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Mary Twitchell

Mary.Twitchell@chicagounbound.edu

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Why We Keep Doing Business with Doing-Business Jurisdiction

Mary Twitchell[†]

This Article discusses a change of heart I have had concerning general jurisdiction. In the past, I have advocated cutting back on “doing-business” general jurisdiction, limiting it to the place of incorporation and the defendant’s principal place of business.¹ My reason was simple: courts were using general jurisdiction theory to reach defendants in cases in which such dispute-blind jurisdiction was improper.² Not only was this unfair to defendants, but the practice interfered with the rational development of both general and specific jurisdiction doctrines.

Rather than proposing a test modifying the reach of doing-business jurisdiction, I suggested that we eliminate it entirely, restricting general jurisdiction to the defendant’s home—that is, to its place of incorporation and principal place of business.³ I suggested this because there was no other place to draw a clear line, and clarity seemed the best way around the problem I had identified. As soon as general jurisdiction is extended to other states where the defendant engages in commercial activities, it becomes almost impossible to create a predictably useful body of law.

This suggestion is very close to the jurisdictional plan proposed in the preliminary draft of the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.⁴ The Hague proposal allows suit on any claim in a defendant’s home state and provides for specific jurisdiction in other

[†] Professor of Law, Levin College of Law, University of Florida. Thanks to Tom Cotter and my research assistant Allen Winsor for their help with this Article.

¹ Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv L Rev 610 (1988).

² See id at 611–22, 633–43.

³ See id at 676.

⁴ See Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters Art 4 (“Hague Draft Proposal”) (adopted Oct 30, 1999) available online at <<http://www.hcch.net/e/conventions/draft36e.html>> (visited Oct 22, 2001).

places in a limited number of circumstances.⁵ However, it specifically forbids jurisdiction “based on the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities.”⁶ I should be pleased with this scheme, but in fact I am not. I am no closer to locating a satisfactory test for doing-business jurisdiction than in the past, but I am persuaded that we are not ready to give it up entirely and probably should not do so even if we could.

This Article explores these misgivings and offers two suggestions for a way out of the problem. Part I addresses the underlying rationale for doing-business jurisdiction, arguing that scholars and the Supreme Court have failed to settle on a coherent view of this jurisdictional doctrine. Part II shows how this lack of theoretical coherence has led to serious problems in the application of the doctrine, specifically in terms of the malleability and unpredictability of the standard and the distortion produced by the fact that claims are often related to the defendant’s forum activities. After Part III describes the advantages of this loose approach, Part IV weighs the disadvantages suffered by foreign commercial defendants and explores the solution offered by the Hague conference draft. Part V then considers the alternative solutions which might be more in keeping with American constitutional and political realities. The Conclusion ultimately recommends that, of these options, the best approach to the exercise of “doing-business” jurisdiction over foreign defendants would be the adoption of a modified Hague proposal or a return by the Supreme Court to a purer standard for general “doing-business” jurisdiction in which such jurisdiction is permitted only if the state would be justified in deciding a claim that is wholly unrelated to the defendant’s forum contacts.

I. THE BAFFLING RATIONALE FOR DISPUTE-BLIND JURISDICTION

Both the theory and practice of doing-business jurisdiction are problematic. Courts seem to have articulated a fairly

⁵ See *id.* at Art 6 (exceptions for suits regarding contracts); Art 7 (exceptions for suits regarding consumer contracts); Art 8 (exceptions for suits regarding individual employment contracts); Art 9 (exceptions for suits regarding defendant’s branch office if such office is related to the suit); Art 10 (stating that suit may be maintained where tortious activity took place); Art 11 (stating that a suit regarding a trust may be maintained where trust is administered or in forum most closely related to the trust); Art 12 (exceptions for suits regarding specific property); Art 14 (exceptions for multiple defendants); Art 15 (exceptions for counterclaims); Art 16 (exceptions for third party claims).

⁶ *Id.* at Art 18(2)(e).

straightforward standard for doing-business jurisdiction: states have general jurisdiction over corporations doing continuous and systematic business in the forum.⁷ But beneath this formula lies a series of hard questions. As Professor Juenger has pointed out, in the late nineteenth and early twentieth centuries our courts struggled to determine the theoretical basis for this form of jurisdiction, working uneasily with concepts of presence, consent, and implied consent.⁸ Ironically, despite their attempts to ground general jurisdiction in principles of private international law, the rule that American courts developed for doing-business jurisdiction is regarded as exorbitant by almost all members of the international community.⁹ This lack of a firm theoretical underpinning, coupled with the practical problems courts encounter in applying the doctrine today,¹⁰ makes its practice today more the product of circumstance and compromise than of a principled application of a well-developed theory.

A. Scholars and the Search for a Theory of General Jurisdiction

The principle of doing-business jurisdiction seems simple on the surface: the defendant business has such strong ties with the state that it may be sued there on any cause of action.¹¹ What is particularly troubling about the doctrine is the notion that a forum can hear *any* claim asserted against a defendant having regular and consistent commercial activities in the forum, no matter how removed the facts of the claim are from those activities. Why do we give a forum this power?

⁷ See *Perkins v Benguet Consolidated Mining Co*, 342 US 437, 438, 447–48 (1952) (finding general jurisdiction where defendant corporation's forum activities were "continuous and systematic, but limited"). See also Sarah R. Cebik, "A Riddle Wrapped in a Mystery Inside an Enigma": *General Personal Jurisdiction and Notions of Sovereignty*, 1998 Ann Surv Am L 1, 7 (noting that the Supreme Court uses the "continuous and systematic" test for general jurisdiction). But see text accompanying notes 44–48 and 57–60 (arguing that the Court does not intend that "continuous and systematic" contacts be sufficient in all cases).

⁸ See generally Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U Chi Legal F 141, 145–53 (describing theoretical development of general jurisdiction in early cases).

⁹ See *id.* at 146–49, 159, 161–63. England and Japan, to some extent, are limited exceptions. See note 99.

¹⁰ See Part II A.

¹¹ See *International Shoe Co v Washington*, 326 US 310, 318 (1945) (noting that in some prior cases, the defendant's "continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities"). See also Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv L Rev 1121, 1148–53 (1966) (introducing the "general" and "specific" terminology).

1. Lea Brilmayer's "insider" approach.

Several commentators have attempted to identify the theoretical underpinnings of the doing-business doctrine.¹² Lea Brilmayer has proposed one of the most useful and widely-regarded rationales for a state's power to exercise general jurisdiction over a defendant doing business in a state. General jurisdiction is available at the defendant's home base or where he engages in systematic activity, she explains, because such "[s]ystematic unrelated activity, such as domicile, incorporation, or doing business, suggests that the person or corporate entity is enough of an 'insider' that he may safely be relegated to the State's political processes."¹³ A defendant engaging in substantial commercial activities within a forum should be held just as broadly accountable in the state's courts as would a local business.¹⁴ Convenience considerations also support this broad jurisdiction, she argues, for the very same reasons that courts permit it at the defendant's home base:

To the extent that defending in one's domicile is convenient, litigating where one carries on continuous and systematic activities is also likely to be convenient. Similarly, allowing suit where the defendant is so engaged serves the plaintiff's convenience by providing a more definite forum; indeed, a test that focuses on continuous and systematic activities eliminates the uncertainty of proving which of several places is the defendant's principal place of business. *Most importantly, the reciprocal benefits rationale obtains when the defendant carries out substantial activities, which implicate the police powers and public facilities of the state.*¹⁵

¹² See Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S Ct Rev 77; Lea Brilmayer, et al, *A General Look at General Jurisdiction*, 66 Tex L Rev 723 (1988); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex L Rev 689 (1987); Cebik, 1998 Ann Surv Am L at 7 (cited in note 7).

¹³ Brilmayer, 1980 S Ct Rev at 87 (cited in note 12). For a more detailed development of Professor Brilmayer's general jurisdiction theory, see Brilmayer, et al, 66 Tex L Rev 723 (1988) (cited in note 12).

¹⁴ See Brilmayer, et al, 66 Tex L Rev at 742 (cited in note 12). See also Cebik, 1998 Ann Surv Am L at 26-31 (cited in note 7) (discussing Brilmayer's test in depth and suggesting an alternative approach).

¹⁵ Brilmayer, et al, 66 Tex L Rev at 741 (emphasis added) (cited in note 12).

The “reciprocal benefits” rationale is what interests me here, since it attempts to explain (without quite succeeding) why “doing-business” jurisdiction is so broad—why it gives the forum power to decide any claim arising from defendant’s activities anywhere in the world.

A quid-pro-quo justification works well for specific jurisdiction. The scope of the defendant’s activity defines the scope of the risk. As the Supreme Court noted in *World-Wide Volkswagen Corp v Woodson*:¹⁶

[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.¹⁷

This is a logically appealing result: a defendant that actively markets its products in other states should expect to be subjected to suits there arising from injuries caused by its defective products.¹⁸ While the burden of defending a particular suit in the state may be greater than the benefits derived from the particular state-related activity,¹⁹ the scope of the *risk* of being subject to jurisdiction in the state is proportionate to the scope of the defendant’s forum-related activities.

There is, however, no equivalent proportionality for an *activities*-based general jurisdiction. Regular and continuous activity in the forum may benefit the defendant in many regards, but this alone does not justify the burden of *unlimited* jurisdic-

¹⁶ 444 US 286 (1980).

¹⁷ *Id* at 297.

¹⁸ See *International Shoe Co v Washington*, 326 US 310, 319 (1945):

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

¹⁹ See Stein, 65 Tex L Rev at 736 (cited in note 12) (noting that the burdens of possible jurisdiction often far outweigh the benefits conferred by the forum state).

tional exposure in that forum.²⁰ Calling such a defendant an “insider” may point us in the right direction, but a look at the current case law shows us that greater clarification is necessary.

Our courts have exercised general jurisdiction over defendants with no physical presence in the forum—whose only contacts are purchases from forum sellers,²¹ sales to forum customers through third parties,²² or even purchases by web site or mail order²³—sometimes using this same reciprocal benefits rationale.²⁴ By relying solely on a finding of “continuous and systematic contacts” and the reciprocal benefits justification, without further exploring the question of whether this defendant should be regarded as an “insider,” courts are applying a theory that makes perfect sense in the context of specific jurisdiction and extending it to general jurisdiction without carefully examining the wisdom of that extension. Such courts have, in effect, modified the *World-Wide Volkswagen* proposition so that it reads:

[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to *any suit whatsoever* in one of those States²⁵

²⁰ But compare Brilmayer, et al, 66 Tex L Rev at 732–33 (cited in note 12) (elaborating on the reciprocal benefits and burdens rationale as the strongest basis for the state’s exercise of coercive power over a domiciliary defendant).

²¹ See, for example, *Pearl Brewing Co v Trans-USA Corp*, 1997 WL 340940, *3 (N D Tex 1997) (finding general jurisdiction over a distributor that bought products of a forum manufacturer).

²² See *Michigan National Bank v Quality Dinette, Inc*, 888 F2d 462, 465–66 (6th Cir 1989) (finding general jurisdiction over a defendant making sales in the forum through an independent sales representative).

²³ See, for example, *American Type Culture Collection, Inc v Coleman*, 26 SW3d 37, 39–40, 52 (Tex App 2000) (finding general jurisdiction over a defendant whose only contact with the forum was through mail order sales).

²⁴ See, for example, *Wise v Lindamood*, 89 F Supp 2d 1187, 1193 (D Colo 1999) (articulating a finding of general jurisdiction in terms of reciprocity, holding that “because [defendant] enjoyed the benefits and protections of Colorado’s laws, it must now submit to the burdens of litigation in Colorado”); *Publications International, Ltd v Burke/Triolo, Inc*, 121 F Supp 2d 1178, 1183 (N D Ill 2000) (finding that sales made over defendant’s web site established general as well as specific jurisdiction, and using “benefits and burden” language).

²⁵ Modifying *World-Wide Volkswagen*, 444 US at 297. See text accompanying note 17.

2. The “adoptive home” and “core policy/activities” approaches.

While agreeing with Professor Brilmayer that the theoretical basis for general jurisdiction over corporations rests squarely on the question of the proper allocation of sovereign authority among the states, two other commentators have found different ways to frame the standard.²⁶ Allan Stein argues that: “The task of defending the reach of a state’s authority for jurisdictional purposes is similar to the task of defining a state’s appropriate ‘interests’ in modern conflict-of-laws doctrine.”²⁷ In Professor Stein’s view, the standard for doing-business jurisdiction should be whether the defendant has “adopted” the state as its sovereign.²⁸ Arguing for a “pervasive and systematic” contacts requirement, he suggests that courts should determine “whether the defendant has adopted the forum as its sovereign. Has it, for most other purposes, treated the forum as its home, notwithstanding its domicile elsewhere?”²⁹ It is not clear what a court should look for in making the determination that a corporation “treats the forum as its home” for “most purposes,” but the standard may be higher than that applied using Professor Brilmayer’s “insider” test.

Sarah Cebik has posited a more specific and limited test for general jurisdiction based on a “realist” theory of sovereign authority.³⁰ She proposes that the foundational question be framed

²⁶ See Stein, 65 Tex L Rev at 722 (cited in note 12) (noting that “the validity of a state’s assertion of jurisdiction is tested expressly by whether the state is acting within the sphere of sovereign prerogative allocated to it within the federal system”); Cebik, 1998 Ann Surv Am L at 23–25 (cited in note 7) (suggesting that the minimum contacts test be recharacterized as an inquiry into whether a defendant’s activity within a state is such that the state “has an interest in the defendant regardless of the particular controversy underlying the cause of action”).

²⁷ Stein, 65 Tex L Rev at 741 (cited in note 12).

²⁸ According to Professor Stein:

A similar analysis applies to assertions of “general jurisdiction” over non-citizens who have pervasive and systematic contacts with the forum and therefore legitimately can be treated as constructive state citizens. At the risk of resurrecting the social contract theory of personal jurisdiction, the state’s relationship with its residents does not appear significantly different from its relationship with its citizens. The fairness of a state’s jurisdiction over its citizens is based on a perceived equitable exchange of the privileges of citizenship for its burdens. Accordingly, it is appropriate to permit jurisdiction over persons who have structured a citizen-like relationship with the forum to the same extent that jurisdiction over absent citizens would be sustained.

Id at 758 (citation omitted).

²⁹ Id.

³⁰ See generally Cebik, 1998 Ann Surv Am L 1 (cited in note 7).

as what sort of “interest” the state has in the defendant which would be recognized by other states if all states were to negotiate for a uniform standard for general jurisdiction:

If [a state] claims to have an interest in the defendant (or, in the case of specific jurisdiction, in the relation of the defendant’s forum activities to the cause of action), that interest must be somehow related to this function as the determiner of rights and duties. Thus, an “interest” in the defendant [sufficient for general jurisdiction] is legitimate if the state would have a reason to be concerned about the rights and duties of the defendant *under any circumstances* The point at which a state will be concerned with the rights and duties of a defendant under any and all circumstances is not immediately obvious [I]t is largely a matter of practice and custom.³¹

She concludes that three conditions would create a sufficient interest in a state to support general jurisdiction: if the defendant is incorporated under the state’s law, if the defendant shapes its corporate policy within the state, or if the defendant conducts its core activities in the state.³² In all other cases, she argues, activities-based jurisdiction would be inappropriate.³³

These attempts to identify the constitutional basis for doing-business jurisdiction make one point clear: it is difficult to discover a rationale that will make it easy to draw a reasonably clear line between forum-related commercial activities that should support jurisdiction for any and all purposes and those activities which should not. Indeed, the greater the focus on the state’s interest in the defendant as the source of its power to decide any and all claims, the harder it is to decide which set of forum-related actions creates the appropriate interest. When does a defendant “adopt” a state: when it works in a local office in the state, when it locates a store close to the state’s border, when it sells products or provides services to forum residents, or when it buys products from forum residents from a distant location? What if it conducts one of these activities—or any other forum-related commercial activity—through a third party with ties to the state?

General concepts of the state’s interest tell us little about why a line might be drawn in one place and not another. We

³¹ Id at 33 (emphasis added).

³² Id at 36.

³³ Id at 40.

know only that some guidance is required, and it would be helpful if it came at a theoretical level, without regard to the nature of the claim, since the very point of general jurisdiction is that the state's authority derives from the defendant's relationship with the state and not from the nature of the claim to be decided.

B. The Impact of Supreme Court Cases on Theory

1. *Burnham* and the benefits/burden rationale.

As important as it is to develop a solid theoretical foundation for doing-business jurisdiction, given the Court's marked failure to develop a coherent theory of personal jurisdiction,³⁴ it is unlikely that we will soon agree on a core approach. If there was ever any hope of arriving at a clearly articulated theory for general jurisdiction, the decision in *Burnham v Superior Court of California*³⁵ probably signaled an end to that hope.

In *Burnham*, the Court unanimously upheld general jurisdiction over a defendant served while traveling in the forum. The Court's split decisions offered no rationale sufficiently robust to provide a meaningful explanation of the state's authority to decide any and all claims asserted against an individual defendant who is served with process within the forum.

Four of the Justices based their decision solely on the historical pedigree of service jurisdiction, making no attempt to explain the theoretical basis for this power.³⁶ The remaining four Justices appropriately challenged this rationale as untenable in the face of *Shaffer v Heitner*,³⁷ which required that "all assertions of state court jurisdiction" be evaluated under the standards set forth in

³⁴ Despite strong and persuasive scholarship, the Court has not developed a clear theoretical basis for personal jurisdiction. See generally Stein, 65 Tex L Rev 689 (cited in note 12) (arguing that any theory of personal jurisdiction must be based on the allocation of power among the states); Linda J. Silberman, "Two Cheers" for International Shoe (*And None for Asahi*): An Essay on the Fiftieth Anniversary of International Shoe, 28 UC Davis L Rev 755 (1995) (criticizing the addition of a separate "reasonableness" prong to the personal jurisdiction test); Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U Cin L Rev 385 (1998) (stating that the Court's emphasis on foreseeability of suit renders personal jurisdiction doctrine "fundamentally incoherent"); Martin H. Redish, *Of New Wine and Old Bottles: Personal Jurisdiction, the Internet, and the Nature of Constitutional Evolution*, 38 Jurimet J 575, 577-78, 606-10 (1998) (noting that the "purposeful availment" standard is unworkable and proposing a test that looks at only two factors: a threshold requirement of state interest and avoidance of significant procedural burdens and inconveniences for the defendant).

³⁵ 495 US 604 (1990)

³⁶ *Id.* at 610-19 (Scalia plurality).

³⁷ 433 US 186 (1977).

*International Shoe Co v Washington*³⁸ and its progeny,³⁹ but then proceeded to offer an even more outrageous fairness justification: anyone traveling into the forum has benefited from the state's highways and police powers and could use the state courts if he so chose. Therefore, it is fair to subject him to jurisdiction there on any transitory cause of action, as long as he is served within the state.⁴⁰ One must agree with Justice Scalia, who scoffingly questioned what sort of quid pro quo this was:

Three days' worth of these benefits strike us as powerfully inadequate to establish, as an abstract matter, that it is "fair" for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the 10 years of his marriage, and the custody over his children. We dare say a contractual exchange swapping those benefits for that power would not survive the "unconscionability" provision of the Uniform Commercial Code.⁴¹

After *Burnham*, we are left with no theory for understanding general jurisdiction and with little prospect that the Court will put meaningful limits on doing-business jurisdiction in the future since it easily satisfies both *Burnham* rationales. It is indeed a venerable form of American jurisdiction, challenged by the acad-

³⁸ 326 US 310 (1945).

³⁹ See *Burnham*, 495 US at 629–33 (Brennan concurring) (discussing *Shaffer*, *International Shoe* and subsequent cases).

⁴⁰ *Id.* (citations omitted):

By visiting the forum State, a transient defendant actually 'avail[s]' himself . . . of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy as well. Moreover, the Privileges and Immunities Clause of Article IV prevents a state government from discriminating against a transient defendant by denying him the protections of its law or the right of access to its courts. . . . Subject only to the doctrine of forum non conveniens, an out-of-state plaintiff may use state courts in all circumstances in which those courts would be available to state citizens. Without transient jurisdiction, an asymmetry would arise: A transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant.

See also Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 Rutgers L J 659, 661–62 (1991) (criticizing Brennan's rationale).

⁴¹ *Burnham*, 495 US at 623. The "benefits" questioned by Justice Scalia included "the fact that . . . [h]is health and safety [were] guaranteed by the State's police, fire, and emergency medical services; he [was] free to travel on the State's roads and waterways; [and that] he likely enjoy[ed] the fruits of the State's economy." *Id.*

emy less often than tag jurisdiction.⁴² Furthermore, the benefits received by a defendant with continuous commercial activities within a state certainly exceed the thin potential benefits received by the hapless traveler who barely sets foot in the forum's territory. For better or for worse, it is unlikely that we can find any help for general jurisdiction at the theoretical level.

2. Designing a theory: the confounding problem of scope.

This lack of sound general jurisdiction theory affects doing-business decisionmaking in a very particular way. Since general jurisdiction rests wholly on the special relationship between the defendant and the state, the nature of the cause of action is immaterial for determining its presence or absence. Jurisdiction for any and all purposes necessarily means jurisdiction over any and all causes of action.

Theorists are asking what it is about the *nature* of the defendant's ties to the state that will justify its assertion of a state's plenary judicial authority. Courts deciding actual cases, however, do not make general jurisdiction decisions in a vacuum. Instead, they are confronted by a particular case that often bears some connection to the defendant's forum contacts. Without better guidance concerning the basis for doing-business jurisdiction or the means to make distinctions between strong and weak cases, it is not surprising that judges may be influenced by the nature of the claim actually presented. The following sections will examine the approach of courts in making doing-business decisions, with particular attention to this difficult problem of scope.

⁴² See, for example, Brilmayer, et al, 66 Tex L Rev at 735-48, 754-55 (cited in note 12) (accepting doing-business general jurisdiction while arguing that "transient jurisdiction has outlived its theoretical justifications"); Patrick J. Borchers, *Competing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 Am J Comp L 121, 134-35 (1992) (noting that general jurisdiction based on continuous and systematic activities is more reasonable than general jurisdiction based on in-state service of process); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction*, 22 Rutgers L J 597, 608 (1991) (asserting that where there is no connection between forum and litigation, using personal service as the basis for jurisdiction is "offensive," and implicitly endorsing the need for continuous and systematic contacts).

II. PROBLEMS WITH APPLICATION

A. The Malleable Standard: It All Depends on the Meaning of "So"

Just as troubling as its uncertain rationale is the weak "continuous and systematic" standard that lower courts frequently apply when deciding whether doing-business jurisdiction exists. The phrase "continuous and systematic" appears in Supreme Court jurisdiction cases, and lower courts often use this standard as the sole touchstone for this form of jurisdiction.⁴³ Yet our Supreme Court precedents, however meager, indicate that finding "continuous and systematic" contacts should only be the starting point of the doing-business inquiry.

1. Source of the "continuous and systematic" standard: the Supreme Court cases.

a) *International Shoe's language*: "so substantial and of such a nature." While the phrase "continuous and systematic" appears in *International Shoe*,⁴⁴ it is important to recognize that it appears only when the court is describing cases in which *specific* jurisdiction is clearly justified:

"Presence" in the state in this sense has never been doubted when the activities of the corporation there *have not only been continuous and systematic, but also give rise to the liabilities sued on*, even though no consent to be sued or authorization to an agent to accept service of process has been given.⁴⁵

The Court lists both "continuous and systematic" contacts and a related cause of action as relevant to its finding that jurisdiction over the International Shoe Company is fair on these facts:

⁴³ See, for example, *Arena Football League, Inc v Roemer*, 947 F Supp 337, 340 (N D Ill 1996) (citations omitted) ("It is proper to exercise general jurisdiction over a non-resident defendant that maintained 'continuous and systematic general business contacts' in Illinois."); *Best Buy Co, Inc v Smith & Alster, Inc*, 1998 Minn App Lexis 1424, *5 (citation omitted) ("General jurisdiction, by contrast, arises where the defendant's contacts with the forum state are 'continuous and systematic.'").

⁴⁴ 326 US at 310.

⁴⁵ *Id* at 317 (emphasis added).

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. *They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state The obligation which is here sued upon arose out of those very activities.* It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.⁴⁶

However, the Court introduces a higher, open-ended standard when describing the situations in which *dispute-blind* jurisdiction has been found in the past:

While it has been held in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity . . . there have been instances in which *the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.*⁴⁷

The standard, then, is “continuous” operations within the state that are “so substantial and of such a nature” to justify dispute-blind jurisdiction. The Court offers no further gloss on this vague and open-ended description, but the cases it cites for this point involve defendants who were operating an office within the forum, staffed with their own employees.⁴⁸

⁴⁶ Id at 320 (emphasis added).

⁴⁷ Id at 318 (emphasis added) (citations omitted).

⁴⁸ The *International Shoe* Court cited *Missouri, Kan & Tex Railway Co v Reynolds*, 255 US 565 (1921) and *Tauza v Susquehanna Coal Co*, 220 NY 259 (1917). *International Shoe*, 326 US at 318. In *Reynolds*, the Supreme Judicial Court of Massachusetts upheld a lower court decision exercising jurisdiction over a corporation with a passenger agent headquartered within the forum. *Reynolds v Missouri, Kan & Tex Railway Co*, 117 NE 913, 914 (1917). In *Tauza*, the New York Court of Appeals exercised jurisdiction over a corporation headquartered outside of the forum that operated a branch office in New York with at least nine employees working out of the office. *Tauza*, 220 NY at 265, 268. The Second Circuit’s decision in *Hutchinson v Chase & Gilbert, Inc*, 45 F2d 139, 141 (2d Cir

While *International Shoe* does not tell us more about what is necessary for this dispute-blind jurisdiction, the Court is clearly not saying that dispute-blind jurisdiction exists *whenever* “continuous and systematic” contacts are found. Indeed, it is difficult to imagine that the Court would have permitted jurisdiction over the International Shoe Company in Washington if the claim had concerned, say, a contract dispute between the defendant corporation and one of its Missouri sales representatives. The corporation’s “systematic and continuous” contacts made the specific jurisdiction question easy, but the Court’s language here clearly indicates that something more substantial is necessary for a state’s authority to extend to any and all claims against a defendant.

The question after *International Shoe* should be not whether continuous and substantial contacts exist, but whether they are the type of contacts necessary to justify full-scale general jurisdiction. And the question today might be: what level of activity within a state must a business conduct before we may treat the place of that business like a headquarters or a place of incorporation? Is an office still enough? Why? And what alternative configurations should be enough?

b) *Perkins, Helicopteros Nacionales, and Keeton: not all contacts count the same.* The Supreme Court’s subsequent general jurisdiction decisions, *Perkins v Benguet Consolidated Mining Co*⁴⁹ and *Helicopteros Nacionales de Colombia, SA v Hall*,⁵⁰ do very little to answer these difficult questions. Neither do they support a bare “continuous and systematic” standard. Although both cases use this phrase, each indicates that something more is required. In *Perkins*, the defendant was basically headquartered

1930), was also cited by the *International Shoe* Court in its discussion. 326 US at 317. In *Hutchinson*, Judge Learned Hand expressed some uncertainty about the presence of an office as a basis for jurisdiction:

Possibly the maintenance of a regular agency for the solicitation of business will serve without more. . . . In *Tauza v. Susquehanna Coal Co.*, [] there was no more, but the business was continuous and substantial. Purchases, though carried on regularly, are not enough . . . nor are the activities of subsidiary corporations . . . or of connecting carriers The maintenance of an office, though always a make-weight, and enough, when accompanied by continuous negotiation, to settle claims . . . is not of much significance It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass.

45 F2d at 141–42 (citations omitted).

⁴⁹ 342 US 437 (1952).

⁵⁰ 466 US 408 (1984).

in Ohio, if only temporarily, so this was not a situation in which the defendant was merely “doing business” in the state.⁵¹ In *Helicopteros Nacionales*, the *totality* of the defendant’s contacts with Texas might be characterized as “continuous and systematic,”⁵² yet the Court held that these were not the type of contacts sufficient to support general jurisdiction.⁵³ Perhaps the Court’s decision in *Helicopteros Nacionales* to discount purchases⁵⁴ was influenced by the plea of the Solicitor General that the Court not allow Texas to base general jurisdiction on purchases in the state for fear of damaging export markets,⁵⁵ a fact further supporting the argument that it is the *nature* of a defendant’s continuous and systematic commercial contacts and not their existence that determines whether dispute-blind jurisdiction is both wise and fair. Unfortunately, neither opinion provides further help in determining exactly what that nature might be—except that purchases are not sufficient.⁵⁶

Dicta in *Keeton v Hustler Magazine, Inc*⁵⁷ further supports the argument that general jurisdiction requires a very substantial contact with the forum. The defendant, Hustler Magazine, Inc., an Ohio corporation with its principal place of business in California, sold ten thousand to fifteen thousand copies of *Hustler*

⁵¹ See *Perkins*, 342 US at 447–48. During World War II, the company president maintained an office in the forum, from which he transacted company business. There, he drew salary checks for himself and two employees, maintained and dispatched company funds, oversaw company policies, and attended directors’ meetings. See *id.*

⁵² Over a period of seven years, defendant company sent its chief executive officer to Houston for contract negotiation, received checks drawn on a Houston bank, purchased helicopters, equipment, and training services from a Texas supplier for substantial sums, and sent personnel to Texas for training. *Helicopteros Nacionales*, 466 US at 410–11.

⁵³ The Court stated:

The Texas Supreme Court focused on the purchases and the related training trips in finding contacts sufficient to support an assertion of jurisdiction. We do not agree with that assessment, for the Court’s opinion in *Rosenberg Bros. & Co. v. Curtis Brown Co.* . . . makes clear that purchases and related trips, standing alone, are not a sufficient basis for a State’s assertion of jurisdiction.

Id. at 417.

⁵⁴ See *id.*

⁵⁵ Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 *Tex Intl L J* 501, 507 (1993) (pointing out that the Solicitor General filed an amicus brief urging the Supreme Court to overturn the Texas decision, arguing that basing general jurisdiction on purchases would hurt U.S. foreign markets).

⁵⁶ But see *Harley-Davidson Motor Co v Motor Sport, Inc*, 960 F Supp 1386, 1389 (E D Wis 1997) (finding defendant’s large purchases from a forum manufacturer over a period of twenty years sufficient to support general jurisdiction).

⁵⁷ 465 US 770 (1984).

magazine in the forum each month.⁵⁸ There is no doubt that this level of activity, like the activity in *International Shoe*, would qualify as “continuous and systematic.” Yet in dicta the Court indicated that these contacts might not justify general jurisdiction over an unrelated cause of action:

In the instant case, respondent’s activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities. But respondent is carrying on a “part of its general business” in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.⁵⁹

In the related footnote, the Court added:

The defendant corporation’s contacts with the forum State in *Perkins* were more substantial than those of respondent with New Hampshire in this case. In *Perkins*, the corporation’s mining operations, located in the Philippine Islands, were completely halted during the Japanese occupation. The president, who was also general manager and principal stockholder of the company, returned to his home in Ohio where he carried on “a continuous and systematic supervision of the necessarily limited wartime activities of the company.” The company’s files were kept in Ohio, several directors’ meetings were held there, substantial accounts were maintained in Ohio banks, and all key business decisions were made in the State. In those circumstances, *Ohio was the corporation’s principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State.*⁶⁰

Thus *Keeton* suggests, in keeping with the scant hints in other Supreme Court cases, that something greater than continuous and systematic contacts is required for doing-business jurisdiction—perhaps a place of business, or even a principal place of business.

⁵⁸ Id at 772.

⁵⁹ Id at 779–80.

⁶⁰ Id at 780 n 11 (emphasis added) (internal citations omitted).

2. The doing-business standard in the lower courts: how substantial? And what nature?

Although courts frequently use the “continuous and systematic” language to describe the standard for doing-business jurisdiction,⁶¹ many lower courts, recognizing that something more than continuous and systematic contacts are needed, have required that “substantial” contacts be found.⁶² However, these cases rarely attempt to develop the content of this “substantiality” requirement.⁶³ Indeed, most simply find that there are a *lot* of “continuous and systematic” contacts; therefore they are “substantial.” And, consequently, general jurisdiction exists.⁶⁴

a) “Insiderness” rarely sought. It would be intriguing to see courts work with the notion of “insiderness,” and what that might entail, but they have typically avoided this inquiry.⁶⁵ For

⁶¹ See note 43. See also *Marshall v Inn on Madeline Island*, 610 NW2d 670, 676–77 (Minn App 2000) (finding that the Inn’s contacts supported general jurisdiction under the “continuous and systematic” standard); *McDermott v Cronin*, 31 SW3d 617, 621 (Tex App 2000) (holding general jurisdiction is established when defendant’s contacts are continuous and systematic).

⁶² See, for example, *Anglo American Insurance Group v Calfed, Inc.*, 899 F Supp 1070, 1074 (S D NY 1995) (“Asserting jurisdiction over [the company] comports with the requirement of due process because [the company’s] contacts with New York are substantial.”). Sometimes courts use “substantiality” language because their long-arm statutes require “substantial and not isolated” contacts. See, for example, Fla Stat Ann § 48.193(2) (West 1994) (“A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.”). However, this statutory language causes its own set of problems since it seems to suggest that all contacts necessarily fall into one category or the other, leaving out the entire mid-range: contacts that could not be characterized as “isolated” because there is some continuity, yet which would not be sufficiently “substantial” to justify the exercise of general jurisdiction.

⁶³ The few cases that address the substantiality question in any depth generally do so within the context of deciding whether general jurisdiction exists based on the acts of an agent in the forum. Courts ask whether the agent’s activities were sufficiently related to the defendant’s activities to be considered a “substantial” part of the business. See, for example, *Wiwa v Royal Dutch Petroleum Co.*, 226 F3d 88, 94–95 (2d Cir 2000) (basing general jurisdiction on services performed by an agent in the forum); *Gelfand v Tanner Motor Tours, Ltd.*, 385 F2d 116, 120–21 (2d Cir 1967) (finding that defendant’s agreement with an in-forum travel agent was directly related to defendant’s corporate purpose and therefore supported doing-business jurisdiction).

⁶⁴ See, for example, *Harley-Davidson Motor Co v Motor Sport, Inc.*, 960 F Supp 1386, 1389 (E D Wis 1997), citing *Capitol Indemnity Corp v Certain Lloyds Underwriters*, 487 F Supp 1115, 1117 (W D Wis 1980) (stating that a defendant is engaged in substantial activities within the state when such activities are “systematic and continuous”).

⁶⁵ See Cebik, 1998 Ann Surv Am L at 31 (cited in note 7) (endorsing Brillmayer’s suggestion that courts might examine “insiderness” by asking whether the defendant had been in a position to participate somehow in the forum’s political processes).

example, courts and commentators have argued that the percentage of a company's business in the forum should be irrelevant to such a test—the relevant question is whether the company is acting like a local business, not how much business it is doing in the state.⁶⁶ Yet many courts, struggling to decide whether a defendant with some continuous forum-related activity is doing “enough” for general jurisdiction, regularly consider such numbers because they lack any better guide.⁶⁷ Lobbying activities within the forum should also be of some significance, since that is one way that a corporate insider can influence local lawmaking,⁶⁸ and yet at least one court has ruled that it will not consider lobbying activity in determining whether doing-business jurisdiction exists.⁶⁹

b) *Agency issues: reaching a defendant through its in-state agents.* The question of counting contacts is further complicated by the variety of ways in which commercial entities do business in a state. We have moved a long way from the local office, staffed by local employees, as the major basis for finding doing-business jurisdiction over a foreign defendant. Nonresidents conduct modern commerce through a multitude of arrangements with subsidiaries,⁷⁰ agents,⁷¹ independent contractors,⁷² and even

⁶⁶ See Brilmayer, et al, 66 Tex L Rev at 742 (cited in note 12). See also *Provident National Bank v Cal Federal Savings & Loan Association*, 819 F2d 434, 437–38 (3d Cir 1987) (holding that the size of the percentage of defendant's total business represented by its forum contacts is generally irrelevant).

⁶⁷ See, for example, *Wenche Siemer v Learjet Acquisition Corp*, 966 F2d 179, 181 (5th Cir 1992) (finding it significant that only slightly over one percent of defendant's sales went to buyers with forum addresses); *Northwestern Corp v Gabriel Manufacturing Co, Inc*, 1996 WL 73622, *2 (N D Ill) (considering percentage of business important to the question of whether to assert general jurisdiction).

⁶⁸ See Brilmayer, et al, 66 Tex L Rev at 742 (cited in note 12).

⁶⁹ *Hollar v Philip Morris Inc*, 43 F Supp 2d 794, 801–02 n 6 (N D Ohio 1998) (holding that the “government contacts” doctrine prevents it from considering defendant's extensive lobbying activities within state in deciding personal jurisdiction). This application of the government contacts doctrine to an attempt to lobby state government is curious since the “government contacts” exception was developed to protect those lobbying the federal government. See Hilaire Henthorne Butler, Note, *The Government Contacts Exception to the District of Columbia Long-Arm Statute: Portrait of a Legal Morass*, 36 Cath U L Rev 745, 745 (1987) (noting the exception's purpose of precluding the exercise of personal jurisdiction by the District of Columbia over nonresidents “if the nonresident's only contact in the District of Columbia is through Congress or a federal agency”). At the very least courts or legislatures should decide whether such state lobbying activity should count as a contact in the jurisdictional calculus.

⁷⁰ See *IDS Life Insurance Co v Sunamerica, Inc*, 958 F Supp 1258, 1266–67 (N D Ill 1997) (holding that foreign defendant had insufficient control over a local subsidiary to establish doing-business jurisdiction over the parent).

their own parent corporations,⁷³ using a variety of interstate and international means of communication and contract performance. A person can do enormous business in many states or nations without ever leaving her own computer chair. Advanced technology also facilitates more complex business relationships that do not readily correspond with traditional models of doing business.

Faced with these commercial realities, many courts today must determine what role these intermediate relationships and novel forms of business should play in justifying both specific and general jurisdiction.⁷⁴ When the issue is one of specific jurisdiction, the task is quite straightforward: in exercising its authority to regulate forum activity, the court must decide whether it can reach beyond its borders to a distant defendant based on that defendant's connection to that forum-related activity. When the question is one of general jurisdiction, the court faces a more complex question: can it subject a distant defendant to jurisdiction in *any and all cases* by virtue of that defendant's connection to the forum-related activities of other persons or legal entities?⁷⁵ Given the complexities of these issues, it is little wonder that we have failed to develop any sort of clear understanding of what it takes to be "doing business" in a state sufficient for general jurisdiction, on either a theoretical or practical level.

⁷¹ See *Wiwa v Royal Dutch Petroleum Co*, 226 F3d 88, 94–95 (2d Cir 2000) (basing general jurisdiction on services performed by an agent in the forum state).

⁷² See, for example, *Ontel Products, Inc v Project Strategies Corp*, 899 F Supp 1144, 1147 (S D NY 1995) (stating that defendant's relationship with an in-forum independent contractor could be sufficient to establish general jurisdiction).

⁷³ See, for example, *Larball Publishing Co v CBS, Inc*, 664 F Supp 704, 706–708 (S D NY 1987) (finding that a forum-based parent acted as the agent for a foreign subsidiary). See also Michael G. Albano, Note, *Agency as a Means of Obtaining Jurisdiction in New York Over Foreign Corporations: A Failed Theory*, 20 Brooklyn J Intl L 169 (1993) (criticizing the agency basis for jurisdiction).

⁷⁴ See text accompanying notes 49–60. This is not always a doing-business question; sometimes it is a straightforward specific jurisdiction question in which the court is merely deciding whether to pierce a corporate veil. See, for example, *Snell v Bob Fisher Enterprises, Inc*, 106 F Supp 2d 87, 91–92 (D Me 2000) (refusing to attribute to non-resident defendant corporation the forum contacts of sole proprietorship in order to establish specific jurisdiction).

⁷⁵ See, for example, *Anglo American Insurance Group, PLC v Calfed, Inc*, 899 F Supp 1070, 1073–74 (S D NY 1995) (finding that a New York federal district court could assert personal jurisdiction over an English insurance company that collected millions of dollars in premiums through New York excess line brokers, relied solely on the New York brokers to acquire information about prospective policyholders, complied with extensive New York regulations and guidelines for doing business there, filed annual financial statements with New York, and maintained a sizeable trust fund in New York).

B. The Influence of Related Claims: Justice Slips off the Blindfold

A third force keeps doing-business jurisdiction both unsettled and unsettling. Because general jurisdiction by definition applies to all claims asserted against a defendant, courts frequently must decide whether general jurisdiction exists when the claim is somehow related to the defendant's forum activities.⁷⁶ The relationship between claim and forum activities may greatly influence a court's jurisdictional decision, either implicitly⁷⁷ or explicitly,⁷⁸ although in theory it should not play any role in dispute-blind jurisdiction analysis. In many of these cases, one wonders whether the court would have found the particular contacts sufficiently substantial had they been presented in a case that was wholly unrelated to those activities.⁷⁹

1. Most recent cases involve "related" claims.

In fact, most cases finding general jurisdiction will involve a dispute that is at least tenuously related to the defendant's forum contacts. Of the several hundred reported cases in which general jurisdiction was asserted over a non-American defendant between

⁷⁶ Professor Brilmayer states that courts should decide the relatedness question first, see Brilmayer, et al, 66 Tex L Rev at 736 (cited in note 12) ("Given that general jurisdiction requires a larger number of contacts, determining whether activities are related or connected in the appropriate sense becomes crucial. Resolution of the relatedness issue thus should precede an assessment of the contacts' quantity."). However, courts often do not resolve this issue first, particularly when the general jurisdiction question is easier. See note 83.

⁷⁷ For example, in *Wise v Lindamood*, 89 F Supp 2d 1187, 1193 (D Colo 1999), the court found "general personal jurisdiction" over both an employer and its employee in a copyright infringement suit arising directly out of the defendant employer's forum contacts. If the suit had been filed against the employee based on a wholly-unrelated cause of action, it is unlikely that the court would have found those contacts sufficient for general jurisdiction.

⁷⁸ Sometimes courts consider the very case itself in deciding whether "general" jurisdiction exists. See, for example, *Bruggeman v Meditrust Acquisition Co*, 532 SE2d 215, 219 (NC App 2000) (justifying "personal general jurisdiction" in part because alleged activities for which plaintiffs sought compensation occurred in state and plaintiff was a local resident).

⁷⁹ See, for example, *Future Tech International, Inc v Tae Il Media, Ltd*, 944 F Supp 1538, 1558 (S D Fla 1996) (holding that forum had general jurisdiction over Korean manufacturer based on its business trips to the forum and business communications with individuals in the forum occurring over a period of about a year in a suit involving claims directly related to these activities); *Best Buy Co, Inc v Smith & Alster, Inc*, 1998 Minn App Lexis 1424, *5 (holding that forum had general jurisdiction over a company and its CEO, who, over the course of one year, traveled to the forum twice and sent faxes relating to forum business activities).

January 1995 and September 2000,⁸⁰ courts exercised such jurisdiction in fewer than twenty-five cases.⁸¹ In almost half of the

⁸⁰ Researching general jurisdiction cases is difficult. There is no Westlaw key number for general jurisdiction, which indicates both the good sense of the Westlaw employees and the problem with this area. General jurisdiction and doing-business jurisdiction are mentioned in many cases—far more frequently mentioned than found to exist—and it is sometimes difficult to tell whether a court has actually based its decision on general jurisdiction. See, for example, *Wise v Lindamood*, 89 F Supp 2d 1187, 1193 (D Colo 1999) (mixing general and specific jurisdiction analysis). My research assistant came up with a total of only sixteen reported cases in the last five and one-half years in which courts found general jurisdiction to exist over either domestic or foreign defendants. Skeptical at these results, we went back and tried again with different word searches, this time locating another seventy or so. Thus, of a thousand or so reported opinions mentioning “general jurisdiction” or “doing-business” jurisdiction or “general personal jurisdiction,” fewer than twenty opinions a year actually held that it existed. And of those twenty, only three or four involved foreign defendants. Of course, these are only the reported cases, and presumably many defendants do not litigate the issue at all. See text accompanying note 88. We also went back and looked for cases in the last year involving a foreign defendant and a foreign cause of action in which defendants raised no general jurisdiction defense, but presented either forum non conveniens or choice of law defenses. This research produced only four more cases, which suggests that the number of cases may be fairly small in which general jurisdiction is sought over a foreign defendant that elects to fight the location of the case in U.S. courts or the application of U.S. law to the case.

⁸¹ My research uncovered twenty-one cases in which a court asserted personal jurisdiction over a non-American defendant, although some may have been overlooked. In one case, the court based general jurisdiction on service upon an individual within the forum. See *Kadic v Karadzic*, 70 F3d 232, 246–47 (2d Cir 1995) (asserting general jurisdiction over defendant served while physically present in the forum). In the remaining twenty cases, courts asserted jurisdiction over non-American defendants because they were doing business within the forum. See *Wiwa v Royal Dutch Petroleum Co*, 226 F3d 88, 95–96 (2d Cir 2000) (asserting general jurisdiction over defendant whose agent performed investor relations services in the forum on behalf of defendant); *Huangyan Import & Export Corp v Nature's Farm Products, Inc*, 2000 US Dist Lexis 12335, *14 (S D NY) (asserting general jurisdiction over defendant with substantial banking activities in the forum); *Shaheen Sports, Inc v Asia Insurance Co, Ltd*, 89 F Supp 2d 500, 503 (S D NY 2000) (asserting general jurisdiction over defendant whose agent settled insurance claims in the forum on behalf of defendant); *Doe v Sun International Hotels, Ltd*, 1999 US Dist Lexis 4186, *10–12 (S D Fla) (asserting general jurisdiction over defendant that maintained an office and advertised in the forum and fourteen percent of defendant's clients were from forum); *ESI, Inc v Coastal Corp*, 61 F Supp 2d 35, 56–57 (S D NY 1999) (asserting general jurisdiction over defendant when defendant's affiliate, present and doing business in the forum, was found to be a “mere department” of the defendant); *City of El Paso v Soule*, 991 F Supp 812, 818–19 (W D Tex 1998) (asserting general jurisdiction over defendant that had signatory authority for forum bank account, conducted personal banking in the forum, and listed forum as permanent address); *Sandstrom v Cultor Food Science, Inc*, 1998 US Dist Lexis 9034, *4–8 (N D Ill) (asserting general jurisdiction over defendant doing business within the forum through wholly-owned subsidiaries); *United Mizrahi Bank Ltd v Sullivan*, 1998 US Dist Lexis 13996, *14–15 (S D NY) (asserting general jurisdiction over defendants that, among other things, sent and received correspondence from forum state, listed forum addresses on stationary, maintained a telephone number within the forum, and traveled to the forum for business meetings); *First American Corp v Price Waterhouse LLP*, 988 F Supp 353, 361–63 (S D NY 1997) (asserting general jurisdiction over defendant that “sent detailed instructions to and repeatedly communicated with” agent doing business in the forum over a six-year period); *WMW Machinery, Inc v Werkzeugmaschi-*

cases finding general jurisdiction based on the defendant's forum business activities, the claim was directly related to those forum contacts.⁸² In several additional cases the claim bore some relationship to the defendant's forum contacts, but the courts found general jurisdiction and did not resolve the possibly more difficult specific jurisdiction question.⁸³ In very few cases, the claim was

nenhandel GmbH IM Aufbau, 960 F Supp 734, 743-44 (S D NY 1997) (asserting general jurisdiction over defendant that had done business in the forum, even though defendant ceased at least two years before plaintiff filed suit); *Future Tech International, Inc v Tae Il Media, Ltd*, 944 F Supp 1538, 1557-58 (S D Fla 1996) (asserting general jurisdiction over defendants whose representatives traveled to the forum and communicated with forum residents over the course of one year); *Kim v Frank Mohn A/S*, 925 F Supp 491, 493-94 (S D Tex 1996) (asserting general jurisdiction over defendant that maintained contact with forum through wholly-owned subsidiary located in forum); *Summit Machine Tool Manufacturing Corp v Warren Transport, Inc*, 920 F Supp 722, 726-27 (S D Tex 1996) (finding sufficient contacts for general jurisdiction based on defendant's business activities with several forum companies); *United States v Nippon Paper Industries Co, Ltd*, 944 F Supp 55, 62 (D Mass 1996) (asserting general jurisdiction over defendant that maintained offices in the U.S., owned portion of U.S. business, and traveled to U.S. to conduct business and oversee operations); *American Cyanamid Co v Eli Lilly and Co*, 903 F Supp 781, 786-87 (D NJ 1995) (asserting general jurisdiction over defendant that maintained a presence in the forum through a subsidiary and conducted collaborative research and development activities within transferee forum); *Anglo American Insurance Group, PLC v Calfed, Inc*, 899 F Supp 1070, 1073-74 (S D NY 1995) (asserting general jurisdiction over defendant that "continuously demonstrate[d] its desire to do business in [the forum] by, among other things, purposefully filing annual financial statements" with the forum state government and selling insurance policies through excess line insurers in forum); *Georgia-Pacific Corp v Multimark's International, Ltd*, 706 NYS2d 82, 83-84 (App Div 2000) (asserting general jurisdiction over defendant that merely maintained a bank account in forum); *Daimler-Benz Aktiengesellschaft v Olson*, 21 SW3d 707, 717-26 (Tex App 2000) (asserting general jurisdiction over defendant car manufacturer that advertised in the forum through its trademarks, had a subsidiary present in the forum, and maintained an interactive web site accessible from the forum); *BMC Software Belgium, NV v Marchand*, 2000 Tex App Lexis 5507, *9-13 (asserting general jurisdiction over foreign subsidiary of forum parent corporation); *Puri v Mansukhani*, 973 SW2d 701, 710-11 (Tex App 1998) (asserting general jurisdiction over defendant because of contacts with forum residents and involvement in management of forum business).

⁸² In nine cases, the court specifically found that both general and specific jurisdiction existed: *ESI*, 61 F Supp 2d at 58; *Andersen v Sportmart, Inc*, 179 FRD 236, 242 (N D Ind 1998) (enough to meet burden of pleading); *City of El Paso*, 991 F Supp at 825; *WMW Machinery*, 960 F Supp at 744; *Future Tech International*, 944 F Supp at 1558; *Summit Machine Tool*, 920 F Supp at 726; *American Cyanamid*, 903 F Supp at 786; *BMC Software*, 2000 Tex App Lexis 5507 at *12, 14; *Puri*, 973 SW2d at 714.

⁸³ This was usually true when either the allegedly illegal acts or the injury occurred outside the forum. See *Shaheen Sports*, 89 F Supp 2d at 501-03 (holding that where a damaged shipment sent from abroad into the forum resulted in suit against shipper's insurer, general jurisdiction existed based on insurer's agency relationship with a forum business); *Sun International*, 1999 US Dist Lexis 4186 at *11-12 (finding general jurisdiction when injury occurred in hotel outside forum, without examining the possible causal connection between plaintiff's claim need not be causally connected to and defendant's forum activities); *Sandstrom*, 1998 US Dist Lexis 9034 at *10 (in a breach of contract suit by employee, the court held that by sending its employees to work on a long-term basis in forum, defendant "established" an ongoing permanence and continuity of activity in fo-

fairly distant from the defendant's forum contacts,⁸⁴ and in only two cases was it totally unrelated.⁸⁵ Because related-claim situations are so common, they may indeed play a significant role in broadening the circumstances in which courts find doing-business jurisdiction. Unless a method is developed preventing a court from taking the nature of the claim into consideration in deciding the general jurisdiction issue, this expansion will inevitably occur.

2. Lack of information: the unreported general jurisdiction cases.

It is important to recognize that the published case law does not reflect the entire picture. General jurisdiction cases often fly below the radar, and it is difficult to know how frequently because such cases are not reported in the case law.⁸⁶ There are two reasons for this. First, defendants are unlikely to object to general jurisdiction in a forum if they operate directly from a physical office there, since this has always been held to be sufficient to

rum); *Kim v Frank Mohn*, 925 F Supp at 492–94 (finding personal jurisdiction where injury occurred in forum but defendant's activities related to the product that caused the injury occurred elsewhere); *Anglo American Insurance Group*, 899 F Supp at 1075 (holding that once the court established general jurisdiction, it need not decide whether specific jurisdiction existed in a case where it was unclear where the acts and injury occurred); *Daimler-Benz*, 21 SW3d at 718 (finding general jurisdiction where injury occurred in forum, manufacturer sold and serviced cars in forum, but the car in question was sold in Europe before being driven by a forum citizen). In the cases cited in this and the following footnotes, courts may have been unable to find specific jurisdiction, or unwilling to make the effort, because of the uncertainty about the type of "relatedness" needed for specific jurisdiction. For the leading article in this area, see Brilmayer, 1980 S Ct Rev 77 (cited in note 12). For a general discussion, see also Twitchell, 101 Harv L Rev 610 (cited in note 1).

⁸⁴ See *First American Corp*, 988 F Supp 353 at 361–63 (finding personal jurisdiction over United Kingdom accounting firm because it was using a forum partnership to perform auditing functions in forum unrelated to claim); *Georgia-Pacific Corp*, 706 NYS2d at 83–84 (finding general jurisdiction based on defendant's use of forum bank to conduct almost all of its business; suit related in sense that plaintiff alleged defendant and co-defendant conspired to have funds at issue illegally diverted from one forum bank account to another account at same forum bank); *Huangyan Import & Export Corp*, 2000 US Dist Lexis 12335 at *2–3, 14 (finding general jurisdiction because of defendant's central and substantial business activities conducted with forum bank; suit related in sense that plaintiff alleged that co-defendant forum bank controlled defendant and that co-defendants conspired to withhold payments legally owed to plaintiff).

⁸⁵ *Wiwa*, 226 F3d at 95–96 (activities of defendant's agent in forum); *Kadic*, 70 F3d at 246–47 (service of process in forum). Although these cases were the least related to defendant's forum contacts, under the proposed Hague Convention, jurisdiction would be available over both because of the Proposal's human rights exception. Hague Draft Proposal at Art 18(3) (cited in note 4).

⁸⁶ See note 80.

justify general jurisdiction.⁸⁷ Second, because of the expense and uncertainty of pursuing jurisdictional challenges, some defendants may not object at all, or may pursue a *forum non conveniens* challenge instead.⁸⁸ Small businesses often cannot afford the fifteen thousand to fifty thousand dollars necessary to litigate the personal jurisdiction issue through an appeal.⁸⁹ This is ironic, since large enterprises over whom general jurisdiction would seem most appropriate are probably those most likely to litigate the issue, while smaller companies, over whom the propriety of general jurisdiction is more questionable, are less able to get the issue resolved effectively because of the costs of mounting a defense.⁹⁰

III. THE ADVANTAGES OF A LOOSE APPROACH

Why do we persist in subjecting defendants to such a loose, unpredictable, poorly defined, and poorly defended standard? Several reasons are self-evident. First, it is a traditional practice going back to very early cases. Second, as long as we use a weak standard, the test is fairly easy to administer because courts need only assess a single variable, the continuity and systematic nature—and, less frequently, the substantiality—of the defendant's contacts. Finally, given the variety of business activities that can occur in a forum and our uncertainties about the constitutional

⁸⁷ See note 48. But see *Follette v Clairol, Inc.*, 829 F Supp 840, 846–48 (W D La 1993) (defendant Wal-Mart successfully challenging jurisdiction on reasonableness grounds despite its substantial and continuous physical operations within forum); *Gerry Tanner & Co v Kroger, Co.*, 1996 Tex App Lexis 404, *5, 9–15 (defendant Kroger challenging general jurisdiction despite the fact that it had (rejecting challenge to general jurisdiction by defendant that had fifty stores in the forum and had done business there since 1956).

⁸⁸ See Letter from Michael Gordon, Professor at University of Florida College of Law, to client (Oct 4, 2000) (“Gordon letter”) [on file with U Chi Legal F] (in a suit filed against foreign chemical manufacturer, recommending that for strategic and economic reasons the defendant raise a *forum non conveniens* defense but not an available personal jurisdiction defense).

⁸⁹ Telephone interview with Andrew J. Markus, Former Chair, Comparative Law Division, American Bar Association Section of International Law and Practice, and Special Counsel, Hughes Hubbard & Reed LLP, Miami, Florida (Nov 5, 2000) (“Markus interview”) (estimating that it would have cost one of his clients in a simple case fifteen thousand to fifty thousand dollars to fight for personal jurisdiction at his home).

⁹⁰ But see Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 UC Davis L Rev 1027, 1043 (1995). Referring to the *International Shoe* case, Juenger wrote:

The primary targets of jurisdictional exorbitance, especially of our overly broad notion of general jurisdiction, are usually large enterprises, such as Volkswagen and Mitsubishi. Such multinationals tend to be less concerned about recognition in their home states than they are about jurisdiction, which puts their United States assets in jeopardy.

underpinnings of the doctrine, devising a more definitive standard is just too hard. Courts⁹¹ and legislatures⁹² discovered early on that it is hard to define “doing business” with any precision. The best they can do is to indicate that continuity and perhaps substantiality are important—after that, things pretty much come down to a question of degree. As Justice Learned Hand said in 1930 as he struggled with this issue, “It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass.”⁹³

Finally, we use doing-business jurisdiction, as Professor Borchers correctly argues, to fill in holes in our jurisdictional scheme.⁹⁴ By providing an additional forum for the plaintiff, we may be engaging in some indirect economic equalization unattainable through more straightforward means; occasionally, do-

⁹¹ See, for example, *Hutchinson v Chase & Gilbert, Inc*, 45 F2d 139, 142 (2d Cir 1930) (defining the corporate “presence” standard as “morass”); *Buddensick v Stateline Hotel, Inc*, 972 P2d 928 (Utah App 1998). The *Buddensick* court distilled the factors relevant to the issue of whether general personal jurisdiction exists to include whether the corporate defendant is:

1. engaged in business in this state;
2. licensed to do business in this state;
3. owning, leasing, or controlling property (real or personal) or assets in this state;
4. maintaining employees, offices, agents, or bank accounts in this state;
5. present in that shareholders reside in this state;
6. maintaining phone or fax listings within this state;
7. advertising or soliciting business in this state;
8. traveling to this state by way of salespersons, etc.;
9. paying taxes in this state;
10. visiting potential customers in this state;
11. recruiting employees in the state;
12. generating a substantial percentage of its national sales through revenue generated from in-state customers.

Id at 930–31.

⁹² See, for example, *Myers v Mooney Aircraft, Inc*, 240 A2d 505, 509 (Pa 1967) (interpreting “doing business” under then extant Pennsylvania corporation law, Section 1101, subdivision C of the Business Corporation Law of 1933 as amended.) The statute provided that:

For the purposes of determining jurisdiction of courts within this Commonwealth, the entry of any corporation into this Commonwealth for the doing of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a single act in this Commonwealth for such purpose, with the intention of thereby initiating a series of such acts, shall constitute “doing business.”

⁹³ *Hutchinson*, 45 F2d at 142 (struggling to set a standard for doing-business jurisdiction).

⁹⁴ See Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U Chi Legal F 119, 130 (noting that general jurisdiction is “necessary to cover for a major deficiency in specific jurisdiction”).

ing-business jurisdiction may provide a forum by necessity where multiple defendants are involved.⁹⁵

Moreover, doing-business jurisdiction generally does little harm. Most defendants are domestic and will have to defend somewhere in the United States anyway. Furthermore, if most cases are somewhat related to the defendant's contacts, then perhaps nothing more than continuous and systematic contacts is needed for a result that is generally reasonable, even if not fully supported by current constitutional theory.

Courts confronting *truly* unrelated cases—cases that might justifiably be covered under this doctrine—can use the separate “reasonableness” prong or forum non conveniens to avoid unjust results.⁹⁶ So as the cases play out, the doctrine often operates in

⁹⁵ See *Helicopteros Nacionales*, 466 US at 419 n 13 (1984) (declining to apply the doctrine of jurisdiction “by necessity” as an alternative to the minimum contacts analysis to justify the assertion of jurisdiction over additional defendants as long as all defendants might be sued together in another country). Compare the proposed Hague Convention, which allows jurisdiction over additional defendants under a looser standard. Hague Draft Proposal at Art 14(1)(a)–(b) (cited in note 4):

A plaintiff bringing an action against a defendant in a court of the State in which that defendant is habitually resident may also proceed in that court against other defendants not habitually resident in the State if—(a) the claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and (2) as to each defendant not habitually resident in that State, there is a substantial connection between the State and the dispute involving the defendant.

⁹⁶ See text accompanying notes 88, 144–49 (addressing the use of forum non conveniens). See also *Burger King Corp v Rudzewicz*, 471 US 462, 476–77 (1985) (introducing a separate reasonableness standard for personal jurisdiction); *Asahi Metal Industry Co, Ltd v Superior Court of California*, 480 US 102, 114 (1987) (refusing to hear a third-party claim against a foreign defendant at the place of injury when the court's assertion of jurisdiction was unreasonable). For lower court cases relying on the “reasonableness” standard as a basis for denying general jurisdiction despite heavy contacts, see, for example, *Metro-politan Life Insurance Co v Robertson-Ceco Corp*, 84 F3d 560, 565–66, 573–75 (2d Cir 1996) (finding that defendant's four million dollars in sales in forum over six years, combined with forum visits, advertising, provision of product support, and deliberate targeting of forum firms as sales prospects satisfied the minimum contacts requirement, but that general jurisdiction was nevertheless unreasonable because forum had no interest in dispute); *Follette v Clairol, Inc*, 829 F Supp 840, 846–48 (W D La 1993) (finding that although Wal-Mart corporation operated out of physical places of business in forum, general jurisdiction was unreasonable outside the place of incorporation or principal place of business when forum had no interest in the suit). For further commentary on the reasonableness standard, see B. Glenn George, *In Search of General Jurisdiction*, 64 Tulane L Rev 1097, 1129–41 (1990) (suggesting that the “reasonableness” test is appropriately used in general jurisdiction analysis); Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 Rutgers L J 569, 579–83 (1991) (criticizing modern use of “reasonableness test” because such reasonableness inquiries might lead to jurisdiction even in absence of minimum

reality as something of a *specific* jurisdiction catchall for commercial defendants.

In sum, we sacrifice the perfect for the good—sacrifice theoretical coherence, clarity and foreseeability for what may amount to reasonable results in individual cases. What other cases have taken away,⁹⁷ a practical use of doing-business jurisdiction can restore.

IV. THE PROBLEMS OF A LOOSE APPROACH: FOREIGN DEFENDANTS

But we cannot blithely accept this status quo. If we are to continue to ground personal jurisdiction on the Constitution (that is, until Professor Borchers's revolution comes),⁹⁸ we need a persuasive theoretical basis for doing-business jurisdiction that either justifies its extreme breadth or limits its boundaries, and our decisions should fairly reflect whatever principle we adopt. These results should also be reasonably predictable, giving defendants notice of which commercial activities will expose them to a forum's plenary power.

A. The Impact on Foreign Defendants

We may never reach these goals, but circumstances may force us to try, primarily because of the pressure put on us by foreign defendants appalled to find that general jurisdiction exposure is the price of doing regular business in U.S. markets. Although general jurisdiction may be unfair in many cases, it is especially unfair when exercised over foreign business enterprises for several related reasons.

1. Lowered foreseeability.

Citizens of countries that do not allow general activities-based jurisdiction over defendants where they are doing-business—that is, citizens of almost every country in the

contacts and will lead to increased transaction costs inappropriate for issues which need to be determined efficiently at the outset of litigation).

⁹⁷ See *Asahi*, 480 US at 109–13 (suggesting that defendant component part manufacturer may need more than knowledge that product is being sold in forum); *World-Wide Volkswagen*, 444 US at 299 (denying jurisdiction at place of tortious injury). See generally Borchers, 2001 U Chi Legal F at 130–32 (cited in note 94) (describing deficiencies in the current specific jurisdiction doctrine).

⁹⁸ Borchers, 2001 U Chi Legal F at 139 (cited in note 94) (suggesting that the Supreme Court “dramatically relax the constitutional limitations on jurisdiction”).

world⁹⁹—may not expect or foresee it, and will perceive it as extraordinarily unfair. This problem is compounded by the lack of a uniform national rule clearly describing the extent to which non-domestic entities may be exposed to such jurisdiction.

2. Unpredictability.

This factor presents a problem for both domestic and foreign defendants. Even if a corporation is aware of the existence of doing-business jurisdiction, the case law is so unsettled that few companies can predict when and to what extent they may be subject to such jurisdiction. Results can vary both state by state and case by case. Given this uncertainty and the expense of litigating jurisdiction, especially for smaller enterprises that may not have regular experience with litigating in the United States, businesses may choose not to assert a defense at all,¹⁰⁰ or may choose not to appeal a negative ruling at the trial level—hence, the *in terrorem* effect Professor Juenger so aptly describes.¹⁰¹

3. More significant exposure.

For an American defendant, being subjected to doing-business jurisdiction means, at worst, having to defend in an additional American state. A change of law may be a significant risk,¹⁰² but otherwise the system is very much the same. A foreign defendant, on the other hand, is subject to jurisdiction in what is often a dramatically different judicial system a long distance from home. Unless it has been engaged in substantial commercial activities here for a long time, it is likely to be unfamiliar with our litigation system and will by definition be seen as an “outsider.” In fact, the whole notion of “insiderness” may play out differently

⁹⁹ But see Linda J. Silberman, *Can the Hague Judgments Project Be Saved?: A Perspective from the United States*, in John J. Barceló, III and Kevin M. Clermont, eds, *A Global Law of Jurisdiction and Judgments: Lessons from The Hague* (forthcoming Kluwer Intl 2001) (noting that England and Japan also permit form of “doing business” jurisdiction over unrelated claims in some circumstances).

¹⁰⁰ See Gordon letter (cited in note 88) (stating that multi-national corporate defendants with world-wide sales increasingly elect to raise forum non conveniens and choice of law rather than personal jurisdiction defenses: “Personal jurisdiction debate is a wonderful activity for the classroom, but a timely and costly one for clients.”).

¹⁰¹ Juenger, 2001 U Chi Legal F at 165 (cited in note 8).

¹⁰² See Silberman, 22 Rutgers L J at 589–90 (cited in note 96) (noting that courts may use general jurisdiction as basis for applying forum law). But see Russell J. Weintraub, *Case Four: Choice of Law Theory*, 29 New Eng L Rev 682, 683 (1995) (arguing that unlike specific jurisdiction, the existence of general jurisdiction based on systematic and continuous contacts should not give the forum the power to apply its own law).

for foreign companies that are not well integrated into American commercial life.¹⁰³

Because of the heightened fairness problems present when general jurisdiction is exercised over foreign corporations, it would seem to follow that if we are going to curtail general doing-business jurisdiction anywhere, it should be here.¹⁰⁴ And yet there is a paradox: the fairness problems may be greater, but the needs of domestic plaintiffs also increase.

For Americans suing Americans, if general jurisdiction is refused, there is always an alternate forum within the same system, the defendant's home. When suing a foreign enterprise, unless the suit fits into our unsettled but potentially narrow definition of specific jurisdiction, there will be no domestic jurisdiction at all. Doing-business jurisdiction gives U.S. courts the power to decide claims arising elsewhere, and jurisdiction over additional defendants in a dispute that may originally be based on specific jurisdiction. It also enhances the possibility that a de-

¹⁰³ If political theory suggests that it is fair to treat such a commercial enterprise as an "insider," are there differences to be taken into account when that "insider" is directed by individuals from another country? And if so, what are we to do with companies that do their business through subsidiaries in the U.S. or that employ U.S. citizens? Should this matter? If so, how? Compare *Cebik*, 1998 Ann Surv Am L at 43-44 (cited in note 7) (arguing that it is difficult to explain how a foreign corporation could ever be a political insider).

¹⁰⁴ See *Silberman*, 28 Tex Intl L J at 506 (cited in note 55) (noting that modern Supreme Court decisions and the Restatement (Third) of Foreign Relations have raised the question of whether the "due process standards play out differently when foreign defendants are involved"). See also *id.* at 509 (citations omitted):

Asahi [] cannot be read as intended for application in international cases alone. Interestingly, however, in their *Asahi* amici curiae brief, the American Chamber of Commerce in the United Kingdom and the Confederation of British Industry did urge a specialized protective jurisdictional standard for foreign defendants. Moreover, the *Restatement (Third) of the Foreign Relations Law of the United States* § 421 identified a "reasonableness" standard limiting jurisdiction to adjudicate and explained that the principle was analogous to the "reasonableness" principle adopted in jurisdiction to prescribe cases in § 403. Section 403 makes clear that the "reasonableness" principle operates as a quite distinct principle of international relations law. The architect of these Restatement sections has himself intimated that the "reasonableness" standard of *Asahi* should also be understood in this manner.

But see *id.* at 511:

When foreign defendants enter the United States market in the same way as their American competitors, it is not clear why they should not answer in the United States forum or just what their special claim is. Indeed, if the foreign defendant selling into the United States may avoid answering in the United States, the United States plaintiff will lose the convenience of litigating in its home state and will also face the added inconvenience of litigating in a foreign and unfamiliar forum abroad.

fendant will not fight an expensive personal jurisdiction battle at either the trial or appellate level.¹⁰⁵

4. Systemic differences.

Systemic differences also cause problems of a different sort. Plaintiffs obtain greater advantages in U.S. courts such as jury trials, contingent fees for their lawyers, broader discovery rules, and broader substantive laws.¹⁰⁶ It is difficult for potential tort defendants from foreign countries to contract around this problem.¹⁰⁷

5. Can foreign corporations ever be “insiders”?

It is hard to know what we should do in this difficult situation in which our national interests conflict with the interests of other countries. If the “insider” theory is to work, general jurisdiction should only be exercised over defendants with enough ties to the forum, and enough clout within the forum, so that the costs of subjecting them to plenary forum power on any cause of action are not externalized. Otherwise, the political theory supporting general doing-business jurisdiction fails.

It is probably no accident that true outsiders—that is, foreign commercial actors rather than domestic defendants—have raised the first significant challenge to this form of jurisdiction. Anyone who wonders why the domestic defense bar does not jump on the bandwagon might consider this fact: of those reported cases finding general jurisdiction over defendants,¹⁰⁸ a significant number of them were commercial suits brought by American business entities, not consumer suits brought by individuals.¹⁰⁹ Like other

¹⁰⁵ See Markus interview (cited in note 89).

¹⁰⁶ See Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 Vand J Transnatl L 389, 396 (1995) (noting advantages to plaintiffs in the American judicial system).

¹⁰⁷ Compare Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U Chi Legal F 1, 24–25 (theorizing general jurisdiction in terms of contract and implied consent is problematic because such jurisdiction necessarily includes potential tort suits “which are not usually governed by explicit or even implied contracts that select the jurisdiction”).

¹⁰⁸ See note 80.

¹⁰⁹ See, for example, *Shaheen Sports, Inc v Asia Insurance Co, Ltd*, 89 F Supp 2d 500 (S D NY 2000) (involving a suit brought by an American corporation and foreign shipper suing foreign insurer of damaged shipment); *ESI, Inc v Coastal Corp*, 61 F Supp 2d 35 (S D NY 1999) (involving a suit brought by an American corporation against foreign utilities companies over disputed share of profits); *First American Corp v Price Waterhouse LLP*, 988 F Supp 353 (S D NY 1997) (involving an attempt by an American corporation to compel discovery from foreign entities for suit against a third party); *WMW Machinery, Inc v*

domestic plaintiffs, American business enterprises benefit from the role that our broad doing-business rule plays in our overall jurisdictional structure.

6. The risks of using doing-business jurisdiction to decide internet cases.

Another problem that this Symposium underscores is the risk that American states may inappropriately use their general jurisdiction powers to reach defendants using the internet for commercial activities. Unlike the specific jurisdiction question, a state can decide that it has doing-business jurisdiction without any consideration of its regulatory authority over the claim presented. Because the standard is so ill-defined, a court can focus merely on the presence of “continuous and systematic” contacts, find “general” jurisdiction, and compel the defendant to respond to the state’s regulatory authority. In sum, the mere existence of this overbroad general jurisdiction power can undercut whatever carefully-designed standard we might develop for determining when specific jurisdiction exists over global commercial activity that causes some effect within a particular nation.

While the state must theoretically apply appropriate choice of law rules, the fact that the defendant is appearing in its court may contribute to the state’s perception that it has the power to apply its own laws. Without any of the checks supplied by the considerations that play a role in determining that specific jurisdiction exists, serious regulatory overreaching can result.¹¹⁰

Werkzeugmaschinenhandel GMBH Im Aufbau, 960 F Supp 734 (S D NY 1997) (involving a suit brought by two American corporations against a German corporation, a German government agency, and the liquidator of a former East German government agency, seeking to recover for breach of joint venture and commercial agency agreements under which American corporations were to distribute machine tools made in Germany); *Future Tech International, Inc. v Tae Il Media, Ltd.*, 944 F Supp 1538 (S D Fla 1996) (involving a suit between an American corporation and a foreign defendant for breach of contract and fraud); *Summit Machine Tool Manufacturing Corp v Warren Transport, Inc.*, 920 F Supp 722 (S D Tex 1996) (involving a suit by an American corporation against a foreign defendant over a transport claim); *American Cyanamid Co v Eli Lilly and Co*, 903 F Supp 781 (D NJ 1995) (involving a suit by an American drug company seeking a declaratory judgment nullifying an alleged patent infringement against a foreign drug company and a domestic competitor); *Anglo American Insurance Group, Calfed, Inc.*, 899 F Supp 1070 (S D NY 1995) (involving a suit between an American company and a foreign defendant for breach of contract); *Georgia-Pacific Corp v Multimark's International, Ltd.*, 706 NYS2d 82 (App Div 2000) (involving a suit between an American corporation and foreign defendants for breach of contract).

¹¹⁰ In the recent cases finding jurisdiction over foreign defendants discussed earlier, I did not find any cases in which the claim presented involved solely the defendant’s internet activity, but such cases are bound to arise in the future. See note 81.

B. The Hague Proposal

The current Hague proposal¹¹¹ would resolve many of the problems foreign defendants face by disallowing all forms of general doing-business jurisdiction in transnational cases. This would reduce the legitimate concerns of foreign defendants, but it would leave Americans without access to local fora for some cases that have traditionally, and perhaps properly, been decided here. No matter how generously the proposal's language permitting jurisdiction is read,¹¹² or how few additional due process limits are imposed by the Supreme Court,¹¹³ under the current proposal plaintiffs would not be able to sue foreign defendants in the United States on claims having no relationship to the defendant's domestic activities.¹¹⁴ This result is, of course, viewed by many other nations as a reasonable limit on what is perceived as an exorbitant exercise of jurisdiction,¹¹⁵ but we are probably not ready to go that far in curtailing this jurisdiction.¹¹⁶

Professor Linda Silberman has proposed a compromise provision for the Hague proposal. Doing-business jurisdiction would be preserved in the "gray area" of permitted jurisdiction exercises¹¹⁷

¹¹¹ See Hague Draft Proposal (cited in note 4).

¹¹² See generally *id.* at Arts 3–22.

¹¹³ For an extended discussion of how possible adoption of the Hague Proposal in the United States might be affected by American constitutional law, see Symposium, *Could A Treaty Trump Supreme Court Jurisdictional Doctrine?*, 61 Albany L Rev 1159 (1998). Another recent symposium focusing on the Hague proposal is Symposium, *Enforcing Judgments Abroad: The Global Challenge*, 24 Brooklyn J Intl L 1 (1998).

¹¹⁴ See Hague Draft Proposal at Art 18(1) (cited in note 4) (prohibiting jurisdiction predicated on "the carrying on of commercial activities by the defendant in that State, except where the dispute is directly related to those activities").

¹¹⁵ Although the Preliminary Draft itself does not use the term "exorbitant" when describing the types of jurisdiction prohibited in Article 18, the phrase appears in the accompanying report. See 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 75–76 ("Report on Preliminary Draft"), available online at <ftp://hchc.net/doc/jdgmppd11.doc> (visited Oct 22, 2001) [on file with U Chi Legal F].

¹¹⁶ After all, consider the relative political power of the Americans who travel abroad or engage in international business; one might expect significant resistance to such a change since they would be among those significantly hurt by it.

¹¹⁷ Article 17 of the proposed Convention permits signatory states to apply their own national rules of jurisdiction as long as they are not prohibited under Article 18. See Hague Draft Proposal at Art 17 (cited in note 4). This jurisdiction is referred to as existing in the "gray area." Linda J. Silberman and Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, An International Treaty, and an American Statute*, 75 Ind L J 635, 641 (2000) (referring to areas of permitted jurisdiction delineated by Article 17 as being in the "middle" or "gray area"). The limited form of doing-business jurisdiction outlined by Professor Silberman would be permitted under this Article since it is excepted from the bases of prohibited jurisdiction listed in Article 18. See note 118.

in countries “where the defendant has a branch office or where the defendant’s activity in the forum is evidence of a substantial presence there, and the plaintiff is habitually resident in the forum state.”¹¹⁸ While her proposal limits jurisdiction to claims brought by local residents, removing many cases from the reach of general jurisdiction, the “substantial presence” standard applied to defendants would continue to impose unpredictability and costly litigation on foreign defendants. It remains to be seen whether this proposal will be considered an acceptable compromise. It may well be that unless doing-business jurisdiction remains entirely in the “gray area,” the Hague proposal will not be accepted by the United States, and other countries may feel equally strongly about keeping all doing-business jurisdiction in the forbidden zone.¹¹⁹

V. IF NOT HAGUE, WHAT?

Even if we do not achieve a successful convention through the Hague, the problems raised by doing-business jurisdiction remain. We have used it regularly for more than a century. Doing-business jurisdiction plays a vital role in resolving multiparty disputes, and situates some cases in fora that might well be reasonable although the jurisdictional exercise would not pass constitutional muster under current specific-jurisdiction case law. Doing-business jurisdiction thus provides a practical solution to thorny constitutional debates. Unless the definition of “substantial” contacts is spelled out with more clarity and is significantly limited, however, doing-business jurisdiction will continue to cre-

¹¹⁸ Professor Silberman noted that:

Article 18 could be modified to prohibit jurisdiction on the basis of the “carrying on of commercial activity by the defendant when the activity did not give rise to the claim” except where the defendant has a branch office or where the defendant’s activity in the forum is evidence of a substantial presence there, and the plaintiff is habitually resident in the forum state.

Silberman, *Can the Hague Judgments Project Be Saved?* (cited in note 99).

¹¹⁹ See Letter from Jeffrey D. Kovar, Assistant Legal Advisor for Private International Law, U.S. Dept of State, to Alasdair Wallace, Head of International and Common Law Services Division, Lord Chancellor’s Dept, United Kingdom (Sept 10, 2000) [on file with U Chi Legal F] (stating that “U.S. bar will be extremely critical” of any convention that would not allow doing-business general jurisdiction “to continue in the gray area as a matter of national law”). Compare Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 Cornell L Rev 89, 115–16 (1999) (suggesting that “doing business” is a “tired old doctrine” that is offensive to Europeans and arguing that we should be willing to give it up).

ate an unreasonable risk for defendants engaging in commerce with United States citizens. Fairness dictates the development of a more principled approach, in which we set a more coherent standard for doing-business jurisdiction, at least insofar as it reaches foreign defendants. We might approach the task of finding a core rationale and developing a predictable practice in one of several different ways.

A. Clarify the Doctrine: Direct Approach

Obviously an accepted and adequately-grounded theory could help resolve the uncertainty about the type of activities sufficient for the constitutional exercise of general jurisdiction by a state over all defendants. However, as discussed above, the Court has not indicated any inclination to flesh out the doctrine.¹²⁰ Its approval of service jurisdiction in *Burnham* has severely reduced the likelihood that it will develop a unified theory for general jurisdiction. Short of overruling the case, which is not likely, the Court could at best articulate a standard for doing-business jurisdiction consistent with the *International Shoe* and *Keeton* dicta,¹²¹ indicating whether a local physical presence is always enough and developing some articulable test for determining the situations in which a business's activities outside the forum, engaged in directly or through a third party, would be sufficient to justify doing-business jurisdiction.¹²²

A key component of this approach would entail clarifying the role that the claim itself should play in the doing-business inquiry. The Court should emphasize the dispute-blind nature of general jurisdiction and remind courts that jurisdiction should not be exercised under the "general" or "doing-business" rubric unless the court has determined that the defendant's ties to the forum are such that jurisdiction exists without regard to the nature of the claim asserted.

¹²⁰ See notes 34–40 and 49–60.

¹²¹ See text accompanying notes 57–60.

¹²² Developing such a theory is hard enough when considering solely American defendants; it becomes even more difficult when taking account of foreign defendants. One is tempted, at this point, to welcome Professor Borchers's revolution with open arms. See Borchers, 2001 U Chi Legal F at 135 (cited in note 94) (calling for a new jurisdictional paradigm).

B. Develop the Doctrine Incrementally

At the opposite end of the continuum, absent a clarifying theory, several smaller steps might be taken to develop and identify the values behind dispute-blind jurisdiction.

1. Remove the claim as a factor in the decision.

Even without guidance from the Supreme Court concerning the theoretical basis for doing-business jurisdiction, the lower courts could significantly reduce the confusion and unpredictability of this form of jurisdiction by making the jurisdiction decision only after considering one or more hypothetical cases against the same defendant involving geographically distant disputes, wholly unrelated to the defendant's forum contacts. A court should specifically consider whether it would have trouble asserting jurisdiction over such unrelated cases. If it sensed that it would generally dismiss such suits for lack of substantial contacts, or on reasonableness or forum non conveniens grounds, the court should recognize that a finding of jurisdiction in the case before it would be based not on principles of general, but of specific, jurisdiction. In other words, it would not have a regulatory relationship with the defendant sufficient to justify jurisdiction over any and all claims, but only of claims with some relationship to the defendant's forum activities.

Instituting such an approach could be done easily, by any court, since it would be merely applying the constitutional theory behind general jurisdiction. In time other courts might follow suit, leading to a gradual reduction in doing-business jurisdiction. However, this solution is not fully satisfactory for two reasons. First, while eliminating the most extreme misuses of doing-business jurisdiction, it would not resolve the theoretical uncertainty about the basis for doing-business general jurisdiction where it continues to exist. More troubling, courts might not be willing to use this approach, even if it leads to a practice more consistent with the true constitutional contours of general jurisdiction, because they would be limiting the reach of their own state's jurisdiction, often in cases that bear some relationship to the defendant's forum activities. Unless our specific jurisdiction doctrine is modified to permit jurisdiction to be found more easily

over a broader scope of “related” claims it is unlikely that courts will want to put this suggestion into practice.¹²³

2. Find principles in unrelated past cases.

We might also arrive at a better theoretical understanding of the basis for true dispute-blind jurisdiction by looking at past decisions. The search should be limited to cases finding or denying general jurisdiction in which the claim was indeed completely unrelated to the defendant’s forum contacts.¹²⁴ Although uncovering such cases would be a tedious process, they would reveal a great deal about when states feel that a nonresident business entity should be treated like an “insider” for any and all judicial purposes.

Another possibility is that we will find few such cases, which would confirm the perception that courts use doing-business jurisdiction primarily for cases in which the claim is somehow related to defendants’ forum activities, but specific jurisdiction is unavailable under current doctrine. If general jurisdiction is used primarily in these situations—at the margins of specific jurisdiction—we might wonder whether the general-specific dichotomy is in fact meaningful, or whether some other approach to jurisdiction is preferable.¹²⁵

C. Choose an Arbitrary Cut-Off

A third approach would be to develop an arbitrary cutoff that would allow some predictable bases for general jurisdiction, but limit its scope, thus reducing confusion and overreaching.

¹²³ As Allan Stein points out, it often takes parents—or in this case, the Supreme Court—to teach us to “keep our elbows in.” Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U Chi Legal F 373, 394 (discussing the need for sensitivity and self-restraint among members of any legal network).

¹²⁴ A distinction between treatment of American and foreign defendants might also be revealed.

¹²⁵ See William M. Richman, Review Essay, *Part I—Casad’s Jurisdiction in Civil Actions; Part II—A Sliding Scale to Supplement the Distinction Between General and Specific Jurisdiction*, 72 Cal L Rev 1328, 1336–46 (1984) (proposing that the categories be supplemented with a sliding-scale model that examines both the extent of the defendant’s forum contacts and their relationship to the plaintiff’s claim). See generally Redish, 38 Jurimet J 575 (cited in note 34) (proposing that the Court abandon purposeful avancement standard (or at least revise it) and focus instead on considerations of state interest and procedural fairness).

1. The branch office as a doctrinal break point.

We could return to the original notion that any defendant operating out of an office within a state is subject to general jurisdiction, and make that the sine qua non of doing-business jurisdiction. The standard would be fairly clear despite some definitional problems, and it would be limited. A similar provision for specific jurisdiction is part of the Hague proposal,¹²⁶ indicating that the presence of a physical office carries jurisdictional significance within the international community.

However, given the scope of our traditional doing-business jurisdiction, many Americans might find it difficult to accept the notion that a physical office, by itself, should separate some defendants from others engaged in significantly more substantial commerce in the state. It is unlikely that such a limitation would sit well with the American bar. For example, why should a small Kansas bicycle repair shop owner who opens a second store in a shopping mall across the border in Missouri be subject to jurisdiction in Missouri on any cause of action, while another Kansas corporation with multiple stores near the border and millions of dollars in annual sales to Missouri citizens, is not? Granted, opening a local shop indicates a physical intent to do steady business within the forum, and the shop owner will receive some additional benefits in terms of the protection of the state's police powers; however it is not clear why this activity in Missouri should justify the exercise of Missouri's regulatory power over all claims that might be asserted against the bike shop owner but not over all claims asserted against the Kansas corporation.¹²⁷

2. Adopt a national standard forbidding general jurisdiction over foreign defendants.

We might simply develop a national rule for doing-business jurisdiction over foreign defendants. There is much to recommend

¹²⁶ See Hague Draft Proposal at Art 9 (cited in note 4). Although the dispute need not arise within the forum, it must relate directly to the activity of the "branch, agency or establishment in the forum." See *id.* The Preliminary Draft also offers optional language that would extend this specific jurisdiction to other forms of "regular commercial activity." *Id.* See also Nygh and Pocar, Report on Preliminary Draft at 56 (cited in note 115) (discussing ramifications of "regular commercial activity" proposal).

¹²⁷ See, for example, *Coastal Video Communications, Corp v The Staywell Corp*, 59 F Supp 2d 562, 571 (E D Va 1999) ("In traditional terms, the placing of a store or salesmen in a state is not sufficient to confer general jurisdiction over a defendant without some evidence that the store or salesmen actually generated sufficient sales in the forum state for the contact to be considered continuous and systematic.").

this approach. If a Hague judgments convention carrying some limitation on general jurisdiction in international cases were ratified by Congress, it is very likely that the Supreme Court would support the result.¹²⁸ Hence this change could be made without interfering with the states' and federal courts' ability to exercise broader general jurisdiction over American defendants. The Supreme Court has already indicated in *Asahi Metal Industry, Co., Ltd v Superior Court of California*¹²⁹ that a fairly high "reasonableness" standard may apply in suits against foreign defendants,¹³⁰ so such a step would be consistent with current constitutional theory. Furthermore, because few foreign countries use any form of general doing-business jurisdiction,¹³¹ joining in such a convention would be an appropriate act of international comity.

There are obvious problems with a national rule prohibiting dispute-blind jurisdiction against foreign defendants. If such jurisdiction were completely banned, many cases routinely heard in American courts would be barred unless the court could establish specific jurisdiction. Under the principles of *World-Wide Volkswagen*¹³² and *Asahi*,¹³³ specific jurisdiction would be restricted in ways that it is not restricted in other countries,¹³⁴ and would often pose difficult analytical questions.¹³⁵

¹²⁸ See Patrick J. Borchers, *Judgments Conventions and Minimum Contacts*, 61 Albany L Rev 1161, 1175 (1998):

If a judgments convention actually emerges from the negotiation process, commands Executive assent, is ratified by two thirds of the Senate, and—presumably—is implemented by federal legislation that passes both Houses of Congress, it is hard to imagine the Court not giving considerable weight to the judgment of its coordinate branches.

¹²⁹ 480 US 102 (1987).

¹³⁰ Id at 114 (holding jurisdiction over foreign defendant unreasonable on facts of case regardless of whether minimum contacts exist).

¹³¹ The Restatement of Foreign Relations states that in international litigation, "jurisdiction based on service of process on a person only transitorily in the territory of the state . . . is not generally acceptable under international law." Restatement (Third) of Foreign Relations Law § 421 comment e (1987).

¹³² 444 US 286 (1980).

¹³³ See id at 295–97 (refusing to find jurisdiction in state of injury unless the suit meets the due process standard of foreseeability there, namely, that "the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there"); *Asahi*, 480 US at 114 (finding jurisdiction unconstitutional over a third-party claim asserted against a foreign manufacturer at the place of consumer injury where such exercise was unreasonable on the facts of the case).

¹³⁴ For example, European countries do not have a "purposeful availment" requirement, so claims can be heard where the tortious act occurs or where the injury is suffered. See Russell J. Weintraub, *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 Albany L Rev 1269, 1271 (1998) (stating that Europeans lack this re-

Despite these short-term difficulties, forcing our courts to focus solely on the specific jurisdiction question might result, in the long run, in far clearer and more useful rules for specific jurisdiction. The Supreme Court might ultimately answer the question that it did not answer in *Helicopteros Nacionales*—whether Texas had sufficient contacts with defendant *to decide the claim before it*, even if it did not have enough contacts to decide *any* claim presented against the defendant.¹³⁶

Confronting these questions, which are similar to jurisdictional questions addressed by our international trading partners, would encourage us to develop more internationally-consistent norms. Of course, to the extent that the Due Process Clause of the Constitution limits permissible jurisdiction in the United States, we would not follow international patterns perfectly.¹³⁷ However, the Supreme Court might, as some commentators suggest,¹³⁸ ultimately be persuaded to overrule prior case law inconsistent with international specific jurisdiction standards.

Still, a total bar on general jurisdiction over foreign businesses would completely prohibit claims by American plaintiffs injured abroad, which would leave a serious jurisdiction gap. The

quirement but might not object to adding such a requirement to the next proposed draft of the Hague convention).

¹³⁵ For example, the Court has failed to establish clear guidelines concerning the type of conduct and knowledge needed by a component part manufacturer before it will be said to have established minimum contacts with a state where its product reaches the consumer. Compare *Asahi*, 480 US at 112 (O'Connor plurality) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.") with *id* at 117–21 (Brennan concurring) (seeing "no need" for an additional showing of purposeful direction towards the forum once the defendant has placed the product into the stream of commerce). See also Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 UC Davis L Rev 531, 531–32 (1995) (threshold determination of personal jurisdiction has become one of the most litigated issues in state and federal courts; deference to the convenience of nonresident defendants has frustrated the reasonable interests of plaintiffs and their home states). See also note 83.

¹³⁶ See 466 US at 415 & n 10 (holding that the Court need not address the question of specific jurisdiction since the parties did not argue that the claim was related to defendant's forum contacts).

¹³⁷ For an extensive discussion of the variances between American jurisdiction rules and those of the European Community and of the possibility of bridging those differences through a treaty, see generally Symposium, 61 Albany L Rev 1159 (cited in note 113).

¹³⁸ Weintraub, 61 Albany L Rev at 1273 (cited in note 134), citing Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting International Shoe to Family Law*, 28 UC Davis L Rev 1047, 1058 (1995) (stating that "we can expect the Court to understand and defer to well-thought-out jurisdictional schemes, even when they deviate from announced Supreme Court doctrine"); Friedrich K. Juenger, 28 UC Davis L Rev at 1044 (cited in note 90) (stating that the U.S. Supreme Court "might well be prepared" to "countenance a change of jurisdictional bases by treaty").

compromise approach suggested by Professor Silberman¹³⁹ would permit some of these cases to be heard in American courts.¹⁴⁰ Under the narrowest version of her proposal, a country could exercise general jurisdiction over a suit brought by one of its habitual residents if the defendant has a branch office there.¹⁴¹

Despite its narrowness, this version of her proposed exception has many strengths. First it would be very predictable. Second, it would create a local forum for some cases that our citizens might find hard to give up. Furthermore, since other countries would not need to recognize such judgments,¹⁴² this form of jurisdiction would be used only when easy enforcement is likely available, either in the forum or elsewhere; for example, if the defendant has assets in the United States.

However, unless Professor Silberman's broader proposal (allowing general jurisdiction where defendant has "substantial" ties) is adopted, the exception would not apply to most recent cases finding general jurisdiction over foreign defendants.¹⁴³ This gap would create a serious problem for United States businesses that regularly seek to sue foreign business entities in American courts. Nevertheless, this doctrinal narrowing is worth the loss, since courts would be compelled to address and refine specific jurisdiction issues in many cases involving foreign defendants.

This approach seems to be the best compromise. It restricts doing-business jurisdiction over defendants abroad without unsettling doing-business jurisdiction as it is practiced against

¹³⁹ See notes 117–19 and accompanying text.

¹⁴⁰ Article 18 could be modified, Silberman suggests, to prohibit jurisdiction on the basis of the:

carrying on of commercial activity by the defendant when the activity did not give rise to the claim "except where the defendant has a branch office or where the defendant's activity in the forum is evidence of a substantial presence there, and the plaintiff is habitually resident in the forum state."

Silberman, *Can the Hague Judgments Project Be Saved?* (cited in note 99).

¹⁴¹ *Id.*

¹⁴² The provision would simply remove this basis for general jurisdiction from the "prohibited bases of jurisdiction" in Article 18 of the proposed convention. See Hague Draft Proposal at Art 18 (cited in note 4). See also Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 Albany L Rev 1283, 1290–91 (1998) (criticizing Americans for insisting that some bases of jurisdiction be put into a "gray" area allowing enforcement within the nation but not beyond, but recognizing that this compromise may be necessary to achieve a convention signed by the United States).

¹⁴³ Most of those cases involved claims that were somehow related to the defendant's forum activities. Few of them involved a branch office operated by the defendant. See notes 81–85 and accompanying text.

American defendants. Over time states might gradually adopt the stricter standard for local cases as well. Equally important, more experience in addressing specific jurisdiction questions in cases where no branch office exists should result in better standards for specific jurisdiction than those currently in place.

D. Use Ad Hoc Measures to Control General Jurisdiction

While a statute or treaty formally limiting general jurisdiction over foreign defendants might be the best approach overall, it is unlikely that we will happily give up our broad doing-business jurisdiction. Therefore courts may elect to use such ad hoc measures as the reasonableness standard,¹⁴⁴ or unforeseeability,¹⁴⁵ or forum non conveniens,¹⁴⁶ to put a brake on this jurisdiction with foreign defendants.

Because the unreasonableness test is already being used in general jurisdiction cases involving American defendants,¹⁴⁷ and has the imprimatur of the Supreme Court,¹⁴⁸ it is likely that this is how most general jurisdiction cases will be approached in the future: courts will assert general jurisdiction whenever they find continuous and systematic contacts, but will dismiss any wholly-unrelated cases on reasonableness grounds unless the defendant has exceptionally long-term and substantial contacts.¹⁴⁹

This approach might protect foreign defendants having little litigation experience in the United States. However, this is the

¹⁴⁴ See notes 147–48.

¹⁴⁵ *World-Wide Volkswagen*, 444 US at 295–97 (refusing to assert jurisdiction in state of injury unless defendant's connection with the forum makes litigation foreseeable there).

¹⁴⁶ See note 88.

¹⁴⁷ *Metropolitan Life Insurance Co v Robertson-Ceco Corp*, 84 F3d 560, 568–69, 573–75 (2d Cir 1996) (upholding trial court's determination that forum had general jurisdiction over American defendant but that suit should nevertheless be dismissed under unreasonableness prong of jurisdiction analysis).

¹⁴⁸ See *Asahi*, 480 US at 113–16 (denying personal jurisdiction as unreasonable in suit involving a foreign component part manufacturer).

¹⁴⁹ There is nothing wrong with a court's finding general jurisdiction and then declining to hear the case before it on reasonableness grounds. This is likely to happen with claims unrelated to the defendant's forum contacts because the forum is less likely to have any interest in such a claim. See, for example, *Metropolitan Life Insurance*, 84 F3d at 573–75 (finding general jurisdiction over claim unrelated to forum contacts but dismissing because forum had no interest in the dispute). However, the point is that courts should not find "general" jurisdiction in the first place unless the defendant's contacts with the state are so strong that there is a state interest in deciding *unrelated as well as related claims*. If a court would dismiss most unrelated claims against a defendant as "unreasonable," the defendant does not have the kind of ties with the forum that are necessary for general jurisdiction, since the point of general jurisdiction is that the state has sufficient interest in the defendant to decide any and all claims against that defendant. See note 11.

least attractive of our options, since it is not a national rule, and forum-shopping incentives and confusion and unpredictability would continue to thrive. Doing-business jurisdiction would remain as a halfway house between specific jurisdiction and the Platonic version of general jurisdiction, catching those somewhat-related cases that we want to decide which do not clearly fail under specific jurisdiction standards.

E. Do Nothing

Finally, we can do absolutely nothing, continuing to use doing-business jurisdiction as we now do. There are costs to businesses that cannot plan, or foresee when courts will find general jurisdiction, but with respect to domestic claims against foreign corporations, these costs are, for the most part, externalized. Maintaining the status quo may be a self-interested and cynical choice, but it is also a realistic one.

F. Recommendation: Some Special Treatment for Foreign Defendants

Given this range of options, the most reasonable solution, from the point of view of both theory and politics, is to abandon our current broad general jurisdiction over foreign defendants. If a compromise can be hammered out in the Hague negotiations allowing us to retain general jurisdiction over a foreign defendant having a branch office in the country,¹⁵⁰ at least as to claims of American plaintiffs, we would have a workable approach to doing-business jurisdiction. We could continue to exercise general jurisdiction over foreign defendants in a limited set of circumstances, without any assurance that such judgments would be enforced by other countries.

Restricting doing-business jurisdiction over foreign defendants would compel courts to address important questions of spe-

¹⁵⁰ Such a provision would allow us to exercise jurisdiction over such defendants. Enforcement of any resultant judgment would depend on the presence of assets in the United States or in the willingness of another nation to honor such a judgment, which would be problematic in many places. See Matthew H. Adler, *If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 L & Pol in Intl Bus 79, 94–95 (1994) (describing recognition rules in foreign countries that interfere with enforcement of American judgments abroad); 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, 8–9 (1998) (if a foreign defendant does not have sufficient assets in the United States, it may have trouble enforcing a U.S. judgment abroad).

cific jurisdiction that have yet to be resolved. The result should be the development of more robust and clearly-defined specific jurisdiction rules, which would then be applied to local as well as foreign defendants. We would “keep our elbows in,” as Allan Stein so aptly puts it,¹⁵¹ cooperating in creating the international jurisdictional standards necessary for successful dispute resolution procedures in a globalized world.

Absent a Hague treaty, this recommendation will be more difficult to put into place. If no treaty is involved, it would take Congress or the Supreme Court to impose the same restrictions on doing-business jurisdiction over foreign businesses, and the likelihood of either body doing this absent the pressure of a completed international treaty is not great. Although the Supreme Court might surprise us all by setting clearer limits on general jurisdiction against foreign defendants, perhaps by ruling that it is generally “unreasonable” to hold a foreign defendant subject to general jurisdiction on an unrelated cause of action unless it has a branch office in this country, it is unlikely that the Court would be willing to adopt such a bright-line rule without considerable pressure from various quarters.

Short of such a dramatic about-face, the best solution would be for the Supreme Court to recognize, and insist that state and federal courts recognize, that due process does not permit “general” doing-business jurisdiction unless the state has such significant ties with the forum that the court would feel equally justified in deciding a wholly-unrelated claim.¹⁵² A clearer judicial exploration of the forum ties needed for general jurisdiction would be tremendously helpful, but perhaps it is too much to ask.¹⁵³

CONCLUSION: SOLVING THE “DOING BUSINESS” PROBLEM

It seems every route of escape from the dilemma of our current use of doing-business jurisdiction is blocked off. Courts will continue use the theory to justify jurisdiction, generally over cases related to the defendant’s forum contacts, when it is easier to find general jurisdiction than specific jurisdiction. This overuse has led to much confusion about the nature of this form of juris-

¹⁵¹ Stein, 2001 U Chi L Rev at 394 (cited in note 123).

¹⁵² See Part V B 1.

¹⁵³ Perhaps we can also do without it. See Cass R. Sunstein, *Problems with Rules*, 83 Cal L Rev 953, 971 (1995) (stating that workable rules can be based on “incompletely theorized agreements—agreements among people who disagree on questions of theory or on fundamental values”).

diction and its role in our constitutional jurisdiction structure. The old notion of the “branch office” is not sufficiently robust to capture the ways that international actors structure their business relationships, and it is unlikely that Americans will be willing to limit “general” jurisdiction to such a norm. But coming up with a different approach will take much thought about the nature of a state’s judicial relationship with remote commercial actors. Pressures from other countries are forcing us to reconsider how far we should go in asserting such judicial jurisdiction on the rest of the world, and the time has come to give up some of this judicial power, as much as we might want to keep it for ourselves.

No matter what approach we take, this is not a problem that can be easily solved. In this we can draw consolation from Learned Hand, who wrote years ago:

None of this, and not all of it, seems to us a good reason for drawing the defendant into a suit away from its home state. In the end there is nothing more to be said than that all the defendant’s local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no *vade mecum*.¹⁵⁴

¹⁵⁴ *Hutchinson v Chase & Gilbert, Inc*, 45 F2d 139, 142 (2d Cir 1930).