A *Shoe* Unfit for Globetrotting

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I. DUE PROCESS AND SOVEREIGNTY — *PENNOYER*'S[1] HERITAGE

There is no longer any doubt: American jurisdictional law is a mess. Split opinions,[2] loaded footnotes,[3] and convoluted opinions larded with a fanciful vocabulary that attempts to give half-baked concepts an aura of reality by dressing them up as political science[4] or presenting them in the garb of folksy similes,[5] signal the Justices' inability to devise a satisfactory approach to the simple question of where a civil action may be brought. While scholars — unlike practitioners — revel in uncertainty, even in academic circles the applause and admiration for the Court's forays into the field of jurisdiction have long ago given way to a distinct disenchantment.[6] What, then, is the reason for

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

[2] *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990) (four-vote plurality opinion by Justice Scalia, four-vote plurality opinion by Justice Brennan, and concurring opinions by Justice White and Justice Stevens); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (four-vote plurality opinion by Justice O'Connor, four-vote plurality opinion by Justice Brennan, and concurring opinion by Justice Stevens); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (six-vote majority opinion by Justice White and separate dissenting opinions by Justices Brennan, Marshall, and Blackmun).

[3] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 211 nn.30 & 37 (1976) (exempting status matters and cases of necessity from unitary standard for jurisdiction); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (recanting basis for Justice White's majority opinion in *World-Wide Volkswagen*).

[4] *See, e.g.*, *World-Wide Volkswagen*, 444 U.S. at 292 (pondering "interstate judicial system's interest in obtaining the most efficient resolution of controversies"); *Asahi*, 480 U.S. at 115 (pondering "Federal Government's interest in its foreign relations policies").

[5] *See, e.g.*, *Shaffer*, 433 U.S. at 216 (asserting that defendants could not reasonably expect to be "haled" into Delaware court); *Asahi*, 480 U.S. at 115 (finding possibility of defendant being "haled" into California court is pertinent to state interest).

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> Since [1977], the Court has issued twelve major opinions, producing an unsatisfactory body of law that is extremely difficult for jurisdiction scholars to organize, synthesize, and comprehend. If the decisions trouble the experts, they must represent a genuine thicket for those who deal with jurisdictional issues

this deplorable state of affairs? Justice White's opinion in *World-Wide Volkswagen Corp. v. Woodson* offers a clue. In his words:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[7]

Justice White's remarks have a two-fold implication: (1) the law of jurisdiction, unlike the rest of civil procedure, is impervious to common sense and practicability; (2) although the Supreme Court has linked jurisdiction to due process,[8] notions of sovereignty rather than fairness actually control. Thus, as conceived by the Court, jurisdiction promotes two disparate values: individual liberty interests on the one hand and sovereign prerogatives on the other. This dual pursuit has a venerable tradition. The celebrated case of *Pennoyer v. Neff*, which invalidated an early Oregon long-arm statute on the implausible ground that American jurisdictional rules had to conform to obsolete English rituals, first linked the two conflicting objectives. Over a spirited dissent, Justice Field persuaded his brethren that "public law" principles[9] concerning territorial sovereignty require in-state

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only occasionally . . . .

> The major part of the problem . . . is the Court's. It is badly divided; nearly all of its recent jurisdiction decisions have been accompanied by separate concurrences or dissents and lately the Court seems unable to agree on a majority opinion, even though all Justices may agree on the result. The Court's two-part test for personal jurisdiction is exceedingly fact-specific, thus opinions applying it offer minimal guidance to lower courts and make prediction of results quite difficult.

William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 600-02 (1993) (footnotes omitted); *see also* Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105 (1991); Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55 (1988).

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

[8] *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 733 (1877); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[9] Justice Field asserted two principles of international law, namely "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," *Pennoyer*, 95 U.S. at 722, and "that no State can exercise direct jurisdiction and authority over persons or property without its territory," *id.*

service or attachment as the sine qua non for the exercise of jurisdiction.[10] In consequence of this axiom, Justice Field maintained, a state court judgment rendered against a nonresident without personal service in the state is void because "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[11]

Justice Field's opinion in *Pennoyer* was the first to lump together the two disparate ideas of sovereignty and fairness, but ever since the two have coexisted uneasily in the realm of jurisdiction. Their marriage proved to be a mismatch because, as Professor Redish points out, sovereignty and due process have entirely different thrusts: whereas the former sanctions the prerogatives of states, the latter protects the rights of individuals.[12] Justice Field connected these two antithetical notions by construing due process to mean "a course of legal proceedings according to those rules and principles which have been established . . . for the protection and enforcement of private rights."[13] In other words, apparently succumbing to the power of a pun, he took the position that "process" without jurisdiction is "undue."

Justice Field's position is not entirely untenable if one assumes that jurisdiction has not only a fixed meaning, but also a rational core. That, however, is not the case: long before Justice Field decided *Pennoyer*, the English (who, incidentally, never fancied quasi-in-rem jurisdiction as we did)[14] had already given up on requiring service in the forum as the exclusive basis for proceeding against nonresidents.[15] The shortcomings of tag ju-

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[10] *Id.* at 733-34. Justice Field recognized two exceptions to this rule, namely "proceedings to determine the status" of a resident, *id.* at 734, and cases in which the nonresident defendant assented to substituted service of process in advance, *id.* at 733.

[11] *Id.* at 733.

[12] Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1120-33 (1981); *see also* Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 575 (1995).

[13] *Pennoyer*, 95 U.S. at 733.

[14] *See* P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 211-13 (12th ed. 1992).

[15] *See* Common Law Procedure Act, 1852, 15 & 16 Vict., ch. 76, §§ 221, 227 (Eng.) (establishing rules for extraterritorial service of process); Schibsby v. Westenholz, 6 L.R.-Q.B. 155 (1870) (describing and discussing, eight years before *Pennoyer*, the jurisdictional bases considered appropriate in common law's home country).

risdiction were such that the scepter'd isle adopted a "long-arm statute" years before *Pennoyer* was decided,[16] although the British chose to couch it in terms of "service without the realm."[17] Unworkable even in the insular United Kingdom, the quaint custom of having process servers chase nonresidents proved to be a serious impediment to the rational disposition of our interstate and international disputes. A federal system and a mobile society inevitably forced American courts and legislatures to pile fiction upon fiction to cope with such problems as how to proceed against foreign motorists and corporations.[18]

II. POST-*PENNOYER* DUE PROCESS

After decades of manipulation and confusion, the Supreme Court in *International Shoe v. Washington* finally scuttled the proposition that in-state service or attachment is necessary to confer jurisdiction upon state courts. When they discarded these outdated practices, the Justices could have used the occasion also to sever the ties *Pennoyer* had forged between jurisdiction and due process.[19] To that end, they might have consulted pre-*Pennoyer* cases, which had looked to the Full Faith and Credit Clause rather than due process to rein in overly enthusiastic state court jurisdictional assertions.[20] This approach would have offered the distinct advantage of putting matters into a proper perspective, as that clause focuses on comity, rather than on the implausible mixture of sovereignty and fairness.

Moreover, linking jurisdictional precepts with the Full Faith and Credit Clause would have emphasized that domestic and international jurisdiction are not necessarily identical: if the Constitution does indeed serve to allocate jurisdiction within the United States, treaties and conventions are the appropriate vehi-

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[16] *See* Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 6 (1993).

[17] Rules of the Supreme Court, Order 11, Rule 1 (1962) (U.K.); *see* NORTH & FAWCETT, *supra* note 14, at 190.

[18] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927) (upholding Massachusetts' "implied consent" statute); St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913) (analyzing Texas corporation's "presence" in New York).

[19] *See* 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, 56 (1990).

[20] *See* Borchers, *supra* note 12, at 565-66.

cles for worldwide cooperation. Instead, Chief Justice Stone's majority opinion in *International Shoe* assumed a continuing interrelationship between the divergent notions of sovereignty and fairness.[21] To be sure, he no longer deduced compliance with the Fourteenth Amendment from the plaintiff's traditional pursuit of the defendant's person or assets by means of in-state service or attachment. Rather, by a curious inversion of reasoning, Chief Justice Stone purported to deduce the limits of state court jurisdiction from the Fourteenth Amendment.[22] Instead of saying, as Justice Field had, that proceedings against a defendant unsupported by a traditional jurisdictional basis violate due process, he now maintained that as long as the defendant's due process rights are not violated, a state court may exercise jurisdiction.[23]

Although *International Shoe* no longer required some magic act within the forum as a prerequisite for the sovereign's acquisition of jurisdiction, Chief Justice Stone's opinion did not eschew the notion of territorial sovereignty. While he emphasized fairness as the basic ingredient of jurisdiction,[24] he also stressed the need for some kind of nexus — "minimum contacts" in his words — between the defendant and the forum state.[25] Regrettably, the Chief Justice not only failed to explain what, if anything, state lines and territorial contacts have to do with due process,[26] but also left in doubt what kinds of contacts must exist before a court can proceed against a nonresident. Writing for a unanimous Court, in *McGee v. International Life Insurance Co.*[27] Justice Black let it suffice that the *transaction* at bar has some contact,[28]

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[21] *See* International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945); Redish, *supra* note 12, at 1116-18.

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

[23] *See* Juenger, *supra* note 16, at 8.

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

[25] *Id.*; *see also id.* at 319 (stating that the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against [a] defendant with which the state has no contacts, ties, or relations.").

[26] *See* Redish, *supra* note 12, at 1120.

[27] 355 U.S. 220 (1957).

[28] "It is sufficient for purposes of due process that the suit was based on a *contract which had substantial connection* with [the forum]." *Id.* at 223. (emphasis added).

at least as long as the forum asserts an "interest" in the litigation by virtue of the fact that the plaintiff is a domiciliary in need of protection.[29] By adopting such a loose transactional-contact standard and by considering the plaintiff's needs as well as the defendant's, *McGee* held forth hope for decoupling due process from territoriality. Conceivably, on the basis of *Shoe* and *McGee* state courts and legislatures could have developed workable jurisdictional catalogs. Adopting a non-interventionist stance, the Supreme Court still could have prevented excesses by striking down those jurisdictional assertions that were sufficiently exorbitant or irrational to warrant due process censure.

Chief Justice Warren's majority opinion in *Hanson v. Denckla*,[30] however, reemphasized the territorial imperative in no uncertain terms. Using language reminiscent of Justice Field's *Pennoyer* opinion, he maintained that restrictions on state court jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."[31] Proceeding from this premise, he felt the need to define further the vague term "minimum contacts." To that end he required a link with the forum state forged by "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[32] In this fashion, the Chief Justice conferred constitutional status upon the quid pro quo principle that a defendant must pay with jurisdictional bondage for whatever benefits he may have received from his intra-forum activities.

While Chief Justice Warren's new test, which bears a striking resemblance to the pre-*Shoe* fictions of "implied consent" and "voluntary submission,"[33] may appeal to puritanical minds, it

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[29] "It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the [defendant] insurance company to a distant State in order to hold it legally accountable." *Id.*

[30] 357 U.S. 235 (1957).

[31] *Id.* at 251.

[32] *Id.* at 253. Some Justices now prefer "purposefully *directing*" to "*availing*." *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 112 (1987).

[33] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352, 356 (1926) (foreign motorists' "implied consent" to jurisdiction in suits arising out of local car accidents); Flexner v. Farson, 248 U.S. 289, 290-91 (1918) (nonresident who conducts business through agent in the forum state

hardly promoted the development of common-sense rules on jurisdiction. Fairness and expediency can suggest the propriety of proceeding even against defendants who have in no way availed themselves of whatever benefits forum law may hold in store for nonresidents. In fact, as the Supreme Court has implicitly recognized, recourse to a local forum sometimes may be necessary to prevent a denial of justice.[34] Also, a rational and effective disposition of multiparty litigation — especially complex litigation engendered, for instance, by mass disasters[35] — may be impossible if each and every litigant must have some forum contact. Moreover, even as modified by a "purposeful availing," the minimum contacts mantra is far too nebulous to serve as a reliable guide for state courts and legislatures.

To make matters worse, the rather vague notions of "minimum contacts" and "purposeful availing/directing" are not the only ones that count in the jurisdictional calculus. Ever since *McGee*, the term "interest" (which Justice Stone first used in the choice-of-law context)[36] continues to play a role in the field of jurisdiction. Interest, of course, is a term with a pro-plaintiff slant: if states are indeed interested in parties to a lawsuit, their solicitude should extend primarily to voters and taxpayers who seek justice in their home-state courts. But the extent to which the Court's solicitude for defendants is counterbalanced by a state interest is far from clear. Sometimes, interests apparently are crucial;[37] at other times they do not matter much, if at all.[38] Also, some of the Justices seemingly believe that only "particularized" interests count, and that legislation is required to

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"impliedly consents" to jurisdiction in related suits).

[34] *See* Shaffer v. Heitner, 433 U.S. 186, 211 n.37 (1976) (presence of property may be sufficient basis for jurisdiction when no other forum is available to plaintiff).

[35] *See generally* Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917 (1995).

[36] *See* FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 94-95 (1993).

[37] *See, e.g.*, Keeton v. Hustler Magazine, 465 U.S. 770, 777-78 (1983); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

[38] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (deeming state's interest, though a "relevant factor," overshadowed by lack of contacts between defendant and forum); *Shaffer*, 433 U.S. at 214 (deeming Delaware's interest in supervising management of Delaware corporations insufficiently asserted and possibly inadequate for jurisdictional purposes).

particularize a state's concerns.[39] To confuse matters further, the Justices appear to attribute different weight to various types of interests,[40] and may use the term to defeat, rather than uphold, jurisdiction by dismissing actions brought by out-of-state plaintiffs.[41] Finally, whatever mileage a plaintiff may derive from state interests is counterbalanced by the folksy expression "haling,"[42] a metaphor for the nonresident defendant's predicament. This emotive term allows Justices to strike down jurisdictional assertions they feel unwarranted.

III. INCOHERENCE AND INJUSTICE

As might have been expected, the tension between territoriality and fairness on the one hand and the inherent vagueness of the Court's jurisdictional standards and terminology on the other produced an incoherent case law. Perhaps the most glaring example of such incoherence is *Pennoyer's* resurrection in *Burnham v. Superior Court.*[43] In an attempt to resolve what *International Shoe* had left open, Justice Marshall's majority opinion in *Shaffer v. Heitner* (which outlawed the acquisition of jurisdiction by means of a quasi-in-rem attachment of corporate stock) stated in no uncertain terms that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* . . . ."[44] Because *Shaffer* clearly impugned tag jurisdiction,[45] Justice Scalia's plurality opinion in

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[39] *See, e.g.,* Kulko v. Superior Court, 436 U.S. 84, 98 (1977); *Shaffer,* 433 U.S. at 214-15.

[40] *See, e.g.,* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987) (California's interests in indemnification suit between foreign parties deemed "slight"); *Kulko,* 436 U.S. at 98 (California's interests in protecting children's welfare and promoting healthy family life, though important, deemed insufficient); *McGee,* 355 U.S. at 223 (noting California's "manifest interest" in providing redress for its residents when their insurers refuse to play claims); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1949) (noting New York's "vital interest" in settling accounts).

[41] *See Asahi,* 480 U.S. at 114 (holding that California lacked sufficient interest in nonresident cross-complainant).

[42] *See, e.g., id.* at 115; *World-Wide Volkswagen,* 444 U.S. at 297; Shaffer v. Heitner, 433 U.S. 186, 216 (1976).

[43] 495 U.S. 604 (1989).

[44] *Shaffer,* 433 U.S. at 212.

[45] *See* Linda J. Silberman, Shaffer v. Heitner*: The End of an Era,* 53 N.Y.U. L. REV. 33, 75 (1978); Arthur T. von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated,* 63 B.U. L. REV. 279, 300-07 (1983).

Burnham,[46] which purports to reconcile *Shaffer* with *Pennoyer* while, at the same time, disavowing *Shaffer*'s notion of a unitary standard, is unpersuasive. But Justice Brennan's effort to square tag jurisdiction with "purposeful availing"[47] is equally unconvincing. Thus, not only do the two plurality opinions in *Burnham* contradict each other — which leaves *Pennoyer*'s continued authority in limbo — but each of them is as implausible as the other.

Burnham may well be the most glaring example of the Supreme Court's doctrinal incoherence, but it is certainly not the only one. To mention but a few additional examples: whereas the case of *Helicopteros Nacionales de Colombia v. Hall*[48] applied the same standards to alien defendants as to those from sister states, in *Asahi Metal Industry Co. v. Superior Court* the Justices accorded decisive weight to the fact that the defendant happened to be a Japanese corporation.[49] *World-Wide Volkswagen* and *Asahi* required each defendant to have contacts with the forum state, yet the Court continues to cite *Mullane v. Central Hanover Bank & Trust Co.*,[50] which dispensed with this requirement. Similarly, the Court continues to cite *World-Wide Volkswagen*[51] as if its authoritative value had remained undiminished despite the fact that Justice White later recanted the very foundation on which his majority opinion rested.[52]

Preoccupied with sovereignty on the one hand and fairness on the other, saddled with a befuddling terminology and unable to muster clear majorities, the Court is floundering. Its decisions

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[46] 495 U.S. at 608-28.

[47] *Id.* at 637-38 (Brennan, J., concurring).

[48] 466 U.S. 408 (1983).

[49] *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115-16 (1987).

[50] 339 U.S. 306 (1949). The case is usually cited for what it said about due process notice requirements. *See, e.g.*, Burnes v. United States, 501 U.S. 129, 136 (1991); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 (1988). But *Mullane* also dealt with a jurisdictional issue, namely whether New York could affect interests of nonresident beneficiaries in New York trusts, *see* 339 U.S. at 311-13, and the Supreme Court has relied on the case in the jurisdictional context. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985).

[51] *See, e.g., Asahi*, 480 U.S. at 109, 113, 115; Keeton v. Hustler Magazine, 465 U.S. 770, 776, 781 (1983).

[52] Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (the Due Process Clause restricts judicial power "not as a matter of sovereignty, but as a matter of individual liberty").

not only lack coherence, but they are often devoid of common sense and justice. *Asahi* and *World-Wide Volkswagen*, for example, have created serious obstacles to the rational disposition of multiparty disputes.[53] At the same time, these cases undermine the substantive policy inherent in current American products liability law, which holds each link in the distributive chain liable,[54] and they impede the adjudication of indemnity and contribution claims. Similarly, because of blind loyalty to questionable dogma, *Rush v. Savchuk*[55] injudiciously struck down a judicially created direct-action remedy. Proceeding from erroneous premises,[56] *Kulko v. Superior Court*[57] has needlessly complicated the litigation of interstate support cases. *Shaffer v. Heitner* — since made obsolete by the Delaware legislature[58] — frustrated the claims of a shareholder who brought a derivative action where it ought to be brought, namely in the defendant's state of incorporation.

Moreover, the Supreme Court has not only obfuscated jurisdiction but also the service of process. In *Omni Capital International v. Rudolf Wolff & Co.*,[59] the Court found no warrant in the Louisiana long-arm statute for service of a complaint alleging a federal cause of action on an English defendant who was subject to the Louisiana federal court's jurisdiction. Unwilling to look elsewhere (counsel had apparently failed to cite the Hague Service Convention),[60] the Justices questioned their power to remedy the situation. This admission of incompetence by the nation's highest court is all the more remarkable considering that the difficulty was self-inflicted: instead of following *International Shoe*'s rationale that service has no other function than to

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[53] *See* Redish & Beste, *supra* note 35.

[54] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96, at 682 (5th ed. 1984).

[55] 444 U.S. 320 (1979).

[56] *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8, at 121-24 (3d ed. 1986).

[57] 436 U.S. 84 (1978).

[58] *See* DEL. CODE ANN. tit. 10, § 3114 (1994). This cumbrous provision, reminiscent of the pre-*Shoe* days when fiction and ritual were necessary to overcome noxious precedent, see *supra* note 18 and accompanying text, was obviously drafted in response to the Court's demand for a "particularized interest." *See supra* notes 38-39 and accompanying text.

[59] 484 U.S. 97 (1987).

[60] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361.

put the defendant on notice,[61] the Court — in *Pennoyer* fashion — seemed to attribute some magic to the piece of paper informing the defendant that he is being sued. The Federal Rules Committee has since attempted to do what the Court thought it could not,[62] relegating a misguided Supreme Court effort to justly deserved oblivion.

IV. INTERNATIONAL PERSPECTIVES

Much of this criticism is familiar,[63] but the deficiencies of the Court's jurisdictional case law bear reiteration before one ponders the implications of the Court's jurisprudence as it relates to international jurisdictional and recognition problems. First of all, it stands to reason that if the Court's work product is unsatisfactory in the domestic context, it can hardly serve as a model for international cooperation. Secondly, while Justice Field — however misguided his *Pennoyer* opinion may have been — still professed to deal with jurisdiction from an international point of view,[64] the Court now — with the exception of Justice O'Connor's opinion in *Asahi*[65] — tends to treat transnational cases as if they were interstate in nature. Thirdly, the assumed interrelationship between due process and state sovereignty is bound to distract the Court's attention from what is going on in the rest of the world at a time when "globalization" has become a cliché.

Our Supreme Court's preoccupation with domestic constitutional puzzles is especially regrettable considering that more than two decades of experience gathered in the European Common Market demonstrate the possibility of a global approach to jurisdiction and judgments recognition.[66] Since its inception,

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[61] *See* International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945); *see also* Milliken v. Meyer, 311 U.S. 457, 463 (1940).

[62] FED. R. CIV. P. 4(k). FED. R. CIV. P. 4(f) now helpfully directs the attention of court and counsel to the Hague Service Convention.

[63] *See* Juenger, *supra* note 16; Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907 (1981).

[64] *See supra* notes 9-11 and accompanying text.

[65] 480 U.S. 102 (plurality opinion of O'Connor, J.).

[66] *See* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and in the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992); Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*,

the Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters[67] has streamlined the recognition and enforcement of judgments within Europe. It has done so despite the fact that the European Union's member nations — unlike the states of our Union — are truly sovereign, that they lack a shared common legal heritage, that their procedural and substantive laws differ widely from one country to another, and that a different language is spoken every few hundred miles. Bridging the distance between legal cultures, the Brussels Convention now unites civil law and common law nations in a joint effort to resolve the problems of jurisdiction and judgments recognition in a rational fashion.

Despite the great diversity of laws and languages that prevails in the European Union, the Brussels Convention works well. Each and every day, judgments rendered in one member state are recognized and enforced in another, and practice under the Convention may be smoother, more efficient, and more satisfactory than American interstate recognition and enforcement.[68] Indeed, the supranational regime created by the Brussels Convention proved sufficiently attractive to induce nations in the European Free Trade Association (EFTA) to join the European Union member states in the Lugano Convention.[69] Far from emulating our Supreme Court's flip-flop jurisprudence, the European Union's Court of Justice — which is empowered to interpret the Convention pursuant to a protocol[70] — has helpfully clarified questions of detail concerning the meaning and import of the Convention's jurisdictional bases.[71]

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82 MICH. L. REV. 1195, 1203-12 (1984). For a recent colloquium on the subject see COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, CIVIL JURISDICTION AND JUDGMENTS IN EUROPE (1992).

[67] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1968 J.O. (L 299) 32, *amended by* 1978 O.J. (L 304) 77 (accession of Denmark, Ireland, and U.K.), *amended by* 1982 O.J. (L 388) 1 (accession of Greece), *amended by* 1989 O.J. (L 285) 1 (accession of Spain and Portugal) [hereafter Brussels Convention].

[68] *See* Juenger, *supra* note 66, at 1207-09.

[69] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9.

[70] Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1990 O.J. (C 189) 25.

[71] *See* Juenger, *supra* note 66, at 1208-09.

In light of the fact that recognition of foreign country judgments has become almost automatic in Europe despite legal and linguistic differences, one wonders whether it might not make sense for the United States to enter into a Lugano-type convention with the European Union. Although some of the features of the Brussels and Lugano Conventions are unacceptable, such as the perpetuation of exorbitant jurisdiction against outsiders,[72] and some other jurisdictional bases may be unsatisfactory,[73] these deficiencies probably could be negotiated out of existence. But even with some of its current flaws, the Convention's framework would still be preferable to the jurisdictional chaos from which this country suffers.

Clearly, in many respects the Brussels Convention offers sounder practical solutions and greater fairness than our Supreme Court case law. This is true, for instance, with respect to the rights of support claimants, whom article 5, paragraph 2 of the Brussels Convention, contrary to *Kulko*, specifically allows to sue in the courts of their domicile. The Convention also accords similar jurisdictional privileges to consumers[74] as well as policyholders and other parties who derive benefits from insurance contracts.[75] In marked contrast to *Carnival Cruise Lines, Inc v. Shute*,[76] the Convention bars powerful enterprises from imposing forum-selection clauses on weaker ones, such as consumers.[77] Common sense and fairness also inform the resolution of multiparty litigation, which the Convention allows to proceed in a single forum.[78] Moreover, the Convention's jurisdictional bases are reasonably clear and cogent, and the Court of Justice's

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[72] While article 3 of the Brussels Convention, *supra* note 67, forbids member states to use exorbitant jurisdictional bases against European Union domiciliaries and corporations, article 4 expressly authorizes the continued use of such bases against parties domiciled outside the Common Market. *See* Juenger, *supra* note 66, at 1211.

[73] *See, e.g.*, Borchers, *supra* note 66, at 138-42 (criticizing Brussels Convention's jurisdictional basis in contract actions).

[74] *See* Brussels Convention, *supra* note 67, art. 14 (allowing consumers to choose between the enterprise's or their own home-state forum, while restricting suits brought by enterprises to the consumer's domicile).

[75] *See id.* arts. 8-11. For direct action remedies see *id.* art. 10.

[76] 499 U.S. 585 (1991).

[77] *See* Brussels Convention, *supra* note 67, art. 12 (policyholders and beneficiaries), art. 15 (consumers), art. 17, para. 6 (employment contracts).

[78] *See id.* art. 6(1) (multiple defendants may be sued where any one of them is domiciled), art. 6(2) (third party proceedings), art. 6(3) (counterclaims).

case law is not marred by such nebulous notions as "state interests" and "purposeful availing," or weasel words such as "haling" and "stream of commerce."

V. IMPEDIMENTS TO INTERNATIONAL ACCOMMODATION

As matters stand, however, American endeavors to promote international cooperation in the fields of jurisdiction and judgments recognition are unlikely to succeed. Some years ago the United States attempted to negotiate a recognition treaty with the United Kingdom, but that effort came to naught.[79] Its failure was laid at the steps of English insurance interests,[80] but it cannot be gainsaid that the confusion that characterizes our jurisdictional law played a role. Saddled with vague concepts and an unsatisfactory terminology, the American delegates tried their best to draft an acceptable list of jurisdictional bases.[81] Although their task was relatively easy considering that they merely aimed for a "single convention," that is, one that only addresses recognition and enforcement and does not impose jurisdictional rules binding on both parties,[82] their work product suffered from the excessive prolixity and questionable terminology[83] that can be expected from any attempt to accommodate the Supreme Court's opaque jurisprudence.

The difficulty of presenting our confused jurisdictional law to the outside world is bound to impede the negotiation of recognition treaties and conventions with foreign nations. Worse yet is the fact that our highest Court insists on its prerogative as the ultimate arbiter of jurisdictional propriety. Foreign nations can hardly be expected to accept, for instance, such American idiosyncracies as the notion of "doing business," a relic of pre-*Shoe* days,[84] as a basis for general jurisdiction. Even if they were

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[79] *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 24.39 (2d ed. 1992); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, LAW & CONTEMP. PROBS., Summer 1994, at 271, 274.

[80] *See* von Mehren, *supra* note 79, at 274.

[81] *See* Draft Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters arts. 10-11, 16 I.L.M. 71, 78-81.

[82] *See* von Mehren, *supra* note 79, at 282.

[83] *See* Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443, 459-62, 468 (1977).

[84] *See, e.g.*, Hutchinson v. Chase & Gilbert, 45 F.2d 139 (2d Cir. 1930); Tauza v.

ready to swallow such exorbitance, how could they be assured that our Supreme Court will not tomorrow alter the definition and import of this term? The predictability for which international compacts aim will remain illusory if jurisdictional bases can change with each change in the Court's membership. Accordingly, the United States Supreme Court has not only created an unsatisfactory body of jurisdictional law, it has tied the hands of the Executive. Frustrating efforts to reach an accommodation with foreign nations in the field of judgments recognition, the Court unduly limits this nation's treaty-making power.

VI. A NEW INITIATIVE

Undaunted by the inability to reach agreement even with the United Kingdom, the United States Department of State has made yet another effort at international cooperation in the field of jurisdiction and judgments recognition. Trying now for a multilateral treaty, the State Department approached the Hague Conference on Private International Law, which at its Seventeenth Session decided to include the topic in its agenda.[85] Desiring to make such a convention palatable to foreign nations, the American negotiators came up with an unusual idea. In light of our jurisdictional peculiarities, they opined that such a compact clearly could not take the form of a "double convention" akin to the Brussels Convention, which lays down a single set of jurisdictional rules binding on all signatories.[86] Not only would it be difficult to derive reasonably well-defined rules from the jumble of Supreme Court case law, but even if superb draftsmanship could resolve that difficulty, foreign nations could not be expected to accept the result as a binding jurisdictional catalog.

Accordingly, the American delegation to the Hague Conference discarded the possibility of negotiating a "double convention." Nor did a "simple convention," which would leave jurisdic-

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Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917).

[85] *See* von Mehren, *supra* note 79, at 271-73. Concerning the fate of an earlier Hague recognition and enforcement convention, see *id.* at 275.

[86] *See id.* at 282-83.

tion entirely in limbo,[87] seem feasible.[88] Instead, the American team proposed a "mixed convention" that combines features of the "simple" and "double" varieties.[89] Such a convention would create three jurisdictional subsets: (1) bases clearly unacceptable because of their exorbitance; (2) bases clearly acceptable to all signatories; and (3) bases that a nation may use domestically, but that do not necessarily entitle the resulting judgment to recognition abroad. According to Professor von Mehren, a member of the United States delegation, dividing jurisdictional bases into "white," "black," and "grey" zones promotes clarity, predictability, and simplicity, though obviously not to the same extent as a double convention.[90] Concededly, with respect to the "grey" zone, "the situation is as muddled as that which exists in the absence of treaty regulation."[91]

Regrettably, though not unexpectedly, the prospect of such a "mixed convention" did not meet with resounding approval in The Hague.[92] Foreign jurists, especially those from civil law countries, prefer reasonably clear jurisdictional bases that afford the litigants a measure of predictability.[93] Leaving a wide range of questions open would defeat the objective of letting plaintiffs, as well as defendants, know from the outset where a lawsuit can legitimately be brought.[94] This consideration is of particular importance in international litigation, because there the differences between procedural and substantive rules are far more pronounced than those that exist among the states of our Union.[95] Even if the uncertainties that beset American jurisdictional law in consequence of a confused and vacillating Supreme Court jurisprudence were tolerable at home, they are unacceptable internationally.

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[87] *See supra* text accompanying note 82.

[88] *See* von Mehren, *supra* note 79, at 283, 287.

[89] *See id.* at 283-87.

[90] *See id.* at 283, 284 n.50.

[91] *Id.* at 283.

[92] Peter Nygh, *Report on Work Towards a Proposed Judgments Convention at The Hague, in* THE PROCEEDINGS OF THE TWENTY-FIRST INTERNATIONAL TRADE LAW CONFERENCE, Sydney, Oct. 1994 (forthcoming July 1995).

[93] *See* HAIMO SCHACK, JURISDICTIONAL MINIMUM CONTACTS SCRUTINIZED 1, 72 (1983).

[94] *See id.* at 72-74.

[95] Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension,* 28 VAND. J. TRANSNAT'L L. (forthcoming June 1995).

A "double convention" of the kind contemplated by the State Department deals with problems that our Supreme Court has created by sweeping them under the rug. A "grey zone," which would leave an important area to domestic experimentation, is bound to displease delegates from those nations whose enterprises can be expected to feel the brunt of American jurisdictional exorbitance. Nor will foreigners feel reassured by the fact that American judgments rendered pursuant to a "grey zone" basis are not entitled to recognition in other countries.[96] 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. Obviously, recognition is of minor concern where a defendant's foreign assets are of sufficient value to satisfy even a hefty judgment.

VII. A EUROPEAN ALTERNATIVE?

Our jurisdictional confusion, apart from discomforting the representatives of foreign nations that might be ready to enter into recognition treaties with us, reduces our negotiators' room for bargaining. In addition, deference to the Court's authority is bound to inhibit concessions to common sense and practicality. Thus Professor von Mehren is on record against modifying the Supreme Court's jurisdictional tenets,[97] and he sees nothing wrong with its incessant experimentation.[98] In fact, he mentions resistance to changing our law as the primary reason for not negotiating with the European Union.[99] That quasi-federation, a major economic power, has by now gained substantial experience with intra-system recognition and could therefore be an ideal treaty partner. We might do well to learn from its experi-

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[96] *See* von Mehren, *supra* note 79, at 283.

[97] *See id.* at 281 (suggesting, by apparently applying American criteria, that "jurisdictional bases recognized by the Lugano Convention may well be overly broad or overly restrictive").

[98] *Id.* (specifying jurisdictional bases in a convention that may be "stultifying" and "prevent[] change in jurisdictional practice").

[99] *See id.*

mentation with a sensible jurisdictional catalog, just as the framers of the Brussels Convention probably learned from our practice under the Full Faith and Credit Clause, although they preferred to shred the record that might confirm this surmise.[100]

Yet, the fact that we are saddled with a chaotic law inhibits us from pursuing a transnational jurisdictional and recognition compact. This is too bad, not only for us, but for our potential treaty partner. Though the European Union's jurisdictional and enforcement scheme is superior to ours, it is by no means free from flaws. The Brussels Convention is marred, above all, by xenophobia. Its article 4 specifically authorizes suits against nonresidents on the exorbitant jurisdictional grounds listed in article 3, which may not be invoked against individuals and enterprises domiciled within the Union.[101] However misguided the Supreme Court's *Asahi* decision may have been otherwise, it at least did not discriminate against outsiders. (In fact, the Court counted alienage as a factor militating against the exercise of jurisdiction.)[102] Nor is discrimination the Brussels Convention's only flaw. Some of its jurisdictional bases are of questionable wisdom,[103] so that negotiating with the United States could also serve the ends of reforming the law within the European Union.[104]

But, as matters stand, such hopes seem vain. Beyond the internal havoc they have caused, *International Shoe* and its progeny present formidable obstacles to international harmonization. Because our own house is in disarray, we are unable to render a contribution to the world at large. Only if the Supreme Court would countenance a change of jurisdictional bases by treaty[105] — which it might well be prepared to do, considering that some

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[100] *See* Juenger, *supra* note 66, at 1205-06.

[101] *See id.* at 1211.

[102] *See supra* note 49 and accompanying text.

[103] *See* C.G.J. Morse, International Shoe *v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 999, 1005-09 (1995); *supra* note 73 and accompanying text.

[104] As Professor von Mehren suggests, doing away with the exorbitant bases listed in article 3 of the Brussels Convention would be a sine qua non for entering into a treaty arrangement with the European Union. Von Mehren, *supra* note 79, at 280-81.

[105] For a persuasive argument in favor of this possibility see Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting* International Shoe *to Family Law*, 28 U.C. DAVIS L. REV. 1047 (1995).

of the Justices seem to be fully aware of the practical shortcomings of the Court's jurisprudence[106] — could there be progress internationally. But as long as our highest court persists in its misguided attempt to derive jurisdictional law from two incongruent sources — due process and state sovereignty — we cannot effectively deal with other nations, however interested they and we may be in securing worldwide faith and credit.

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[106] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting) (stating that "the standards enunciated by [*International Shoe* and its progeny] may already be obsolete as constitutional boundaries"); *id.* at 313 (Marshall, J., dissenting) ("[T]he constitutional standard is easier to state than to apply."); Shaffer v. Heitner, 433 U.S. 186, 217 (1976) (Powell, J., concurring) (referring to "uncertainty of the general *International Shoe* standard"); *cf.* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (Blackmun, J.) (time and expense of determining the correct forum); Burnham v. Superior Court, 495 U.S. 604, 626 (1990) (Scalia, J.) (noting hazards of "uncertainty and litigation over the preliminary issue of the forum's competence"); *id.* at 626 (White, J., concurring) (criticizing fairness inquiry for inviting "endless, fact-specific litigation").