Jurisdictional Pragmatism: *International Shoe*'s Half-Buried Legacy

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INTRODUCTION

When, five decades ago, the United States Supreme Court decided *International Shoe Co. v. Washington*,[1] the end of Supreme Court micro-management of state court jurisdiction seemed in sight. At least since its decision in *Riverside & Dan River Cotton Mills v. Menefee*,[2] and maybe as far back as *Pennoyer v. Neff*,[3] the Supreme Court had — through the vehicle of the Due Process Clause of the Fourteenth Amendment[4] — assumed for itself the role of the final arbiter of state court jurisdiction. The Supreme Court did not renounce this role in *International Shoe*, but there were promising hints that it would.

The reasons for optimism came from at least two different sources in the opinion. First, the Court replaced the previous era's crudely geographical approach with a more flexible test that allowed for jurisdiction over corporate defendants[5] who had "certain minimum contacts" with the forum state.[6] Because contacts came in two varieties — those related to the claim[7] and

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In his contribution to this Symposium, Professor Oakley criticizes many of the historical arguments that I make in this Article, and that I have made in my earlier writings. I take vigorous issue with him on many of the points that he raises. Constraints of time and space have prevented me from responding here, but I will publish a comprehensive reply in the near future.

[1] 326 U.S. 310 (1945).

[2] 237 U.S. 189 (1915).

[3] 95 U.S. 714 (1877).

[4] U.S. CONST. amend. XIV, § 1.

[5] This approach was later expanded to all defendants. *See* Shaffer v. Heitner, 433 U.S. 186, 204 n.19 (1977) (stating that *International Shoe*'s standard applies to natural persons as well as to corporations).

[6] *International Shoe*, 326 U.S. at 316.

[7] This later came to be known as "specific" jurisdiction. *See* Arthur von Mehren &

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those unrelated but nonetheless "systematic and continuous"[8] — greatly-expanded reach for state courts seemed inevitable.

Second, the antiquated homage to the notion of "sovereignty" required by the earlier era seemed to disappear. The *Pennoyer* era[9] depended upon two principal means of obtaining jurisdiction over defendants, both of which were simultaneously over- and under-inclusive. The first was the rule that an individual defendant served with a summons (or "tagged") while within the borders of the forum state, no matter how briefly, was subject to jurisdiction.[10] The second was obtaining jurisdiction by pre-judgment attachment of in-state property, no matter what its relationship (if any) to the dispute might be.[11] These devices were over-inclusive because they allowed for jurisdiction over a defendant who happened to have her body or property in the wrong place at the wrong time. These devices were under-inclusive because corporations — lacking a physical embodiment — could not be "tagged" for jurisdictional purposes, even through service of one of their officers.[12] This forced the Supreme Court to rely on the odd notion that corporations doing substantial business in a state implicitly consented to jurisdiction,[13] a rationale later extended to natural persons.[14]

So, when the Supreme Court said in *International Shoe* that defendants are subject to jurisdiction even if "not present within the territory of the forum, [but having] certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'"[15] this was progress. But, it was progress more for what

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Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-45 (1966).

[8] *International Shoe*, 326 U.S. at 320. This came to be known as "general jurisdiction." *See* von Mehren, *supra* note 7, at 1136.

[9] I will use this term to refer to jurisdictional doctrine before *International Shoe*, although, as discussed below, it is not clear that *Pennoyer* meant to give the Supreme Court the broad authority to regulate jurisdiction that it now assumes.

[10] Pennoyer v. Neff, 95 U.S. 714, 724-25 (1877).

[11] *Id.* at 727-28.

[12] *See, e.g.*, Goldey v. Morning News, 156 U.S. 518 (1895).

[13] *See* Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407-08 (1855) (holding conditional business charters may subject businesses to jurisdiction).

[14] *See* Hess v. Palowski, 274 U.S. 352, 355-57 (1927) (holding that use of state highways by out-of-state motorists may subject them to jurisdiction).

[15] 326 U.S. at 316 (citations omitted).

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the Court *didn't* say than what it did say. The Court didn't say that this "presence" had to be accompanied by some symbolic assertion of sovereignty, such as service of the summons while in the forum or attachment of in-state property. The Court was willing to give up the notion that regulating personal jurisdiction in civil lawsuits between private parties involved an important element of state "sovereignty." Maybe it was also willing to give up the whole idea — born originally of public international law[16] — that it needed to act as a "Super Court" of jurisdiction.

This promise of *International Shoe* has been realized only partially. The minimum contacts test has allowed for broader jurisdictional reach than would have been possible before.[17] Thus, jurisdiction in the United States is now slightly more responsive to the realities of multi-party, multi-claim interstate litigation than it was before *International Shoe*.

But, all is not well. At least seven times[18] since *International Shoe*, the Supreme Court has stepped in to invalidate state court assertions of jurisdiction that, on their faces, were reasonable. The results in these post-*International Shoe* cases have been neither sensible nor predictable. The Court, for example, has refused to allow a derivative suit against corporate directors and officers in the state of incorporation,[19] products liability actions in the state of the injury,[20] and a child support action in the child's home state.[21] Each of these assertions of jurisdiction, however, would be allowed by major international conventions.[22] On the other hand, the Court has validated jurisdiction

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[16] *See* Pennoyer v. Neff, 95 U.S. 714, 722-24 (1877) (discussing jurisdiction in context of public international law).

[17] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[18] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 418-19 (1984); Rush v. Savchuk, 444 U.S. 320, 332-33 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298-99 (1980); Kulko v. Superior Court, 436 U.S. 84, 101 (1978); Shaffer v. Heitner, 433 U.S. 186, 216-17 (1977); Hanson v. Denckla, 357 U.S. 235, 256 (1958).

[19] *Shaffer*, 433 U.S. 186.

[20] *Asahi*, 480 U.S. 102; *World-Wide Volkswagen*, 444 U.S. 286.

[21] *Kulko*, 436 U.S. 84.

[22] *E.g.*, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 5, 16, 96 Common Mkt. Rep. (CCH) (1968), *reprinted in* 8 I.L.M. 229, 232, 234 (1969) [hereafter Brussels Convention], *as amended by* the Convention on Accession of Denmark, Ireland and the United Kingdom to the Brussels

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based solely on in-state service of the defendant,[23] a practice so outrageous that the major European treaties specifically abolish it.[24]

The only fair conclusion is that jurisdiction in the United States is a mess. But, there is a path out of this mess — a path faintly indicated by *International Shoe* but abandoned since. The path to a more pragmatic era of jurisdiction rests on two propositions that run counter to the prevailing American wisdom, but are nonetheless well worth defending. The first is that the Due Process Clause places almost no limitations on personal jurisdiction. As a result, constitutional invalidation of state court assertions of jurisdiction ought to be so rare as to be of little interest.[25] The second is that jurisdictional rules ought to be constructed in such a way as to make people's lives better, not worse. Legislatures are in a position superior to courts to accomplish that goal. Part I defends the first proposition, Part II the second.

I. CONSTITUTIONAL PERSONAL JURISDICTION

A. *The Supreme Court's Long, Strange Trip*[26]

To understand why the Supreme Court should get out of the business of regulating jurisdiction, it is necessary to understand how it got into the business in the first place. The Court began by "indirectly" regulating jurisdiction. Civil law systems maintain a useful distinction between "direct" and "indirect" rules of juris-

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Convention, Oct. 9, 1978, 1978 O.J. (L 304) 77, *reprinted in* 18 I.L.M. 8 (1979) (entered into force between original six Member States and Denmark on Nov. 1, 1986, between these countries and the United Kingdom on Nov. 1, 1987, and between these countries and Ireland on June 1, 1988); Inter-American Convention on Support Obligations, 29 I.L.M. 75, art. 8 (1990) [hereafter OAS Convention].

[23] Burnham v. Superior Court, 495 U.S. 604, 628 (1990).

[24] *E.g.*, Brussels Convention, *supra* note 22, art. 3 as amended, 18 I.L.M. at 10; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 3, Sept. 16, 1988, art. 3, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620, 624 (1989).

[25] This is Professor Graglia's phrase, although he uses it to refer to the entire institution of constitutional review. *See* George Will, *An Activist Court*, THE TIMES-PICAYUNE, Apr. 18, 1994, at B7. It is not my view that all of constitutional review is suspect, just that constitutional invalidation of state court assertions of jurisdiction is suspect.

[26] THE GRATEFUL DEAD, *Truckin'*, *on* AMERICAN BEAUTY (Warner Bros., Inc. 1970) (chorus includes the verse: "What a long, strange trip it's been").

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diction.[27] Direct rules of jurisdiction are those that operate on the judgment-rendering court.[28] They "directly" forbid or allow the court in which the plaintiff files the suit to take jurisdiction.[29] Indirect rules do not limit the judgment-rendering court's authority to hear the case. Instead, indirect rules of jurisdiction prevent a judgment-recognizing court (often referred to as "F-2" to denote that it is the second forum to hear the case) from enforcing a judgment rendered in a court (often referred to as "F-1") if F-1 exceeded some generally accepted basis of jurisdiction.[30]

The differences between direct and indirect regulation of jurisdiction can be profound. The most important difference is that if F-1's judgment can be enforced without another court recognizing the judgment, indirect rules of jurisdiction never come into play. The constitutional provision dealing with judgment recognition is the Full Faith and Credit Clause.[31] Not surprisingly, the Supreme Court's first involvement with state court jurisdiction came about in the context of interpreting the Full Faith and Credit Clause and its implementing legislation.[32]

The Court early on interpreted the Full Faith and Credit Clause to require state courts, nearly unquestioningly, to recognize sister-state judgments.[33] The Court also suggested that this principle of unquestioning recognition might admit of an exception for judgments rendered in excess of common principles of jurisdiction.[34] The important case of *D'Arcy v. Ketchum*[35] held that a defendant could successfully collaterally attack — on principles of "international law" — a state court judgment where the

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[27] von Mehren & Trautman, *supra* note 7, at 1136.

[28] Peter Hay, *The Common Market Preliminary Draft Convention on the Recognition and Enforcement of Judgments: Some Considerations of Policy and Interpretation*, 16 AM. J. COMP. L. 149, 151 (1968).

[29] *Id.*

[30] *See, e.g.*, Schibsby v. Westenholz, 6 Q.B. 155, 162-63 (1870) (English court will not recognize French judgment where French court took jurisdiction based solely upon French citizenship of *plaintiff* even though judgment is enforceable in France).

[31] U.S. CONST. art. IV, § 1.

[32] Act of May 26, 1790, ch. 11, 1 Stat. 122, *as amended by* Act of March 27, 2 Stat. 298 (current version at 28 U.S.C. § 1738 (1988)).

[33] *See, e.g.*, Mills v. Duryee, 11 U.S. (7 Cranch) 481, 483-85 (1813).

[34] Hampton v. M'Connell, 16 U.S. (3 Wheat.) 234, 236 (1818).

[35] 52 U.S. (11 How.) 165 (1850).

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defendant had neither voluntarily appeared nor been served while in-state.[36]

It is important to understand how limited the Supreme Court's role was in regulating jurisdiction. First, its role was entirely indirect. The Full Faith and Credit Clause is implicated only if a judgment-creditor presents a judgment for recognition, thereby creating a federal issue allowing the Court to exercise appellate jurisdiction.[37] Second, the Supreme Court cases of this era did not hold that the Full Faith and Credit Clause placed any affirmative limitations on jurisdiction. These cases rarely involved F-2 chosing to give effect to F-1's judgment. Instead, they were all cases in which F-2 *refused* recognition, and the Court had to decide whether, in so doing, F-2 had violated the Full Faith and Credit Clause.[38]

Moreover, the Court in this early era was receptive to jurisdictional innovation. In *Lafayette Insurance Co. v. French*,[39] the Court upheld an Ohio statute forcing insurance companies to "consent" to jurisdiction as a condition of doing any substantial business in the state.[40] In *Galpin v. Page*[41] — authored by Justice Field, who would write *Pennoyer* only four years later — the Court stated in a dictum that states could pass statutes to allow for "constructive" service of non-resident individuals without instate service of the summons.[42]

1. The Importance of *Pennoyer v. Neff*

All of this history makes *Pennoyer v. Neff*[43] an important opinion, but probably not for the reason commonly asserted. The conventional reading of *Pennoyer*, endorsed by recent Supreme

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[36] *Id.* at 174-76.

[37] Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 587-88 (1981).

[38] *See id.* (discussing Supreme Court cases in which F-2 had refused to recognize F-1's judgment).

[39] 59 U.S. (18 How.) 404 (1855).

[40] *Id.* at 408-09.

[41] 85 U.S. (18 Wall.) 350 (1873) (constructive service statute will confer jurisdiction because "every principle of justice exacts a strict and literal compliance with the statutory provisions").

[42] *Id.* at 369.

[43] 95 U.S. 714 (1877).

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Court cases, is that *Pennoyer* held that the Due Process Clause of the Fourteenth Amendment directly limits the jurisdictional reach of state courts.[44] But, as I argued in the pages of this *Review* a few years back,[45] this is not an obvious reading of *Pennoyer.*

Pennoyer differed from the earlier jurisdictional cases in the important respect that, in *Pennoyer,* F-1 and F-2 were both courts in the same state. F-1 was an Oregon state court that entered a default judgment against the defendant before it, Marcus Neff. The plaintiff never served Mr. Neff with process (either in or out of the state), attached any of Mr. Neff's property prior to judgment, or seriously tried to apprise Mr. Neff of the proceedings.[46] F-2 was an Oregon federal court in which Neff sued, in trespass, the person (Sylvester Pennoyer) who had purchased[47] Neff's land at a sheriff's sale held to enforce F-1's default judgment.[48]

After the lower federal court (F-2) refused to recognize F-1's judgment — thus allowing Neff's trespass suit to proceed[49] — the Supreme Court was faced with a difficult analytical problem. The difficult problem was that the earlier cases allowing collateral attacks for lack of jurisdiction were mostly[50] cases of *interstate* recognition: F-1 and F-2 were courts in different states. *Pennoyer* presented the problem of F-1 and F-2 in the same state; thus,

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[44] *E.g.*, Burnham v. Superior Court, 495 U.S. 604, 609 (1990).

[45] Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 32-43 (1990).

[46] Borchers, *supra* note 45, at 33 (only "service" on Neff was publication in *The Pacific Christian Advocate* — a local paper with no circulation in California, where Neff resided).

[47] Well, sort of. Pennoyer actually bought the land from judgment-creditor Mitchell three days after the sheriff's sale. Wendy Purdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 486 (1987). The important point, though, is that it was Pennoyer who was in possession of the land when Neff brought his trespass suit in the Oregon federal court, and Pennoyer's right to the land depended upon the validity of sheriff's deed. When the proceedings in the Oregon state court (F-1) were ultimately determined to lack jurisdiction, the sheriff's deed made to enforce the judgment was, of course, invalid. Neff, as the original owner of the land, was held to be the rightful owner. Borchers, *supra* note 45, at 32-34.

[48] *Id.* at 33-34.

[49] Neff v. Pennoyer, 17 F. Cas. 1279 (C.C.D. Or. 1875) (No. 10,083).

[50] The Court did face some earlier cases of intrastate recognition, such as Galpin v. Page, 85 U.S. (18 Wall.) 350 (1873), but the Court had always managed to dispose of them on other grounds, such as statutory construction. *Id.* at 369.

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the Court had to decide whether to transplant the interstate recognition principles to *intra*state recognition.

Justice Field, author of the *Pennoyer* majority opinion, clearly understood that the case before him differed from the interstate recognition cases.[51] But, Field decided that because F-1 was a state court and F-2 federal, the principles developed in interstate recognition should apply.[52] The *Pennoyer* majority reasoned:

> Whilst [the federal courts] are not foreign tribunals in their relations to the State courts, they are tribunals of different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.[53]

Probably, then, the principal holding of *Pennoyer* was that the Court could indirectly regulate jurisdiction in cases of intrastate recognition, at least if F-1 was a state and F-2 a federal court. This was an important extension of the Court's regulatory authority over issues of state court jurisdiction. But, it is a long way from the common understanding that *Pennoyer* transformed the Court into a *direct* regulator of state court jurisdiction with the final say in all circumstances. What is it, then, that accounts for the common perception that *Pennoyer* turned the Supreme Court into a direct regulator of state court jurisdiction?

A good deal of the attention to *Pennoyer* has been devoted to its discussion of the Due Process Clause. A common explanation for the Court's transformed role is that *Pennoyer* was the Court's first opportunity to consider jurisdiction after the ratification of the Fourteenth Amendment.[54] This explanation, however, is doubtful. The Fourteenth Amendment was ratified in July of 1868,[55] and the Court had considered other jurisdictional cases since its ratification, notably *Galpin v. Page*.[56] Moreover, the timing of the case does not support the argument that the Court

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[51] 95 U.S. at 732-33.

[52] *Id.*

[53] *Id.*

[54] Perdue, *supra* note 47, at 502-04; Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 821 (1981).

[55] Proclamation 13, 40th Cong., 2d Sess., 15 Stat., app. at 708 (1868).

[56] 85 U.S. (18 Wall.) 350 (1873).

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viewed the Due Process Clause as setting jurisdictional limits on state courts. The state court entered judgment in 1866, two years prior to ratification of the Fourteenth Amendment.[57]

The difficulty is discerning why the Court discussed the Due Process Clause at all and what it meant to say. The Court's discussion is woefully unclear, and is open to multiple interpretations. As I suggested earlier, the Court may not have meant the Due Process Clause to limit a state court's jurisdiction, but, rather, to guarantee a defendant at least one chance to contest jurisdiction.[58] Several portions of the opinion support this more limited reading of *Pennoyer*.

First, the Court's decision to treat cases of intrastate recognition like interstate ones was born of concern for a mechanism for enforcing jurisdictional rules. The Court, as noted above, understood that the interstate cases justified intervention in jurisdictional matters because of the Full Faith and Credit Clause.[59] But, the *Pennoyer* majority recast those cases, saying that the "language used [in those interstate cases] can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted."[60]

Second, it was this ability to challenge jurisdiction at least once that seemed to prompt the Court's discussion of the Due Process Clause. Almost immediately after the language quoted above, the Court reasoned that "[s]ince the adoption of the 14th Amendment . . . the validity of such judgments may be directly questioned, and their enforcement in the State resisted."[61] While the Court was surely saying that a direct jurisdictional attack ought to be possible in some court, it was not necessarily saying that the Due Process Clause itself defined the jurisdictional reach. The Court's concern throughout this whole portion of the opinion was with ensuring some mechanism to allow a defendant to contest jurisdiction.

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[57] Pennoyer v. Neff, 95 U.S. 714, 719 (1877).

[58] Borchers, *supra* note 45, at 38-43.

[59] *See supra* notes 31 to 38 and accompanying text (discussing Court's application of Full Faith and Credit Clause to interstate cases).

[60] *Pennoyer*, 95 U.S. at 732.

[61] *Id.* at 733.

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Third, supporting the idea that the Court's role was not to set jurisdictional limits, but rather to ensure defendants a fair opportunity to contest jurisdiction in some forum, the Court relied upon secondary authority.[62] In 1834, Joseph Story — himself a Supreme Court Justice — penned the most significant American work on the conflict of laws.[63] The *Pennoyer* majority relied heavily on Story's treatise, which makes his discussion of the subject of special importance.[64] Story, in the crucial passage — referring to judgments entered without jurisdiction — wrote that "[t]he effects of all such proceedings are *purely local*; and, *elsewhere*, they will be held as mere nullities."[65] This, of course, is the essence of indirect, not direct, regulation of jurisdiction.

Finally, the Court had no real need to hold that the Due Process Clause itself limits state court jurisdiction. All the parties in *Pennoyer* seemed to agree that Oregon followed the accepted "international" principles of jurisdiction.[66] In fact, the *Pennoyer* majority's entire discussion of jurisdictional principles came in the context of construing Oregon Code section 55.[67] Because the Oregon Code only restated traditional jurisdictional principles, the *Pennoyer* opinion would be a strange vehicle indeed for hypothesizing constitutional limits on state court jurisdiction.

2. Post-*Pennoyer* Developments

In the years immediately following *Pennoyer*, the Supreme Court did not appear to believe that it had become the direct regulator of state court jurisdiction. Nor did the Court appear to believe that the Due Process Clause set any limit on state courts' authority to enforce their own judgments. In several cases, the Supreme Court clearly indicated that restraints on jurisdiction become relevant only when the judgment is presented for recognition in another court.[68] Thus, a state court enforcing one of

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[62] *Id.* at 722.

[63] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834). For a discussion of this work's importance, see FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 29-31 (1993). The *Pennoyer* Court evidently cited the seventh edition of Story's treatise, published in 1872. *Pennoyer*, 95 U.S. at 722.

[64] *Id.*

[65] STORY, *supra* note 63, § 546 (emphasis added).

[66] Perdue, *supra* note 47, at 506.

[67] Borchers, *supra* note 45, at 40-41.

[68] *See, e.g.*, Goldey v. Morning News, 156 U.S. 518, 521 (1895) ("Whatever effect a con-

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its *own* judgments would present no constitutional issue. Field himself — in *Insurance Co. v. Bangs*,[69] a case decided only three years after *Pennoyer* — reasoned that state courts, in enforcing their own judgments, were not necessarily required to follow the jurisdictional principles articulated in *Pennoyer*.[70] The *Bangs* Court held that a Michigan statute allowing substituted service on a guardian of a defendant did not apply to an action brought in a Michigan federal court.[71] The Court, however, noted that the practice "may be otherwise in the State courts [and that] service of process upon the general guardian, or his appearance without service, is deemed sufficient for . . . jurisdiction."[72]

Only two years later, Field described the *Pennoyer* opinion in very limited terms: "In *Pennoyer v. Neff* we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render a personal judgment . . . *which would be received as evidence in the Federal courts*."[73] The italicized language is, of course, inconsistent with the notion that *Pennoyer* held the Due Process Clause to limit the state courts' jurisdiction to enforce their own judgments. Had *Pennoyer* stated such a broad principle, Field could have written the sentence without the italicized language, and it would have been complete and accurate. The added language confirms that *Pennoyer* was really about transplanting the principles of interstate recognition to cases of intrastate recognition.

Thus, the transformation of the Supreme Court to a direct regulator of jurisdiction, and the Due Process Clause to the principal source of limitations on state court jurisdiction, almost

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structive service *may be allowed in the courts of the same government*, it cannot be recognized as valid by courts of *any other government*.") (emphasis added); Grover & Baker Sewing Mach. Co. v. Radcliffe, 137 U.S. 287, 295 (1890) (noting "the distinction between the validity of a judgment rendered in one state, under its local laws on a subject, and *its validity in another state*." (emphasis added)); Hart v. Sansom, 110 U.S. 151, 155 (1884) (referring to Texas statute allowing for service by publication of non-resident defendants: "[t]he courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes. But no court *deriving its authority from another government* will recognize a merely constructive service as bringing the person within the jurisdiction of the court." (emphasis added)).

[69] 103 U.S. 435 (1880).

[70] *Id.* at 439-41.

[71] *Id.* at 440.

[72] *Id.* at 439.

[73] St. Clair v. Cox, 106 U.S. 350, 353 (1882) (Field, J.) (emphasis added).

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surely did not happen in *Pennoyer*. Instead, it occurred — thirty-eight years later — in the much less well-known case of *Riverside & Dan River Cotton Mills v. Menefee*.[74] *Menefee* is the first case in which the Supreme Court exercised its appellate authority over state court jurisdiction without the judgment having been attacked in a second proceeding.[75] Put another way, *Menefee* is the first post-*Pennoyer* Supreme Court case that considered a direct, as opposed to collateral, attack on jurisdiction. And, of course, Supreme Court consideration of a direct attack on state court jurisdiction would necessarily entail direct regulation of jurisdiction.[76]

Menefee began as a case in a North Carolina state court, against a Virginia corporation, for injuries suffered by the plaintiff in Virginia.[77] The plaintiff attempted to obtain jurisdiction over the corporate defendant by serving one of the directors while the director was temporarily in North Carolina.[78] The defendant appeared specially in the North Carolina state court to object to jurisdiction, and, after the trial court overruled the objection, defended on the merits and lost.[79]

The defendant then appealed to the North Carolina Supreme Court on the jurisdictional issue, and that court authored an extremely instructive opinion.[80] The majority of the North Carolina Supreme Court noted that the defendant premised, in part, its objection to jurisdiction on due process grounds.[81] The majority was confronted with authority from the United States

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[74] 237 U.S. 189 (1915).

[75] In two cases a few years prior to *Menefee*, the Court considered judgments that had been presented to the same state courts that had rendered them. *See* Dewey v. Des Moines, 173 U.S. 193 (1899); Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899). By reviewing the jurisdictional issues in those cases, the Court implicitly rejected the limited view of *Pennoyer* that the constitutional principles of jurisdiction operate only if the judgment is presented to the courts of another state for recognition. Borchers, *supra* note 45, at 47-48. *Menefee*, however, was the first case of a truly direct attack on jurisdiction being considered by the Supreme Court, thus forcing the Supreme Court to consider the matter expressly instead of by implication.

[76] *See supra* notes 28-29 and accompanying text (describing direct jurisdiction regulation).

[77] 237 U.S. at 190.

[78] *Id.*

[79] *Id.* at 190-91.

[80] Menefee v. Riverside & Dan River Cotton Mills, 76 S.E. 741 (N.C. 1912).

[81] *Id.* at 742.

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Supreme Court, most notably *Goldey v. Morning News*,[82] holding that in-state service of a corporate officer is not a basis for jurisdiction over the corporation that will allow a judgment to be recognized in another court. But, as the North Carolina high court noted, *Goldey* also assumed only an indirect role for the United States Supreme Court in regulating jurisdiction.[83] After reviewing the North Carolina statutes and decisions authorizing corporate "tag" jurisdiction, the North Carolina court quoted the following language from *Goldey*: "'Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government.'"[84]

The North Carolina Supreme Court quite sensibly interpreted this language to mean that the United States Supreme Court decisions were none of its concern.[85] Because the standards articulated by the United States Supreme Court became relevant only on a collateral attack of the judgment, they did not bear on a direct attack. The state court majority articulated this as follows:

> Under our decisions above quoted, and upon which the plaintiff relied in bringing his action, the service is sufficient for a valid judgment at least *within our jurisdiction*. What opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration.[86]

Facing a direct attack to jurisdiction, and with the lower court's issue so starkly presented, the United States Supreme Court could hardly ignore the growing confusion over its role in regulating jurisdiction. The Court did not ignore the issue, but its treatment was not very satisfactory either. The Court did little to deal with the contrary language of *Goldey* and the other cases cited by the North Carolina high court. Instead, the Court said only that it was "unnecessary to pursue the subject from an original point of view, since in *Pennoyer* . . . it was said that 'proceedings . . . [without] jurisdiction do not constitute due

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[82] 156 U.S. 518 (1895).

[83] *Menefee*, 76 S.E. at 743.

[84] *Id.* (quoting *Goldey*, 156 U.S. at 521).

[85] *Id.*

[86] *Id.* (emphasis added).

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process of law.'"[87] Although, as we have seen, this was a doubtful reading of *Pennoyer*, it did have the virtue of clarifying the roles of both the Supreme Court and the Due Process Clause in the jurisdictional equation. The Due Process Clause was to act as a direct check on state court assertions of jurisdiction, while the Supreme Court, with the final word on constitutional issues, would also have the final word on jurisdictional issues.

B. Modern Implications

All of this has modern implications beyond the fact that jurisdictional opinions of our era cite *Pennoyer* when, instead, they probably should cite *Menefee*. Lately, history has profoundly influenced the Supreme Court's jurisdictional opinions, most obviously *Burnham v. Superior Court*.[88] In *Burnham*, the Court held that the historical pedigree of the in-state service rule ensured its constitutionality.[89] The historical pedigree of constitutional personal jurisdiction, however, has been vastly overstated. The idea that the Due Process Clause directly limits state court jurisdiction springs not from *Pennoyer*, decided shortly after the Civil War and ratification of the Fourteenth Amendment, but, rather, from *Menefee*, decided during World War I.[90] Moreover, the idea that the Constitution regulates personal jurisdiction did not arise from careful consideration of the consequences of transmuting common law concepts to constitutional ones. Rather, the idea arose in sloppy language in *Pennoyer* that ultimately bred conflicting authorities which the Supreme Court finally resolved in *Menefee*.

This history ought to give us pause to consider whether constitutional limits on personal jurisdiction serve any recognizable constitutional values. A doctrine of such ignoble birth ought to be subjected, at least once, to critical examination; the constitutionalization of personal jurisdiction is still awaiting that critical examination from the Supreme Court. A reexamination, from a more fundamental perspective, of the relationship of the

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[87] *Menefee*, 237 U.S. at 195.
[88] 495 U.S. 604 (1990).
[89] *Id.*
[90] *See supra* notes 74-87 and accompanying text (discussing *Menefee*).

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Due Process Clause to state court jurisdiction yields some fruitful avenues of inquiry.

1. Possible Constitutional Limits on Personal Jurisdiction

If, as I suggest, the historical argument for constitutional limits on personal jurisdiction is unpersuasive, let us consider some of the other assertedly constitutional justifications for limiting state court reach. First, the Court has, in an on-again-off-again fashion, suggested that constitutional limitations on personal jurisdiction are necessary to protect values of "interstate federalism" or "sovereignty."[91] Many commentators have criticized this approach,[92] and even the Court now seems to agree that these considerations have nothing to do with personal jurisdiction.[93] Suffice it to say that extending the ambit of a clause that protects "persons" to states has not survived close scrutiny.

Another assertedly constitutional value in the jurisdictional calculus is that of the need to protect "forum state interests."[94] The Court has never been very clear on what it means by this.[95] At times, the forum state interest factor has resembled the federalism factor, thus suffering from the same analytical deficiencies.[96] At other times, though, the forum state interest factor appears to elliptically refer to the plaintiff,[97] which is a more plausible possibility that I will address below.[98]

Another rationale offered in support of constitutional limits on personal jurisdiction is the need to prevent "jurisdictional

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[91] *See, e.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286, 291-92 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958).

[92] *See, e.g.*, Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jursdiction*, 58 NOTRE DAME L. REV. 699 (1983); Martin H. Redish, *Due Process, Federalism and Personal Jurisdiction: A Theorectical Evaluation*, 75 NW. U. L. REV. 1112 (1981).

[93] Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

[94] *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84, 92 (1978); Shaffer v. Heitner, 433 U.S. 186, 214-16 (1977).

[95] *See generally* Harold S. Lewis, Jr., *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769 (1982) (discussing forum state interest doctrine).

[96] *Id.* at 770-71.

[97] *E.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1983).

[98] *See infra* note 122 and accompanying text.

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surprise."[99] The idea appears to be that due process allows only for "foreseeable" exercises of jurisdiction.[100] And, unforeseeable exercises of jurisdiction present the same constitutional difficulties as retroactive application of legislation.[101] There is some surface appeal to this argument, but it is ultimately circular.[102] State court exercises of jurisdiction become foreseeable when they are well-established or when the state announces its intention to exercise jurisdiction in a long-arm statute.

The problem is that limited jurisdiction is not necessarily predictable jurisdiction, nor is broad jurisdiction unpredictable. The French, for instance, grant their courts personal jurisdiction in any dispute in which the plaintiff is French, regardless of the connection of the defendant or the dispute to France.[103] This is a very predictable basis for personal jurisdiction, but extremely broad in application. Perhaps more to the point, the judicially announced constitutional rules of personal jurisdiction have not been predictable, making predictability alone an untenable basis for constitutional limits.

2. Due Process Limits on Personal Jurisdiction

After examining the unconvincing historical explanation and the unsatisfactory justifications that the Court has attempted to devise, the only real candidates for limiting state court jurisdiction are those classically embodied in the Due Process Clause. Due process limitations on state action are commonly divided into two broad categories: substantive and procedural.[104] Substantive due process demands that state action bear a rational relationship to a legitimate state goal, unless the state action impinges on some fundamental right, such as voting[105] or

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[99] *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 636-37 (1990) (Brennan, J., concurring in the judgment); World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980); *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

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

[101] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

[102] *World-Wide*, 444 U.S. at 299 (Brennan, J., dissenting).

[103] Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 128 n.55 (1992).

[104] JOHN E. NOWAK ET AL. CONSTITUTIONAL LAW § 10.6 (3d ed. 1986).

[105] Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

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speech.[106] If the state action impinges on a fundamental right, the action must serve a compelling interest by the least restrictive means.[107] Procedural due process requires that a state depriving any person of "life, liberty or property"[108] grant some minimal procedural protection to ensure that the deprivation is fundamentally fair.[109] Either substantive or procedural due process may limit personal jurisdiction because a state court proceeding against a civil defendant is surely state action in which a defendant has her property at stake.

a. Substantive Due Process

State court exercises of personal jurisdiction demand only "rational basis" scrutiny under substantive due process analysis.[110] The mere fact that a state court chooses to exercise jurisdiction in a civil case does not threaten any recognized fundamental right such as voting, speech, or privacy. And, unless a state were to enact a discriminatory jurisdictional rule — for example, a rule providing for jurisdiction over defendants of only one racial group — it is hard to see how a state would trigger any scrutiny beyond the deferential "rational basis" test.[111]

The rational basis test is a weak check on state court jurisdiction. Certainly one can conceive of irrational exercises of jurisdiction — an Alaska state court considering a small, local contract dispute between two Floridians, for example.[112] But, as long as the state advances a legitimate goal in a not-irrational manner, substantive due process demands no more. Certainly, in

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[106] Carey v. Brown, 447 U.S. 455 (1980).

[107] Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[108] U.S. CONST. amend. XIV.

[109] Matthews v. Eldridge, 424 U.S. 319, 332-33 (1976).

[110] *See* Steven E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1293 (1983).

[111] *See, e.g.*, Williamson v. Lee Optical of Okla., Inc. 348 U.S. 483, 491 (1955) (state statute requiring licensing of opticians is constitutional under rational basis test); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (articulating circumstances under which heightened scrutiny is appropriate).

[112] *Cf.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972) ("We are not here dealing with an agreement between two Americans to resolve their essentially local dispute in a remote alien forum.").

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every Supreme Court case since *International Shoe* the attempted exercise of jurisdiction was rational. California's attempt in *Kulko v. Superior Court*[113] to take jurisdiction was a rational manner of advancing the legitimate goal of protecting the child-support rights of two children then living in California. Oklahoma's attempt to take jurisdiction in *World-Wide Volkswagen v. Woodson*[114] was a rational endeavor, given that the auto accident occurred on Oklahoma highways and all of the physical evidence was located there. *Rush v. Savchuk*[115] was a rational effort by Minnesota to allow one of its own citizens a local forum to collect against an insurance policy written by a national company. And, it is hard to argue with the rationality of Delaware's attempt, in *Shaffer v. Heitner*,[116] to allow a shareholder's derivative action against the officers and directors of a national company that had chosen Delaware as its corporate home.

b. Procedural Due Process

Procedural due process also sets a weak check on state court assertions of personal jurisdiction. Both the plaintiff and the defendant have property at stake in a civil case,[117] and each is entitled to a forum that will allow fair resolution of their dispute.[118] Assuming that there is not some internal problem with the forum — such as a biased judge[119] — state court jurisdiction ought to threaten this value only occasionally. For example, a consumer required to defend a very small dispute in a distant forum might find the costs of mounting a defense so prohibitive as to make it economically rational to default.[120] But, in making a procedural due process assessment, courts must remember that both the plaintiff[121] and the defendant have "property" —

[113] 436 U.S. 84 (1978).

[114] 444 U.S. 286 (1980).

[115] 444 U.S. 320 (1980).

[116] 433 U.S. 186 (1977).

[117] Borchers, *supra* note 45, at 95; Wendy C. Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991).

[118] *E.g.*, Matthews v. Eldridge, 424 U.S. 319, 332-35 (1976); Goldbeg v. Kelly, 397 U.S. 254 (1970).

[119] Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

[120] Borchers, *supra* note 45, at 98-99.

[121] The Court seems to recognize that the plaintiff has a stake in jurisdictional asser-

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in the due process sense — at stake in civil proceedings,[122] and that the dispute has to be resolved *somewhere*. So, while the Supreme Court in *Kulko* focused on the inconvenience to Mr. Kulko of defending a child-support proceeding on the other side of the country, its solution was to require Mrs. Kulko to prosecute her action at an equal distance from her home.[123]

As a practical matter, procedural due process values are colorably threatened only if the location of the forum prevents a fair hearing. However, this is a distant outer limit on state court exercises of jurisdiction, as with the substantive due process rationality requirement. Certainly neither the directors and officers in *Shaffer*,[124] nor the insurance company in *Rush*,[125] nor the father in *Kulko*,[126] nor the car dealer in *World-Wide*[127] could have shown that he faced the dilemma of defending or defaulting.

This rationality-plus-fair-hearing test that I propose has two principal advantages over the current jurisdictional test. First, it would infrequently invalidate state court exercises of jurisdiction. The test would place the job of constructing jurisdictional rules in the hands of legislatures that, as I shall explain in the next section, are in a superior institutional position. Second, it would unify the jurisdictional due process standard with the standards generally applied in due process analysis, thereby separating the values actually deserving of constitutional protection from the spurious rationales.

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tions, but does so by elliptical references to the "forum state interest." *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987); Calder v. Jones, 465 U.S. 783, 788 (1984).

[122] *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950) (failure to give reasonable notice to trust beneficiaries of potential cause of action against trustee violates due process).

[123] Kulko v. Superior Court, 436 U.S. 84 (1978).

[124] Shaffer v. Heitner, 433 U.S. 186 (1977).

[125] Rush v. Savchuk, 444 U.S. 320 (1980).

[126] Kulko v. Superior Court, 436 U.S. 84 (1978).

[127] World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

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c. International Shoe *and Due Process*

The place of *International Shoe Co. v. Washington*[128] in this due process equation is an ambiguous one. The result in *International Shoe* was not surprising. The Court had many times sustained state court jurisdictional assertions over out-of-state businesses, usually on the "implied consent" rationale, and often on the basis of forum-related activites less substantial than the International Shoe Company's.[129] Justice Black argued in concurrence that the result in the case was so obvious that the appeal should have been dismissed for failure to present a substantial question.[130] Thus, had *International Shoe* said simply that the defendant's regular maintenance of a dozen salesmen in the state was implicit consent to a suit based on failed unemployment contributions, this would not have been news. What was news in *International Shoe* was that the Court appeared to make some progress towards shaking off the ancient formalisms that had come to haunt it. So much attention has been devoted to the "minimum contacts" language in *International Shoe* that it is easy to forget the other things the Court said. First, the Court dispensed with, in part, the ritualist reliance upon sovereignty that had come to dominate jurisdictional analysis. Modern procedure no longer required civil arrest, or its equivalent, for notice of a civil action.[131] Therefore, the Court reasoned that some equivalent of "presence" in the forum state — without the necessity for in-state service — should suffice for jurisdiction.[132]

Second, the Court's ultimate test for jurisdiction was not so much the "minimum contacts" concept that has dominated our analysis since, but, rather, the broader principle of "fair play and substantial justice."[133] While the phrase "minimum contacts" appears only once in the opinion,[134] the appeals to general notions of fairness are repeated. For instance, in applying its stan-

[128] 326 U.S. 310 (1945).

[129] *See, e.g.*, Washington v. Superior Court, 289 U.S. 361 (1933); St. Clair v. Cox, 106 U.S. 350 (1882); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855).

[130] *International Shoe*, 326 U.S. at 322 (Black, J., concurring in the judgment).

[131] *Id.* at 316.

[132] *Id.*

[133] *Id.*

[134] *Id.*

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dard to the defendant, the *International Shoe* majority said: "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it is the purpose of the Due Process Clause to insure."[135] These general appeals to fairness might have been a giant step towards treating personal jurisdiction under the general standards of rationality and fairness demanded by the Due Process Clause.

Third, the *International Shoe* Court discussed some of the considerations that I have argued ought to be relevant to the due process calculation. The Court seemed concerned about the practicalities of litigation. For instance, the Court pointed to "[a]n estimate of the inconveniences" in defending the case away from home as a relevant factor in the calculus.[136]

Although the Court laid the foundations for broad reform, later decisions focused primarily on the minimum contacts language. All of the preoccupation with minimum contacts might just as well be preoccupation with implied consent, because there is little practical difference between the two.[137] The minimum contacts test has led to broader assertions of jurisdiction, but a more liberal interpretation of the implied consent test could have achieved the same. In fact, the similarities between the two are so great that in a minimum contacts case decided only a decade ago — *Helicopteros Nacionales de Colombia, S.A. v. Hall*[138] — the majority relied heavily on a 1923 implied consent case — *Rosenberg Bros. & Co. v. Curtis Brown Co.*[139] The majority never discussed whether *Rosenberg* retained any precedential force after *International Shoe.*

The real legacy of *International Shoe* ought to be more than the replacement of the implied consent with the minimum contacts metaphor. *International Shoe*'s real, but still half-buried, legacy is that jurisdiction is a practical inquiry, and only irratio-

[135] *Id.* at 319.

[136] *Id.* at 317.

[137] Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907, 912-13 (1981) (describing current minimum contacts/purposeful availment formula as "reincarnation" of implied consent doctrine).

[138] 466 U.S. 408 (1984).

[139] 260 U.S. 516 (1923). *Rosenberg*'s citation and discussion in *Helicopteros* appears at 466 U.S. at 417.

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nal state action or procedures that will deny a fair hearing threaten the Constitution. Now that a half-century has passed, perhaps it is time to examine the decision's true foundations and begin a new era.

II. REAL REFORM

Stripped of its constitutional clothing, personal jurisdiction is a subject whose dimensions are almost completely procedural. Although choice of forum can greatly impact the progress of a case — because of differing jury pools, procedural rules, and forum-biased choice-of-law approaches[140] — personal jurisdiction has no directly substantive dimension. It does not speak to the primary rights and liabilities of parties nor to the relief awarded for legal wrongs. It allocates business between courts, providing civil plaintiffs with a defined subset of potential fora and civil defendants the right to object to forum choices outside that subset.

Because personal jurisdiction is a procedural subject, a utilitarian assessment of it ought to consider both internal and external costs and benefits. By "internal" costs and benefits, I mean those associated with resolving the question of personal jurisdiction itself. By "external" costs and benefits, I mean the effects of personal jurisdiction doctrine on dispute resolution generally.

A. *Internal Costs*

The closer a procedural rule is to self-executing, the lower its internal costs. Procedural rules that set clear norms in advance discourage conflict at the trial level and renewed conflict at the appellate level. This reduces the transaction costs associated with procedural litigation.

Judged by its internal costs, our current law of personal jurisdiction is a disaster. Between 1960 and 1983, there were 3,900 *reported* American cases on personal jurisdiction, to say nothing of the thousands of unreported cases.[141] Moreover, jurisdiction-

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[140] *See* Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 374 (1992) (modern approaches to choice of law result in application of forum law in between 55% and 74% of reported cases).

[141] ROBERT CASAD, JURISDICTION IN CIVIL ACTIONS v (1983).

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al decisions are notoriously unstable at the appellate level. Current jurisdictional doctrine has shown an extraordinary capacity for generating cases in which the result in the case switches multiple times on the way up the appellate ladder.[142] The realistic chance of reversal generated by the confusing and unstable doctrine invites appeals. Moreover, in many courts — including the federal courts — an appeal on the jurisdictional issue does not lie until there is a final judgment in the case.[143] If the trial court denies the defendant's motion to dismiss, the plaintiff may litigate the case and prevail, only to have the judgment snatched away on appeal on a close question of personal jurisdiction.[144]

The reason for personal jurisdiction doctrine's poor internal performance is two-fold. First, the Supreme Court has not announced clear standards, even considering the inherently less-predictable nature of constitutional law. Constitutionalized personal jurisdiction, as discussed above,[145] is a doctrine created by implication and accident, as opposed to, for instance, the Court's deliberate effort to constitutionalize defamation law.[146] Lacking any clear foundation, the Court has constantly reversed itself on such fundamental questions as whether personal jurisdiction is a personal right or whether it implicates federalism and sovereignty concerns.[147] Disagreement on the fundamental justification for the Supreme Court's regulation of state court jurisdiction has inevitably led to unpredictability and the attendant costs.

But, clarifying the basis of Supreme Court personal jurisdiction is only a partial solution. Adjudication is inherently con-

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[142] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); Hanson v. Denckla, 357 U.S. 235 (1958).

[143] *See* 28 U.S.C. § 1291 (1988) (appeals will not lie until there is final judgment).

[144] *See, e.g.*, *Helicopteros*, 466 U.S. 408 (judgment in excess of $1,000,000 vacated by Supreme Court decision reversing Texas Supreme Court decision).

[145] *See supra* Part I (discussing constitutional history of Supreme Court's personal jurisdiction analysis).

[146] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[147] *Compare* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982) (White, J.) *with* World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980) (White, J.).

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cerned with past events, and the Court necessarily focuses on reaching a result based upon the specific facts of that case. This process simply does not lend itself well to announcing broad, easy-to-apply rules.[148] Legislation, of course, is much better suited to prospective announcement of broad rules.

The Supreme Court's exceedingly close attention to personal jurisdiction has stunted legislative innovation.[149] Every state has a "long-arm" statute. But, many are of the "give-it-up" variety, such as California's, which simply makes jurisdiction available on any basis "not inconsistent" with the Constitution.[150] These give-it-up statutes throw litigants to the mercy of the constitutional standards, thus doing nothing to promote predictability. But, it is hard to blame legislatures for passing statutes like California's. Even long-arm statutes that appear to announce broad rules are routinely interpreted to "go to the limits" of the Constitution, thus becoming give-it-up statutes in disguise.[151] And, even long-arm statutes that clearly stop short of the constitutional limits, as does New York's,[152] inevitably bump up against the Constitution in many places. Thus courts must frequently interpret such statutes in light of constitutional principles.[153]

B. External Costs

The performance of current personal jurisdiction doctrine on the external score is equally poor. One nasty side effect of the unpredictability of the current law is that it discourages settlement of the underlying dispute. Assuming economically rational litigants, cases settle when the parties' estimates of the case's value are separated by less than the expected cost of litigating

[148] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 216 (1988) (Scalia, J., concurring).

[149] Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 10 (1993).

[150] CAL. CODE OF CIV. PROC. § 410.10 (Deering 1991); *see also* R.I. GEN. LAWS § 9-5-33 (1985). *See generally* David S. Welkowitz, *Going to the Limits of Due Process: Myth, Mystery and Meaning*, 28 DUQ. L. REV. 233 (1990) (discussing interpretation of long-arm statutes).

[151] *See, e.g.*, U-Anchor Advertising v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).

[152] N.Y. CIV. PRAC. L. & R. § 302 (McKinney 1990 & Supp. 1994).

[153] Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust, 464 N.E.2d 432 (N.Y. 1984); Etra v. Matta, 464 N.Y.S.2d 1001 (App. Div. 1983), *aff'd*, 463 N.E.2d 3 (N.Y. 1984).

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through trial.[154] Unstable and unpredictable legal doctrine inhibits the convergence of the parties' estimates of the case value, thus inhibiting settlement.[155]

A more fundamental external problem with current personal jurisdiction doctrine is that it is only marginally responsive to the realities of litigation. One case is cheaper to try than two or more cases. Yet, the Court has repeatedly decided cases in such a way as to require multiple lawsuits over one transaction.[156]

Changes in tort law are making the problem worse. Getting all of the defendants before one court in, for instance, a products liability suit was not necessary under joint-and-several liability, as long as one solvent defendant was amenable to jurisdiction.[157] But, now that "tort reform" is limiting joint-and-several liability,[158] full relief demands a full complement of defendants

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[154] Richard A. Posner, *Symposium on Litigation Management: The Summary Jury Trial and Other Methods of Alternate Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369-71 (1986). For example, if the plaintiff estimates the value of the case at $100,000, and the defendant estimates the value of the case at $75,000, and the cost to each of going to trial is $20,000, then one would expect the case to settle immediately at a figure between $80,000 and $95,000. For any immediate settlement within that range, both the plaintiff and the defendant would be better off settling than going to trial, even if each is correct in her estimate of the case. The plaintiff expects to recover $100,000, but will spend $20,000 to get it, for a net return of $80,000. The defendant expects to pay $75,000 in a judgment and $20,000 in fees for a total of $95,000. Thus, the plaintiff is better off with an immediate settlement that exceeds $80,000 and the defendant with an immediate settlement less than $95,000.

If, on the other hand, the plaintiff values the case at $200,000, and the defendant at $50,000, and each expects to spend $20,000, then the case will not settle immediately. The plaintiff will take nothing less than $180,000 and the defendant will pay no more than $70,000.

This simple model, of course, ignores more complicated effects such as the time value of money and collateral economic consequences of settlement. Posner, *supra*, at 370. Many "repeat" players in litigation will not settle even on terms that appear economically rational for fear that they will be sued repeatedly on meritless theories by plaintiffs hoping for a nuisance settlement. A defendant sued on a theory that it believes has no merit may well prefer to spend $20,000 to defend the case successfully than to pay $10,000 in immediate settlement, for fear of inviting similar lawsuits later on. The simple model does make the very real point, however, that settlement usually depends upon converging estimates of the case, which is discouraged by uncertain and unstable legal doctrine.

[155] *Id.* at 371.

[156] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114-16 (1987) (indemnity claim by primary defendant against third-party defendant cannot be tried in same court as underlying claim); *World-Wide Volkswagen*, 444 U.S. at 288 n.3 (foreign defendants subject to jurisdiction in Oklahoma, but regional distributor and dealer must be sued in New York).

[157] *Cf. World-Wide Volkswagon*, 444 U.S. at 317 (Blackmun, J., dissenting).

[158] *See, e.g.*, CAL. CIV. CODE § 1431.2 (Deering 1994) (joint-and-several liability limited to

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before the court. All too often, counting "contacts" means that the plaintiff will have to pursue defendants in multiple actions, or not at all.

The problem is worse yet in truly complex litigation like the recent *In re DES Cases.*[159] *In re DES Cases* is a class action against manufacturers of DES, a drug given to women in the 1960's to prevent miscarriages, but which harmed many of the children born to them.[160] New York — whose tort law applies in this diversity case — follows a "national market share" liability approach in such cases because a plaintiff can rarely recall which (chemically identical) brand of the drug she took three decades ago.[161] Judge Weinstein, recognizing that the national market share theory required a full complement of national defendants, took personal jurisdiction over all of the defendants, some of whom had never sold any of their drugs in New York, the forum state.[162]

Judge Weinstein's approach makes perfect pragmatic sense. All of the companies are represented by counsel and will be able to mount a defense anywhere.[163] A case such as this demands a single forum, and, since all of the plaintiffs are New York women,[164] New York is the only sensible forum. But, let's hope the Supreme Court never gets its hands on this case or one like it. If the Court counts contacts, adhering to its current position that every defendant needs its own minimum contacts,[165] the Court is likely to dismiss several defendants, making litigation like this a practical impossibility.

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economic damages; several-only liability for non-economic damages); N.Y. CIV. PRAC. L. & R. § 1601 (McKinney Supp. 1994) (joint-and-several liability for non-economic damages applies only to defendants more than 50% at fault).

[159] 789 F. Supp. 552 (E.D.N.Y. 1992).

[160] *Id.* at 558.

[161] Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1075 (N.Y.), *cert. denied*, 493 U.S. 944 (1989). Under the *Hymowitz* approach, a defendant whose sales are 10% of the national market would be responsible for 10% of the liability of each defendant, unless the defendant could affirmatively show the plainiff did not injest the defendant's drug.

[162] *E.g.*, In re DES Cases, 789 F. Supp. at 592-94 (discussion of Boyle defendant).

[163] *Id.* at 556, 586.

[164] All of the plainiffs that are the subject of this opinion, anyway, are New York domiciled. *Id.* at 559-60.

[165] *E.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

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Cases are also cheaper and easier to try close to the physical evidence and the important witnesses. The Brussels Convention, for example, which regulates jurisdiction as between the member states of the European Community, provides that, in tort cases, jurisdiction will lie in the place of the injury.[166] This rule is easy to apply in the vast majority of circumstances and locates jurisdiction in the most convenient place.[167] Conversely, the Supreme Court not only has repeatedly denied jurisdiction in tort cases in the place of the injury,[168] but has insisted that factors such as witness convenience[169] or the "center of gravity"[170] of the evidence are of little concern to it.

The case-by-case, constitutional development of jurisdiction in the United States has also inhibited the protection of economically weaker parties in litigation. In one of its most sensible jurisdictional decisions, *McGee v. International Life Insurance Co.*,[171] the Court held that the widow of a policyholder could sue a large insurance company in her home state, California.[172] The Court did not require her to pursue the company at its home in Texas. But, to be consistent, the Court later held, in *Burger King v. Rudzewicz*,[173] that a large fast-food franchisor could sue one of its nickel-and-dime Michigan franchisees in Florida, the franchisor's home state.[174]

It is certainly not my contention that *Burger King* is wrong as a matter of constitutional law, because Florida's exercise of jurisdiction passes the rationality-plus-fair-hearing test proposed above. But, from the standpoint of legislative policy, there might be good reasons to give *both* policyholders like Mrs. McGee and franchisees like Mr. Rudzewicz the ability to litigate at home. One of the consequences of leaving the development of jurisdictional principles almost entirely with the judiciary is that it becomes impossible to draw sharp distinctions between policyhold-

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[166] Borchers, *supra* note 103, at 145.

[167] *Id.*

[168] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); *World-Wide*, 444 U.S. 286.

[169] *World-Wide*, 444 U.S. at 294.

[170] Kulko v. Superior Court, 436 U.S. 84, 98 (1978).

[171] 355 U.S. 220 (1957).

[172] *Id.* at 223.

[173] 471 U.S. 462 (1985).

[174] *Id.* at 487.

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ers and insurance companies, employees and employers, franchisees and franchisors, and so on. The drafters of the Brussels Convention, uninhibited by constitutional dogma, gave jurisdictional preferences to a wide variety of economically weaker parties. Insurance policyholders may be sued on insurance contracts only in their home nation, but may sue insurance companies either in the policyholder's or the company's home.[175] Consumers and employees are beneficiaries of similar preferences.[176]

The degree to which the constitutionalization of personal jurisdiction has inhibited sensible legislative development became painfully clear during the work of the United States Commission on Interstate Child Support. Congress created the Commission in 1988 to report on ways to improve enforcement of child support awards in cases in which the parents live in different states.[177] A shocking two-fifths of custodial parents are unable to obtain and enforce child-support awards, and the prospects worsen if the non-custodial parent lives out of state.[178] Quite sensibly, the Commission considered what it termed a "child-state" model of jurisdiction to address the problem.[179] The child-state model would mean always allowing jurisdiction in support matters in the child's home state.[180] This quite reasonable approach is being used world-wide now, including in the Hague Convention[181] and the recent Organization of American States Convention.[182]

The Commission, however, was concerned about *Kulko v. Superior Court*,[183] which held — at least on the facts of that case — that jurisdiction lay not in the child's, but the non-custodial parent's, home state.[184] Several academics — myself

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[175] Borchers, *supra* note 103, at 141.

[176] *Id.* at 142.

[177] U.S. Comm'n on Interstate Child Support, Supporting Our Children: A Blueprint for Reform vii (1992) [hereafter Commission Report].

[178] *Id.* at 78.

[179] *Id.* at 81.

[180] *Id.*

[181] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 51 Fed. Reg. 10 (1986).

[182] O.A.S. Convention, *supra* note 22.

[183] 436 U.S. 84 (1978).

[184] *Id.* at 101.

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included[185] — argued to the Commission that the inability of custodial parents to collect against out-of-state non-custodial parents, coupled with Congress's special powers under section five of the Fourteenth Amendment,[186] would allow legislative "overruling" of *Kulko.* But, bullied by *Kulko,* the Commission recommended a "half-way" solution, calling for a "hodge-podge" jurisdictional statute[187] coupled with a second child-state statute. The child-state statute would include a direct appeal to the United States Supreme Court to determine its validity.[188] *Kulko* is not the Commission's fault, and one can hardly fault the Commission for being cautious. But, the direct appeal provision is an open invitation to invalidation.[189] And, faced with indisputable evidence that the current *Kulko*-based system is a national disaster,[190] Congress ought to be able to do *something.*

Congress and the states could do something if the Supreme Court would just let them. In all probability, no member of the Court has attempted to collect on a support award or litigated a family law case at any time in the last twenty years. The Court is not able to conduct legislative hearings or commission studies on the scope of the problem. All of this is in the nature of being a court, not a legislature. The consequence is that the Court is not in a good position to resolve such a problem by fiat.

CONCLUSION

Real reform won't come from the Court, because it can't. No amount of modifying the minimum contacts test is going to do the trick. It is not in the character of that test, or any constitutional test, to take account of the policy choices and pragmatics

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[185] *See* Commission Report, *supra* note 177, at 83 & n.5.

[186] *See, e.g.*, Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

[187] Commission Report, *supra* note 177, at 85.

[188] *Id.* at 86.

[189] *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990).

[190] Commission Report, *supra* note 177, at 80 ("All witnesses who testified on this subject agreed that the two-state process of [the Uniform Reciprocal Enforcement of Support Act (URESA)] resulted in burdensome paper flow and lack of cooperation between the two states."). *Kulko* was premised in part on the Court's mistaken belief that URESA offered a satisfactory alternative to California taking jurisdiction over Mr. Kulko. Kulko v. Superior Court, 436 U.S. 84, 98-99 (1978).

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that must go into the calculus. Real reform may be slow, and it may be painful, but it will only come through the political process, and it will only begin when the Court decides to get out of the business of regulating state court jurisdiction. *International Shoe* (albeit faintly) marks the beginning of that path, and it's time to follow it.

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