and without including other acts that may constitute doing business, any ... non-resident natural person shall be deemed doing business in this State by entering into contract by mail ... or the committing of any tort in whole or in part in this State."

The commission of a tort is not commercial activity, yet is defined by the statute to fall within the "doing business" coverage of the law. Thus, there is no particular reason to look askance at the conclusion of the court's below that appellants' activities also fall within the terms of the statute. And the Texas courts have indicated that the statute is to be construed to obviate any question save the federal constitutional inquiry as to the limits of due process. U-

Anchor Advertising, Inc. v. Burt, supra.

The remaining question, then, is whether the due process clause allows a DC in Texas to exercise jurisdiction over the appellants. At a general level, the parties agree that this question is controlled by the principle announced in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

But what about fairness under D/P clause

Jurisdiction is constitutional if the defendant had "such contacts ... with the state of the forum as make it reasonable in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there." Id., at 317. The appellants argue that their

The test

contacts with Texas were inadequate to support jurisdiction. They support this argument in two ways.

First, they cull phrases from some of this Court's cases since International Shoe. They rely, for example, on the statement in Kulko v. Superior Court, 436 U.S. 84 (1978), that the lower court's reliance on a defendant "having caused an 'effect' in [the forum state] was misplaced". From this they argue that it was error for the lower courts to refer to the effect of the Idaho law and its enforcement on the activities of the appellee in Texas. Similarly, citing International Shoe and Hanson v. Denckla, 357 U.S. 235 (1958), appellants argue that they did not "exercise the privilege of conducting activities in [Texas], [or] enjoy the benefits and protections of the laws of that state." International Shoe, supra, at 319.

Second, the appellants develop a "slippery slope" argument that if jurisdiction is sustained here, state officials will be summoned all over the country to defend against actions to enjoin their enforcement of all manner of state laws. As an example, they cite California officials who enforce that State's air quality laws to automobiles coming into the State. They argue that under the decision of the lower courts in the present case, California officials could be forced to defend a constitutional challenge to their statute in the Michigan courts, since by influencing the production decisions of the automobile manufactureres there, their statute

has a "practical, extra-territorial effect" in Michigan. As other examples of state laws with extra-territorial effects, the appellants cite domestic relations laws and corporate law.

I think that the appellants have misstated the development of the law of personal jurisdiction in this Court's decisions since International Shoe. Although the slippery slope argument merits serious consideration, I think that it, too, is probably inadequate to sustain the appellants' position.

The general fairness standard announced in International Shoe cannot be reduced to a precise set of tests or rules, and that has not been the Court's enterprise in the cases since International Shoe. Rather, the Court has taken a number of cases to illustrate the application of the general International Shoe standard to a variety of jurisdictional problems. In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), for example, the Court considered a situation in which, unlike International Shoe, no employee of the defendant conducted any activity inside the forum. Rather, the only contact of the defendant insurance company with the forum state was the mailing of the policy into the state. In Shaffer v. Heitner, 433 U.S. 186 (1977), the Court explained the application of International Shoe principles to in rem jurisdiction. And in Kulko v. Superior Court, 436 U.S. 84 (1978), the Court considered the personal jurisdiction problems

raised in a domestic law case.

The present case calls upon the Court once again to demonstrate the International Shoe analysis in a new context -- that of a suit to enjoin a state official from enforcement of a state statute that criminalizes activities conducted outside of the state. Just as in the Court's previous cases in this area, the factual context is so different from prior cases that precedential guidance is available only at the level of general principle. That general principle is familiar enough -- has some purposeful activity on the part of the defendant created some contact with the forum that is significant enough to make it fair, within our federal system, to require the defendant to defend the suit in the forum.

no really guiding principle

I think that this inquiry should be concluded in favor *Bruce* of jurisdiction in the present case. The Idaho statute purports to restrict the right of the Texas corporation to enter into transactions with shareholders of the target corporation in Texas and every other State, as well as to regulate transactions within Idaho. Pursuant to that statute, the appellants sent an order to the appellee instructing it to defer its tender offer because of noncompliance with Idaho's statute. Failure to comply with that order would have been a violation of the Idaho law, subjecting the appellee's officers and directors to indictment in Idaho and extradition from Texas. The application of the Idaho statute does not depend *favor juris.*

upon the residence within Idaho of any shareholders of the target corporation, but only on the location there of the incorporation, offices, or assets of the target corporation. When a state passes a statute directly regulating activity beyond its borders, on pain of criminal penalties for noncompliance, I see no unfairness in requiring the officials of that State to defend that law from suits for declaratory and injunctive relief in the fora where the regulated activities occur.

Strong point

Nor do I think that this situation is difficult to distinguish from the mine run of state laws that regulate activity within the State itself. To take the appellants' example, the California air quality statute only regulates the emissions of automobiles within California. It does not regulate or impose criminal sanctions on the manufacture, sale, or use of automobiles outside the State of California. I would not think that a suit challenging such a law could be maintained outside of California, and I also think that this conclusion is consistent with sustaining the Texas DC's personal jurisdiction over appellants in the present case.

Because the Texas long-arm statute supplies an adequate statutory ground for the jurisdiction of the DC, I will not analyze the arguments of the parties concerning personal jurisdiction under Section 27 of the Securities Exchange Act of 1934. The principle issue presented in this

regard is whether enforcement of a state law that is pre-empted by the 1934 Act would constitute a "violation" of the 1934 Act within the meaning of Section 27, the jurisdictional provision of the 1934 Act. My own view is that it would not. Even if the Idaho statute is pre-empted, the official actions taken to enforce it do not violate any of the proscriptions contained in the 1934 Act. Rather, those actions are forbidden by the Supremacy Clause of the Constitution.

Before leaving Section 27, I would call to your attention also the suggestion in the appellee's Brief that in federal question cases, the due process-minimum contacts analysis is relevant to personal jurisdiction only if (i) that jurisdiction rests on a state long-arm law incorporated into federal law, and (ii) the state law is written or construed (as a matter of state law) in terms of the federal due process standard. In the present case, for example, jurisdiction might be based on the incorporation of the Texas long-arm statute by Rule 4. And since the Texas courts have construed the Texas statute to extend jurisdiction to the limits of due process, the minimum contacts analysis that defines those limits is relevant. But it is relevant to the proper interpretation of the state law, and not to a determination of the constitutional limits on federal court jurisdiction. Thus, appellees argue, if jurisdiction rests instead on some federal statute (such as § 27 of the 1934 Act, in the present case), then there is no

need for the minimum contacts analysis. Personal jurisdiction by any federal court is consistent with the Constitution. As the appellee puts it in its Brief, at 49, "Only the territorial limits of the United States circumscribe the validity of federal process."

This theory, also suggested in footnote 1 of the SG's Brief, is a throwback to the territorial-power theory of jurisdiction embodied in Pennoyer v. Neff, and rejected by this Court in the area of state court jurisdiction since International Shoe. I see no reason why the theory should be retained in discussing the personal jurisdiction of federal courts around the country. Rather, I would think it proper to apply the same test of minimum contacts with the forum, i.e., the district in which the federal court is held, to ascertain the fairness of calling the defendant to defend the suit in that place.

C. Venue in the DC in Texas

The general venue statute applicable to the present case is 28 U.S.C. §1391(b), which provides:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

In his treatise on federal practice, Professor Moore suggests that venue should be proper under §1391 in any district in which compulsory process against the defendant is available.

The CA acknowledged the advantages that follow from such a construction, but also recognized that there is considerable support for the contrary position that a claim "arises" in only one district for purposes of §1391.

The CA found no necessity to resolve this disputed statutory construction, however, because it concluded that in the present case, the claim "arose" in Texas. There is some precedential support for this position in the decisions of the lower federal courts. Moreover, in the context of an action for declaratory and injunctive relief against a criminal statute, this construction of the statute makes sense. The Idaho statute under which the appellants acted purports to control the activities of the appellee in Texas. The claim of the appellee to be free of the Idaho statute thus sensibly may be said to "arise" at the place where the appellee seeks to perform the actions -- making the tender offer -- that appellants purport to control by reason of the Idaho law.

II

Validity of the Idaho Statute

The CA found the Idaho statute invalid on both Supremacy Clause and Commerce Clause grounds. In view of the direct and substantial burden imposed by the Idaho statute on interstate commerce in securities, I think that the Commerce Clause will support invalidation of the state law. I also think that pre-emption of the state law by the Williams Act is

clear.

Compliance with the state law does not make compliance with the Williams Act impossible. But the Court has never required a showing of such severe inconsistency between a state and a federal law to support a conclusion that the state law is pre-empted. Rather, either "occupation of the field" by the federal law, or a finding that the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", are sufficient to show pre-emption. Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978). It seems to me that under either of these two formulas the Idaho statute is pre-empted.

The Williams Act is a comprehensive regulation of tender offers for corporate control. It controls the actions of both the offeror and the target company during the offer, all with a view to protecting the interests of the shareholders of the target company. It makes no provision for the incorporation of state takeover statutes that impose additional requirements on offerors and target companies. Accordingly, I think that one can conclude reasonably that Congress has occupied this field of regulation, and that state regulation is ousted.

But a weak one

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On the basis of a more detailed comparison of the Williams Act and the Idaho statute, I also think that one must conclude that the state law frustrates accomplishment of the

Conflict

congressional objectives underlying the Williams Act. The legislative history of that Act, as stated in the CA opinion and the briefs of the appellee and the SEC, indicates that the overriding purpose of the federal law is the protection of investors. From this proposition the appellants argue that the state is doing nothing more in its law than imposing additional requirements that further protect investors. These additional protections are afforded by ¹slowing down the pace of tender offers, ²allowing target company management more time to review the offer, ³requiring much more extensive disclosure by the offeror regarding its financial and business condition, and ⁴interposing approval of the offer by the State's regulatory commission.

Idaho argument
Additional provisions for investor protection

The appellees and the SEC argue, however, that the appellants have taken a one-sided view of the protections for the shareholders that Congress incorporated into the Williams Act. The legislative history of that Act shows that Congress was alert to the multiple interests of shareholders in the tender offer context. On the one hand, shareholders have an interest in having available to them the information regarding the offer and offeror that they need in order to make an intelligent decision about the offer. But equally important, they have an interest in not having offerors discouraged, and in not having unworkable and expensive burdens imposed on tender offers. Tender offers, as Congress recognized during

its lengthy deliberations on the proposals that eventually became the Williams Act, are often of great value to the shareholders of target companies; in a broader sense, the potential availability of tender offers is valuable to shareholders in almost all corporations as an incentive to efficient management.

Yes

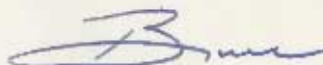
In balancing the need for disclosure against the desire to avoid discouraging tender offers, Congress made various decisions in structuring the requirements of the Williams Act. That Act has no requirement for any filing with the SEC prior to the making of the offer. There is no requirement that the offer receive prior approval from the SEC, and the offer may be interrupted and delayed only by an injunction. The required disclosures are limited.

Williams Act is limited

The Idaho statute has a pre-offer filing and disclosure requirement of the sort rejected by Congress. It also requires that commencement of the offer be delayed until the state regulatory body has reviewed the terms of the offer, held hearings, and approved the offer -- also a structure of regulation rejected by Congress. The practical upshot of the Idaho statute (as well as other state takeover laws), as the commentators have agreed, is to strengthen greatly the power of the target company management to delay the commencement of the tender offer and, in the meantime, to take action that will result in the defeat of the takeover bid.

In its own regulation of tender offers, Congress rejected such powers for the incumbent management of the target company. Accordingly, I think that the state's law must be viewed as pre-empted by the Williams Act.

I should mention in closing that the appellants also argue that a tender offeror has no standing under the Williams Act to challenge the constitutionality of the state takeover statute. This argument is based on a misreading of Piper v. Chris Craft Industries, 430 U.S. 1 (1977), where the Court held that an offeror does not have standing to sue for damages for noncompliance with the Williams Act. Here, the appellee is not suing for injunctive relief or for damages for noncompliance with the Williams Act. Rather, its suit rests on a constitutional claim under the Supremacy and Commerce Clauses to be free of the requirements of the Idaho statute. I see no problem of "standing" here.



SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-759, Kidwell v. Great Western United Corp.

Luther Munford, one of Justice Blackmun's clerks, yesterday shared an interesting observation about this case with me. He pointed out that nowhere in the opinion of the CA 5 or in the Briefs of the parties here has there been any discussion of the source of Great Western United's right to maintain this action in federal court -- that is, the source of its "cause of action." Instead, attention has focused on the question of personal jurisdiction.

Great Western's claim is that the Idaho statute contravenes the Supremacy Clause because it is inconsistent with the Williams Act. Given the position expressed in our opinion in Chapman, 42 U.S.C. §1983 does not provide a basis for Great Western's suit. We argue in Chapman that "laws" in §1983 includes only civil rights laws, among which the Williams

Act does not number. And it would undercut this limitation on "laws" completely if the term "Constitution" in the statute were construed to include Supremacy Clause claims. On this latter point, I refer you to Justice Stevens' discussion in his opinion in Chapman of the comparable situation with respect to 28 U.S.C. §1343 (copy attached).

An alternative source for Great Western's cause of action is the Williams Act itself. But there is only a tenuous basis for supposing that the Williams Act creates a statutory right to be free of conflicting state laws, and even less support for the conclusion that it authorizes private suits in federal court to obtain declaratory and injunctive relief from such state laws. The argument on the former point rests on Section 28 of the 1934 Act, 15 U.S.C. § 78bb, which provides that:

"Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Great Western might argue that by implication, Section 28 prohibits state laws in conflict with the federal securities laws. If this is so, Great Western might continue, then the enforcement of such laws against it would violate Section 28, and Section 27 creates the cause of action Great Western asserts.

Section 27, 15 U.S.C. §§78aa, provides in part:

"Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulation, may be brought in any such district [where the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business"

Its own suit, Great Western would urge, seeks to enjoin a violation of Section 28, so it is authorized by Section 27.

Section 27, however, actually leaves the crucial question unanswered. While it governs jurisdiction over the suits authorized by the 1934 Act, it does not define what those suits are; in particular, it does not authorize suits by private parties for declaratory and injunctive relief. Nor does any other section of the Williams Act explicitly authorize a private party to maintain such an action.

Following the approach towards implied causes of action that we are working on in the Cannon opinion, then, I would have to conclude that there is no authorization in the Williams Act for Great Western to claim declaratory and injunctive relief from the Idaho statute. Nor do I think that the Declaratory Judgments Act, 28 U.S.C. §2201, should be read to create such a claim for relief. The purpose of §2201 is to allow federal causes of action otherwise maintainable in federal court to be pursued at an earlier stage in any given controversy, before actual damage has been sustained by the plaintiff. In terms of the Declaratory Judgments Act, 28 U.S.C. §2201, Great Western does not have a right to a

declaration of the unconstitutionality of the Idaho statute, because Congress has not created such a right. The implication of this reasoning is that under current federal law, Great Western's Supremacy Clause claim could only be asserted as a defense to an action against it under the Idaho statute in the Idaho courts.

As I mentioned at the beginning of this memorandum, the appellants have not raised any question regarding the basis for Great Western's suit. Since no issue of jurisdiction is implicated by the "cause of action" problem, I think that the Court would be justified in simply noting the problem and stating that the appellants have conceded any claim they might have had on this point. In other cases involving similar actions for declaratory and injunctive relief against state statutes on the ground that they conflicted with federal statutes, the Court has proceeded directly to the pre-emption question with no mention of the statutory basis for the plaintiffs' suit. Jones v. Rath Packing Co., 430 U.S. 519 (1977); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).

I do think that it would be a good idea to indicate the presence of the problem. As in Cannon, there is an opportunity to point out here the need for precise analysis of the relief that Congress affords to various parties, at various times during a given controversy, in either federal or state courts.

Brown

II

The statutory language suggests three different approaches to the jurisdictional issue. The first involves a consideration of the words "secured by the Constitution of the United States" as used in § 1343. The second focuses on the remedy authorized by § 1983 and raises the question whether that section is a statute that secures "equal rights" or "civil rights" within the meaning of § 1343. The third approach makes the jurisdictional issue turn on whether the Social Security Act is a statute that secures "equal rights" or "civil rights." We consider these approaches in turn.

1. *The Supremacy Clause*

Under § 1343 (3), Congress has created federal jurisdiction of any civil action authorized by law to redress the deprivation under color of state law "of any right, privilege, or immunity secured [1] by the Constitution of the United States or [2] by an act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." Claimants correctly point out that the first prepositional phrase can be fairly read to describe rights secured by the Supremacy Clause. For even though that Clause is not a source of any federal rights, it does "secure" federal rights by according them priority whenever they come in conflict with state law.²⁹ In that sense all federal rights, whether created

claiming that a court has power to grant relief in his behalf has the burden of persuasion on the jurisdictional issue, *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 189, especially when he is proceeding in a court of limited jurisdiction. *Turner, Administrator v. Bank of North America*, 4 Dall. 8, 11.

²⁹"The argument that the phrase in the statute 'secured by the Constitution' refers to rights 'created,' rather than 'protected' by it, is not persuasive. The preamble of the Constitution, proclaiming the establishment of the Constitution in order to 'secure the Blessings of Liberty,' uses the word 'secure' in the sense of 'protect' or 'make certain.' That the phrase was used in this sense in the statute now under consideration was recognized in *Carter v. Greenhow*, 114 U. S. 317, 322, where it was held

by treaty, by statute, or by regulation, are "secured" by the Supremacy Clause.

In *Swift & Co. v. Wickham*, 382 U. S. 111, the Court was confronted with an analogous choice between two interpretations of the statute defining the jurisdiction of three-judge district courts.³⁰ The comprehensive language of that statute, 28 U. S. C. § 2281,³¹ could have been broadly read to encompass statutory claims secured by the Supremacy Clause or narrowly read to exclude claims that involve no federal constitutional provision except that Clause. After acknowledging that the broader reading was consistent not only with the statutory language but also with the policy of the statute, the Court accepted the more restrictive reading. Its reasoning is persuasive and applicable to the problems confronting us in this case.

"This restrictive view of the application of § 2281 is more

as a matter of pleading that the particular cause of action set up on the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.' See, as to other rights protected by the Constitution and hence secured by it, brought within the provisions of R. S. § 5508, *Logan v. United States*, 144 U. S. 263; *In re Quarles and Butler*, 158 U. S. 532; *United States v. Mosley*, 238 U. S. 383." *Hague v. C. I. O.*, 307 U. S. 496, 526-527 (opinion of Stone, J.).

³⁰ The three-judge court statute, including the language at issue in *Swift & Co. v. Wickham*, 382 U. S. 11, was originally enacted in 1910, 36 Stat. 557, at a time when the Judicial Code of 1911 was under active consideration.

³¹ When *Swift & Co.* was decided, § 2281 provided:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of any order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three-judges under section 2284 of this title." (Emphasis added.)

consistent with a discriminating reading of the statute itself than is the first and more embracing interpretation. The statute requires a three-judge court in order to restrain the enforcement of a state statute 'upon the ground of the unconstitutionality of such statute.' Since all federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause, the words 'upon the ground of the unconstitutionality of such statute' would appear to be superfluous unless they are read to exclude some types of such injunctive suits. For a simple provision prohibiting the restraint of the enforcement of any state statute except by a three-judge court would manifestly have sufficed to embrace every such suit whatever its particular constitutional ground. It is thus quite permissible to read the phrase in question as one of limitation, signifying a congressional purpose to confine the three-judge court requirement to injunctive suits depending directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single-judge court." *Swift & Co. v. Wickham*, 382 U. S. 111, 126-127.

Just as the phrase in § 2281—"upon the ground of the unconstitutionality of such statute"—would have been superfluous unless read as a limitation on three-judge court jurisdiction, so is it equally clear that the entire reference in § 1343 (3) to rights secured by an act of Congress would be unnecessary if the earlier reference to constitutional claims embraced those resting solely on the Supremacy Clause. More importantly, the additional language which describes a limited category of acts of Congress—those "providing for equal rights of citizens"—plainly negates the notion that jurisdiction over *all* statutory claims had already been conferred by the preceding reference to constitutional claims.

Thus, while we recognize that there is force to claimants' argument that the remedial purpose of the civil rights leg-

islation supports an expansive interpretation of the phrase "secured by the Constitution," it would make little sense for Congress to have drafted the statute as it did if it had intended to confer jurisdiction over every conceivable federal claim against a state agent. In order to give meaning to the entire statute as written by Congress, we must conclude that an allegation of incompatibility between federal and state statutes and regulations does not, in itself, give rise to a claim "secured by the Constitution" within the meaning of § 1343 (3).

2. Section 1983

Claimants next argue that the "equal rights" language of § 1343 (3) should not be read literally or, if it is, that § 1983, the source of their asserted cause of action, should be considered an act of Congress "providing for equal rights" within the meaning of § 1343 (3) or "providing for the protection of civil rights" within § 1343 (4). In support of this position, they point to the common origin of § 1983 and § 1343 (3) in the Civil Rights Act of 1871 and this Court's recognition that the latter is the jurisdictional counterpart of the former.²² Since broad language describing statutory claims was used in both provisions during the period between 1874 and 1911 and has been retained in § 1983, and since Congress in the Judicial Code of 1911 purported to be making no changes in the existing law as to jurisdiction in this area, the "equal rights" language of § 1343 (3) must be construed to encompass all statutory claims arising under the broader language of § 1983. Moreover, in view of its origin in the Civil Rights Act of 1871 and its function in modern litigation, § 1983 does "provid[e] for the protection of civil rights" within the meaning of § 1343 (4).

²² See *Lynch v. Household Finance Corp.*, 405 U. S. 538, 540, 543; *Examining Board of Engineers, Architects & Surveyors v. DeOtero*, 426 U. S. 572, 583.

*Preemption
issue alone
- not enough
for fed.
power under
§ 1343(3)*

"Take-over" statute case

I jurisdiction. My tentative views are that the DC in Dallas did not have personal jurisd. either under Texas Long Arm statute or under § 27 of '34 Act

D/P fairer principles of Int. Shoe and Sheffer v Hestner. Contacts with Texas were minimal. (But in view of extra territorial effect of Idaho statute there is a non-frivolous argument to contrary)

§ 27 is the jurisdictional provision of the '34 Act. It is applicable (allowing suit in any DC) only where there has been a violation of the Act. I doubt that a violation of the Supremacy Clause (by preemption doctrine) constitutes a violation of any provision the Act.

II. Source of Resp's right to sue in Fed Ct? - i.e. what is statutory source of right to ~~sue~~ maintain this action in fed. ct.

Resp. relies on Supremacy Clause, but doesn't join's decision in Chapman undercut this argument. (see p 14 attached)

Now does § 27 of '34 Act, or the only alleged violation ~~is~~ alleged in of the Supremacy Clause.

Respondent has abandoned 1983 & under my Chapman view, this could not have helped anyway

J. Goddard
dissent
is
permissive

Heiser (D/AG of Idaho)

Sole response of Appellee to Idaho's request for information was filing of this suit.

Under Texas long arm statute, D must have been "doing business in Texas" or having ~~been~~ committed a tort there.

Apart of this, under Int. Shoe & Heiser D/P clause does not support venue.

Venue was alleged under § 27 of '34 act.

Mr. Jeweler (Asst AG of NH).

Great Western does business all over ~~the~~ U.S. & could have brought this suit in Idaho - & thus avoid all of the severe juris & venue Qs in this case.

Juvin (Appellate - Great Western)

G/Western is Del corp with major
business in Texas.

Only 2 1/2 % of shares of Sunshine
were in Idaho.

Idaho Act is typical of other state
statutes

Violation of § 27 of 34 Act:

Relies on § 284 as allowing
juvin under the Supremacy Clause
(W.H.R. thinks this places
no affirmative duty on state
officers not to ~~violate~~ enforce a
state law in conflict with 34 Act)

Juvin obtained under Texas Long
Arm statute - as construed by Tax. Cts.

Easterbrook (SG)

Statute applies even if no share-
holders live in Idaho. Nor does
it apply if mgt. agrees to take-
over.

BB 4/13/79
rev. 4/19/79

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-759, Kidwell v. Great Western United Corp.

Luther Munford, one of Justice Blackmun's clerks, yesterday shared an interesting observation about this case with me. He pointed out that nowhere in the opinion of the CA 5 or in the Briefs of the parties here has there been any discussion of the source of Great Western United's right to maintain this action in federal court -- that is, the source of its "cause of action." The appellee's complaint mentions the Securities Exchange Act of 1934 and 42 U.S.C. §1983 as the laws under which its claim arises.

Great Western has two bases for attacking the validity of the Idaho statute, the Commerce Clause and the pre-emption claim under the Supremacy Clause and the Williams Act. Given the construction of the term "Constitution" in §1983 that we adopt in Chapman, §1983 does provide a cause of action for

assertion of the Commerce Clause claim. But §1983 does not create a cause of action based on the contravention of the Williams Act by the Idaho statute. We argue in Chapman that "laws" in §1983 includes only civil rights laws, among which the Williams Act does not number. And it would undercut this limitation on "laws" completely if the term "Constitution" in §1983 were construed to include Supremacy Clause claims. On this latter point, I refer you to Justice Stevens' discussion in his opinion in Chapman of the comparable situation with respect to 28 U.S.C. §1343.

An alternative source for Great Western's cause of action is the Williams Act itself. But there is only a tenuous basis for supposing that the Williams Act creates a statutory right to be free of conflicting state laws, and even less support for the conclusion that it authorizes private suits in federal court to obtain declaratory and injunctive relief from such state laws.

The argument on the former point would overlap, I suppose, with the appellee's contentions regarding the availability of personal jurisdiction under Section 27 of the 1934 Act. This argument actually begins with Section 28 of the 1934 Act, which provides that:

"Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."

Great Western has argued, in connection with the question of jurisdiction, that Section 28 by implication prohibits state

laws in conflict with the federal securities laws.* Granted this premise, it might argue also that a private cause of action to enforce that prohibition should be implied under Section 28.

Even assuming, as the appellee urges, that Section 28 was meant to do more than limit the pre-emptive effect of the 1934 Act, there may be no warrant for implying a private cause of action to enforce in federal court the implied limitation on state laws. It is true that under the 1934 Act, there is no apparent provision for enforcement of that limitation by the SEC in federal courts. Even if that is so, I see no particular problem with the conclusion that the pre-emptive effect of the Williams Act is to be left for assertion as a defense to an action by the State under the Idaho statute in the Idaho courts.

The appellee also invoked the Declaratory Judgments Act, 28 U.S.C. §2201, in its complaint. But as long as the concepts of jurisdiction and cause of action are to be separated carefully, that Act cannot provide a cause of action for

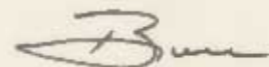
.....
 * Given this construction of Section 28, the appellee has argued that enforcement of a state law inconsistent with the Williams Act constitutes a "violation" of that Act within the meaning of Section 27 of the 1934 Act.

"Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district [wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business"

The appellee argues that since some of the acts constituting the violation occurred in Texas, the suit properly was maintained there.

assertion of the pre-emption claim. The purpose of §2201 is only to allow federal causes of action otherwise maintainable in federal court to be pursued at an earlier stage in any given controversy, before actual damage has been sustained by the plaintiff. In terms of the Declaratory Judgments Act, then, Great Western does not have a right to a declaration of the unconstitutionality of the Idaho statute because Congress has not created a cause of action for such a declaration.

As I mentioned at the beginning of this memorandum, the appellants have not raised any question regarding the basis for the appellee's Supremacy Clause-Williams Act claim. Since no issue of jurisdiction is implicated by the "cause of action" problem, I think that the Court would be justified in simply noting the problem and stating that the appellants have conceded any claim they might have had on this point. In other cases involving similar actions for declaratory and injunctive relief against state statutes on the ground that they conflicted with federal statutes, the Court has proceeded directly to the pre-emption question with no mention of the statutory basis for the plaintiffs' suits. E.g., Jones v. Rath Packing Co., 430 U.S. 519 (1977); Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977). But I do think that it would be well at least to indicate the presence of the problem. As in Cannon, there is an opportunity here to point out the need for precise analysis of the relief that Congress affords to various parties, at various times during a given controversy, in either federal or state courts.



4/19/79

78-759 Take-Over Case (Great Western)
II Cause of Action

Under 1983, Commerce Clause
claim - a const. provision - is
appropriate. (This would be a cause of
action, but would eliminate ~~the~~ Preemption Claim)

But under 1983, the Supremacy Clause
& Woods Claim is not a Const. claim.
(See Stevens op in Chapman)

No basis for implying a cause
of action under Woods Act.

I Jurisdiction

Long
Arm

(a) § 9 accept state law construction,
but this leaves D/P issue - close one.

? If long arm statute applies in
this fed. ct. case, it also would
allow a Tex. state ct. to assume
jurisdiction. (Judge Goldbold's dissent
advances strong reasons contra
- Del. corp. law challenged in any
state).

§ 27

(b) § 27 applies only to violation
of Act. Only alleged violation
here is of Supremacy Clause.

Reverse 6-3

78-759 Leroy v. Great Western United

Conf. 4/20/79

The Chief Justice

Reverse - No jurisdiction in Texas, But Texas DC could transfer

No business transacted in Texas by Resp. to DC in Idaho.
Thus Texas long arm statute does not apply.

Nothing to § 27 issue.

Resp. could, under Ex parte Young, seek injunction in Idaho courts.

Under concepts of comity, the Idaho statute should be challenged only in Idaho ~~and~~ could do this only in Fed court (what basis?).

On preemption, WMA act controls to extent of conflict. Extra-territorial provisions violate Commerce Clause.

Mr. Justice Brennan

Mr. Justice Brennan. Affirm

Confusing case. The § 27 jurisdiction claim is based on "violation" of WMA Act. [But this is violation of Supremacy Clause]

Under 1983, the ~~Supremacy~~ court. issue as to Commerce Clause is actionable, & under the "under laws" provision the Supremacy WMA Act affords cause of action.

Mr. Justice Stewart Reverse

Qs of venue & personal jurisdiction are different.

A law that is preempted by Fed law is not violated. Thus no venue under § 27

nor is there ~~personal~~ personal jurisdiction under § 27 for same reason.

Nor is there personal jurisdiction under long arm statute - ~~a~~ minimum contacts not present. D/P since

Idaho statute is preempted

Venue was in wrong place & there was no personal jurisdiction.

Mr. Justice White Affirm

There is personal jurisdiction under §27+28.
I do not see interfering with Fed statute. Venue
lies for civil cases as well as criminal
cases.

If issue of remedy arises, 1983
provides this. Agree with WQB on this.

Mr. Justice Marshall Affirm

Agree with WQB & BHW

Mr. Justice Blackmun Reverse

Difficult to find jurisdiction under 27+28.
Nor was I doing business in Texas.
Kulko is relevant. Nor does Texas
long arm statute confer jurisdiction.

If there were jurisdiction, HAB
would find venue.

~~The~~ On merits, would ~~be~~
involuntarily I do it on Commerce
Clause - not Prescription.

Mr. Justice Powell

Reverse

See my other notes.

Mr. Justice Rehnquist

Reverse

As to merits, agree with Harry that Commerce Clause is violated. Also preempted.

§ 27 - no violation of Wm. Act - only alleged violations are of Constitution.

No subject matter jurisdiction in Texas.

Under 1331 & ~~1331~~ 1332, we look to Texas long-arm statute - + there is no personal jurisdiction. Kulko. Only minimal contacts - not enough.

Need not reach venue - but think no venue either.

Mr. Justice Stevens

Reverse

§ 27 & 28 do not provide jurisdiction.

Have doubt as to long-arm statute - can argue both sides but it is clear there is no venue. Would avoid deciding long-arm

Reverse for these two reasons.)

Can't transfer to 8 also absent jurisdiction.

On merits, statute is bad.

Mr. Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: NY 22 79

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-759

Reviewed
LJP
5/25
Join

David H. Leroy, Attorney General of Idaho, et al.,
 Appellants,
 v.
 Great Western United Corporation.

On Appeal from the United States Court of Appeals for the Fifth Circuit.

[May —, 1979]

Decided on venue grounds, I also could hold that Texas long arm statute was invalid under D/P clause as applied.

MR. JUSTICE STEVENS delivered the opinion of the Court.

An Idaho statute imposes restrictions on certain purchasers of stock in corporations having substantial assets in Idaho. The questions presented by this appeal are whether the state agents responsible for enforcing the statute may be required to defend its constitutionality in a federal district court in Texas, and if so, whether the statute conflicts with the Williams Act amendments to the Securities Exchange Act of 1934,¹ and the Commerce Clause of the United States Constitution.²

Sunshine Mining and Metal Co. (Sunshine) is a "target company" within the meaning of the Idaho Corporate Takeover Act—a statute designed to regulate takeovers of corporations that have certain connections to the State.³ Sunshine's

¹ 82 Stat. 454, see 15 U. S. C. §§ 78m (d)–78m (e), 77n (d)–78n (f).

² "The 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.

³ Chapter 15 of Title 30 of the Idaho Code is entitled "Corporate Takeovers." Its opening provision contains the following definition:

"Target company" means a corporation or other issuer of securities which is organized under the laws of this state or has its principal office in

principal business is a silver mining operation in the Coeur d'Alene Mining District in Idaho. Its executive offices and most of its assets are located in the State. Sunshine is also engaged in business in New York and, through a subsidiary, in Maryland. Its stock is traded over the New York Stock Exchange, and its shareholders are dispersed throughout the country. App. 36. It is a Washington corporation. 439 F. Supp. 420, 423-424.

Great Western United Corporation (Great Western) is an "offeror" within the meaning of the Idaho statute.⁴ Great Western is a publicly owned Delaware corporation with executive headquarters in Dallas, Tex., and corporate offices in Denver, Colo. App. 131. In early 1977, Great Western decided to make a public offer to purchase 2 million shares of Sunshine stock for a premium price. Because consummation of the proposed tender offer would cause Great Western to own more than 5% of Sunshine's outstanding shares, Great Western was required to comply with certain provisions of the Williams Act and arguably also to comply with the Idaho

this state, which has substantial assets located in this state, whose equity securities of any class are or have been registered under chapter 14, title 30, Idaho Code, or predecessor laws or section 12 of the Securities Exchange Act of 1934, and which is or may be involved in a takeover offer relating to any class of its equity securities." Idaho Code § 30-1501 (6) (emphasis added).

⁴ "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates and associates of that person, and all persons acting jointly or in concert for the purpose of acquiring, holding or disposing of or exercising any voting rights attached to the equity securities for which a take-over offer is made."

"Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after the acquisition thereof the offeror would be directly or indirectly a beneficial owner of more than five per cent (5%) of any class of the outstanding equity securities of the issuer." Idaho Code §§ 30-1501 (3), (6).

Corporate Takeover Act as well as with similar provisions of New York and Maryland.

On March 21, 1977, Great Western publicly announced its intent to make a tender offer for 2 million shares of Sunshine, and its representatives took simultaneous steps to implement the proposed tender offer. They filed a Schedule 13D with the Securities Exchange Commission in Washington disclosing the information required by the Williams Act. They consulted with state officials in Idaho, New York, and Maryland about compliance with the corporate takeover laws of those States. And they filed documents with the Idaho Commissioner of Finance in an attempt to satisfy Idaho's statute.

On March 25, 1977, Melvin Baptie, who was then the Deputy Administrator of Securities of the Idaho Department of Finance, sent a teletype letter of objections to Great Western's filing to the company's offices in Dallas. The letter stated that certain pages of Great Western's SEC Form 13D were missing, asked for several additional items of information, and indicated that no hearing would be scheduled, nor other action taken, until all of the requested information had been received. App. to Juris. Statement, at A-156 to A-164. On the same day Tom McEldowney, the Director of Finance of Idaho, entered an order delaying the effective date of the tender offer. *Id.*, at A-165 to A-166. Great Western made no response to Baptie's letter or to McEldowney's order.

On March 28, 1977, Great Western filed this action in the United States District Court for the Northern District of Texas, naming as defendants the state officials responsible for enforcing the Idaho, New York, and Maryland takeover laws. The complaint prayed for a declaration that the state laws were invalid insofar as they purported to apply to interstate cash tender offers to purchase securities traded on the national exchange. App., at 1-36. The claims against the Maryland and New York defendants were dismissed because the former did not attempt to enforce their statute against Great Western

and the latter expressly stated that they would not assert jurisdiction over the proposed tender offer. 439 F. Supp., at 428-429. The two Idaho defendants—McEldowney, the Director of Finance, and Wayne Kidwell, then Attorney General of the State⁵—appeared specially to contest jurisdiction venue, and the merits of the claim.

The District Court found four separate statutory bases for federal jurisdiction.⁶ It held that personal jurisdiction over the Idaho defendants had been obtained by service pursuant to the Texas longarm statute.⁷ It concluded, however, that venue was improper under the general federal venue statute, 28 U. S. C. § 1391 (b),⁸ because the defendants obviously did not reside in Texas and the claim arose in Idaho rather than in Texas. Nonetheless, it decided that venue could be sustained under the special venue provision in § 27 of the Securities Exchange Act of 1934 (the 1934 Act). 15 U. S. C. §§ 78aa. See nn. 9 and 10, *infra*, and accompanying text.

On the merits, the District Court held that the Idaho Take-over Act is pre-empted by the Williams Act and places an impermissible burden on interstate commerce. It granted injunctive relief that enabled Great Western to acquire the desired Sunshine shares in the Fall of 1977. 439 F. Supp., at 434-440. That acquisition did not moot the case, however,

⁵ Baptie, who wrote the letter of comment on March 25, 1977, was not named as a defendant. David H. Leroy has now replaced Kidwell as Attorney General of the State.

⁶ "The Court has subject matter jurisdiction over this case on four bases: 28 U. S. C. § 1331 (general federal question), 28 U. S. C. § 1332 (diversity), 28 U. S. C. § 1337 (acts affecting commerce) and Section 27 of the [Securities Exchange Act of 1934, 15 U. S. C. § 78aa]." 439 F. Supp., at 430.

⁷ Tex. Rev. Civ. Stat., art. 2031.

⁸ Section 1391 (b) provides:

"[C]ivil actions in which jurisdiction is not founded solely on diversity of citizenship may be brought in the judicial district 'where all defendants reside, or in which the claim arose, except as otherwise provided by law.'"

because the question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed. The court sustained federal subject matter jurisdiction on the same four grounds relied upon by the District Court. See n. 6, *supra*. It then advanced alternate theories in support of both its determination that the District Court had personal jurisdiction over the defendants and its conclusion that venue lay in the Northern District of Texas. First, it noted that the Texas longarm statute authorized the assertion of personal jurisdiction over nonresidents to the fullest extent allowable under the Due Process Clause of the Fourteenth Amendment. It then held that an Idaho official who seeks to enforce an Idaho statute to prevent a Texas-based corporation from proceeding with a national tender offer has sufficient contacts with Texas to support jurisdiction. Second, it held that jurisdiction was available under § 27 of the 1934 Act,⁹ which gives the federal district courts exclusive jurisdiction over suits brought "to enforce any . . . duty created" by the Act. It based this holding on the theory that Idaho's enforcement attempts, by conflicting with the Williams Act, constituted a violation of a "duty" imposed by

⁹"The district courts of the United States, . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity or actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . ." 15 U. S. C. § 78aa.

§ 28 (a) of the Act.¹⁰ It relied on the same reasoning to support its conclusion that venue was authorized by § 27 of the 1934 Act. Finally, disagreeing with the District Court, the Court of Appeals concluded that venue in the Northern District of Texas was also proper under the general federal venue provision, 28 U. S. C. § 1391 (b), because the allegedly invalid restraint against Great Western occurred there and it was accordingly "the judicial district . . . in which the claim arose." 577 F. 2d, at 1265-1274. On the merits, the Court of Appeals agreed with the analysis of the District Court. *Id.*, at 1274-1296.

We noted probable jurisdiction of the appeal. — U. S. —. Without reaching either the merits or the constitutional question arising out of the attempt to assert personal jurisdiction over appellants, we now reverse because venue did not lie in the Northern District of Texas.

I

The question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum. See generally Wright, Miller & Cooper, *Federal Practice & Procedure* § 3801, at 5-6 (1976). On the other hand, neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties. See *Olberding v. Illinois Central R. Co.*, 346 U. S. 338, 340; *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 167-168. Accordingly, when there is a sound pru-

¹⁰ Section 28 provides, in pertinent part:

"Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U. S. C. § 78bb.

dential justification for doing so, we conclude that a court may reverse the normal order of considering personal jurisdiction and venue.

Such a justification exists in this case. Although for the reasons discussed in Part II, *infra*, it is clear that § 27 of the 1934 Act does not provide a basis for personal jurisdiction, the question whether personal jurisdiction was properly obtained pursuant to the Texas longarm statute is more difficult. Indeed, because the Texas Supreme Court has construed its statute as authorizing the exercise of jurisdiction over non-residents to the fullest extent permitted by the United States Constitution,¹¹ resolution of this question would require the Court to decide a question of constitutional law that it has not heretofore decided. As a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions. We find it appropriate to pretermitt the constitutional issue in this case because it is so clear that venue was improper under either § 27 of the 1934 Act or under § 1391 (b) of the Judicial Code.

II

The linchpin of Great Western's argument that venue is provided by § 27 of the 1934 Act is its interpretation of § 28 (a) of that Act. See nn. 9-10, *supra*. It reads § 28 as imposing an affirmative "duty" on the State of Idaho, the violation of which may be redressed in the federal courts under § 27. As Mr. Justice Frankfurter said of a similar

¹¹ *E. g.*, *U-Achor Advertising, Inc. v. Burt*, 553 S. W. 2d 760 (Tex. 1977). Appellants argue that this construction is only applicable to private commercial defendants and should not govern either in a suit against the agents of another sovereign state or in one against persons who are not engaged in commercial endeavors. Both the District Court and the Court of Appeals, however, have concluded that the statute does extend to the limits of the Due Process Clause in this case, and it is not our practice to re-examine state-law determinations of this kind. *E. g.*, *Butner v. United States*, — U. S. —, —; *Bishop v. Wood*, 428 U. S. 341, 345-346, and n. 8; *Propper v. Clark*, 337 U. S. 472, 486-487.

argument in a similar case, however, "[t]his is a horse soon carried." *Olberding, supra*, 346 U. S., at 340.

The reference in § 27 to the "liabilit[ies] or dut[ies] created by this chapter" clearly corresponds to the various provisions in the 1934 Act that explicitly establish duties for certain participants in the securities market or that subject such persons to possible actions brought by the Government, the Securities and Exchange Commission, or private litigants.¹² Section 28 is not such a provision. There is nothing in its text or its legislative history to suggest that it imposes any duty on the States or that indicates who might enforce any such duty. The section was plainly intended to protect, rather than to limit, state authority.¹³ Because § 28 imposed no duty on petitioner, the argument that § 27 establishes venue in the District Court is unsupported.

¹² *E. g.*, § 14 (a) of the 1934 Act, 15 U. S. C. § 78n (a) ("It shall be unlawful for any person . . . to solicit . . . any proxy . . . in controvention of such rules as the Commission may prescribe . . .") (emphasis added); *id.*, § 16 (b), 15 U. S. C. § 78p (b) ("For the purpose of preventing the unfair use of information which may have been obtained by [the] beneficial owner [of 10% of any class of equity security], director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer . . .") (Emphasis added); *id.*, § 17 (a) (1), 15 U. S. C. § 78q (a) (1). ("Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to [15 U. S. C. § 786] shall make, keep, and preserve . . . such accounts . . . and make such reports . . . as the Commission by its rules and regulations may prescribe . . .") (emphasis added).

¹³ Thomas Corcoran, a principal draftsman of the 1934 Act, indicated to Congress that the purpose of § 28 was to leave the States with as much leeway to regulate securities transactions as the Supremacy Clause would allow them in the absence of such a provision. Senate Committee on

select an unfair or inconvenient place of trial.¹⁵ For that reason, Congress has generally not made the residence of the plaintiff a basis for venue in nondiversity cases. But cf. 28 U. S. C. § 1391 (e). The desirability of consolidating similar claims in a single proceeding may lead defendants, such perhaps as the New York and Maryland officials in this case, to waive valid objections to otherwise improper venue. But that concern does not justify reading the statute to give the plaintiff the right to select the place of trial that best suits his convenience. So long as the plain language of the statute does not open the severe type of "venue gap" that the amendment giving plaintiffs the right to proceed in the district where the claim arose was designed to close,¹⁶ there is no reason to read it more broadly on behalf of plaintiffs.¹⁷

Moreover, the plain language of § 1391 (b) will not bear the Court of Appeals' interpretation. The statute allows venue in "the judicial district . . . in which the claim arose." Without deciding whether this language adopts the occasionally fictive assumption that a claim may arise in only one district,¹⁸ it is absolutely clear that Congress did not intend to

¹⁵ See *Braden v. 30th Judicial Circuit Court*, 410 U. S. 484, 493-494; *Denver & R. G. W. R. Co. v. Brotherhood of Railroad Trainmen*, 387 U. S. 556, 560; *Nierbo, supra*, 308 U. S., at 168; *Reuben H. Donnelley Corp. v. FTC*, 560 F. 2d 264, 269 (CA7 1978).

¹⁶ See *Brunette Machine Works v. Kokum Industries*, 406 U. S. 706, 710, and n. 8. As *Brunette* indicates, the amendment of § 1391 to provide for venue where the claim arose was designed to close the "venue gap" that existed under earlier versions of the statute in situations in which joint tortfeasors, or other multiple defendants who contributed to a single injurious act, could not be sued jointly because they resided in different districts. *Id.*, at 710 n. 8. In this case, by contrast, Great Western has attempted to join in one suit three separate claims—each challenging a different statute—against three sets of defendants from three States. The statute simply does not contemplate such a choice on the part of plaintiffs.

¹⁷ "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding, supra*, 346 U. S., at 340.

¹⁸ The two sides of this question, and the cases supporting each, are

provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts. *Denver & R. G. W. R. Co. v. Trainmen*, 387 U. S. 556, 560. Rather, it restricted venue either to the residence of the defendants or to "a place which may be more convenient to the litigants"—*i. e.*, both of them—"or to the witnesses who are to testify in the case." S. Rep. No. 1752, 89th Cong., 2d Sess. (1963). See *Denver & R. G. W.*, *supra*, at 560. See also *Brunette Machine Works v. Kokum Industries*, 406 U. S. 706, 710. In our view, therefore, the broadest interpretation of the language of § 1391 (b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district,¹⁹ a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff)—may be assigned as the locus of the claim. Cf. *Braden v. 30th Judicial Circuit Court*, 410 U. S. 484, 493-494.

This case, is not, however, unusual. For the claim involved has only one obvious locus—the District of Idaho. Most importantly, it is action that was taken in Idaho by Idaho residents—the enactment of the statute by the legislature, the review of Great Western's filing and the forwarding of the comment letter by Deputy Administrator Baptie, and the entry of the order postponing the effective date of the tender by Finance Director McEldowney—as well as the future action that may be taken in the State by its officials to punish or to remedy any violation of its law, that provide the basis for Great Western's federal claim. For this reason, the bulk of the relevant evidence and witnesses—apart from employees

discussed in 1 J. Moore, *supra*, ¶ 0.142 [5.-2], at 1426-1435; Wright, Miller & Cooper, *supra*, § 3806, at 28-34.

¹⁹ See ALI, Study of Jurisdiction Between State and Federal Courts, Commentary to Proposed Final Draft, at 80-81 (1965).

of the plaintiff, and securities experts who come from all over the United States²⁰—is also located in the State. Less important, but nonetheless relevant, the nature of this action challenging the constitutionality of a state statute makes venue in the District of Idaho appropriate. The merits of Great Western's claims may well depend on a proper interpretation of the State's statute, and federal judges sitting in Idaho are better qualified to construe Idaho law, and to assess the character of Idaho's probable enforcement of that law, than are judges sitting elsewhere. See cases cited in n. 11, *supra*.

We therefore reject the Court of Appeals' reasoning that the "claim arose" in Dallas because that is where Great Western proposed to initiate its tender offer, and that is where Idaho's statute had its impact on Great Western. Aside from the fact that these "contacts" between the "claim" and the Texas district fall far short of those connecting the claim and the Idaho district, we note that this reasoning would subject the Idaho officials to suit in almost every district in the country. For every prospective offeree—be he in New York, Los Angeles, Miami, or elsewhere, rather than in Dallas—could argue with equal force (or Great Western could argue on his behalf) that he had intended to direct his local broker to accept the tender and was frustrated in that desire by the Idaho law.²¹ As we noted above, however, such a reading of § 1391 (b) is inconsistent with the underlying purpose of the

²⁰ At the trial held in the Northern District of Texas, the witness roster, in addition to various Idaho officials and Great Western employees from Dallas, mainly included experts from the New York area as well as one each from California, Maryland, Texas, and Wisconsin. App., at 100-292.

²¹ Sunshine's shareholders are located in 49 States as well as the District of Columbia and Puerto Rico. App., at 36.

²² In *Denver & R. G. W.*, the Court concluded that the drafters of § 1391 (b) did not intend to provide venue in suits against unincorporated associations in every district in which a member of the association resided. To do so, it noted would give the plaintiff an unrestrained choice of venues and would accordingly be "patently unfair" to the defendant. 387 U. S., at 560. A like reasoning is controlling here.

provision, for it would leave the venue decision entirely in the hands of plaintiffs, rather than making it "primarily a matter of the convenience of litigants and witnesses." *Denver & R. G. W.*, *supra*, 387 U. S., at 560.²² In short, the District of Idaho is the only one in which "the claim arose" within the meaning of § 1391 (b).

The judgment of the Court of Appeals is reversed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



May 22, 1979

MEMORANDUM TO THE CONFERENCE

Re: 78-759 - Leroy v. Great Western
United Corporation

Although I realize that a majority of the Court was prepared to reverse on the ground that there was no personal jurisdiction in Texas over the Idaho official, I am hopeful that you may find my reliance on the clear absence of proper venue acceptable. I did have some difficulty with the implications of a jurisdictional holding and believe it is proper to avoid that constitutional question when a simple statutory answer is available. I try to justify this approach in Part I on pages 6 and 7.

Respectfully,

7

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 23, 1979

MEMORANDUM TO THE CONFERENCE

Due to a mix-up, an earlier memorandum circulated today advised that I was considering a dissent in No. 78-1060, Great Western Sugar Co. v. Edward L. Nelson. In fact, the case is No. 78-759, Leroy v. Great Western United Corporation. Please substitute the attached corrected memorandum for the earlier one.

Sincerely,

B.R.W.

B.R.W. 4/22

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 23, 1979

Re: No. 78-759 — Leroy v. Great Western
United Corporation

Dear John:

I am considering a dissent in this
case.

Sincerely,

B.R.W.

B.R.W. by R.L.

Mr. Justice Stevens

Copies to the Conference

May 26, 1979

78-759 Leroy v. Great Western United Corp.

Dear John:

Please join me.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



May 29, 1979

Re: No. 78-759 - Leroy v. Great Western United Corp.

Dear John:

Please join me.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

BB 6/7/79

I agree with this.

MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-759, Leroy v. Great Western United Corp.

I have reviewed Justice White's dissent, and recommend that you stay with Justice Stevens' opinion for the Court. Justice White accepts at least two arguments that you have considered and rejected. First, he concludes that some part of the alleged "violation" by the Idaho officials occurred in Texas. Second, he decides that the activities of the Idaho officials in enforcing their statute amounts to a "violation" of the Williams Act (within the meaning of § 27 of that Act) if the state statute has been preempted by the federal law.

I also call to your attention Section II of Justice White's opinion, because it contains a pernicious idea that should be guarded against in the future. He states that there are "no restrictions imposed by the Constitution on the exercise of jurisdiction by the United States over its residents." This argument has been advanced by the SG in recent cases, including this one, so it probably will reappear in the future. As I understand the argument, it amounts to the assertion that so far as the Due Process Clause is concerned, any federal court may acquire personal jurisdiction over any resident of the United States, so long as service of process is sufficient to give the notice required by the Constitution and to meet whatever statutory requirements may be applicable.

This seems to me to be totally at odds with the kind of fairness analysis adopted in International Shoe. Suppose, for example, that the federal securities laws provided that a suit under those statutes could be maintained in any federal court, and that service of process could be made anywhere in country. Under the statutes, it would be possible for a New York investor defrauded by a New York broker to bring suit in Montana, and secure personal jurisdiction for the federal court in Montana, by serving process on the defendant in New York. I suggest that such personal jurisdiction would be in contravention of the Due Process Clause of the Fifth Amendment.



BB 4/24/79

Good memo

MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-759, Leroy v. Great Western United Corp.

I recommend that you join Justice Stevens opinion for the Court. His preference for deciding the case on venue grounds is explained and justified in Section I of his opinion, beginning on p. 6. I think that his arguments there are convincing.

In Section II of the opinion, Justice Stevens makes short work of the claim that venue (and, by implication, personal jurisdiction) are proper under § 27 of the 1934 Act. We have discussed these arguments before, and I think that Justice Stevens reaches the correct resolution.

yes
 Section III is obviously the difficult section of the opinion. In it, Justice Stevens presents his reasons for concluding that Great Western United's claim arose in Idaho rather than Texas within the meaning of the general venue statute. He gives the following reasons: In general, statutory restrictions on venue are meant to protect defendants from having to defend in courts that have personal jurisdiction but in which defense of the lawsuit would be unfair or inconvenient. This purpose is evident from the failure to specify the residence of the plaintiff as a basis for venue except in a few limited types of actions. Construing the statutory allowance for venue in the district where the claim arises, with this general purpose in mind, indicates that in a case such as this one, the claim should be considered to have arisen in Idaho. See pp. 11-12 of Justice Stevens' opinion.

The dissent is likely to raise two objections to Justice Stevens argument in Section III. First, it will argue that because the actions of the Idaho officials had an impact on Great Western in its activities in Texas, the claim of Great Western should be considered to have arisen there. Justice Stevens has said about all there is to say on this point at p. 12 of his opinion. I would describe his approach to this argument as a balancing of relative convenience, with the scale tipped at the outset towards the interests of the defendants

because of the general statutory policy of protecting defendants from unfair or inconvenient venue.

The dissent will probably argue, second, that Justice Steven has created a so-called venue gap of the sort that recent amendments to § 1391 were meant to eliminate. Before these amendments, venue under § 1391(b) was proper only in a district in which all of the defendants resided. Because in situations of multiple defendants this often made venue with respect to all defendants improper in every district, the statute was amended to provide also for jurisdiction in the district where the claim arose. The dissent will argue that by taking the position he has, Justice Stevens has created a comparable venue gap by forcing plaintiffs such as Great Western to sue each state with a takeover statute in the federal district court in that state.

Yes | My own view is that this is a red herring. Great Western and other corporations in a similar situation do not have a single cause of action against multiple defendants. Rather, they have separate claims arising out of each State's corporate takeover statute. Each claim may be pursued in a separate action, since each presumably will raise unique questions because of the particular provisions of the state statute at issue.

Justice Stewart has joined Justice Stevens' opinion; Justice White has indicated his plan to file a dissenting opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

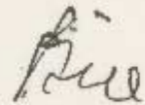
June 11, 1979

RE: No. 78-759 Leroy v. Great Western United Corporation

Dear Byron:

Please join me in the dissent you have prepared in the
above.

Sincerely,




Mr. Justice White

cc: The Conference

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1979

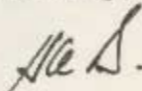


Re: No. 78-759 - Leroy v. Great Western United Corporation

Dear John:

Although my first preference was to decide the case on the personal jurisdiction issue, the route you have chosen is acceptable. My vote will give you a Court, and I therefore join your opinion.

Sincerely,



—

Mr. Justice Stevens

cc: The Conference

CHAMBERS OF
THE CHIEF JUSTICE



June 12, 1979

Dear John:

Re: 78-759 Leroy v. Great Western

I am satisfied to dispose of this case on venue grounds. I am equally satisfied that Texas had no jurisdiction.

I join.

Regards,

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 21, 1979

Re: No. 78-759 - Leroy v. Great Western United Corp.

Dear Byron:

Please join me.

Sincerely,

T.M.

T.M.

Mr. Justice White

cc: The Conference

