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JUDICIAL JURISDICTION IN THE UNITED STATES AND IN THE EUROPEAN COMMUNITIES: A COMPARISON

*Friedrich Juenger**

I signed up for the first seminar Eric Stein taught at Ann Arbor before the Rome Treaty instituting the Economic Community was ratified and when the European Coal and Steel Community was still young. European integration has long since become an economic and political reality. To be sure, the Communities have had their ups and downs, as has Europe's relationship with the United States. But despite the Common Market's current woes and the complaints of American farmers about European protectionism, we should not overlook the fact that the Communities present the most impressive experiment in supranationalism the world has seen. For lawyers in this country, the Communities' law and institutions present a tempting field of inquiry because, as Justice Potter Stewart remarked, "there are important similarities in the goals and institutional characteristics of the two systems," and because the Communities' "Court of Justice has been called upon to play a role that . . . appears very similar to that performed by the Supreme Court of the United States."¹

Eric Stein deserves our gratitude for making European integration accessible to American students and teachers. He has taught and written widely on this important subject, and the casebook he published with Hay and Waelbroeck² is a valuable aid for dispelling what a judge of the Communities' Court of Justice called "splendid mutual ignorance."³ Following Judge Pescatore's suggestion that it is time to take note of the experience gathered on both sides of the Atlantic,⁴ it seems worthwhile to compare the evolution of jurisdictional principles in the United States and in the Common Market.⁵

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1. Stewart, *Foreword*, in 1 COURTS AND FREE MARKETS vii (T. Sandalow & E. Stein eds. 1982); see also Preface, HARMONIZATION OF LAWS IN THE EUROPEAN COMMUNITIES vii (P. Herzog ed. 1983).

2. E. STEIN, P. HAY & M. WAELEBROECK, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE (1976).

3. Pescatore, *Foreword*, in 1 COURTS AND FREE MARKETS, *supra* note 1, at x.

4. *Id.*

5. Justice White has noted that the United States is a "common market" whose component states have retained attributes of sovereignty. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). As his felicitous observation suggests, the functions which jurisdictional principles must serve in this country and in the European Communities are sufficiently similar to warrant comparison.

I. AMERICAN LAW

The American law of jurisdiction has been shaped primarily by the United States Supreme Court which, for well over a century, has claimed the power to control state jurisdictional practices. Originally, it derived this power from the full faith and credit clause,⁶ until a dictum in *Pennoyer v. Neff*⁷ established that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."⁸ To delineate the jurisdiction of state courts, about which the fourteenth amendment was silent, Justice Field's opinion in *Pennoyer* invoked legal history and dogma. He defined due process to mean "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence."⁹ But he also cited Story's conflicts treatise¹⁰ to support the propositions that "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and that "no tribunal . . . can extend its process beyond that territory to subject either persons or property to its decisions."¹¹ From these premises Justice Field concluded that, with limited exceptions,¹² jurisdiction can only be acquired by a symbolic exercise of sovereignty: personal service of process within the state to proceed *in personam* and the attachment of local assets for actions *quasi in rem*.

Justice Field's opinion demonstrates the pitfalls of undiscerning reliance on dogmatic considerations. His effort to elevate common law practices to the status of immutable constitutional principle proved to be seriously misguided. Due process and state sovereignty do not easily mix because states' rights have little in common with the protection of individual freedoms and the attempt to blend these disparate ingredients was bound to breed anomalies. As Justice Hunt's dissent points out, it is unconvincing to let the constitutionality of state court jurisdiction hinge on the elusive distinction between actions *in personam* and *in rem*.¹³ Nor is it possible to explain why some magic act such as service or attachment should be required for asserting sovereign prerogatives. Equally flawed are the policy reasons that Justice Field adduced to justify premising jurisdiction on the ministrations of process servers and sheriffs, for his arguments confuse the requirement of

6. See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 406 (1856); *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174-75 (1850); cf. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878).

7. 95 U.S. 714 (1878).

8. 95 U.S. at 733. The fourteenth amendment had not yet been enacted when the state court judgment at issue was rendered.

9. 95 U.S. at 733.

10. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 22, 682 (7th ed. 1872).

11. 95 U.S. at 722, 723 (citing STORY, *supra* note 10, at ch. 2 & § 539).

12. These exceptions were divorce jurisdiction and jurisdiction over a foreign "partnership or association." 95 U.S. at 734-35.

13. See 95 U.S. at 737-38, 748. The parties in *Pennoyer* claimed title to Oregon land which Pennoyer had bought at a sheriff's sale conducted to satisfy an Oregon default judgment. At issue was the validity of that judgment, which a third party had obtained against Neff, a resident of California. Justice Field's opinion concedes that if the third party had attached Neff's land before, rather than after, judgment and had proceeded *quasi in rem*, Pennoyer would have acquired good title. See 95 U.S. at 723-24, 733.

notice with the power to adjudicate.¹⁴ Worse yet, the Court's insistence on practices rooted in medieval usages¹⁵ discouraged state experimentation at a time when the deficiencies of the procedural law this country had inherited were widely recognized. Ironically, a quarter of a century before *Pennoyer*, tradition-bound England had enacted the Common Law Procedure Act,¹⁶ which permitted service abroad and thereby authorized the very "extraterritoriality" Justice Field condemned.

Thus the Supreme Court, left to its own devices, started off on the wrong foot. Jurisdiction that rests on the service of transients or the attachment of goods which pass through a state is obviously exorbitant if it can be used to litigate facts that have no connection with the forum. *Pennoyer* prompted process servers to hound hapless travellers,¹⁷ if need be in airplanes,¹⁸ and to lure defendants away from their home state to gain an unfair advantage. Similarly, by attaching assets in remote locations unscrupulous plaintiffs could put defendants to the choice of either litigating in an inconvenient forum or losing their property. Up to a point, the courts could curb the most egregious abuses of such tag jurisdiction by inventing antidotes, such as the *forum non conveniens* doctrine¹⁹ and defenses premised on fraud principles.²⁰ But it proved difficult to cope with the obverse defect of *Pennoyer*, i.e., its failure to provide a forum for meritorious causes where neither the defendant nor sufficient property could be found within the state.

Corporate defendants, in particular, were hard to "find" and slap with a summons. In *Saint Clair v. Cox*,²¹ Justice Field suggested that the problem posed by such artificial entities could be resolved by requiring foreign corporations to agree to the appointment of a local agent as a target for local process servers, which agreement "may be implied as well as expressed."²² Taking their cue from this case, state courts and legislatures began to develop a new jurisdictional rationale. Foreign corporations that failed to appoint local agents for service of process were held amenable to jurisdiction on an "implied consent" theory. Liberally mixing fact with fiction, courts deduced the "consent" and "presence" of such entities from the business they did in the forum state.²³ But *Pennoyer* also posed some difficulties as

14. See 95 U.S. at 726-27.

15. For the evolution of English notions of process in common law and equity courts, see 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 250-56, 348-51 (3d ed. 1944).

16. Common Law Procedure Act, 1852, 15 & 16 Vict., ch. 76. The current rules on English long-arm jurisdiction derive from Order 11 of the Rules of the Supreme Court promulgated pursuant to the 1875 Judicature Act, 38 & 39 Vict., ch. 77. See generally G. CHESHIRE & P. NORTH, PRIVATE INTERNATIONAL LAW 85-95 (9th ed. 1974).

17. For a judicial reaction against such transient jurisdiction, see *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 143-44, 34 A. 714, 729-30 (1895) (Hamersley, J., dissenting).

18. See *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

19. See A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 121-22 (1962).

20. See, e.g., *Wyman v. Newhouse*, 93 F.2d 313 (2d Cir. 1937); *Blandin v. Ostrander*, 239 F. 700 (2d Cir. 1917).

21. 106 U.S. 350 (1882).

22. 106 U.S. at 356; see also *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855).

23. See Kurland, *The Supreme Court, the Due Process Clause and the in Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 584-85 (1958).

applied to human beings. To be sure, a dictum in that case helped resolve the very common problem of divorce proceedings against absconding spouses²⁴ and in *Milliken v. Meyer*²⁵ the Supreme Court finally concluded that individuals can be sued at their domicile. But it was still necessary to fall back on the "implied consent" fiction developed in the corporate area to give local relief to persons who were run over by nonresident motorists.²⁶ By the time the Supreme Court condoned this subterfuge, it had become apparent that *Pennoyer* had succumbed to erosion and that a reorientation was needed to make the law of jurisdiction more practical and plausible.

Drawing on the corporate and nonresident motorist cases, as well as the principle of domiciliary jurisdiction, the Supreme Court in *International Shoe Company v. Washington*²⁷ articulated a novel principle. Retreating from the idea that the defendant's amenability to suit should depend on a symbolic exercise of power, Justice Stone's opinion established that nonresidents can be sued locally if they have a sufficient relationship, certain "minimum contacts," with the forum state. If these contacts are "continuous and systematic" (as in the case of intensive business activities in the forum state), then the foreign defendant is amenable to general jurisdiction, *i.e.*, suable even on unrelated causes of action. But if the defendant's relationship to the forum is more attenuated, he may still be subject to limited personal jurisdiction with respect to causes of action that arise from certain local contacts, such as the commission of a tort within the state.

Although it retained the notion that due process is the fountainhead of jurisdiction, the Court inverted the relationship between the Constitution and the power of state courts. *Pennoyer* established that an adjudication comported with due process only if the court had jurisdiction pursuant to common law principles. In contrast, *International Shoe* teaches that process is due, unless it transgresses "traditional notions of fair play and substantial justice."²⁸ In other words, whereas Justice Field had ascertained compliance with due process from fixed jurisdictional rules, Justice Stone purported to deduce the outer limits of jurisdiction from the "vague due process clause."²⁹ This new rationale expanded the potential reach of state jurisdiction. Once the Supreme Court abandoned its attempt to prescribe precise rules, the states were free to fashion new bases of jurisdiction, as long as they stayed within the nebulous confines of "minimum contacts" and "fair play." Seizing upon the opinion in *International Shoe*, state legislatures began to enact long-arm statutes to broaden their courts' power to adjudicate.

One such statute, pursuant to which California asserted jurisdiction over foreign insurers that collected premiums in the state, was at issue in *McGee*

24. 95 U.S. at 734-35. Justice Field tried to justify this deviation from the principle of territoriality by characterizing divorce as a matter of "status."

25. 311 U.S. 457 (1940).

26. See *Hess v. Pawloski*, 274 U.S. 352 (1927).

27. 326 U.S. 310 (1945).

28. 326 U.S. at 316 (quoting from Justice Douglas' opinion in *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

29. 326 U.S. at 323 (Black, J., dissenting).

*v. International Life Insurance Co.*³⁰ According to the opinion Justice Black wrote for a unanimous Court, a single insurance policy which straddled state lines sufficed to enable the California court to adjudicate the rights of the local beneficiary against a Texas corporation because the "contract had a substantial connection with that State" and because California had a "manifest interest" in the resident plaintiff.³¹ This language seemed to spell a further expansion of jurisdiction, for it suggested that the due process calculus does not necessarily require a nexus between the defendant and the forum. However, Chief Justice Warren's majority opinion in *Hanson v. Denckla*³² rejected the substitution of transactional contacts and forum interests for defendant contacts. Like Justice Field in *Pennoyer*, Warren emphasized the "territorial limitations on the power of the respective States,"³³ from which he deduced the requirement of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."³⁴ Thus the idea that jurisdiction amounts to a quid pro quo for the defendant's pursuit of forum benefits, which underlies the "implied consent" fiction,³⁵ gained new currency. The *Pennoyer* power rationale was revived in modified form: the magic of defendant contacts replaced the magic of service, and once again due process coalesced with the notion of sovereignty.³⁶

In the decades following this trilogy of decisions the Supreme Court routinely denied petitions for *certiorari* in jurisdictional cases, leaving the states free to experiment with long-arm legislation. Hesitantly at first, then more boldly, state courts and legislatures expanded local jurisdiction in multi-state cases. But while the direction was clear, the going proved tough. Interpreting the new statutes in the light of *International Shoe*, *McGee* and *Hanson* turned out to be an onerous task because of the amorphous nature of the Supreme Court's guidelines and the deficiencies of statutory draftsmanship.³⁷ To obviate the need for reconciling local legislation with consti-

30. 355 U.S. 220 (1957).

31. 355 U.S. at 223.

32. 357 U.S. 235 (1958).

33. 357 U.S. at 251.

34. 357 U.S. at 253.

35. See Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective Litigation Values vs. the Territorial Imperative, (b) The Uniform Child Custody Jurisdiction Act*, 75 Nw. L. REV. 363, 369, 379-81, 420 (1980); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting).

36. Chief Justice Warren said in *Hanson*:

[R]estrictions [on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

377 U.S. at 25.

37. The verbose and inanelly worded Texas long-arm statute offers a telling example. See TEX. REV. STAT. ANN. art. 2031b (Vernon 1964 & 1982-83). Even more carefully drafted enactments are far from satisfactory, as shown by Pennsylvania's experimentation with the Uniform Interstate and International Procedure Act, which had to be amended several times. See *Columbia Metal Culvert Co. v. Kaiser Ind. Corp.*, 526 F.2d 724 (3d Cir. 1975); Gorso v.

tutional mandates, which required judges to wrestle with two sets of precepts at the same time, several states enacted statutes that simply conferred jurisdiction to the fullest extent permitted by the Supreme Court.³⁸ Some state courts achieved the same effect by construing local long-arm legislation, irrespective of the statutory text, as an incorporation by reference of the Supreme Court case law.³⁹ Thus, as a practical matter, state law and Supreme Court doctrine are once again converging. However, while the states increasingly availed themselves of the full range of permissible jurisdiction, at the end of the last decade the Supreme Court reverted to an interventionist stance. Breaking a long period of silence, it decided four jurisdictional cases in as many years, all of which struck down what the Court considered to be overly expansive exercises of state power.

In *Shaffer v. Heitner*⁴⁰ the Court outlawed one remnant of *Pennoyer*, i.e., *quasi in rem* jurisdiction to litigate claims unrelated to the property attached.⁴¹ According to Justice Marshall's majority opinion the constitutionality of all state jurisdictional assertions must be tested against a single standard: that "set forth in *International Shoe* and its progeny."⁴² Subsequently, *Kulko v. Superior Court*⁴³ used the purposeful availment test propounded in *Hanson* to reverse a state court decision that would have enabled children to seek an increase of support payments in their home state. *World-Wide Volkswagen Corp. v. Woodson*⁴⁴ held that the purposeful availment formula precluded the assertion of jurisdiction over the foreign distributor and retailer of a defective car. Finally, in *Rush v. Savchuk*,⁴⁵ the Court relied on its decision in *Shaffer* to bar litigation by a local tort plaintiff against a local insurance company because the plaintiff had proceeded against the nominal defendant on a *quasi in rem* theory. Whatever one might think of the practical wisdom of these four recent Supreme Court decisions,⁴⁶ they do signal a retrenchment from the *laissez-faire* attitude of *International Shoe*. Whereas the "minimum contacts" test was designed to

Bell Equip. Corp., 476 F.2d 1216 (3d Cir. 1973); Comment, *Pennsylvania's New Long-Arm Statute: Extended Jurisdiction over Foreign Corporations*, 79 DICK. L. REV. 51 (1974). The statute has since been revised to extend jurisdiction "to the fullest extent allowed under the Constitution of the United States." 42 PA. CONS. STAT. § 5322(b) (Purdon 1981).

38. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973) ("any basis not inconsistent with the Constitution of this state or of the United States"); N.J. R. CT. § 4:4-4(c)(1) ("consistent with due process of law").

39. See, e.g., *Woodring v. Hall*, 200 Kan. 597, 438 P.2d 135 (1968); *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870 (Tex. 1982), *revd.*, 104 S. Ct. 1868 (1984).

40. 433 U.S. 186 (1977).

41. See 433 U.S. at 212 n.38. But see 433 U.S. at 211 n.37 (leaving open the question of recourse to attachment jurisdiction "when no other forum is available to the plaintiff"); note 54 *infra*.

42. See 433 U.S. at 212. This includes *Hanson's* "purposeful availment" test. See 433 U.S. at 216. But see 433 U.S. at 208 n.30 ("we do not suggest that jurisdictional doctrines . . . such as particularized rules governing adjudication of status are inconsistent with the standards of fairness") (citation omitted).

43. 436 U.S. 84 (1978).

44. 444 U.S. 286 (1980).

45. 444 U.S. 320 (1980).

46. See Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C.D. L. REV. 907, 909-14 (1981).

expand state court jurisdiction, the "purposeful availment" formula is meant to be restrictive. The Court's current insistence on a single jurisdictional standard harkens back to *Pennoyer*, as does the statement in *World-Wide Volkswagen* that the fourteenth amendment "acts to ensure" state sovereignty.⁴⁷ Once again the Court seems willing to sacrifice the rational administration of interstate justice in deference to conceptualism and the myth of state sovereignty.⁴⁸

Preoccupation with dogma necessarily diverts attention from practical problems. This propensity is illustrated by *Shaffer* in which the Court, with commendable zeal, set out to eradicate one (if not both⁴⁹) of the remnants of *Pennoyer* exorbitance. Regrettably, it picked a case in which *quasi in rem* jurisdiction was made to serve a purpose which, as Justice Marshall apparently realized,⁵⁰ was constitutionally unobjectionable, namely to concentrate actions against the management of a Delaware corporation in a Delaware court. By focusing on the jurisdictional rationale advanced, rather than the permissible range of state court jurisdiction, the majority opinion in *Shaffer* (as well as the one in *Rush*) recalls Justice Field's insistence on form over substance.⁵¹ At the same time, these opinions ignore the needs of sound interstate procedure. Similarly, the Court's decision in *World-Wide Volkswagen* compels wasteful concurrent litigation of identical issues in different states. These examples suggest that rigid insistence on a single jurisdictional standard is apt to impede the efficient disposition of multi-party suits. Yet, it can also be argued that that standard is too broad because it enables plaintiffs to sue foreign corporations in states that have little or no connection with the facts.⁵² Thus our current jurisdictional lore

47. 444 U.S. at 292. According to Justice White, the "sovereignty of each State . . . implied a limitation on the sovereignty of all of its sister States — a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." 444 U.S. at 293.

48. See 444 U.S. at 294 ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest a State of its power to render a valid judgment.").

49. The adoption of a single standard would seem to render transient jurisdiction unconstitutional. See, e.g., Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 425 n.74 (1981) (listing recent commentary opposing transient jurisdiction); Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031, 1035 (1978). But see *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980).

50. Justice Marshall's opinion suggests that Delaware could enact a statute, as some states have, which treats acceptance of a directorship in a Delaware corporation as an "implied consent" to the jurisdiction of Delaware courts. 433 U.S. at 216. Delaware has since enacted such an implied consent statute. Del. Code Ann. tit. 10, § 3114 (1982 Cum. Supp.).

51. See note 13 *supra*.

52. See Kozyris, *Reflections on Allstate — The Lessening of Due Process in Choice of Law*, 14 U.C.D. L. REV. 889, 894-95 (1981); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966). Indeed, an instinctive appreciation of the possible overbreadth of "doing business" jurisdiction may explain the Supreme Court's decision in *Rush v. Savchuk*, 444 U.S. 320 (1980). But for that unstated consideration, it is difficult to understand why it should be unconstitutional to permit a local plaintiff to sue a "local" defendant in a local court.

once again suffers from the twin defects of *Pennoyer*: overbreadth and insufficient coverage.

But whereas *Pennoyer* explicitly delineated the jurisdictional bases state courts could use, the minimum-contacts-resulting-from-purposeful-availment formula is too fuzzy to furnish guidance in borderline cases. The split opinions in *World-Wide Volkswagen* show that even the Justices cannot agree on its meaning, and the endless decisions that clutter the advance sheets suggest the difficulties state and lower federal courts encounter when forced to apply the test in practice. The resulting uncertainty allows even basic issues, such as whether a local seller can sue a foreign buyer⁵³ and whether aliens are entitled to the same measure of due process as American citizens and residents,⁵⁴ to remain unresolved. Thus, after more than a century of experimentation, the American law of interstate jurisdiction is as muddled as ever.

The Supreme Court's continued preoccupation with doctrine also hampers inquiry into jurisdictional policies. For example, the Court and most legal writers accept the purposeful availment formula as a given, a natural consequence of territorial sovereignty. But if one looks at it through the eyes of a litigator, it becomes apparent that that formula has an inherent bias which favors individuals, particularly products liability claimants, who sue large enterprises engaged in nationwide activities. There may be good reasons for granting this class of plaintiffs a jurisdictional privilege,⁵⁵ but one wonders why it should be withheld from other disadvantaged groups, such as the support claimants in *Kulko*. Conversely, while it may make sense to expose manufacturers of defective products to nationwide jurisdiction, other classes of defendants, such as eleemosynary institutions, arguably deserve a greater measure of protection against the hazards of forum shopping. Yet, the territorialist dogma that currently prevails makes no allowance for distinctions of this kind. Blind to results, it treats General Motors in the same fashion as the Boy Scouts of America.

American jurisdictional law can be expected to remain unstable until the Court resolves the inherent conflict between territorialism and "substan-

53. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S. Ct. 1868 (1984); *Lake-side Bridge & Steel Co. v. Mountain State Constr. Co.*, 445 U.S. 907 (1980) (White & Powell, JJ., dissenting) *denying cert. to* 597 F.2d 596 (7th Cir. 1979).

54. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S. Ct. 1868 (1984), and *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1982), assume the point without discussion. However, a contrary conclusion is suggested by a footnote in *Shaffer*, which reads as follows: "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." 433 U.S. at 211 n.37. This "cryptic statement," *Papendick v. Robert Bosch GmbH*, 410 A.2d 148, 150 n.5 (Del. S. Ct. 1979), *cert. denied*, 446 U.S. 909 (1980), has caused courts to split on the question whether alien defendants who lack minimum contacts with the United States are still amenable to *quasi in rem* jurisdiction. Compare *Louring v. Kuwait Boulder Shipping Co.*, 455 F. Supp. 630 (D. Conn. 1977) (yes), and *Rich v. Rich*, 93 Misc. 2d 409, 402 N.Y.S.2d 767 (Sup. Ct. 1978) (yes), with *Majique Fashions Ltd. v. Warwick & Co.* 96 Misc. 2d 808, 409 N.Y.S.2d 581 (Sup. Ct. 1978), *revd. on other grounds*, 67 App. Div. 2d 321, 414 N.Y.S. 2d. 916 (1979) (no), and *Istituto Bancario Italiano SpA v. Hunter Engg. Co.*, 449 A.2d 210, 216 n.10 (Del. Sup. Ct. 1982) (*dubitante*); see also note 116 *infra* and accompanying text.

55. Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

tial justice." Awareness of the tension between these two components may have prompted Justice White to recant, two years ago, his earlier attempt to commingle the protection of defendants with the prerogatives of sovereignty.⁵⁶ In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* he wrote: "The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."⁵⁷ This opinion, in which seven of the Justices joined, could foreshadow a "substantial change in the law."⁵⁸ The Supreme Court's most recent decisions, however, continue to apply the purposeful availment test in a mechanical fashion without regard to the policies and interests at stake. Thus, in two cases decided this term the Justices explicitly refused to consider first amendment concerns in upholding limited jurisdiction in libel actions brought against the publisher of one magazine, and the president/editor and a reporter of another.⁵⁹ In consequence, because of the omnipresence of their "products," the media now face a greater jurisdictional exposure than manufacturers, a result whose wisdom is surely less than obvious. The latest case, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁶⁰ reversed a Texas Supreme Court decision on the ground that the contacts of the defendant, a Colombian corporation, with Texas were insufficient to justify the exercise of general jurisdiction in a tort action resulting from a helicopter crash in Peru. Justice Blackmun's majority opinion assumes that alien corporations are entitled to the same constitutional protection as sister-state entities. Such evenhandedness is admirable, but one would have expected some discussion of the underlying rationale in light of the uncertain state of the law and the divergent views held by the concurring and dissenting judges below. If these recent cases are any indication, the Court remains committed to a territorialist dogma that is unresponsive to substantive values and the exigencies of procedural policy.

II. EUROPEAN LAW

Compared with Anglo-American law continental Europe's history of jurisdictional law has been both longer and smoother. The Justinian Code already incorporated the maxim *actor sequitur forum rei*⁶¹ and thus anticipated the decision in *Milliken v. Meyer*,⁶² according to which the courts at the defendant's residence are entitled to exercise general personal jurisdiction. In addition, Roman law recognized the concept of limited jurisdiction by permitting the plaintiff to sue in tort at the place of wrongful conduct, to bring contract actions at the place of execution or performance, and to vin-

56. See note 47 *supra* and accompanying text.

57. 456 U.S. at 702 (footnote omitted). *But cf.* 456 U.S. at 702 n.10 (restriction of sovereign power as a "function of the individual liberty interest preserved by the Due Process Clause").

58. 456 U.S. at 714 (Powell, J., concurring).

59. *Calder v. Jones*, 104 S. Ct. 1482 (1984); *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984).

60. 104 S. Ct. 1868 (1984).

61. Code Just. 3.19.3, 3.13.2; see M. KASER, *DAS RÖMISCHE ZIVILPROZESSRECHT* 183, 478 (1966).

62. 311 U.S. 457 (1940).

dicating property rights at the situs.⁶³ In other words, fourteen hundred years before *International Shoe*, the civil law, unhampered by constitutional doctrine and territorialist dogma, already premised jurisdiction on "minimum contacts," and this idea continues to inform current European jurisdictional law.⁶⁴ Conversely, the *Pennoyer* principles that for so long retarded the evolution of American law never appealed to civilians.⁶⁵

However, the codes of several European countries do contain provisions that are even more exorbitant than our former catch-as-catch-can jurisdiction. Thus, section 23 of the German Civil Procedure Code provides for *in personam* jurisdiction over nonresident defendants who own assets in Germany.⁶⁶ This provision does not require a prior attachment or any nexus between the litigation and the Federal Republic. Also, unlike the Oregon statute before the United States Supreme Court in *Pennoyer*, section 23 does not limit jurisdiction to the value of the German assets and is therefore yet more blatantly unfair than the *quasi in rem* jurisdiction⁶⁷ outlawed by *Shaffer*. The forum-shopping potential of the German rule should be readily apparent. Practically any large enterprise in the world is likely to have some assets, such as an open account or an equity interest, in the Federal Republic, and even nonresident individuals, for instance tourists who leave personal objects behind, may feel the sting of this provision.⁶⁸ Since German law does not provide for a special appearance,⁶⁹ a foreign defendant cannot even contest the presence of local property without submitting to jurisdiction; nor is a default judgment based on a plaintiff's spurious allegation that the defendant owned something in the Federal Republic open to collateral attack.⁷⁰ Yet more exorbitant than the German assets jurisdiction is the rule derived from article 14 of the French Civil Code,⁷¹ which enables French plaintiffs to sue anyone in French courts⁷² whether or not the dispute has any connection with France. At the same time article 15 of the Code provides that Frenchmen can only be sued in France. Although this blatant jurisdictional chauvinism has been criticized in and outside France,⁷³ several European nations have copied the French scheme in one

63. M. KASER, *supra* note 61, at 184, 478.

64. See R. SCHLESINGER, *COMPARATIVE LAW* 363 (4th ed. 1980); Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 AM. J. COMP. L. 323, 328-36 (1961).

65. R. SCHLESINGER, *supra* note 64, at 362, 363; Pillet, *Jurisdiction in Actions Between Foreigners*, 18 HARV. L. REV. 325, 335 (1905).

66. R. SCHLESINGER, *supra* note 64, at 372-73; deVries & Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 IOWA L. REV. 306, 332-34 (1959); Weser, *supra* note 64, at 327-28.

67. See Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 1004-06 (1967).

68. For a vivid and poetic account of Jean Claude Killy's experience in Austria, (which, like the Federal Republic, authorizes assets jurisdiction), see Siegel, *Case & Comment, In Vagrant Verse*, 76 CASE & COM. Sept.-Oct. 1971, at 56, 62-63.

69. See R. SCHLESINGER, *supra* note 64, at 391 n.1.

70. See R. SCHLESINGER, *supra* note 64, at 380-81.

71. See deVries & Lowenfeld, *supra* note 66, at 316-30; Weser, *supra* note 64, at 324-25.

72. The only American analogue is divorce jurisdiction, for which the petitioner's domicile suffices. See *Williams v. North Carolina*, 317 U.S. 287 (1942).

73. See, e.g., 2 H. BATIFFOL & P. LAGARDE, *DROIT INTERNATIONAL PRIVÉ* 483 (7th ed. 1983); M. WOLFF, *PRIVATE INTERNATIONAL LAW* 61 (2d ed. 1950).

form or another.⁷⁴ To make matters worse, continental European countries do not recognize the *forum non conveniens* doctrine,⁷⁵ so that their courts cannot decline jurisdiction even if a suit is brought solely to harass the defendant.

Thus, pursuant to the laws of several European nations, jurisdiction is largely controlled by the law of the jungle, and unfortunately their recognition practices are as narrow as their jurisdictional assertions are broad, except to the extent that treaties afford relief. Such a state of affairs hardly accords with the needs of a quasi-federal system like the Common Market. But the architects of the Communities, less prescient than the framers of the United States Constitution, failed to include precepts akin to our due process and full faith and credit clauses in the constitutive documents. The only pertinent provision is found in article 220 of the Rome Treaty⁷⁶ which, among other things, exhorts the member states to enter into negotiations "with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments" The committee of experts appointed to draft a convention that would implement this provision recognized that its scope was much too narrow. Stretching the word "formalities" far beyond its normal meaning, the experts elaborated a "modern, liberal law"⁷⁷ that put the intra-European recognition of judgments on a solid treaty basis. In general outline and numerous details the Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters⁷⁸ closely resembles the rules which the United States Supreme Court developed under the due process and full faith and credit clauses. There are, however, several instructive differences.

The framers of the Brussels Convention had a dual advantage. They could draft on a clean slate, unconstrained by precedent and dogma, yet they were free to draw on rules and principles existent in the laws of the Communities' member states,⁷⁹ including earlier treaties and conventions to which these nations were parties.⁸⁰ Although the available sources are

74. See Weser, *supra* note 64, at 324-27.

75. See Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, 22 O.J. EUR. COMM. (No. C 59) 71, 97 (Mar. 5, 1979) [hereinafter cited as Schlosser Report].

76. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958).

77. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 22 O.J. EUR. COMM. (No. C 59) 1, 7 (Mar. 5, 1979) [hereinafter cited as Jenard Report].

78. Sep. 27, 1968, 15 O.J. Eur. Comm. (No. L 299) 32 (Dec. 31, 1972) (entered into force Feb. 1, 1973). The convention was first revised to accommodate the accession of Denmark, Ireland, and Great Britain and Northern Ireland. 21 O.J. EUR. COMM. 77 (No. L 304) (Oct. 30, 1978). It was again amended upon the accession of Greece. 25 O.J. EUR. COMM. (No. L 388) 1 (1982). Citations are to the latest version which has not yet entered into force [hereinafter cited as Brussels Convention].

79. See Jenard Report, *supra* note 77, at 3-6 (recognition of judgments); *id.* at 14-83 (jurisdiction).

80. See Jenard Report, *supra* note 77, at 6-7.

silent on this point,⁸¹ one may surmise that the committee of experts also consulted the laws of such federal systems as the United States, Switzerland and Australia. Whatever the scope of its comparative research, the committee made good use of the available materials. In superimposing a new order on the member states' discordant, and often xenophobic, jurisdictional and recognition practices⁸² the experts plainly emulated American law. They realized the cogency of the principle which the United States Supreme Court had established early on, namely that the enforcement of a judgment should hinge primarily on the jurisdiction of the court that rendered it. To assure the congruence of adjudicatory power and judgment recognition, the experts were not content merely to circumscribe the outer limits of permissible member state jurisdiction as the Supreme Court did in *International Shoe*. Instead, they defined the appropriate jurisdictional bases as a matter of supranational law. Like Justice Field in *Pennyroyer*, the draftsmen could rely on "rules and principles established in our [European] systems of jurisprudence,"⁸³ except that they had more to work with. Although the note which the Common Market Commission had sent to the member states in 1959 to invite negotiations on the Convention maintained that "jurisdiction . . . is derived from . . . sovereignty,"⁸⁴ the experts did not attempt to deduce rules from that dubious concept but preferred to make their choices of jurisdictional provisions on grounds of policy and common sense. Realizing that exorbitance is incompatible with basic tenets of interstate comity, they outlawed the use against Common Market domiciliaries of article 14 of the French Civil Code and section 23 of the German Civil Procedure Code, as well as kindred provisions of other nations.⁸⁵ They also replaced the nonexorbitant member state rules with a catalog of detailed jurisdictional bases suitable to the needs of the Communities' quasi-federal system. In this fashion the experts produced a "double convention"⁸⁶ that, in American parlance, combines a long-arm statute and full faith and credit in a single instrument.

In broad outline, the jurisdictional scheme of the Brussels Convention is as follows:

1. The courts at the defendant's domicile (or, in the case of an enterprise, its principal place of business⁸⁷) have general jurisdiction;⁸⁸
2. Enterprises that maintain a branch or other establishment in a member state can be sued there on causes of action arising out of these local

81. The Jenard, *supra* note 77, and Schlosser, *supra* note 75, Reports do not refer to any such comparative researches. Regrettably, the preparatory work of the commission of experts has not been published. See G. DROZ, *COMPÉTENCE JUDICIAIRE ET EFFETS DES JUGEMENTS DANS LE MARCHÉ COMMUN* 2 (1977).

82. The member states' jurisdictional exorbitance is matched by the narrow-mindedness of their recognition practices. See Jenard Report, *supra* note 77, at 3-6, 19-20.

83. See text at note 9 *supra*.

84. Jenard Report, *supra* note 77, at 3.

85. See Brussels Convention, *supra* note 78, art. 3.

86. Herzog, *The Common Market Convention on Jurisdiction and the Enforcement of Judgments: An Interim Update*, 17 VA. J. INTL. L. 417, 420 n.16 (1977). The official report speaks of a "convention based on rules of direct jurisdiction." Jenard Report, *supra* note 77, at 7.

87. Brussels Convention, *supra* note 78, art. 53, par. 1.

88. Brussels Convention, *supra* note 78, art. 2, par. 1.

operations;⁸⁹

3. Limited personal jurisdiction is provided for contract⁹⁰ and tort⁹¹ actions;

4. There is exclusive local jurisdiction in actions concerning real property,⁹² the internal affairs of corporations and other associations,⁹³ and rights recorded in public registers;⁹⁴

5. Certain classes of plaintiffs, *i.e.*, consumers, policyholders and support claimants, are accorded the jurisdictional privilege to litigate in the member state in which they are domiciled;⁹⁵

6. Special rules liberally authorize joining and impleading parties not otherwise subject to the jurisdiction of the court in which the principal action is pending;⁹⁶

7. By means of forum-selection clauses the parties can stipulate to the jurisdiction of member state courts.⁹⁷

The Convention's jurisdictional provisions compare favorably with our long-arm statutes. In contrast to American state legislators, who had to take into account not altogether consistent Supreme Court pronouncements, the European draftsmen could rely on their own best judgment, which helped make their work product tidier, more functional and more precise. In particular, they were able to design appropriate rules to govern multi-party practice and to accord jurisdictional privileges to certain disadvantaged groups, provisions that would not pass our Supreme Court's constitutional muster. In this respect the Brussels Convention may appear permissive to an American observer; however, it also protects enterprises against undue jurisdictional exposure. In contrast to the uncertainty which prevails in the United States concerning the extent to which foreign corporations doing business locally are amenable to general jurisdiction,⁹⁸ the Convention is quite specific. According to articles 2 and 53, par. 1, unrelated causes of action can only be brought at a member state corporation's principal place of business. Local operations expose such entities to limited jurisdiction only, and even if they "do business" through a local branch,

89. Brussels Convention, *supra* note 78, art. 5, No. 5.

90. Brussels Convention, *supra* note 78, art. 5, No. 1 (place of performance).

91. Brussels Convention, *supra* note 78, art. 3, No. 3 (place of "harmful event"). In view of the fact that a number of European countries permit private parties to seek damages incidental to a criminal proceeding, *see* R. SCHLESINGER, *supra* note 64, at 457-61, the Convention also provides for concurrent jurisdiction over civil claims raised in criminal cases. *See* art. 5, No. 4. Special provisions govern litigation relating to trusts (art. 5, No. 6) and salvage claims (art. 5, No. 7).

92. Brussels Convention, *supra* note 78, art. 16, No. 1 (*situs*).

93. Brussels Convention, *supra* note 78, art. 16, No. 2 (principal place of business).

94. Brussels Convention, *supra* note 78, art. 16, Nos. 3 and 4 (place of registration).

95. *See* Brussels Convention, *supra* note 78, art. 14 (consumer transactions, as defined in art. 13); art. 8, par. 2 (policyholders); art. 5, No. 2 (support claimants); *see also* art. 9 (liability and real property insurers suable at place of harm) and art. 10, pars. 2 and 3 (direct actions).

96. *See* Brussels Convention, *supra* note 78, art. 6, Nos. 1 and 2; *see also* art. 6, No. 3 (counterclaims).

97. *See* Brussels Convention, *supra* note 78, art. 17. Articles 12 and 15 restrict the contractual designation of a forum in cases involving policyholders and consumers.

98. *See* E. SCOLES & P. HAY, CONFLICT OF LAWS 297-302, 332-37 (1982); note 52 *supra* and accompanying text.

article 5(5) restricts jurisdiction to causes of action related to the branch's activities.

To assure uniform application of these jurisdictional rules, the member states of the Common Market have ratified a Protocol⁹⁹ that provides for supranational review by empowering the Court of Justice of the European Communities to interpret the Convention upon a reference from national courts.¹⁰⁰ Since 1976 the Court has issued rulings in over thirty cases that have dealt with a wide variety of issues, ranging from jurisdiction in a major international pollution litigation¹⁰¹ to the enforcement of a Belgian small claims court judgment in the Netherlands.¹⁰² The case law accumulated within the relatively short span of eight years¹⁰³ sensibly elaborates and clarifies the Convention's rules. Given the firm guidance provided by specific and well thought out provisions, the task of the Court of Justice as the ultimate arbiter of the Common Market's law of jurisdiction and enforcement of judgments is less demanding than that facing the United States Supreme Court. At the same time, the European court has shown considerable creativity in giving many of these rules a supranational content to ensure uniformity of application.¹⁰⁴ Moreover, several of its deci-

99. Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 21 O.J. EUR. COMM. (No. L 304) 50 (Oct. 30, 1978) [hereinafter cited as Protocol].

100. The procedure of referring issues to the Court of Justice resembles that for preliminary rulings pursuant to art. 177 of the Rome Treaty, which is discussed in Hay & Thompson, *The Community Court and Supremacy of Community Law: A Progress Report*, 8 VAND. J. TRANSNATL. L. 651 (1975). However, there are several significant differences between the two methods of supranational review. See Kohler, *The Case Law of the European Court on the Judgments Convention*, Part I, 7 EUR. L. REV. 3, 4-6 (1982).

101. *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A.* (Case No. 21/76), 1976 E. Comm. Ct. J. Rep. 1735 (Preliminary Ruling).

102. *De Wolf v. Harry Cox B.V.* (Case No. 42/76), 1976 E. Comm. Ct. J. Rep. 1759 (Preliminary Ruling).

103. For a review of cases decided up to June of 1981, see Kohler, *supra* note 100, and Kohler, *Part II*, 7 EUR. L. REV. 103 (1982); see also Freeman, *The EEC Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments*, 3 NW. J. INTL. L. & BUS. 496 (1981).

104. Although the Court of Justice does consult the laws of the Common Market nations in giving content to the terms of the Brussels Convention, it tends to favor an "autonomous" interpretation, *i.e.*, to fashion its own definitions rooted in supranational law. As the court said in an early case:

[T]o ensure, as far as possible, that the rights and obligations which derive from [the Brussels Convention] for the Contracting States and the persons to whom it applies are equal and uniform. . . . the concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol (Case No. 29/76), 1976 E. Comm. Ct. J. Rep. 1541, 1551 (Preliminary Ruling) (interpreting the phrase "civil and commercial matters" in art. 1 of the Convention). For other instances of "independent" characterization, see *Somafer SA v. Saar-Ferrogas AG* (Case No. 33/78), 1978 E. Comm. Ct. J. Rep. 2183 (Preliminary Ruling) (definition of "branch, agency or other establishment" in art. 5, no. 5 of the Convention); *Sanders v. van der Putte* (Case No. 73/77), 1977 E. Comm. Ct. J. Rep. 2383 (Preliminary Ruling) (definition of "tenancies of immovable property" in art. 16, no. 1 of the Convention). *But see* *Industrie Tessili Italiana Como v. Dunlop AG* (Case No. 12/76), 1976 E. Comm. Ct. J. Rep. 1473 (Preliminary Ruling) ("place of performance of the obligation in question" in art. 5, no. 1 of the Convention defined by member state law applicable to such obligation pursuant to the forum's conflict of laws rules). For discussion and evaluation of the

sions show commendable concern about both fairness in adjudication¹⁰⁵ and important substantive policies.¹⁰⁶

In at least one respect the Court of Justice has clearly gone beyond the mere interpretation of preordained rules. Early on, the European judges, hypothesizing a link between the Brussels Convention and the Rome Treaty, established that the fundamental principles which inform the Common Market's constitutive documents also apply to the Convention.¹⁰⁷ This idea has far-reaching implications. The court has long recognized that the Communities' legal order must adequately protect human rights, and it has claimed the power to create the necessary safeguards from constitutional provisions found in the laws of the member states and in the European Human Rights Convention.¹⁰⁸ Hence, the court can be expected to intervene against jurisdictional practices that jeopardize fundamental rights. A first step in this direction is its emphasis on the opportunity to be heard¹⁰⁹ and other aspects of procedural fairness.¹¹⁰

court's development of supranational concepts, see Freeman, *supra* note 103, at 504-06, 508; Kohler, *supra* note 100, at 7-13.

The national/supranational conflicts posed by the Brussels Convention correspond to the state/federal conflicts problems which the Supreme Court has encountered in other contexts. Compare *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) (holding state law to be controlling), with *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (holding federal law to be controlling).

105. See *Pendy Plastic Prods. B.V. v. Pluspunkt Handelsgesellschaft GmbH* (Case No. 228/81), 1982 E. Comm. Ct. J. Rep. 2723 (Preliminary Ruling) (to protect defendant's right to be heard, the court in which recognition is sought may review the adequacy of service); *Klomps v. Michel* (Case No. 166/80), 1981 E. Comm. Ct. J. Rep. 1593 (Preliminary Ruling) (recognition court may review sufficiency of time to arrange for defense); *Elefanten Schuh GmbH v. Jacqmain*, (Case No. 150/80), 1981 E. Comm. Ct. J. Rep. 1671 (Preliminary Ruling) (defendant entitled to present jurisdictional objections together with defenses on the merits); *Denilauler v. S.n.c. Couchet Frères* (Case No. 125/79), 1980 E. Comm. Ct. J. Rep. 1553 (Preliminary Ruling) (ex parte attachment not entitled to recognition in other member states).

106. See, e.g., *Ivenel v. Schwab*, (Case No. 133/81), 1982 E. Comm. Ct. J. Rep. 1891 (Preliminary Ruling) ("place of performance" in art. 5, no. 1 construed to confer jurisdiction on courts of employee's place of work to protect weaker party); *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace* (Case No. 21/76), 1976 E. Comm. Ct. J. Rep. 1735 (Preliminary Ruling) (place of "harmful event" construed to allow tort victim a choice between suing at place of defendant's conduct or at place of injury).

107. In its very first judgment on the Brussels Convention the court stressed that "the Convention must be interpreted having regard both to its principles and objectives and to its relationship with the [Rome] Treaty." *Industrie Tessili Italiana Como v. Dunlop AG* (Case No. 12/76), 1976 E. Comm. Ct. J. Rep. 1473, 1484 (Preliminary Ruling). In *Bavaria Fluggesellschaft Schwabe & Co. v. Eurocontrol* (Case Nos. 9 and 10/77), 1977 E. Comm. Ct. J. Rep. 1517, 1525, (Preliminary Ruling), the court referred to the "principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Article 220 of the EEC Treaty, which is at its origin." See Kohler, *supra* note 100, at 14.

108. See, e.g., *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission of the Eur. Communities* (Case No. 4/73), 1974 E. Comm. Ct. J. Rep. 491; *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, (Case No. 11/70), 1970 C. J. Comm. E. Rec. 1125 (Preliminary Ruling); *Stauder v. Ulm*, (Case No. 29/69), 1969 C. J. Comm. E. Rec. 419 (Preliminary Ruling); see also Dagoglou, *Human Rights and European Community Law*, 56 TUL. L. REV. 294 (1981); Juenger, *The Role of Comparative Law in Regional Organizations*, in *LAW IN THE UNITED STATES OF AMERICA IN SOCIAL AND TECHNICAL REVOLUTION* 49, 60-63 (J. Hazard & W. Wagner eds. 1974); *The Emerging European Constitution*, [1978] AM. SOC'Y. INTL. L. PROC. 166.

109. See note 105 *supra* and accompanying text.

110. See *AM & S Europe Ltd. v. Commission of the Eur. Communities* (Case No. 155/79),

For the American observer, the procedure under the Protocol to the Brussels Convention holds an interesting lesson. The pertinent rules¹¹¹ enable the member state governments¹¹² to present their views in statements and written observations addressed directly to the court, and they have availed themselves of this opportunity on numerous occasions.¹¹³ Although the governments frequently side with their nationals' legal position, the summaries published in the reports do not reveal much concern on the part of these governments about a possible infringement of their sovereignty. Thus, there is empirical evidence for Justice White's remark in *Compagnie des Bauxites* that jurisdictional issues touch upon individual liberty interests rather than state prerogatives.¹¹⁴ This evidence is all the more convincing if one considers that the member states of the Common Market are truly sovereign nations with divergent histories, laws and languages.

The comparison between the jurisdictional rules of the Brussels Convention and our own awkward approaches suggests that the Europeans are ahead of us. In one respect, however, the Convention falls seriously short of the standards of jurisdictional propriety that have emerged in the United States. Since state court jurisdiction is circumscribed by the fourteenth amendment and since nonresident aliens are entitled to due process protection,¹¹⁵ the American law on jurisdiction is, on its face, nondiscriminatory,¹¹⁶ although the Supreme Court has never expressly confirmed this

1982 E. Comm. Ct. J. Rep. 1575 (attorney-client privilege); *Estasis Salotti di Colzani v. RÜWA Polstereimaschinen GmbH* (Case No. 24/76), 1976 E. Comm. Ct. J. Rep. 1831 (Preliminary Ruling) ("informed consent" required for forum selection clause that changes the normal rules of jurisdiction).

111. Protocol art. 5, par. 1 incorporates by reference the Protocol on the Statute of the Court of Justice of the European Economic Communities, Apr. 17, 1957, 298 U.N.T.S. 147 (1958), art. 20, par. 2 of which authorizes the submission of statements and written observations in proceedings concerning preliminary rulings.

112. This class includes those that are not parties to the Brussels Convention and the Protocol but have merely undertaken to accede to these instruments. *See* *Industrie Tessili Italiana Como v. Dunlop AG* (Case No. 12/76), 1976 E. Comm. Ct. J. Rep. 1473 (Preliminary Ruling) (observations submitted by the Republic of Ireland and the United Kingdom).

113. *See, e.g.*, *Pendy Plastic Prods. B.V. v. Pluspunkt Handelsgesellschaft mbH* (Case No. 228/81), 1982 E. Comm. Ct. J. Rep. 2723 (Preliminary Ruling); *Handelskwekerij G. J. Bier BV v. Mines de Potasse d'Alsace SA* (Case No. 21/76), 1976 E. Comm. Ct. J. Rep. 1735 (Preliminary Ruling).

114. *See* text at note 57 *supra*.

115. *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952) (dictum); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931). *But cf.* *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("legitimate distinction" between citizens and aliens).

116. Even federal courts, whose jurisdiction is limited by the due process clause of the fifth rather than the fourteenth amendment, consider it axiomatic that a nonresident alien's amenability to suit is controlled by *International Shoe* and its progeny. *See, e.g.*, *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1452 n.1 (10th Cir. 1983) (diversity case); *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 416 n.7 (9th Cir. 1977) (trademark infringement); *Honeywell, Inc. v. Metz Apparaterwerke*, 509 F.2d 1137, 1143 (7th Cir. 1975) (patent infringement); *see also* *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (foreign nation a "person" for purposes of due process). Indeed, several circuit court opinions have intimated that the defendant's alienage and nonresidence are factors that caution against the assertion of jurisdiction. *See, e.g.*, *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981) ("sovereignty barrier" higher if defendant resides in a foreign

conclusion.¹¹⁷ In stark contrast, the Brussels Convention openly discriminates against outsiders. While article 3 outlaws recourse to the member states' exorbitant jurisdictional bases in actions brought against Common Market domiciliaries and corporations,¹¹⁸ article 4 expressly authorizes the continued use of such provisions against parties domiciled outside the Common Market.¹¹⁹ The dreary catalog of transgressions upon comity and general decency contained in article 3 includes not only article 14 of the French Civil Code and section 23 of the German Code of Civil Procedure, but several equally unreasonable jurisdictional assertions found in the laws of other member states. Indeed, to accommodate the accession of the Communities' new members to the Brussels Convention, that catalog was further lengthened and now includes English transient jurisdiction, Scottish and Irish foreign attachments, as well as Danish and Greek assets jurisdiction. Worse yet, the experts charged with drafting the revised version explicitly rejected the *forum non conveniens* doctrine as un-European and too burdensome for plaintiffs.¹²⁰ Thus, outsiders are left without even a modicum of protection against excessive forum shopping and harassment.¹²¹

nation); *Donahue v. Far Eastern Air Transp. Corp.*, 652 F.2d 1032, 1036 (D.C. Cir. 1981) (Supreme Court jurisdictional cases applicable "*a fortiori*" to Taiwan company); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972) (jurisdiction based on effects within the state to be asserted "with caution, particularly in an international context").

On the other hand, some opinions suggest that a lesser forum nexus is required to proceed against aliens in federal question cases, because it should be permissible to aggregate all of the contacts such defendants have with the entire United States even in the absence of a federal rule or statute that explicitly authorizes nationwide service. *See, e.g., Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1237-39 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981) (dictum); *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143 n.2 (7th Cir. 1975) (dictum); *Cyromedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975). *But see Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (aggregation of contacts with the United States as a whole would require amendment of Federal Rules of Civil Procedure); *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276, 1281-83 (D.N.J. 1980), *aff'd*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981) (same).

117. *See* note 54 *supra* and accompanying text; text following note 60 *supra*.

118. *See* note 85 *supra* and accompanying text.

119. Nor is such unequal treatment limited to jurisdiction; it permeates the entire Convention and affects the rules on recognition as well as such important safeguards as the right to be heard. *See generally* Juenger, *La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale*, 72 R.C.D.I.P. 37 (1983). In particular, the Convention requires the enforcement of judgments of other member states against "outsiders" even if such judgments are premised on exorbitant jurisdictional bases. *See* Brussels Convention, *supra* note 78 art. 28; von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Community and the United States*, 81 COLUM. L. REV. 1044, 1059 (1981).

120. *See* Schlosser Report, *supra* note 75, at 97-98.

121. The Convention's only concession to the interests of third nations concerns the enforcement of judgments premised on exorbitant grounds. Brussels Convention art. 59, par. 1, permits a member state to refuse to enforce such judgments against the domiciliaries of any third nation with which the member state has ratified a recognition treaty containing a provision to that effect. For the history of this concession, see Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282 (1969). Art. 59 may remain illusory, as demonstrated by the inability of the United States to negotiate a recognition treaty with the United Kingdom. *See* E. SCOLES & P. HAY, *supra* note 98, at 971-72; von Mehren, *supra* note 119, at 1060 n.61. These authors adduce several reasons to explain the failure of the two major common law nations to reach agreement. In addition, the difficulty of drafting a treaty that fully takes into account existing

Yet, strange as it may seem, there is no indication in reported decisions to suggest that the Brussels Convention's jurisdictional discrimination has posed much of a practical problem. So far, the Court of Justice has never been asked to deal with issues relating to article 4, perhaps because European counsel are less adept at forum shopping, or less inclined to resist jurisdictional impositions by raising constitutional arguments than their American counterparts. Be that as it may, the Convention does expose outsiders to chicanery and miscarriages of justice. Fortunately, as mentioned earlier,¹²² the Court of Justice is sensitive to the protection of fundamental rights and the need for adequate procedural safeguards. Conceivably, the judges in Luxembourg may find a way to remedy, or at least to mitigate, the discriminatory aspects of the Brussels Convention once the matter is presented to them.

CONCLUSION

This brief comparison of interstate and supranational approaches to judicial jurisdiction indicates that the problems posed by federalism on either side of the Atlantic call for similar responses. The European Community has made impressive progress coping with these problems in a remarkably short span of time. Leaving aside its discriminatory features, the functional and pragmatic European approach appears preferable to our reliance on an "imprecise inquiry."¹²³ The experience gathered under the Brussels Convention demonstrates that multistate jurisdictional problems are amenable to rational solutions, and that national sovereignty need not inhibit the framing of workable rules. While this observation suggests the need for a reassessment of the territorialist dogma that has prevailed in the United States, it is no less true that the Europeans might gain from paying attention to American ideas about fundamental rights and procedural fairness. It would be deplorable if these two major systems, linked by political realities and a shared belief in the rule of law, were to disregard each other's accomplishments.

Supreme Court case law, and the inflexibility of the American negotiating position that resulted from the need to abide by constitutional limitations, may have played a role.

122. See notes 107-10 *supra* and accompanying text.

123. *Calder v. Jones*, 104 S. Ct. 1482, 1487 (1984).