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The Problem with General Jurisdiction

Patrick J. Borchers†

General jurisdiction in the United States is a problematic concept. It is problematic in its scope, its application, its fairness—perhaps in its mythical existence, as one member of our panel has forcefully argued. The problems get worse once one tries to extend the concept internationally, as the famously poor record of the United States in attempting to conclude international jurisdictional agreements shows. But, as I shall argue here, general jurisdiction's problems are at least partly about specific jurisdiction; sensible and predictable bases of general jurisdiction should cause no difficulty. The issue, as I see it, is not so much with general jurisdiction as such, but with finding a rational jurisdictional scheme that encompasses both general and specific jurisdiction.

To dispense with a few preliminary matters: “general jurisdiction” and “specific jurisdiction” are terms invented by Professors von Mehren and Trautman and used by the Supreme Court. The term “general jurisdiction” (at least supposedly) refers to bases of jurisdiction that are independent of the operative facts of the dispute between the parties. Professor Twitchell helpfully calls this “dispute-blind” jurisdiction. Thus, assertions of jurisdiction based upon the in-state service of the defendant or

† Dean and Professor of Law at the Creighton University School of Law.
4 See, for example, Helicopteros Nacionales de Colombia v Hall, 466 US 408, 418 n 12 (1984).
5 See Twitchell, 101 Harv L Rev at 611 (cited in note 1) (“[C]ourts have developed a variety of approaches to the conceptual framework that are not always consistent with the original meaning of the terms ['general' and 'specific'].”).
6 See id at 613.
7 See, for example, Burnham v Superior Court of California, 495 US 604, 610–11 (1990) (“Among the most firmly established principles of personal jurisdiction in American
the defendant's domicile\(^8\) are assertions of general jurisdiction because they apply without regard to the nature of the dispute.

Specific jurisdiction is not general. It is the assertion of jurisdiction in a manner dependent upon the operative facts of the lawsuit. For instance, when the Supreme Court in *McGee v International Life Insurance Co*\(^9\) allowed California to assert jurisdiction over a Texas-based life insurance company in a dispute involving a policy sold to a California domiciliary, it was allowing specific jurisdiction.\(^10\) The fact that created jurisdiction—the sale of the policy in the forum state—was also relevant to the lawsuit. The term "specific" is helpful because the Supreme Court was not saying that the defendant was amenable to suit in California by policyholders who lived and had bought their policies elsewhere; rather, the allowance of jurisdiction was specific to that case.

Of course, things are a little fuzzier around the edges than this summary would lead one to believe, but let us defer those problems for a bit. In this paper, I aim to string together a few connected observations regarding general jurisdiction. Ultimately I agree with those who say that general jurisdiction as it currently exists in the U.S. is problematic from the standpoint of our entry into international agreements, as well as the promotion of sensible jurisdictional practices in international cases. The radical growth of e-commerce will surely increase by many fold the number of international transactions in the coming years. If we fail to come to grips with the implications of our fuzzy understanding of the boundaries of general jurisdiction, we run the risk of introducing unnecessary uncertainties into these transactions and ultimately will stump the development of international business. But the problems run deeper than general jurisdiction. Development of a sensible jurisdictional regime in the United States requires curing the diseases that currently infect specific jurisdiction. In the end, I believe that sensible reform will require legislative intervention that allows for modest and predictable bases of general jurisdiction.

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\(^8\) See, for example, *Milliken v Meyer*, 311 US 457, 462 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.").


\(^10\) Id at 223 ("It is sufficient for purposes of Due Process that the suit was based on a contract which had substantial connection with that state.").
In Part I, I discuss general jurisdiction’s relationship to the Constitution, and argue that much of the concept’s difficulties stem from courts’ application of constitutional principles to general jurisdiction. In Part II, I discuss particular challenges in application, focusing on the fuzzy notion of what counts as a “related” contact and the uncertain “test” for evaluating the substantiality of contacts. In Part III, I evaluate the possibilities for future reform and contend that considering general jurisdiction as part of a complete package with specific jurisdiction offers the best approach. Ultimately, development of a predictable jurisdictional regime will require legislative action—the passage of more meaningful jurisdictional statutes domestically and the adoption of conventions internationally.

I. GENERAL JURISDICTION AND THE CONSTITUTION

Personal jurisdiction in the United States is today a question of constitutional law. I have argued at length that this is an unfortunate mistake. I will not repeat these arguments, except to summarize by saying that treating jurisdiction as a question of constitutional law—in particular, as a question of interpreting the Due Process Clause of the Fourteenth Amendment with respect to the jurisdictional reach of state courts—is a doctrine that is difficult to reconcile with other constitutional principles and is based upon a questionable reading of that bête noir of Civil Procedure students, Pennoyer v Neff. Even assuming that due process principles provide a legitimate check on the jurisdictional reach of courts, however, I have also argued that these principles should provide little obstacle to U.S. entry into international jurisdictional agreements. This latter point is of some relevance to the ongoing Hague negotiations, though here too the conventional

11 See, for example, Burnham v Superior Court of California, 495 US 604, 609 (1990) (determining “whether the assertion of personal jurisdiction is consistent with due process”).


13 95 US 714 (1877) (finding that state jurisdictional law must comport with the Fourteenth Amendment).

wisdom is against me, as the U.S. delegation apparently feels itself bound by domestic due process principles.\(^\text{15}\)

A. State Jurisdictional Statutes

Even at face value, the proposition that jurisdiction is largely a question of constitutional law does not get one far down the road. The constitutional regulation of jurisdiction means that many state jurisdictional statutes provide no meaningful information. Consider, for instance, California’s jurisdictional long-arm statute, which provides simply that the Golden State’s courts have jurisdiction “on any basis not inconsistent” with the Constitution.\(^\text{16}\) State courts construe even seemingly more definite jurisdictional statutes as if they were California’s.\(^\text{17}\) Even statutes that have not been so construed fail to give a clear picture because they live in the shadow of the Constitution. For instance, New York’s long-arm statutes do not grant the constitutional maximum of jurisdiction.\(^\text{18}\) Yet New York still allows a common law basis of general jurisdiction over defendants who are “doing business” in New York.\(^\text{19}\) This basis of personal jurisdiction is notoriously indeterminate and seems to exist without regard for supposed due process limits.\(^\text{20}\)

For the most part, therefore, determining whether a court can and will assert general jurisdiction is a matter of interpreting the United States Supreme Court’s pronouncements on the sub-


\(^\text{16}\) Cal Civ Proc Code § 410.10 (West 2000) (“Section 410.10 permits California courts to exercise judicial jurisdiction on any basis not inconsistent with the state or federal Constitutions.”).

\(^\text{17}\) See, for example, In-Flight Devices Corp v Van Dusen Air, Inc, 466 F2d 220, 224 (6th Cir 1972) (noting that Ohio’s long-arm statute extends to the limits of the Due Process Clause); Fidelity Financial Services, Inc v West, 640 NE2d 394, 397 (Ind App 1994) (finding that “[t]he purpose of [Indiana’s long-arm statute] is to extend jurisdiction to the boundaries permitted by the due process clause of the Fourteenth Amendment”); U-Anchor Advertising, Inc v Burt, 553 SW2d 760, 762 (Tex 1977) (“The Texas long-arm statute reaches as far as the federal constitutional requirements of due process will permit.”).

\(^\text{18}\) David D. Siegel, New York Practice 122 (West 2d ed 1991) (“New York’s first general longarm statute, [Civil Practice Law and Rules §] 302, . . . was originally modeled on the Illinois statute. It does not go as far as due process permits.”).

\(^\text{19}\) See Bryant v Finnish National Airline, 260 NYS2d 625, 628 (1965).

\(^\text{20}\) Compare Siegel, New York Practice at 120–21 (cited in note 18) (comparing unclear corporate “doing business” tests).
ject. As for the more conventional, common law bases of general jurisdiction—in-state service of process, defendant’s domicile, appearance, and consent—it seems clear that they are constitutional. These bases are not the diplomatically troublesome ones, however, because they are mostly acceptable to the international community. The notable exception here is in-state service, a basis that Western Europe's Brussels and Lugano Conventions specifically outlaw as exorbitant and which is notoriously unfair, particularly in international applications. The U.S. delegation to the Hague negotiations contends that the in-state service basis is necessary in human rights cases, but does not seem anxious to defend it in other contexts.

B. "Continuous and Systematic"

The major definitional problems stem from the notion that unrelated but “continuous and systematic” contacts can give rise

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22 Milliken v Meyer, 311 US 457, 462 (1940) (“Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.”).
23 Adam v Saenger, 303 US 59, 67–68 (1938) (“The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.”).
24 National Equipment Rental v Szukhent, 375 US 311, 314 (1964) (concluding that defendants had consented to personal jurisdiction by authorizing an agent to receive service of process).
26 Id at 70, n 193 (describing "exorbitant jurisdiction" provisions from Art III § 2 of the Brussels and Lugano Conventions which “include jurisdiction on the ground of the nationality of the plaintiff, presence of unrelated property of the defendant in the forum, service of process, etc.”).
28 Peter Hay, Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California, 1990 U Ill L Rev 593, 600 (“To Europeans, . . . transient jurisdiction no longer comports with contemporary standards of due process (or its equivalent) and therefore had to be abandoned in English and Irish practice.”).
29 See, for example, Prepared Testimony of Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, US Department of State, Before the House Committee on the Judiciary Subcommittee on the Courts and Intellectual Property (June 29, 2000) available online at <http://www.house.gov/judiciary/Kova0629.htm> (visited Oct 9, 2001) [on file with U Chi Legal F].
to jurisdiction. The Supreme Court first suggested this basis in these terms in its seminal “minimum contacts” case, *International Shoe Co v Washington*, but since has only twice directly addressed it. Unfortunately, in each case there were special circumstances that limit the explanatory value of the majority opinion. In fact, each case is so peculiar it might be thought that the notion that general jurisdiction is even a “doctrine” is quite suspect, though—as we shall see—lower courts treat it as such.

In *Perkins v Benguet Consolidated Mining Co*, the Supreme Court considered a suit brought by a shareholder against a Philippines-based mining company. The plaintiff contended that she was entitled to dividend payments and stock issuances. The plaintiff brought the action in the Ohio state courts, even though none of the actions bore any obvious relationship to Ohio. Essentially, Ohio was the state from which the company’s president had conducted critical company business during World War II. The Supreme Court held, apparently relying upon its “continuous and systematic contacts” language in *International Shoe*, that the Ohio courts had personal jurisdiction.

Several factors make *Perkins* a poor case from which to generalize. First, the appellate posture of the case made it nearly an advisory opinion to the Ohio courts, a point that the dissent argued forcefully. Second, the lack of any alternative forum might make *Perkins* a case of jurisdiction by necessity, rather than a clear example of contacts-based general jurisdiction. Third, while the Supreme Court treated the case as one of unrelated contacts, one can now easily imagine an argument that the corporation’s Ohio activity (or perhaps more accurately, inactivity) was related to the claims in the case.

The other Supreme Court case purporting to address contacts-based general jurisdiction, *Helicopteros Nacionales de Colombia v Hall*, is not much better. In *Helicopteros*—a case filed

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31 326 US 310 (1945).
33 Id at 438–39.
34 Id.
35 Id at 450 (Minton dissenting). See also Eugene F. Scoles, et al, *Conflict of Laws* 348–49 (West 3d ed 2000) (“In any event the Supreme Court came very close to issuing an advisory opinion decision, which might have weakened the opinion’s precedential force considerably.”).
originally in the Texas courts—\(^{38}\) the Court considered actions brought by four American (but non-Texan) plaintiffs arising out of a fatal helicopter accident in South America. In support of jurisdiction, the plaintiffs noted that the South American transportation company had purchased about four million dollars in helicopters and parts from a Texas company and that the South American company had sent its pilots to Texas for training.\(^{39}\) The Supreme Court interpreted the plaintiffs’ brief to concede that specific jurisdiction was not available and then held that the Texas purchases and other contacts did not create general jurisdiction.\(^{40}\)

All of this makes \textit{Helicopteros} nearly as unhelpful as \textit{Perkins}. First, it is impossible to discern whether the Supreme Court would have been willing to treat any of the contacts as related had that argument been urged upon it. Some of the contacts—particularly the pilot training in Texas—might have borne a causal nexus to the liability-creating events because one theory of relief was pilot negligence. Second, it is also impossible to discern how much more weight the Court would have given to the defendant’s Texas contacts if it had been willing to treat those contacts as related because the majority avoided the question by treating it as having been conceded. In the end, \textit{Helicopteros} amounts to little more than a solemn pronouncement that “mere purchases, even if occurring at regular intervals, are not enough to warrant a State’s assertion of \textit{in personam} jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions”\(^{41}\) even though this holding has little connection with the facts of that case.

This brief sketch is, I hope, sufficient to make clear why foreign defendants are anxious to avoid subjecting themselves to American-style general jurisdiction. The holdings in \textit{Helicopteros} and \textit{Perkins} are limited by their facts and do not give clear legal rules for contacts-based general jurisdiction. Because the jurisdictional inquiry in the United States has become constitutionalized, jurisdictional statutes are of no help to a foreign company trying to ascertain whether, say, opening a sales office in a state or fulfilling internet orders for its products will subject it to American jurisdiction on unrelated claims. In the next section, I address

\(^{38}\) \textit{Hall v Helicopteros Nacionales de Colombia}, 638 SW2d 870 (Tex 1972).

\(^{39}\) \textit{Helicopteros}, 466 US at 411.

\(^{40}\) Id at 418.

\(^{41}\) Id.
more specifically some of the problems created by the current state of American doctrine regarding general jurisdiction.

II. DIFFICULTIES IN APPLICATION

While the last section's cursory review of the Supreme Court decisions relating to contacts-based general jurisdiction is probably sufficient to make my point, there are at least two related issues that deserve some discussion. First is the vexing question of what counts as a "related" contact. The second is the amorphous nature of the "test" for the substantiality of contacts. Part of the problem with regard to related contacts stems from the Supreme Court's loose formulation in *International Shoe*. In that case, the Court referred to "continuous and systematic" activities giving rise to jurisdiction on "causes of action unconnected with the activities there."42 In the context of discussing what would now be called specific jurisdiction, the Court referred to "obligations [that] arise out of or are connected with the activities within the state . . . ."43

The phrases "connected with" and "arising out of" are neither self-defining, nor are they necessarily interchangeable. Consider, for instance, the Ninth Circuit's decision in *Shute v Carnival Cruise Lines*,44 in which the plaintiff was injured while on a cruise in territorial waters off of California.45 She and her husband had purchased their cruise through a travel agent in their home state of Washington.46 When they sued in their home state, the defendants objected to this choice of forum, arguing that the cruise line did not have minimum contacts with Washington. Given that the cruise line's contacts were mostly advertisements, the question of whether the contacts were sufficiently "related" for purposes of specific jurisdiction was an important one because if the contacts were treated as "related," the prospects for sustaining jurisdiction in Washington would improve greatly.

If one attempts to answer the question by applying the phrases "connected with" and "arising out of" it becomes clear that it makes a difference which phrase is chosen. One can, I think, more easily say that the plaintiff's injuries were "connected with" the defendant's forum activities because the Washington legal system is

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42 326 US at 317–18.
43 Id at 319.
44 897 F2d 377 (9th Cir 1990), revd on other grounds, 499 US 585 (1991).
45 Id at 379.
46 Id.
advertisements set in motion an unbroken chain of events—starting with Mrs. Shute’s decision to take the cruise and ending with her injury—that led to the claim. In fact, this is essentially the theory that the Ninth Circuit adopted by deciding that contacts are “related” if they bear a “but for” causal relationship to the claim.47

If, however, one emphasizes the phrase “arising out of,” a bare causal relationship seems insufficient. Some courts and commentators have concluded that the forum events must, at a minimum, include some or all of the facts of relevance to the theory of relief.48 Under this approach, the contacts in Shute would be unrelated—because no liability-creating events occurred in Washington—and thus sufficient for jurisdiction only if they were weighty enough to pass the test for general jurisdiction.

This brings me to my second question, which is: what is the “test” for determining whether the contacts are sufficient for general jurisdiction? Consider, for example, the matter of whether forum-state sales subject the seller to general jurisdiction. This is a common fact scenario, yet no clear answer exists, as the following two cases show.

In Travelers Indemnity Co v Calvert Insurance Co,49 the defendant insurance company had no related forum-state contacts.50 The plaintiff did show, however, that the defendant had engaged a New Orleans law firm on a regular basis (in fact, the firm listed the defendant as its principal client) and that at least twenty-five other cases against the defendant were pending in the very district court where the action had been filed.51 These fact strongly indicate that the insurer had substantial sales volume in the forum. The court held, however, that these contacts were insufficient for general jurisdiction purposes.52

In Dillon v Numismatic Funding Corp,53 the plaintiff claimed that the defendant had breached its contractual commitment to employ him.54 The plaintiff had been lured from his home in South Carolina to New York only to find himself unemployed.55 He then was forced to move back home to live with his parents in

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47 Id at 384.
49 798 F2d 826 (5th Cir 1986).
50 Id.
51 Id at 833.
52 Id.
53 231 SE2d 629 (NC 1977).
54 Id at 629–30.
55 Id at 630.
North Carolina, where he filed suit.\textsuperscript{56} The defendant had no related North Carolina contacts. Its unrelated North Carolina contacts consisted of sales of rare coins to twenty-seven North Carolina residents in a total amount of about fifty-thousand dollars.\textsuperscript{57} The North Carolina Supreme Court held that these contacts were sufficient for general jurisdiction purposes.\textsuperscript{58}

Perhaps there are ways of reconciling the cases. For instance, the \textit{Dillon} plaintiff was an individual (and thus probably less able to refile in an alternative forum, perhaps making the court more sympathetic to his forum choice), while \textit{Travelers} was a battle between businesses. But if one focuses on the volume of the defendants’ contacts (which is, after all, the principal focus of the “minimum contacts” test\textsuperscript{59}), \textit{Travelers} seems like the better case for finding jurisdiction. Yet it is hard to say that either case is wrong on the law because both lie between \textit{Helicopteros} and \textit{Perkins}. Sales are a clearer demonstration of a purposeful association with the forum than the purchases found wanting in \textit{Helicopteros}, but do not approach in significance the relocation to the forum of the corporate headquarters that sufficed in \textit{Perkins}.

If \textit{Travelers} and \textit{Dillon} involved unlikely factual scenarios, then the inconsistency between the courts would perhaps just be the stuff of academic handwringing. But these cases and thousands of other reported and unreported cases represent common scenarios to which no clear jurisdictional standard applies. With the rise of e-commerce to multi-billion dollar proportions,\textsuperscript{60} and as interstate and international transactions over the internet become increasingly common and nearly frictionless, the radical indeterminacy of American jurisdictional principles is a major problem. Indeed, it is hard to quibble with the American Bar Association Global Cyberspace Jurisdiction Project draft report’s contention that intelligible jurisdictional rules are “[o]ne critical element of the predictability necessary for electronic commerce to evolve profitably and efficiently . . . .”\textsuperscript{61} Without the ability to

\textsuperscript{56} Id.  \\
\textsuperscript{57} \textit{Dillon}, 231 SE2d at 632.  \\
\textsuperscript{58} Id at 632–33.  \\
\textsuperscript{59} \textit{Shaffer v Heitner}, 433 US 186, 204 (1977) (holding that “the relationship among the defendant, the forum, and the litigation” is the “central concern” of modern jurisdictional analysis).  \\
\textsuperscript{60} Jube Shriver, Jr., \textit{Web Firms Suddenly Want an Older Kind of Access}, Milwaukee J & Sentinel 3D (Mar 28, 2000).  \\
\textsuperscript{61} American Bar Association Global Jurisdiction in Cyberspace Project, \textit{Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet} 5 (London Meeting Draft 2000).
structure relationships in ways that have predictable consequences for forum selection, commercial development will be forever retarded.

III. So WHAT Now?

A. Abandon General Jurisdiction?

A tempting solution is to hope that the United States abandons general jurisdiction both domestically and internationally. Given general jurisdiction’s ill-defined boundaries, its uncertainty in application and its many mysteries, one might rationally think that the Supreme Court or Congress should abolish it. Maybe so, except that specific jurisdiction would then remain by itself.

Specific jurisdiction’s boundaries are clearer than general jurisdiction’s because the Supreme Court has decided more specific jurisdiction cases in recent years. But even here uncertainties abound, as demonstrated, for example, by the Supreme Court’s startling about-face on whether jurisdictional limitations protect “interstate federalism” instead of the individual rights of defendants. Moreover, current specific jurisdiction doctrine con-

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62 See, for example, Asahi Metal Industry Co v Superior Court of California, 480 US 102, 112 (1987) (finding no personal jurisdiction where defendants placed a manufactured item in the “stream of commerce”); Burger King Corp v Rudzewicz, 471 US 462, 478 (1985) (finding personal jurisdiction over a franchisee who had never visited the forum state, but conducted business there); Calder v Jones, 465 US 783, 788–91 (1984) (finding personal jurisdiction where defendant’s intentional conduct was allegedly calculated to cause injury in the state where the harm was felt); Keeton v Hustler Magazine, Inc, 465 US 770, 781 (1984) (finding personal jurisdiction in a libel action where defendant intentionally and regularly circulated its magazines in the forum state); Rush v Sauchuk, 444 US 320, 327–33 (1980) (finding no quasi in rem jurisdiction where the defendant’s only contact with the forum state was an insurance policy held by a company in that state); World-Wide Volkswagen, Inc v Woodson, 444 US 286, 295–99 (1980) (finding no personal jurisdiction where defendant carried on no activity in the forum state); Kulko v Superior Court of California, 436 US 84, 93–96 (1978) (finding that the defendant’s act of sending a child to the forum state to live with her mother did not suffice to obtain personal jurisdiction); Shaffer v Heitner, 433 US 150, 213–17 (1977) (finding no quasi in rem jurisdiction in shareholder’s derivative suit where minimum contacts were lacking); Hanson v Denckla, 357 US 235, 235 (1958) (finding no personal jurisdiction over defendant who had not conducted business in the forum state because he did not personally avail himself of the benefits of that state); McGee, 355 US at 223 (1957); Travelers Health Association v Virginia, 339 US 643, 648–49 (1950) (finding personal jurisdiction over defendant who solicited business in the forum state).

63 World-Wide Volkswagen, 444 US at 293.

64 Insurance Co of Ireland, Ltd v Compagnie des Bauxites de Guinee, 456 US 694, 702 (1982) (“The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).
tains several irrational elements, some of which make general jurisdiction an unpleasant necessity.

B. Specific Jurisdiction's Deficiencies

First, the Supreme Court's interpretation of its "purposeful availment" test often denies plaintiffs in tort cases access to the most rational forum—in other words, the state of the injury. Consider the quandary of the plaintiffs in the *World-Wide Volkswagen* case. Seriously injured by their defective car while driving through Oklahoma, the plaintiffs could not proceed against the dealer and the distributor in the state of injury, leaving only the state of the sale, New York. In order for the plaintiffs to continue their action in Oklahoma against solvent defendants, general jurisdiction over the manufacturer and the importer was the only available option. Thus, general jurisdiction is necessary to cover for a major deficiency in specific jurisdiction which is its inability to provide a single, rational forum.

Filling this gap would not be necessary, however, under more reasonable jurisdictional schemes that exist internationally. The Brussels and Lugano Conventions, for instance, allow for tort jurisdiction wherever the "harmful" event occurred, which has been interpreted liberally to cover both the place of the tortious action and the place of injury.

Another serious defect in specific jurisdiction is its failure to consider litigation realistically as a package of legal claims between all of the involved parties. The *World-Wide Volkswagen* case is a good example of this failure because the net result of the ruling was to encourage multi-forum litigation over one car accident. *World-Wide Volkswagen*, however, is far from unique in this regard. In *Asahi Metal Industry Co v Superior Court of Califor*

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67 As it turned out, this proved to be much to the defense's advantage in the case, as the case was then removed on diversity grounds to a much more defendant-friendly federal venue, ultimately resulting in a verdict for the defense in the case. See generally Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 Neb L Rev 1122 (1993) (describing in detail the litigation tactics).

68 See, for example, *Handelskwekerij C.J. Bier BV v Mines de Potasse d'Alsace SA* (Case No 21/76), 1976 ECR 1735, 1747 (1977) (ruling that the Conventions are properly interpreted "in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it").
nia, the Supreme Court ruled that the contacts of a third-party defendant in a products liability case had to be evaluated separately from the defendant in the underlying action, requiring that the third-party action be severed and litigated abroad. In Rush v Savchuk, the Supreme Court ruled that the contacts of the defendant's insurer were irrelevant to the jurisdictional calculus, even though the suit was, as a practical matter, against the insurer under the forum state's judicially created direct action doctrine. In Kulko v Superior Court of California, the Supreme Court ruled that the forum state did not have jurisdiction over the defendant father in an action for child support, even though the forum state was the domicile of the children and thus had custody jurisdiction over the children.

Again, these results could mostly be avoided under more sensible jurisdictional schemes. The Brussels and Lugano Conventions, for instance, allow for ancillary personal jurisdiction over related actions. Major international conventions allow for support actions in the maintenance creditor's home. Since the United States lacks these reasonable rules, general jurisdiction remains as a sort of poorly functioning safety valve for plaintiffs trying to find a rational forum where they can litigate all of their claims.

Another major problem with specific jurisdiction in the United States is its indifference to the relative economic strength of the parties. In contract cases, for instance, the Supreme Court

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70 Id at 114–16.
71 444 US 320 (1980).
72 Id at 328–29.
74 Id at 94, 97–98.
76 See, for example, id at § 2 Art 5(2); Hague Conference on Private International Law, Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children, 539 UN Treaty Ser 27 (1958).
77 An example of this is the Supreme Court's perverse reference to Kulko. Burnham v Superior Court of California, 495 US 604 (1990), involved essentially the same facts as Kulko, except that the defendant father was served in-hand with process while visiting the forum state. Id at 628. The Supreme Court held that jurisdiction was constitutional. Thus, the Burnham children got the benefit of a home-state forum because their mother prevailed in an adult version of the game of "tag." See Linda J. Silberman, Shaffer v. Heitner: The End of an Era, 53 NYU L Rev 33, 75 (1978) (coining the term "tag" jurisdiction to describe the in-state service rule). The horror of all of this is that Mr. Burnham thus would have obtained a jurisdictional benefit by staying away from his children.
has applied the same "substantial connection" test to allow for jurisdiction in the plaintiff's home forum whether that plaintiff is an insurance policyholder suing an insurer\textsuperscript{78} or a giant company suing a nickel-and-dime franchisee.\textsuperscript{79} In the related area of contractual jurisdiction clauses, the Court has appropriately enforced the contracts not only when they were the subject of actual bargaining between businesses\textsuperscript{80} but also when they were against consumers under the most oppressive of circumstances.\textsuperscript{81} Again, general jurisdiction does not cure these defects, but at least it offers some forum choice to plaintiffs who find themselves in litigation against much larger enterprises.

Thus, abolishing general jurisdiction might be a more palatable alternative if specific jurisdiction operated more sensibly. But as things stand, abolishing general jurisdiction would make a bad situation worse. So then, one might fairly ask, what's the answer?

C. Alternatives

A good start would be for the Supreme Court to dramatically relax the constitutional limitations on jurisdiction. I have elsewhere argued that the Due Process Clause ought deny the plaintiff's forum choice only if it is so inconvenient that it actually impairs the defendant's ability to mount a defense.\textsuperscript{82} Interestingly, a test similar to this is developing in the federal courts regarding the Fifth Amendment limitations that apply to some federal actions.\textsuperscript{83} A dramatic relaxation of the constitutional standards would allow reasonable legislative standards to develop and

\textsuperscript{78} McGee, 355 US at 221.
\textsuperscript{79} Burger King Corp v Rudzewicz, 471 US 462, 464–66 (1985).
\textsuperscript{80} The Bremen v Zapata Offshore Co, 407 US 1, 17–18 (1972) ("Whatever inconvenience [defendant] would suffer by being forced to litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting.") (citations omitted).
\textsuperscript{81} Carnival Cruise Lines, Inc v Shute, 499 US 585, 587–88 (1991) (quoting a forum-selection clause from materials accompanying plaintiffs' cruise ticket which provided that "all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U. S. A., to the exclusion of the Courts of any other state or country").
\textsuperscript{82} See, for example, Borchers, 24 UC Davis L Rev at 94 (cited in note 12).
\textsuperscript{83} See, for example, Republic of Panama v BCCI Holdings, SA, 119 F3d 935, 946 (11th Cir 1997) (holding that jurisdiction is unconstitutional under the Fifth Amendment only if defendant can show a practical inability to defend in the forum or a lack of contact with the United States as a whole).
would rid American jurisdictional law of many of the oddities catalogued above.84

Of course, an immediate shift in the Supreme Court's jurisdictional jurisprudence is unlikely. Legislative action seems to be the most promising route. The obvious place to start is with state long-arm statutes. Most of these statutes either expressly or by court interpretation allow for jurisdiction to the constitutional maximum and thus cede authority over the development of jurisdictional principles to the judicial branch.85 While this is understandable given the complex and overly restrictive body of constitutional law that has developed in this area, the practical abolition of legislative limits on jurisdiction is an unfortunate development. Perhaps now is the time to consider state statutes that will provide some more definite bases.

Now might also be the time to consider federal legislation, a subject that the American Law Institute has taken up recently as part of its consideration of the Hague negotiations.86 Federal legislation has the advantage that it avoids the need for state-by-state enactment. Congress has somewhat broader authority in setting jurisdictional rules than does any one state, so that perhaps federal legislation could test what the Supreme Court perceives to be the constitutional boundaries.87 Federal legislation, however, presents the question of federal authority to enact such a statute. Recent Supreme Court decisions have made "old reliable"—the Commerce Clause88—a good deal less reliable as a universal source of congressional authority.89 In fact, the Supreme

84 One major advantage of statutes, even ones with open-ended terms, is that they limit the scope of potential considerations. A significant difficulty with the judicially created constitutional test that has evolved is the confusing multiplicity of verbal formulae. See, for example, notes 42–48 and accompanying text. A statute, even if it contains open-ended terms—such as, for instance, "foreseeable" or "reasonable"—has the advantage of focusing the parties' and the court's attention on the same words. An empirical study of the Louisiana conflicts codification has shown that replacing a judicially created conflicts approach with a comprehensive, but flexible, statute has significantly improved the affirmance rate of Louisiana lower courts in conflicts cases. See generally Patrick J. Borchers, Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability, 60 La L Rev 1061 (2000).
85 See Part I A.
89 United States v Morrison, 529 US 598, 613 (2000) (finding that Congress lacked the power under the Commerce Clause to provide a civil remedy for victims of gender motivated violence); United States v Lopez, 514 US 549, 567–68 (1995) (finding that Congress lacked the power under the Commerce Clause to criminalize the possession of firearms near schools).
Court's insistence that legislation under the Commerce Clause bear some obvious nexus to commerce makes it likely that there would be at least some cases that would present a serious question as to federal power.

Another possible source of congressional power is the Full Faith and Credit Clause, which is the asserted source of authority for some other federal statutes with jurisdictional implications, including the Parental Kidnapping Prevention Act and the Defense of Marriage Act. That Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." This Clause does give Congress some legislative competence, but probably not enough to cover every aspect that would need to be covered in a federal statute. For example, to the extent that such a federal statute purported to govern whether a state court should recognize a French judgment, the statute could not fall within the scope of the Full Faith and Credit Clause because it is not prescribing "the Effect" of any state proceeding. It is also possible that the Supreme Court will invent some new principle of federalism that limits federal authority to dictate state court jurisdictional practices. This is not to say that considering federal legislation is a worthless endeavor, only that it may not be a panacea.

To turn to matters international generally and the Hague negotiations specifically, it seems increasingly less likely that the answer lies there. It has been evident for some time that it will be difficult to reach a conclusion in the Hague negotiations that produces a convention which the United States will ratify. There are many reasons for this. First, the other nations in the Hague Conference simply are not willing to agree to anything that will require them to recognize without reexamination American-style tort judgments, complete with large pain-and-suffering and puni-

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90 US Const Art IV, § 1.
93 US Const Art IV, § 1.
94 Consider Alden v Maine, 527 US 706, 748-54 (1999) (holding that state government is immune from suits by state employees in state court for damages under the Fair Labor Standards Act because of residual sovereignty retained by states under constitutional plan).
95 For a general discussion, see Borchers, 24 Brooklyn J Intl L 157 (cited in note 14); Juenger, 24 Brooklyn J Intl L 111 (cited in note 2).
tive damages awards. Given this unwillingness, any agreement ultimately reached at the Hague will probably be of benefit to holders of American judgments only in the sense that the liability determination, and perhaps some part of the damages, would be immune from collateral attack. This is a sufficiently modest benefit for which United States interests are unlikely to pay any heavy price in exchange.

Second, as noted above, the consensus is that the Supreme Court’s due process jurisprudence precludes the United States from entering into any convention that includes jurisdictional rules more expansive than those permitted by the minimum contacts test. This presumably precludes the possibility of drafting a Hague Convention with some of the relatively firm jurisdictional rules found in the Brussels and Lugano Conventions. The currently available draft Hague Convention does an admirable job of trying to find some common ground, but it remains uncertain whether those efforts will succeed.

To the extent that a positive resolution at the Hague remains possible, the question arises regarding the future of general jurisdiction with respect to international agreements because no international agreement can avoid the issue. The possibility of foreign defendants being subjected to, in particular, contacts-based general jurisdiction in American courts remains one of the most powerful incentives for the other members of the Hague Conference to seek some common ground with the United States. This, however, routes us back to the question of the extent to which general jurisdiction should be clipped back.

D. Jurisdictional Principles for the Future

Thus, in the (probably unrealistic) hope that some new jurisdictional paradigm will emerge, I offer some suggestions for jurisdictional principles that will lead to a more rational scheme encompassing both specific and general jurisdiction. First, in tort

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96 Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ch I Art 10 (adopted Oct 30, 1999), available online at <http://www.hcch.net/e/conventions/draft36e.html> (visited Dec 14, 2001) (on file with U Chi Legal F) (stating that in tort, jurisdiction will lie in the state “in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State”).

actions that involve a physical injury, the state in which the plaintiff's injury occurs should have jurisdiction. This is a relatively simple rule that allows for jurisdiction in a place convenient to the plaintiff and in which at least some of the evidence is located. For non-physical injuries—such as injuries to reputation or business advantage—jurisdiction in the plaintiff's home state would probably be the best solution. Again, such a rule would have reasonable definition and would allow for jurisdiction in a place likely to be convenient for litigation purposes.

Second, in contract cases jurisdiction ordinarily ought be allowed in either party's home state. Time has shown the futility of efforts to locate contracts in one place or the other through metaphysical devices such as the “characteristic performance.” However, some classes of contracting parties—consumers, policyholders, employees and perhaps others—ought to get the advantage of a jurisdictional rule requiring litigation in their home states.

Third, in family relations matters the rules should be more liberal than the Supreme Court currently allows. Jurisdiction in child support matters should be allowed in the child's home state, again without any qualifications. Spousal support matters probably ought to be subject to a similar rule allowing for jurisdiction in the home state of the spouse seeking support. Here, however, the equities may not be as strong, particularly if the spouse seeking support has moved away from the former marital domicile; so perhaps the fundamental rule ought to be that jurisdiction lies in the marital domicile as long as one spouse or the other continues to live there. In any event, there should be some rule like this rather than the amorphous inquiry currently dictated by the Supreme Court's jurisprudence.

Fourth, with regard to general jurisdiction, some of the current bases ought to stand. Jurisdiction based upon a defendant's "home" connection, such as domicile or habitual residence, does no violence to fairness and is reasonably predictable and certain in its operation. Jurisdiction based upon an express advance agreement is also acceptable, although consumers and other weaker parties need express protection not currently afforded by

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98 See, for example, *Shenawai v Kreischer*, (Case No 266/85), 1987 ECR 239, 241-45 (attempting to determine in the context of the Brussels Convention the place of the characteristic performance in an action on a debt for professional services rendered).


100 See, for example, *National Equipment Rental v Szukhent*, 375 US 311, 314 (1964) (concluding that defendants had consented to personal jurisdiction by authorizing an agent to receive service of process).
the case law.\textsuperscript{101} Personal jurisdiction by voluntary appearance is an ancient concept that ought be continued, because if the defendant has no objection to the choice of the forum it seems silly to require a court to raise it on his behalf.\textsuperscript{102} Jurisdiction based solely upon the in-state service of the defendant should have been discarded decades ago. To abolish it by legislation or treaty would be to move toward the rational administration of justice.

The stickier problem is how much of contacts-based general jurisdiction should continue. Allowing jurisdiction over businesses that have their principal place of business or are incorporated in the forum state is a sensible rule that raises no serious issues of fairness to the defendant and is analogous to domicile or residence jurisdiction over individual defendants.\textsuperscript{103} At the other end of the spectrum, it goes too far to allow jurisdiction based solely upon unrelated sales or purchases in the forum, or advertising in the forum, or the fact that the defendant’s web page is accessible in the forum, or any of the other actions that loosely fit under the heading of “doing business” in the forum. If one assumes a more rational scheme of specific jurisdiction, then such bases allow for more forum choice than necessary to protect the plaintiff and present serious fairness problems to the defendant.

The harder questions lie in the middle. Should, for instance, general jurisdiction exist in a forum in which a defendant has a “branch” facility as proposed in the current draft of the Hague Convention?\textsuperscript{104} I favor such a basis because having a “branch” connotes a connection a good deal more tangible than merely having customers or advertisements in the forum. Allowing for general jurisdiction beyond a defendant’s home base also might discourage the defendant from manipulating its home location to gain a jurisdictional advantage. Of course, such jurisdictional bases come at some cost of predictability, as the notion of what counts as a “branch” is not self-evident. Some definition of this term, perhaps in terms of a fraction of the defendant’s total economic activity, might increase predictability and prevent twigs

\textsuperscript{102} See, for example, FRCP 12(h)(1) (allowing waiver of personal jurisdiction).
\textsuperscript{103} Twitchell, 101 Harv L Rev at 614 (cited in note 1) (“Ideally, states should limit general jurisdiction to the defendant’s ‘home base.’”).
\textsuperscript{104} See Preliminary Draft, Art IX (cited in note 96) (“A plaintiff may bring an action in the courts of a State in which a branch, agency, or any other establishment of the defendant is situated, . . . provided that the dispute relates directly to the activity of that branch, agency or establishment.”).
from being treated as branches. For business entities without any clear physical location, certainty may require ascribing them one.

Finally, we need to build a bridge between general and specific jurisdiction. Any sensible jurisdictional scheme ought to have as one goal the creation of a single forum to resolve conclusively all of the parties' related claims arising out of a common transaction or occurrence. Unfortunately, the Supreme Court's restrictive specific jurisdiction test has often thwarted this goal, as has its insistence that the contacts of each defendant be assessed individually and without regard to any other party. Thus, we need a more expansive notion of ancillary or supplemental personal jurisdiction. One model is that found in the Brussels Convention, which provides for jurisdiction over cross-party and third-party actions if jurisdiction exists over the main defendant.

Of course the jurisdictional principles I propose will permit some forum choice by plaintiffs, and they and their lawyers will go on making forum choices in the manner they perceive to be to their advantage. Some give this practice of selecting the most favorable venue the pejorative name "forum shopping," though other commentators have questioned whether the practice deserves any unfavorable label. In any event, allowing plaintiffs to select some reasonable forum, in which all of the parties can be gathered, and reasonably restricting the number of available fora would fairly accommodate the parties' competing interests. It bears recalling that venue transfer and the common law doctrine of forum non conveniens give the defendant some opportunity to influence the choice of forum even if the plaintiff succeeds in establishing jurisdiction. Thus these devices counteract any advantage to the plaintiff that the plaintiff derives from having multiple fora from which to choose.

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105 See, for example, World-Wide Volkswagen, 444 US at 295–99 (refusing to allow Oklahoma to exercise personal jurisdiction over out-of-state defendants).

106 Brussels Convention, Art VI (cited in note 75).


Abandoning general jurisdiction is not the answer. General jurisdiction's defects cannot be separated from those of specific jurisdiction. Given the restrictive and confused body of law that now determines specific jurisdiction, general jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it. Jurisdictional doctrine could be improved through the creation of reasonable and definite jurisdictional bases through legislation, though this is a difficult task given the constitutionalized limits on jurisdiction. If the Supreme Court were to dramatically relax those limits, however, the prospects for sensible statutory rules would improve considerably. A sensible reform project could produce more rational bases of specific jurisdiction coupled with modest bases of general jurisdiction. In particular, clear rules such as allowing tort plaintiffs who suffer a physical injury to sue in the injury state and allowing child support claimants to sue in the child's home state would be a major step forward in the fair administration of justice.