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The American Law of General Jurisdiction

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American jurisdictional law is unique. First of all, other nations—both in the civil and the common law orbit—usually have a national "long-arm statute" that delineates the scope of general and specific jurisdiction.[1] While we rely on such open-ended concepts as "minimum contacts" or "purposeful availment," these foreign enactments enumerate, with considerable specificity and admirable clarity, the jurisdictional bases available for international litigation. These bases do not necessarily coincide, in other federal systems, with those used domestically. Even more importantly, other nations do not consider jurisdiction a constitutional matter. Although the Swiss Constitution formerly enshrined the maxim *actor sequitur forum rei*[2] by requiring lawsuits to be brought at the defendant's domicile, this provision specified that it was subject to legislation that would set forth additional jurisdictional bases.[3] Thus, we are the only nation in the world to leave jurisdiction to a motley array of (frequently poorly drafted) state statutes,[4] whose application to specific cases is subject to a vacillating and confused Supreme Court case law. The historical roots of the differences between our jurisdictional notions and those that prevail in the rest of the world also help explain the peculiarities of general jurisdiction as conceived in the United

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[†] Tragically, Professor Juenger passed away before this article was completed. The text of the article—except for the conclusion—is entirely his work, with only the slightest editorial modifications. The conclusion was written by his former student Dean Patrick J. Borchers of the Creighton University School of Law, and is based upon conversations between Dean Borchers and Professor Juenger regarding, in particular, how Professor Juenger wished to respond to Professor Epstein's paper. Professor Juenger drafted many of the footnotes; they were completed and additional footnotes were added by Dean Borchers and the editors of the *Legal Forum*.

[1] For a general discussion, see Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U Colo L Rev 1, 17–18 (1993) (comparing American jurisdictional law with that of European Union).

[2] "The plaintiff follows the forum of the property in suit of the forum of the defendant's residence." *Black's Law Dictionary* 34 (West 6th ed 1990).

[3] See Thomas Pfeiffer, *Internationale Zustandigkeit und prozessuale Gerechtigkeit* 329–31 (Klostermann 1995) (comparing German jurisdictional rules to Swiss).

[4] Juenger, 65 U Colo L Rev at 2 (cited in note 1) (discussing Texas, Rhode Island, and California jurisdictional provisions).

States. Indeed, without considering its evolution, neither the principles nor the details of American jurisdictional law can be fully understood. It is therefore necessary to reiterate here what has been said and commented upon many times, and often better, by other legal writers.

I. GENERAL AND SPECIFIC JURISDICTION

A. A Note on Terminology

The terms "general" and "specific" jurisdiction were apparently coined by von Mehren and Trautman in the 1960s.[5] Since the Supreme Court adopted them, they have become part and parcel of the American procedural vocabulary. The former signifies the defendant's "dispute-blind" amenability to suits on any cause of action, whether or not the litigation has any connection with the forum.[6] In contrast, specific jurisdiction refers to the court's "dispute-specific" power to adjudicate those causes of action that are in some fashion related to the defendant's forum activities.[7] A further category, to which this paper will occasionally refer, is the so-called "exorbitant" jurisdiction, yet another turn of phrase that has become a term of art.[8] This category encompasses assertions of general jurisdiction in cases where neither defendant nor the dispute have contacts with the forum that suffice to make the exercise of adjudicatory power reasonable. Commonly noted examples include Article 14 of the French Civil Code,[9] which confers upon French plaintiffs the privilege of suing aliens on any cause of action in a French court, and section 23 of

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[5] See Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv L Rev 1121, 1135–36, 1164–66 (1966) (defining "specific jurisdiction" and "general jurisdiction"). See also Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 Harv Intl L J 373, 378 n 25 (1995) ("The distinction between specific and general jurisdiction was first suggested by Arthur von Mehren and Donald Trautman.").

[6] See Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv L Rev 610, 613 (1988) (tracing the history of the concepts of "specific" and "general" jurisdiction and arguing for a return to their original meanings).

[7] See id at 618–630.

[8] See Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 Brooklyn J Intl L 7, 9 (2000) (noting that under European Union law, entities and individuals not domiciled in the European Union may be subject to litigation based on heads of jurisdiction recognized as "exorbitant" and "impermissible" against any domiciliary of the European Union).

[9] Code Civil Art 14 (France) (establishing unlimited general jurisdiction over any defendant where plaintiff is a French national).

the German Code of Civil Procedure,[10] according to which the ownership of German assets renders nonresidents amenable to full in personam jurisdiction.[11]

B. An Age-Old Distinction

1. Roman law.

Although the terminology is of recent vintage, the distinction between general and specific jurisdiction is ancient.[12] Long before the common law came into existence, the Romans acknowledged the principle that a court's power to adjudicate depends on the relationship of the defendant or the dispute with the forum. Thus Justinian's *Corpus iuris civilis* distinguished between actions brought in the defendant's domicile, where he was amenable to jurisdiction for any cause of action, and those against nonresidents on, for example, contracts made or to be performed there.[13] In the latter case, the forum's power to adjudicate was limited to causes of action arising from the contractual relationship. This distinction between general and specific jurisdiction still prevails not only in the domestic rules of civil law countries but also in international compacts such as the Brussels and Lugano Conventions.

2. England.

In marked contrast, the English common law courts made the exercise of jurisdiction dependent not on the defendant's or the dispute's contacts with the forum, but rather on an official act, namely the service of process on the defendant.[14] That act conferred general jurisdiction: a defendant who was served in England was amenable to the common law courts' jurisdiction, whether or not he or the dispute had any contacts with the scepter'd isle. By the same token, a defendant who could not be served there could not be sued, whatever contacts the transaction under-

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[10] Zivilprozessordung § 23 (Germany).

[11] See Arthur T. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 BU L Rev 279, 284 & nn 12–13 (1983) (discussing jurisdiction under both French and German law).

[12] Consider Friedrich K. Juenger, *Choice of Law and Multistate Justice* 8–10 (Martinus Nijhoff 1993).

[13] Justinian's Code, cod 3.19.3, 3.13.2. See also Juenger, *Choice of Law* at 8–10 (cited in note 12).

[14] For a general discussion, see Juenger, 65 U Colo L Rev at 6 (cited in note 1) (tracing the evolution of English common law jurisdiction).

lying the dispute might have with England.[15] Once the common law courts began to handle maritime and commercial cases, these archaic jurisdictional notions no longer suited a country with far-flung commercial activities. Responding to business necessities, the 1875 Common Law Procedure Act authorized a species of long-arm jurisdiction.[16] Order 11 of the Rules of the Supreme Court, which was promulgated pursuant to this statute, conferred upon the judiciary discretion to serve abroad defendants who could not be found in the United Kingdom.[17] Framed—bowing to tradition—in terms of service of process, it in effect introduced the concept of specific jurisdiction, so that this scheme amounted to a reform that reflected the civil law approach.[18]

3. United States.

Although early American law followed the English common law tradition, the notion of specific jurisdiction was not entirely unknown in the United States. In an 1856 decision, *Lafayette Insurance Co v French*,[19] the Supreme Court upheld the assertion of jurisdiction over an Indiana insurance company by an Ohio court pursuant to an Ohio statute that allowed the service of process on the "agents" of foreign insurers.[20] The Court reasoned that because foreign corporations can only transact business within another state with that state's consent, that permission can be conditioned on the defendant's submission to the jurisdiction of the state's courts. Providing its citizens with a remedy by requiring foreign corporations that carry on insurance business in Ohio "to answer there for the *breach of their contracts of insurance there made and to be performed*" was held not to be unreasonable.[21] Hence, as regards suits on such contracts, Ohio did not violate the United States Constitution by treating the local sales agent of a foreign corporation that transacts continuous business in Ohio as an authorized agent for service. Rather, by virtue of this fictional consent the host state could do so "as effectually as if he

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15 Juenger, *Choice of Law* at 22 (cited in note 12).

16 Common Law Procedure Act, 38 & 39 Victoria Ch 77 (1875) (permitting service abroad).

17 See Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities*, 82 Mich L Rev 1195, 1197 n 16 (1984) (discussing the evolution of English jurisdictional rules).

18 Id at 1197.

19 59 US (18 Howard) 404 (1856).

20 Id at 407–08.

21 Id.

were designated in the charter as the officer on whom process was to be served."[22] Again, jurisdiction was ostensibly based on that procedural act. But by limiting jurisdiction to causes of action arising out of the nonresident corporation's local activities, the Court implicitly recognized the concept of specific jurisdiction. The *Lafayette Insurance Co* case could therefore have become the starting point for aligning American jurisdictional law with that of the common law's cradle as well as civil law countries. This possibility vanished, however, once the Court handed down a fateful decision that seriously inhibited sensible reform.

II. *PENNOYER V NEFF*

A. Constitutionalizing an Old Common Law Rule

The peculiarities of current American jurisdictional law are a consequence of the Supreme Court's decision in *Pennoyer v Neff*.[23] That case struck down a judgment an Oregon court rendered against a California resident pursuant to a state statute, which (like section 23 of the German Code of Civil Procedure)[24] purported to authorize in personam jurisdiction over nonresidents who own property in Oregon. Accordingly, the judgment nullified the title to a plot of land, which had served as the requisite basis for a default judgment against the Californian defendant, after the land was sold to a third party at a sheriff's sale in order to satisfy the judgment. In so holding, the Court gave constitutional stature to the old common law principle that jurisdiction must be acquired by serving the defendant with process. Citing Story's *Commentaries on the Conflict of Laws* and *Wheaton on International Law*, Justice Field's majority opinion maintained that this rule was mandated by principles of "public law," that is international law.[25] According to the law of nations, he reasoned, a sovereign state has plenary power—in other words, general jurisdiction—over all things and persons within its territory but none outside.[26] Thus, Justice Field believed that these principles were

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22 Id (emphasis added).

23 95 US 714 (1877).

24 Zivilprozessordung § 23. Unlike the German provision, however, the Oregon statute limited the judgment to the value of the Oregon assets.

25 *Pennoyer*, 95 US at 722 (stating that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" but that "the laws of one State have no operation outside its territory").

26 Id.

still pertinent to our federal system except to the extent that the Constitution constrains state court jurisdiction.

For this reason the Court held that Oregon lacked in personam jurisdiction over the California defendant, who had not been not served with process within the state's borders. By way of dictum, the Court also took the opportunity to put its seal of approval on quasi in rem jurisdiction.[27] Relying again on notions of territorial sovereignty, Justice Field maintained that the Oregon plaintiff did not have to rely on the state's long-arm provision.[28] Rather, he could proceed directly against the California defendant's Oregon property, which would allow him to vindicate his rights incidental to such an in rem proceeding. Unlike earlier Supreme Court cases, the *Pennoyer* opinion premised the scope of permissible state court jurisdiction not on the Full Faith and Credit Clause but on the newly adopted Fourteenth Amendment's Due Process Clause.[29] Even though its purpose was the protection of individual liberties rather than state sovereignty, Justice Field had no qualms about invoking this provision. He believed that the new provision was relevant because he construed the words "due process" to imply "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[30] In other words, Justice Field took the position that only those means of acquiring jurisdiction that existed in the common law inherited from England accorded with due process, a proposition for which he was able to cite *Cooley on Constitutional Limitations*.[31]

B. *Pennoyer*'s Shortcomings

The *Pennoyer* opinion was thoroughly flawed. Although drawing an analogy to international law, Justice Field nevertheless failed to seek guidance from the jurisdictional rules of other civilized nations. Indeed, although he relied on a common law heritage, he did not even consider English developments that

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[27] Id at 723.

[28] Id at 723–24, 733.

[29] This point is debatable, however. See Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 UC Davis L Rev 19, 38–40 (1990) (arguing that *Pennoyer*'s reference to "due process" might have merely established a right of collateral attack and that full constitutionalization of jurisdictional rules was not clearly established until 1915).

[30] *Pennoyer*, 95 US at 733.

[31] Id.

changed the "rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[32] His opinion did not refer to the Common Law Procedure Act and Order 11, nor did it cite such cases as *Schibsby v Westenholz*[33] that reflected then-current English practice, which by that time supplemented the general jurisdiction created by service with a dispute-specific power to adjudicate.[34] By failing to recognize the concept of specific jurisdiction, *Pennoyer* was out of tune with the times. Even in those horse-and-buggy days, the exclusive reliance on process servers and tracers of assets made little sense in a federal system that harbors a mobile population and a burgeoning economy. Catch-as-catch-can jurisdiction, which was found wanting even in a unitary English legal system[35] with more sedentary inhabitants, defied common sense because it imposed a Procrustean scheme that was at once too broad and too narrow.[36]

Jurisdiction à la *Pennoyer* was too broad because it authorized litigation in states with which the defendant had little or no contacts, as cases like *Grace v MacArthur*[37] dramatically illustrate. There an Arkansas federal court proceeded to adjudicate a case in which jurisdiction was premised on service in the Arkansas airspace over which the defendant happened to fly.[38] Although American legal scholars have sharply criticized such jurisdictional exorbitance,[39] not too long ago a Supreme Court plurality opinion, relying on *Pennoyer*, affirmed the continued validity of this species of general jurisdiction,[40] even though an earlier deci-

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[32] Id.

[33] 6 QB 155 (1870).

[34] Id at 157, 159 (discussing French practice under Code Civil Art 14 and English practice under the Common Law Procedure Act, 1852, ch 76 §§ 18 & 19).

[35] Scotland, however, has some distinct legal traditions that survived integration. See Donald W. Large, *The Land Law of Scotland—A Comparison with American and English Concepts*, 17 Envir L 1, 3 (1986).

[36] Juenger, *Choice of Law* at 22–25 (cited in note 12) (comparing the jurisdictional scheme under the common law in England to the *Pennoyer* decision).

[37] 170 F Supp 442 (E D Ark 1959).

[38] Id at 443.

[39] See, for example, Peter Hay, *Transient Jurisdiction Especially Over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U Ill L Rev 593 (1990) (discussing malign implications for international litigants); Marcel Kahan and Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 NYU L Rev 765 (1998) (discussing problem of forum shopping that can arise in class action suits under an exorbitant approach to jurisdiction); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L J 289 (1956) (discussing impact on conflicts-of-law).

[40] *Burnham v Superior Court of California*, 495 US 604, 607, 619–22 (1990).

sion suggested that the Justices were ready to abolish it.[41] Moreover, since *Pennoyer*, numerous judges have taken issue with premising the power to adjudicate on such a tenuous contact, especially in international cases.[42] As a Connecticut judge, writing not long after *Pennoyer*, decried:

> It can hardly be claimed that the interests of our own citizens, or friendly intercourse with other nations, will be served by encouraging the establishment of a sort of international syndicate for promoting the collection of home debts through foreign courts. . . . Such a policy would offer premiums to scavengers of sham and stale claims at every center of travel, breeding a class of process firers to lie in wait for their game at docks and railway stations.[43]

Premising litigation on quasi in rem jurisdiction, which is designed to vindicate personal claims through the attachment of local assets, is equally unsatisfactory.[44] Such exorbitance ultimately displeased the Court sufficiently to induce the abolition of this hoary practice.[45]

Although *Pennoyer* promoted jurisdictional exorbitance, it also confined the power of state courts to adjudicate actions brought against nonresidents to an intolerable degree. The archaic common law heritage it promoted and constitutionalized could not possibly accommodate the needs of a federal system. Actions against foreign corporations, for instance, were already a fact of American life and commerce when the Court handed down *Pennoyer*.[46] Yet, process servers were and are unable to stalk artificial entities that lack a corporeal presence. An analogy to the exercise of jurisdiction over human beings, taken to its logical conclusion, would mean that only the state of incorporation could adjudicate actions against such entities because they do not exist

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[41] See *Shaffer v Heitner*, 433 US 186, 212 (1977) (stating that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny").

[42] See, for example, *Fisher v Fielding*, 34 A 714, 729 (Conn 1895) (Hamersley dissenting).

[43] Id.

[44] *Pennoyer*, 95 US at 723.

[45] *Shaffer*, 433 US at 207–12 (stating the case for applying *International Shoe*'s minimum-contacts standard to in rem and quasi in rem cases).

[46] See, for example, *Myer v Liverpool, London & Globe Insurance Co*, 40 Md 595 (1874) (subjecting foreign corporation to garnishment within a state where it holds property); *Martine v International Life Insurance Society of London*, 53 NY 339 (1873) (subjecting foreign life insurance company to New York law).

elsewhere.[47] This dire consequence did not, however, bother Justice Field. In *St Clair v Cox*[48] he held that the "doctrine of . . . [*Pennoyer*] applies, in all its force, to personal judgments of State courts against foreign corporations."[49] Later, when the automobile became a popular means of transportation, nonresident motorists could evade lawsuits in states in which their vehicles maimed or killed hapless victims by flooring the gas pedal. Mandated—as it supposedly was—by constitutional tenets, the decision in *Pennoyer* inhibited the states from searching for more sensible solutions to these problems. It therefore fell to the Supreme Court to cope, as best it could, with the difficulties its noxious precedent had caused.

C. Jurisdictional Facts and Fictions

1. Corporations.

During the following decades, the normative force of facts compelled the Supreme Court to adapt the *Pennoyer* principles to the realities of our federal system. Hoisted by their own petard, however, the Justices apparently felt unable to do so directly; instead they resorted to a number of contrivances to accommodate the system's jurisdictional necessities. As construed in *Pennoyer*, the Due Process Clause did provide some leeway for creative solutions. Personal service within the state was not an indispensable prerequisite for the forum's power to adjudicate cases brought against nonresidents since a defendant could waive the protection that clause afforded by entering an appearance or consenting to jurisdiction.[50] An early Supreme Court decision, which had suggested that legal entities could only be sued in their state of incorporation,[51] had already prompted the states to enact legislation that required foreign corporations that wished to do business

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[47] *Pennoyer*, 95 US at 726.

[48] 106 US 350 (1882).

[49] Id at 353.

[50] *Pennoyer*, 95 US at 723.

[51] See *Bank of Augusta v Earle*, 38 US 519, 588 (1839). In *Bank of Augusta* the Court held that:

> It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

Id.

in the forum to consent to local jurisdiction. Although such consent alone should obviate the need for personal service within the forum state, for good measure these "qualification statutes" also provided for service within the state.[52] They accomplished this by requiring nonresident enterprises to appoint a local person—usually the secretary of state—as their "true and lawful agent" on whom service could be effected.[53] Such statutes provided an incentive for compliance by means of stringent sanctions.[54] These included, in addition to fines, voiding agreements to which noncompliant foreign corporations were parties and depriving them of the capacity to hold and dispose of property.[55] Undisturbed by the fact that such "consent" was obtained in an extortionate manner, the Supreme Court held that nonresident corporations were bound by it.[56]

A line of Supreme Court decisions had, however, held that there were limits on the conditions for doing business locally that a state might impose on corporations engaged in interstate commerce. Several state statutes were held to have transgressed those limits, which shed doubt on the propriety of subjecting such entities to local jurisdiction.[57] Also, stringent sanctions notwithstanding, a foreign corporate defendant might have either failed to appoint a local agent in the first place or revoked his authority before a suit was filed. How, then, could it be sued? Notwithstanding earlier authority that seemingly permitted this expedient,[58] in *Goldey v Morning News of New Haven*,[59] the Supreme Court rebuffed an attempt to anthropomorphize corporations and refused to equate service on corporate officials with service on the corporation. It said that such service "must be regarded as of no validity . . . unless . . . [it] was made . . . upon an agent appointed

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[52] See, for example, *St Clair*, 106 US at 353, citing 2 Michigan Comp Laws §§ 6544, 6550 (1871) (noting that states may require non-residents entering into a partnership or association within its limits to appoint a local agent or representative to receive service of process).

[53] See, for example, 1959 Tex Gen Laws 43, amended by 1979 Tex Gen Law 245, repealed by 1985 Tex Gen Laws 959.

[54] See, for example, id.

[55] See, for example, id.

[56] See, for example, *St Clair*, 106 US at 353; *Pennoyer*, 95 US at 735.

[57] See Juenger, 65 U Colo L Rev at 10–13 (cited in note 1).

[58] See, for example, *Lafayette Insurance Co*, 59 US (18 Howard) at 408 ("The law may and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service and being bound by it, the corporation is identified with such agent or officer."); *Pope v Terre Haute Car & Manufacturing Co*, 87 NY 137, 141 (1881) (holding that an officer need not be served while conducting corporate business in order to obtain jurisdiction over out-of-state corporations).

[59] 156 US 518 (1895).

to act there for the corporation, and not merely upon an officer or agent . . . only casually within the state and not charged with any business of the corporation there."[60]

As a consequence, fiction substituted for fact. If actual consent could not be obtained, "constructive" consent had to do; if members of its management could not be *Pennoyer*ed, perhaps the corporation itself might be "deemed" to have a local "presence." As noted earlier, in *Lafayette Insurance Co*, the Supreme Court had already held that transacting certain kinds of business within a state amounted to an "implied consent" to be served with process there.[61] Later cases held that a corporation doing a sufficient volume of business in the forum may be deemed to be "present" for the purpose of exercising jurisdiction.[62] To hold nonresident entities amenable to local jurisdiction, the courts sometimes relied on one of these fictions, sometimes on the other. In fact, they often treated "implied consent" and "presence" as interchangeable concepts despite the fact that there was an important difference between the two.[63] *Pennoyer* permitted state courts to exercise general jurisdiction over natural persons who were served within the forum state while present there. In contrast, the very concept of consent suggests that a nonresident corporation need not necessarily be subject to suits on any causes of action that might be brought in the state to whose jurisdiction it consented. Rather, as *Lafayette Insurance Co* implied, consent depended on the defendant's volition; it might choose to be amenable only to certain kinds of lawsuits. In other words, while "presence" implied general jurisdiction, "consent" may engender specific jurisdiction only. This obvious difference was, however, further obliterated when judges subsumed both of these fictions under the notion of "doing business."

In a way, "doing business" is a more satisfactory term to explain jurisdiction over foreign corporations than the two fictive ones, both of which were in reality premised on the defendant's

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[60] Id at 522.

[61] *Lafayette Insurance Co*, 59 US (18 Howard) at 408 (noting that "express or implied" consent to transact business in a state may be accompanied by such conditions as the state may think fit to impose).

[62] See *Philadelphia & Reading Railway Co v McKibbin*, 243 US 264, 268 (1917) (finding sales of tickets on foreign railways within country's jurisdiction insufficient). Compare *International Shoe Co v Washington*, 326 US 310, 317 (1945) ("Presence in the State . . . has never been doubted when the activities of the corporation have . . . been continuous and systematic.").

[63] See, for example, *St Louis Southwestern Railway Co of Texas v Alexander*, 227 US 218 (1913) (analyzing a Texas corporations "presence" in New York).

commercial activities within the state. As Judge Learned Hand put it in *Hutchinson v Chase & Gilbert Inc*,[64] jurisdiction depends on "whether the extent and continuity of what [the corporation] has done in the state in question makes it reasonable to bring it before one of its courts."[65] In other words, as is true in other countries, in Hand's opinion, the amenability of nonresidents to suit is a consequence not of the magic act of service or an unexpressed consent, but rather on the defendant's relationship with the forum.[66] Looking at the matter in this fashion raises the obvious question whether forum activities are truly analogous to the presence of a human defendant so as to subject a nonresident corporation to general jurisdiction, or whether they should only confer specific jurisdiction concerning actions that are related to these activities, as the Supreme Court had held in *Lafayette Insurance Co*.[67] On this point, the Court has vacillated. In *Old Wayne Mutual Insurance Life Association v McDonough*[68] it refused to extend the notion of "implied consent" to a transaction that had no relationship with the insurance business that the foreign corporation conducted in the forum state.[69] In other cases, the idea implicit in *Pennoyer* that "presence" allows the exercise of general jurisdiction had induced the Court to allow actions against nonresident corporations that were unrelated to the defendant's forum activities.[70] Most of the cases that reached the Court dealt with the issue of how much is enough, in other words, whether such forum activities as the solicitation of business are sufficient to render the business amenable to local lawsuits.[71] Their preoccupation with such details may explain the Justices' failure to elaborate a satisfactory distinction between dispute-specific and dispute-blind jurisdiction in suits against foreign corporations.

The decisions of state and federal courts mirrored this confusion. Judge Learned Hand's opinion in *Hutchinson* echoed that in

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64 45 F2d 139 (2d Cir 1930).

65 Id at 141.

66 Id (describing presence as a "shorthand" for an estimate of the continuity of the corporation's business within the forum state and the inconveniences of requiring the corporation to defend itself where it has been sued).

67 See 59 US (18 Howard) at 408.

68 204 US 8 (1907).

69 See id at 21–23.

70 *Hutchinson*, 45 F2d at 139 (discussing Supreme Court cases allowing the exercise of general jurisdiction against nonresident corporations).

71 See, for example, *Quinn v Southern Railway*, 236 US 115, 128–32 (1915); *Old Wayne Mutual Insurance Life Association*, 204 US at 8.

Lafayette Insurance Co: Even though the corporate defendant had engaged in "continuous dealings in the state of the forum,"[72] Hand concluded that the foreign enterprise was amenable to jurisdiction only with respect to causes of action arising out of those dealings.[73] In this respect, the Second Circuit Court of Appeals deviated from the earlier New York Court of Appeals decision in *Tauza v Susquehanna Coal Co.*[74] *Tauza* dealt with an action brought against a Pennsylvania company that maintained a branch office in New York manned by a sales agent, clerical assistants, and eight salesmen.[75] The defendant, which regularly sold coal to that state, was held amenable to general jurisdiction in New York.[76] As Judge Cardozo's opinion in *Tauza* noted, "jurisdiction does not fail because the cause of action sued upon has no relation . . . to the business here transacted."[77] Thus, the "doing business" rubric thoroughly obscured the distinction between dispute-blind and dispute-specific jurisdiction.

2. Cars.

The distinction between general and specific jurisdiction was, however, posed succinctly in a different context. In *Hess v Pawloski*,[78] the Supreme Court considered the constitutionality of a convoluted Massachusetts statute that relied on the fiction of implied consent to authorize tort actions against nonresident motorists who caused an accident in Massachusetts.[79] The legislature "deemed" driving in Massachusetts to be "equivalent to an appointment by such nonresident of the registrar . . . to be his true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved while operating a motor vehicle" in the Commonwealth.[80] Noting that "the implied consent is limited to proceedings" arising out of local accidents, the Supreme Court upheld that exercise of jurisdiction against the defendant's due process challenge.[81] Equating fact

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[72] *Hutchinson*, 45 F2d at 141.
[73] Id.
[74] 115 NE 915 (NY 1917).
[75] Id at 918.
[76] Id.
[77] Id.
[78] 274 US 352 (1927).
[79] Id at 356–57.
[80] Id at 354.
[81] Id at 356.

with fiction, Justice Butler reached the remarkable conclusion that the "difference between the formal and implied appointment is not substantial, so far as concerns the application of the" Due Process Clause.[82] Apart from extending the implied consent fiction beyond the corporate context, *Hess* clearly recognized the distinction between general and specific jurisdiction as a matter of constitutional law.[83] In addition, the case increased the opportunities for suits against nonresidents by suggesting that jurisdiction may be appropriate even if a defendant did not engage in a course of "continuous dealing" but merely committed a single act within the forum state.[84]

III. *INTERNATIONAL SHOE CO V WASHINGTON*

A. A New Jurisdictional Principle

Once the Supreme Court fully recognized the distinction between dispute-blind and dispute-specific jurisdiction, it was but a short step to find a more plausible basis for in personam jurisdiction than the questionable "physical power" rationale on which *Pennoyer* had relied. Law, however, is a conservative business; after it decided *Hess*, it took the Court yet another eighteen years before it handed down its landmark decision in *International Shoe Co v Washington*,[85] which, at long last, accomplished that feat. In effect, *International Shoe* "civilized" in personam jurisdiction by recognizing that a relationship (which the Court confusingly dubbed "minimum contacts"), rather than the magic act of service, may enable the forum to adjudicate actions against nonresidents.[86] Such a relationship of course exists whenever the defendant is a forum resident[87] or, in the case of a legal entity, is incorporated or has its principal place of business there. But what should be the rule if a nonresident corporation merely conducts business activities in the forum? As the citation of its own precedents and the *Tauza* case indicates, the *International Shoe* Court apparently felt bound by post-*Pennoyer* jurisprudence, which had authorized the exercise of general in personam jurisdiction as

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[82] *Hess*, 274 US at 357.

[83] Id at 355.

[84] Id at 356–57.

[85] 326 US 310 (1945).

[86] Id at 316–17.

[87] See *Milliken v Meyer*, 311 US 457 (1940) (finding domicile sufficient to establish jurisdiction).

long as the defendant was "doing business" in the forum state.[88] Hence the *International Shoe* Court chose to continue along this path and thereby to perpetuate the rift that separates this country from all others.

B. An Opportunity Missed

The *International Shoe* Court could have done better—as the *Pennoyer* Court could have—by employing a comparative approach. As noted earlier, with respect to corporate defendants that are neither incorporated nor have their principal place of business in the forum state, civil law as well as common law nations merely assert specific jurisdiction.[89] Had the Justices at least looked at the practices in other common law countries, they could have seized the opportunity to align American law with that which prevails elsewhere. But instead of drawing a sharp line between dispute-blind and dispute-specific jurisdiction, the *International Shoe* opinion envisaged a spectrum of activities ranging from "continuous and systematic" to "single or isolated" acts. Whereas the latter would at best confer specific jurisdiction, the former might authorize the forum to adjudicate causes of action that are unrelated to the defendant's forum activities.[90] As might have been expected, these weasel words cause, to this day, major problems in practical application.[91] Matters were hardly improved by the fumbling attempts of state legislatures to avail themselves of the greater leeway for jurisdictional innovation that the *International Shoe* decision afforded. The Solons in the state legislatures modeled their enactments on legislation adopted during the *Pennoyer* era, in particular the nonresident motorist statute that had won the Supreme Court's approval in *Hess*.[92]

Yet another problematic aspect of the *International Shoe* decision was the Court's steadfast adherence to the notion that jurisdiction and the Fourteenth Amendment's Due Process Clause are somehow intertwined. While it no longer takes the position

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[88] See Part II C.

[89] Unless, of course, the plaintiff can rely on an exorbitant jurisdictional basis such as Civil Code Art 14 (France). See Part I.

[90] See Juenger, 65 U Colo L Rev at 7–10 (cited in note 1).

[91] Compare *McGee v International Life Insurance Co*, 335 US 220 (1957) (emphasizing transaction contacts) with *Hanson v Denckla*, 357 US 235, 253 (1958) (emphasizing defendant contacts).

[92] See, for example, *St Louis Southwestern Railway Co of Texas v Alexander*, 227 US 218 (1917) (discussing a New York statute); 1995 Ill Laws 2245–46.

that the Constitution mandates reliance on archaic common law practices, the Court reaffirmed its reliance on the Due Process Clause as the pertinent constitutional provision from which jurisdiction is derived.[93] Engaging in a curious inversion of reasoning, instead of deriving constitutional propriety from pre-existing jurisdictional ideas, Justice Stone's majority opinion deduced jurisdiction from the Fourteenth Amendment. According to him, Due Process enables states to exercise jurisdiction as long as they have "certain minimum contacts with . . . [the defendant] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[94] It is no wonder that this vague standard left state legislatures, judges, and practitioners bewildered. Unable to define these terms, the Court has since handed down a series of decisions characterized by a lack of clarity and cogency that have, at times, yielded questionable results. Additional verbiage, such as "purposeful availment" through which the Justices have embellished "minimum contacts," merely adds to the confusion.[95] The Supreme Court's vacillating jurisprudence has befuddled state and federal courts and fails to provide answers to even some obvious questions, such as where precisely the line between general and specific jurisdiction should be drawn.[96]

C. The Current Status of General Jurisdiction

Fifty-six years after *International Shoe* was decided, we still do not know when states may assert dispute-blind jurisdiction over nonresident corporations. In *International Shoe*, Justice Stone characterized the presence of the defendant's thirteen salesmen, who roamed the State of Washington to solicit orders, as "continuous and systematic."[97] Specific jurisdiction was, however, the only issue presented because the defendant's tax liability arose out of its local activities.[98] Hence the opinion in that case provides no clue concerning whether the defendant's "continuing

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[93] *International Shoe*, 326 US at 316 ("[D]ue process requires . . . that . . . [the defendant] have certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"), quoting *Milliken v Meyer*, 311 US 457, 463 (1940).

[94] Id.

[95] See, for example, *Asahi Metal Industry Co v Superior Court of California*, 480 US 102, 108 (1987); *Burger King Corp v Rudzewicz*, 471 US 462, 475 (1985); *Hanson v Denckla*, 357 US 235, 253 (1958).

[96] See Juenger, 65 U Colo L Rev at 3–4 (cited in note 1) (citing cases).

[97] *International Shoe*, 326 US at 320.

[98] Id at 316.

and systematic" activities might have permitted a Washington court to adjudicate, say, a tort action by a person who was injured by one of the International Shoe Company's trucks in Saint Louis. Only one Supreme Court case decided after *International Shoe*, *Perkins v Benguet Consolidated Mining Co*,[99] has condoned a state court's exercise of general jurisdiction over a foreign or out-of-state corporation.[100] The facts presented by that case were, however, unique: during the Japanese occupation of the Philippines, the only "presence" the defendant Philippine corporation could be said to have anywhere was in Ohio, where its president conducted the corporation's activities.[101] Thus, the Court's decision affords little guidance regarding the scope of dispute-blind jurisdiction.

One other Supreme Court decision dealt with, but rejected, an assertion of general jurisdiction. In *Helicopteros Nacionales de Colombia v Hall*,[102] the defendant foreign corporation bought helicopters in Texas, but had few other contacts with that state.[103] The Texas Supreme Court, reversing its original stance, nevertheless held that the Colombian enterprise was subject to general jurisdiction.[104] The U.S. Supreme Court rejected the proposition that Texas courts could rely on general jurisdiction to adjudicate the Colombian defendant's liability for wrongful death on account of a helicopter crash in Peru.[105]

As if to underline the Justices' confusion about jurisdictional concepts, the *Helicopteros* majority inexplicably relied on a pre-*International Shoe* precedent for its conclusion.[106] Yet, the defendant's tenuous relationship with the forum notwithstanding, Justice Brennan's dissent argued that the Texas court could have asserted general as well as specific jurisdiction.[107] Moreover, that a plurality of the Court, in *Burnham v Superior Court of Califor-*

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[99] 342 US 437 (1952).

[100] Id at 447–48.

[101] Id.

[102] 466 US 408 (1984).

[103] Id at 415–16.

[104] *Hall v Helicopteros Nacionales de Colombia*, 638 SW2d 870, 881–82 (Tex 1982) (Campbell concurring).

[105] *Helicopteros Nacionales de Colombia*, 466 US at 416 (because plaintiffs failed to assert specific jurisdiction, the majority opinion never dealt with this point).

[106] See id at 417–18, relying on *Rosenberg Brothers & Co v Curtis Brown Co*, 260 US 516, 518 (1923).

[107] *Helicopteros Nacionales de Colombia*, 466 US at 420–24 ("the undisputed contacts in this case . . . are sufficiently important . . . to make it . . . fair and reasonable . . . to assert personal jurisdiction"), relying on *Perkins*, 342 US at 438, 445 and *Rosenberg Brothers & Co*, 260 US at 518.

nia,[108] resuscitated *Pennoyer* "tag" jurisdiction—a species of general jurisdiction[109]—suggests that the Justices are not particularly concerned about the fact that truly minimal contacts may render a nonresident defendant amenable to wide-ranging jurisdictional assertions.

D. The Restatements

The Court's skimpy case law leaves unanswered a number of obvious questions, such as the potential exercise of general jurisdiction over foreign multinational enterprises that sell large quantities of their products in the United States. Can, for instance, any plaintiff who was injured by a car manufactured in Wolfsburg, Germany sue the Volkwagenwerke AG in whatever state offers the best recovery? And should it matter whether the nonresident corporation's "continuous and systematic" forum business is conducted by individuals or subsidiaries? Do a subsidiary's activities render the parent amenable to general jurisdiction on any cause of action, wherever it has "arisen"?[110] The Restatements fail to shed much light on the matter. The Second Conflicts Restatement contains the following terse statement:

> A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise jurisdiction.[111]

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[108] 495 US 604, 607 (Scalia) (plurality), 628 (White concurring) (1990).

[109] See Eugene F. Scoles, et al, *Conflict of Laws* § 6.2 (West 3d ed 2000) (describing "transient" jurisdiction based on in-state service as a "truly" general basis of jurisdiction).

[110] Judicial opinion on this point is split. Some courts cite *Cannon Manufacturing Co v Cudahy Packing Co*, 267 US 333 (1925), a pre-*International Shoe* case, for the proposition that the mere fact of stock ownership in a wholly-owned subsidiary does not render a nonresident corporation amenable to even specific jurisdiction. See, for example, *Delagi v Volkswagenwerk, AG*, 283 NE2d 432 (NY 1972) (denying jurisdiction in New York over German corporations which manufactured automobiles in Germany and imported them into the United States through a New Jersey subsidiary). Others suggest that business done by a subsidiary may allow the exercise of general jurisdiction over the parent. See, for example, *Velandra v Regie Nationale des Usines Renault*, 336 F2d 292 (6th Cir 1964) (holding that subsidiary corporation doing business within state insufficient to establish jurisdiction over parent manufacturer); *Gallager v Mazda Motor of America Inc*, 781 F Supp 1079 (E D Pa 1992) (imputing jurisdictional contacts of subsidiary to corporate parent).

[111] Restatement (Second) of Conflict of Laws § 47(2) (1971).

The Judgments Restatement simply incorporates the Conflicts Restatement by reference.[112] The Foreign Relations Law Restatement would subject any foreign individual or entity to general jurisdiction if he, she or it "regularly carries on business within the state."[113] While that Restatement purports to set forth principles of international law, its reporters have failed to mention the discrepancy between the American and foreign views on that point. Of course, these Restatements were published before the Supreme Court's decision in the *Helicopteros* case, which casts doubt on their authoritative value.

E. Academic Critics

The Supreme Court case law, the Restatements and the academic literature largely agree that foreign corporations doing a sufficient volume of business are subject to general in personam jurisdiction even though they are neither incorporated nor have their principal place of business within the forum state. Yet, given the vast potential scope of general jurisdiction, it is no wonder that some American scholars have questioned the conventional wisdom that the mere fact of some continuous and systematic activities in the forum suffice to hold foreign corporations amenable to local suits that are unrelated to such business.[114] Thirty-five years ago, von Mehren and Trautman already maintained that only the home state ought to be able to exercise such jurisdiction.[115] Subsequently, Twitchell argued that a broader test for specific jurisdiction should make the notion of general jurisdiction largely dispensable.[116] Others have gone so far as to advocate elimination of the entire notion of general jurisdiction.[117] That, of course, would pour the baby out with the bath water. Why should a plaintiff be unable to sue a corporation at its principal place of business, or an individual at his domicile, on any cause of action? As this consideration suggests, total abolition seems hardly warranted, especially if one considers that other

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112 Restatement (Second) of Judgments § 5 (1982).

113 Restatement (Third) of Foreign Relations Law § 421(2)(h) (1987).

114 See, for example, Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U Chi Legal F 171.

115 See von Mehren and Trautman, 79 Harv L Rev at 1141–44, 1179. (cited in note 5).

116 Twitchell, 101 Harv L Rev at 633, 665–67 (cited in note 6) (cautioning against the abolishment of general jurisdiction).

117 See, for example, Harold G. Maier and Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction of Choice of Law*, 39 Am J Comp L 249, 271–80 (1991) (arguing that "the exercise of general jurisdiction, standing alone, necessarily violates the Due Process Clause of the United States Constitution").

nations not only recognize this basis of jurisdiction but consider the maxim *actor sequitur forum rei* to be a fundamental tenet of procedural law.[118] Rather, the question is whether, in light of the views that prevail abroad, the assertion of general jurisdiction over corporations doing business in the United States is not sufficiently exorbitant to require some adjustments.

IV. THE INTERNATIONAL RAMIFICATIONS OF JURISDICTIONAL EXORBITANCE

A. Cosí Fan Tutte

Desirable as narrowing the scope of general jurisdiction might be, it may seem that there is no pressing need for such reform. No doubt, our expansive ideas about its scope may hurt foreign defendants. This country is, however, not the only one with overly broad jurisdictional rules. As a glance at Article 3 of the Brussels[119] and Lugano[120] Conventions shows, other nations boast of equally, or even more, exorbitant bases.[121] In that provision one encounters, among other things, national rules to the effect that the presence of assets in Germany, a plaintiff's residence in France, or personal service in the United Kingdom each allows European courts to entertain general in personam jurisdiction over foreign individuals and enterprises.[122] To be sure, judgments based on such a tenuous foundation may not be recognized abroad, so that, after vigorous litigation, a judgment creditor might be deprived of the fruits of his victory.[123] This is true for European jurisdictional exorbitance as well as our own.[124] In practice, however, nonrecognition abroad is usually not a major concern to many American plaintiffs, such as those who sue on account of injuries caused by defective products manufactured by

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118 See Pfeiffer, *Internationale Zustandigkeit* at 329–31 (cited in note 3).

119 See European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention"), 1972 OJ (L 229) 32, reprinted in 8 ILM 229 (1968). The Brussels Convention has been amended since 1968 and the current consolidated text may be found at 1990 OJ (C 189) 1, reprinted in 29 ILM 1413 (1990).

120 See European Communities–European Free Trade Assosiation Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention"), 1988 OJ (L 319) 9, 28 ILM 620 (1988).

121 See Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 Brooklyn J Intl L 111, 115–16 (1998).

122 Id.

123 For a general discussion, see Mathias Reimann, *Conflict of Laws in Western Europe* 149–50 (Transnational 1995).

124 Id.

a foreign enterprise—alien entities that are amenable to general jurisdiction in the United States tend to have sufficient state-side assets to assure the successful plaintiff's full recovery.

B. Law Reform via a Judgments Recognition Convention?

Exorbitance, however, becomes problematic whenever an effort is launched to assure the regional or worldwide recognition of foreign judgments. Thus, within the European Union, the exorbitant French, German and British rules listed in Article 3 of the Brussels and Lugano Conventions had to give way to more sensible heads of jurisdiction, at least as far as corporate or individual defendants domiciled in the signatory states are concerned.[125] Similarly, the broad sweep of American general jurisdiction became problematic when this country began to negotiate with other nations for an international judgments recognition convention under the auspices of the Hague Conference on Private International Law.[126] In the Hague, the American delegation aimed for a "mixed convention," in other words one that would not only contain a "white" list of approved heads of jurisdiction but would also tolerate, up to a point, national idiosyncracies.[127] Jurisdictional bases falling within this idiosyncratic category are enumerated in a "gray" list; judgments rendered on any of these bases need not be recognized by the other signatory states.[128] There was, however, general agreement that certain jurisdictional assertions are sufficiently exorbitant to merit inclusion in a "black" list that the signatories may not invoke against residents and entities of member states.[129] After setting forth the general principle that jurisdiction requires a "substantial connection" between the forum and a dispute, Article 18 of the Draft Convention lists several examples of prohibited bases. As one might expect, that list, as it stands, includes—as do the Brussels and Lugano Conventions—jurisdictional privileges that favor forum residents and nationals as well as German asset-based and British "tag"

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125 Id.

126 See Juenger, 24 Brooklyn J Intl L at 117–18 (cited in note 121) (discussing the difficulty of exporting the American jurisdictional model).

127 Id at 114–16, 118–20 (discussing unwillingness of American delegates to depart from the American jurisdictional model).

128 Id at 119 (explaining that "between the recognized and the impermissible heads of jurisdiction there would be a "gray zone").

129 Id at 118–20.

jurisdiction.[130] American-style "doing business" general jurisdiction, however, also struck the delegates from other countries represented in the Hague Conference as sufficiently exorbitant to merit blacklisting.

Accordingly, Article 18 of the current draft convention provides, in relevant part:

> Prohibited grounds of jurisdiction
>
> 1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute.
> 2. In particular, jurisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following . . .
>
> e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities. . . .[131]

The accompanying report[132] by Professors Peter Nygh and Fausto Pocar explains the reasons for including "doing business" general jurisdiction as follows: "This ground of jurisdiction [doing business] . . . makes it possible in some situations to bring a suit against the defendant even when the claim has no specific relationship with the activity carried on by the defendant in the State of the court seised."[133] They also conclude that the application of the "doing business" standard is worrisome because of the difficulties in "determining the quality and quantity of activity which is needed . . . ; this again has to be left to the court seised to decide."[134] Thus, the inclusion of "doing business" jurisdiction risks

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130 Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters Art 18 (adopted Oct 30, 1999), available online at <http://www.hcch.net/e/conventions/draft36e.html> (visited Dec 14, 2001) [on file with U Chi Legal F].

131 Id.

132 Peter Nygh and Fausto Pocar, Report of the Special Commission on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ("Report of the Special Commission"), available online at <ftp://hcch.net/doc/jdgmpd11.doc> (visited Nov 25, 2001) [on file with U Chi Legal F].

133 Id at 77.

134 Id.

increased disputes between parties which run counter to the purpose of the Convention. As Professors Nygh and Pocar conclude:

> It should be explained that the connection to the defendant's activity in the State is prohibited only for the purpose of founding a general jurisdiction .... The prohibition would not be justified if the dispute is related to that activity or is directly connected to it. Jurisdiction would not in fact be based on "doing business[,"] but rather on "transacting business[,"] which may reflect a sufficient link between the dispute and the State in which the activity is carried on. . . .[135]

In other words, "transacting business," as a basis for specific jurisdiction falls within the "grey zone," so that signatories remain free to employ it against enterprises from other signatory states, even though a judgment rendered on this basis is not entitled to automatic recognition.[136]

C. The Prospects of a Hague Convention

Including the "transaction of business" in the draft convention's "gray" list, while relegating the assertion of general jurisdiction for "doing business" among the prohibited exorbitant heads of jurisdiction, should please the critics of America's overly broad notions of general jurisdiction. This common-sensical compromise solution, however, as well as the attempt to devise more precise jurisdictional provisions than our amorphous "minimum contacts" cum "purposeful availment/direction," has caused consternation within the United States. For example, the represen-

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[135] Id at 78. "Transacting business" includes, for purposes of specific jurisdiction, the activities of subsidiaries. As the report by Professors Nygh and Pocar notes: "a party which seeks to derive gain from commercial activities in a particular State should be subject to the jurisdiction of that State in respect of claims arising out of those activities, notwithstanding the formal means employed for conducting those commercial activities." Id at 56.

[136] The report also notes the advantage of relying on the more settled traditional concepts similar to those used in the Brussels and Lugano Conventions, which are included in the Convention's "white" list of bases that require recognition of the resulting judgment:

> On the other hand, the words "branch, agency or other establishment . . . depend primarily on the formal legal relationship between the subordinate entity and the defendant. The advantage of such a formal approach is that one can arrange one's affairs to avoid jurisdiction without losing commercial advantage in the state where the activity takes place. The disadvantage to consumers and other plaintiffs in that state is obvious.

Report of the Special Commission at 56 (cited in note 132).

tative of the U.S. Department of State has sharply criticized various aspects of the draft convention. As regards jurisdiction, the Department's communication states, in pertinent part:

> We believe that unless there is a clear well-defined permitted area of jurisdiction that allows for growth and development in the future, the convention will not have the flexibility it needs to meet the requirements of a changing world .... Regrettably, the current draft creates rigid principles and factors for prohibiting jurisdiction .... We detected very limited support for [the draft's rules on "transacting business"] .... Yet even that language may not go far enough to satisfy the litigating bar .... This article ties ... a minimum legal standard for jurisdiction to a long illustrative list of ... national jurisdictional practices ... [that] are then declared not to meet the minimum standards.[137]

This language suggests that our State Department is not only concerned about a possible rejection of the draft convention's "transaction of business" provision but would also like to remove "doing business" general jurisdiction from the list of exorbitant bases. In later testimony before the House of Representatives, the Assistant Legal Adviser for Private International Law concluded, after consultations with industry, consumer and legal groups, that "the draft convention is not close to being ratifiable in the United States and cannot be an effective vehicle for final negotiations."[138] Obviously, American-style general jurisdiction was not the only reason for this assessment. Concerns about limiting exorbitant American jurisdictional bases did, however, doubtless play a role. Once the Supreme Court condones a particular jurisdictional practice, vested interests inevitably attach to it. Human rights groups have pressed for retaining *Pennoyer*-style tag jurisdiction to vindicate civil causes of action for human rights viola-

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[137] Letter of Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Department of State dated February 22, 2000 to J.H.A. van Loon, Secretary General of the Hague Conference on Private International Law, available online at <www.cptech.org/ecom/jurisdiction/Kovarletter.html> (visited Nov 7, 2001) [on file with U Chi Legal F].

[138] See Testimony of Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Department of State, Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary of the House of Representatives, available online at <http:www.house.gov/judiciary/kova0629.htm> (visited May 14, 2001) [on file with U Chi Legal F].

tions.[139] In fact, their concerns have induced alternative proposals that are included as bracketed provisions in the current draft.[140] Other groups are equally interested in retaining "doing business" general jurisdiction in the gray list of permitted bases rather than relegating it to the blacklist that would entirely prohibit its use.[141]

The Assistant Legal Adviser mentions a number of organizations from whom the Department of State solicited opinions on the proposed judgments convention, one of which was the Association of Trial Lawyers of America.[142] Obviously, in products liability litigation against foreign manufacturers, for instance, the possibility of relying on general jurisdiction is of considerable practical importance. Even if a particular court might be skeptical about the propriety of exercising it, or is inclined to dismiss a suit brought on this basis on forum non conveniens grounds, the in terrorem effect of potential litigation in the United States should not be underrated. Abroad such American peculiarities as jury trials in civil matters, which often produce verdicts that by foreign standards are excessive, punitive damages and our wide-ranging discovery are viewed with dismay.[143] Hence the mere prospect of a lawsuit in this country may prompt alien defendants to settle rather than incur the risk that a case will indeed be tried here. Other areas of interest to attorneys are actions against foreign enterprises that employed slave labor or violate American antitrust laws. The latter should also interest the "federal agencies with substantial litigation interests,"[144] to which the Assistant Legal Adviser refers.[145]

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139 See Report of the Special Commission at 80 (cited in note 132).

140 Id.

141 Id.

142 See Testimony of Jeffrey D. Kovar at n 2 (cited in note 138) (listing organizations and interest groups with whom the U.S. State Department has consulted regarding the Hague Conference negotiations).

143 For a general discussion, see Rolf Sturner, *Some European Remarks on a New Joint Proposal of the American Law Institute and Unidroit*, 34 Intl Law 1071, 1074 & n 13 ("For European continental critics this [jury trial] sometimes appears to be more of a drama than a due process of law to find the truth and to give a fair judgment.").

144 See Testimony of Jeffrey D. Kovar (cited in note 138) (identifying "federal agencies with substantial litigation interests as one of the groups with whom the U.S. Department of State has consulted").

145 Equally interested are counsel who represent clients that have private causes of action for such violations. See William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 L & Pol in Intl Bus 363, 380 (2001) (noting that the "net effect" of the Draft Convention on antitrust cases involving foreign corporations would probably be very limited).

D. Congressional Action

Overly aggressive jurisdictional assertions that are incompatible with prevailing notions in other nations are not the only reasons to explain why the prospects of reaching a consensus in The Hague look dim and the Senate is unlikely give its advice and consent.[146] Accordingly, the American delegation cannot show the same measure of flexibility it expects from the other delegates. Its hands are tied by precedents, even if a particular basis may be perfectly acceptable to the vast majority of, or even all, foreign nations. It is therefore highly unlikely that the Hague negotiations will prompt what may well be viewed as an overdue reform of domestic jurisdictional law.

But there remains another avenue to accomplish this end. The American Law Institute has on the drawing board a project envisaging the preparation of draft legislation to be submitted to Congress that would federalize the American law of judgments recognition, an area currently left to the states.[147] Such an act would either incorporate the Hague Convention into domestic law or, in the likely event that the efforts in The Hague should founder, lay down appropriate federal rules. At this stage, it is difficult to gauge the prospects of such legislation. At any rate, to the extent that it would attempt to reduce the scope of general jurisdiction, it too is bound to clash with vested interests. Moreover, Congress is not only busy with many other things, but may also hesitate to encroach on states' rights. Judgments recognition has long been perceived to be within the province of the states, as ample case law and numerous legislative enactments demon-

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[146] Another major reason is rooted in the Supreme Court's insistence on the constitutional nature of our jurisdictional law. Our notions are not only too broad, but they may also be too narrow, as suggested by a comparison of heads of jurisdiction used, for example, in Europe. As the Assistant Legal Adviser has noted:

> Because the Due Process Clause puts limits on the extension over defendants without a substantial link to the forum, the United States is unable to accept certain grounds of jurisdiction as they are applied in Europe under the Brussels and Lugano Conventions. For example, we cannot, consistent with the Constitution, accept tort jurisdiction based solely on the place of injury, or contract jurisdictions based solely on place of performance stated in the contract.

Testimony of Jeffrey D. Kovar (cited in note 138).

[147] See Andreas F. Lowenfield and Linda Silberman, Memorandum to the Council re Proposal for Project on Jurisdiction and Judgments Convention (Nov 20, 1998), available online at <http://www.ali.org/ali/1999_Lowen1.htm> (visited Nov 7, 2001) [on file with U Chi Legal F].

strate.[148] But even if the Congress should be inclined to federalize judgments recognition, it seems unlikely that it would use the occasion to reform the law of jurisdiction. Apart from states' rights considerations, given the Supreme Court's insistence on the constitutional nature of jurisdictional law, congressional action might amount to an exercise in futility.

E. The Supreme Court

Thus, it seems that only the Supreme Court can remedy the situation it has created. In the future, it could conceivably choose to follow the suggestions of legal writers and revise its views on general jurisdiction.[149] That, however, seems quite unlikely. It took the Court sixty-seven years to discard the obviously misguided *Pennoyer* principles. For the next fifty-six years it has struggled, less than successfully, to make those principles it adopted in *International Shoe* work. Not only do the Justices seem disinclined to resort to a comparative approach to guide jurisdictional reform, but if past decisions are any indication, their grasp of jurisdictional ideas is tenuous at best. Moreover, at present they happen to be preoccupied with topics of greater political import than the intricacies of civil procedure.[150] But even if they were inclined to devote their efforts to the reform of the American law of jurisdiction, they might find it difficult to deal with the subject. Neither *International Shoe* nor subsequent precedents have established a clear line of demarcation between general and specific jurisdiction. Nor have legal writers, who hold widely diverging views on this point,[151] been able to clarify what belongs to one category and what to the other. In the absence of a scholarly consensus on that point, the Court cannot be expected to clarify the subject at any time in the foreseeable future.

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148 For a general discussion, see Juenger, 65 U Colo L Rev 1 (cited in note 1).

149 See Part III F.

150 Important decisions currently on the Court's docket include *Simmons-Harris v Zelman*, 234 F3d 945 (6th Cir 2000), cert granted 122 S Ct 23 (2001) (school vouchers) and *Rucker v Davis*, 237 F3d 1113 (9th Cir 2001), cert granted as *Department of Housing and Urban Development v Rucker*, 122 S Ct 24 (2001) (eviction of public housing tenants for drug related activity).

151 See Part III E.

CONCLUSION

Concluding allows me an opportunity to offer some observations on Professor Epstein's paper[152] and to revisit the themes of this essay. It seems extraordinarily unlikely that Professor Epstein's proposed resurrection of an "implied" or "hypothetical" consent principle will heal American jurisdiction's self-inflicted wounds.

A major difficulty is a small matter of history: "consent" has been tried before as a unifying jurisdictional principle. Now as to actual consent, I heartily agree that parties ought to be able to engage in real bargaining over the place of suit. I have many times commented favorably on the Supreme Court's decision in *The Bremen v Zapata Off-Shore Co*,[153] where two companies—one American and the other German—of equal bargaining power agreed in advance to litigate their dispute in England and the Supreme Court held them to their bargain.[154] Law and economics, however, has never been put to worse use than in the Supreme Court's decision in *Carnival Cruise Lines, Inc v Shute*.[155] Professor Epstein nonetheless regards *Carnival Cruise Lines* as so obviously correct that he wonders why it even required the Supreme Court's intervention to establish the principle.[156] The short answer, of course, is that the Ninth Circuit's opinion in *Carnival Cruise Lines*[157] had it right in refusing to enforce the purported forum-selection clause on the grounds that the consumer was at such a disadvantage that the bargain ought not be enforced.[158] Indeed, even law-and-economics icon Judge Posner commented on the Ninth Circuit opinion: "If ever there was a case for stretching

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[152] Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U Chi Legal F 1.

[153] 407 US 1 (1972).

[154] See, for example, Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 Am J Comp L 195, 199 (1997) (describing *The Bremen* as a "landmark" case).

[155] 499 US 585 (1991). See Juenger, 65 U Colo L Rev at 16 (cited in note 1) ("Has law and economics ever been put to worse use than in Justice Blackmun's opinion in *Carnival Cruise Lines, Inc. v Shute*?"). See also Russell J. Weintraub, *Case One: Choice of Forum Clauses*, 29 New Eng L Rev 553, 555 (1995) ("*Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), applying economic theory apparently gleaned from the back of a bubble gum wrapper, enforced the clause.").

[156] Epstein, 2001 U Chi Legal F at 10 (cited in note 152) ("In my view, the outcome of [*Carnival Cruise Lines*] is so clearly correct that it is hard to understand why it had to be litigated to the Supreme Court in the first place.").

[157] *Shute v Carnival Cruise Lines Inc*, 897 F2d 377 (9th Cir 1990).

[158] Id at 387–89 (discussing federal cases reviewing similar forum selection clauses and concluding that "this case suggests the sort of disparity in bargaining power that justifies setting aside the forum selection provision").

the concept of fraud in the name of unconscionability, it was *Shute*; and perhaps no stretch was necessary."[159] A close examination of the facts of the case reveals that the clause was not part of a two-sided exchange even in the fictional sense: the Shutes did not get notice of the forum-selection clause until after they had paid their money and no refund was possible.[160]

When one moves away from the relatively narrow area of forum-selection clauses any pretense of actual consent disappears. In its place appear wholly fictional notions of "implied" and "hypothetical" consent. Other modern scholars have occasionally suggested a resurrection of these metaphors.[161] "Consent" of this kind does not, however, seem to be a promising foundation upon which to build the house of jurisdiction, and this is why the Supreme Court abandoned the metaphor after a century or so of experimenting with it.

At bottom, Professor Epstein's proposal is infected with the same disease that afflicts the current regime. Whether the metaphor is power, consent, "purposeful availment," or "minimum contacts," the fundamental problem is that the Supreme Court, acting on the doubtful premise that the Due Process Clause requires the constitutionalization of jurisdictional doctrine, remains the final arbiter. If one wishes, as does Professor Epstein, to make the current jurisdictional regime more efficient, then the proper target is the transaction costs generated by the unnecessary uncertainties in the law caused by judicially invented metaphors. An overactive and vacillating judiciary has left the United States without the hope of any meaningful statutory guidance on the subject.[162] As a result, jurisdiction remains the perpetual joker in the deck by giving the losing party an incentive to continue litigating and appealing—on an issue wholly divorced from the merits of a case—because a jurisdictional reversal might force the parties to throw their cards back in the pile for a new deal.[163]

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159 *Northwestern National Insurance Co v Donavan*, 916 F2d 372, 376 (7th Cir 1990).

160 See *Shute*, 897 F2d at 389 n 11. See also Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after* Carnival Cruise*: A Proposal for Congressional Reform*, 67 Wash L Rev 55, 59, 73 (1992).

161 See, for example, Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 Geo Wash L Rev 849, 898–905 (1989) (arguing that "political consent" is a necessary and proper basis for personal jurisdiction).

162 Juenger, 65 U Colo L Rev at 22 (cited in note 1).

163 For empirical verification that procedural statutes provide greater predictability than the common law counterparts, see Patrick J. Borchers, *Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability*, 60 La L Rev 1061 (2000).

Indeed, Professor Epstein's own discussion of tort problems suggests that his proposal might be worse than the current mess.[164] While his paper contains extensive critiques of the Supreme Court's non-tort jurisdictional cases, when Professor Epstein confronts torts he resorts to a notion of "hypothetical" consent and mostly discusses fictional instead of real cases. But even with an admittedly simple example—"X in state A shoots a gun that hits Y in state B"[165]—the consent metaphor struggles mightily to solve the problem of whether Y can sue at home or must go to tortfeasor X's state.[166] The minimum contacts test has, at least, been able to generate a fairly predictable "effects" test for intentional torts.[167] If conceptual gymnastics are needed to solve simple problems, the mind boggles at the thought of entrusting courts armed with the consent metaphor to resolve cross-border environmental torts, multistate products liability actions and all the other stuff of modern tort litigation. Would not it be better to do as the Europeans have done and dispense with the metaphors and the consequent judicially-created uncertainty and instead draft some relatively clear statutory rules? The verdict of history and the comparative method is a resounding "yes."

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164 Epstein, 2001 U Chi Legal F at 30–31 (cited in note 152).

165 Id at 30.

166 Id.

167 See Scoles, et al, *Conflict of Laws* § 7.3 at 360–63 (cited in note 109) ("The very nature of these torts usually locates the actions and the consequences in one place. As a result, courts have had little difficulty asserting jurisdiction over a defendant, if the tort took place in the forum, even if the defendant was there only casually.").