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Consent, Not Power, as the Basis of Jurisdiction
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Consent, Not Power, as the Basis of Jurisdiction

Richard A. Epstein†

I. THE GENERAL FRAMEWORK: THE LOGIC OF CONSENT

My assignment for this occasion asks me to apply my general world view, which stresses, among other things, the importance of voluntary exchange and strong property rights, to the vexed problem of jurisdiction within our federal system. In undertaking that task, I do not take the same critical view of the Supreme Court's work that I have in other areas.¹ Indeed, on this topic, I think that the set of rules now in place, in general, reaches the right conclusion. I can easily see why many observed cases might come out on the other side of some mythical line, but I do not see a single conceptual move or trick that would lead to a major simplification or improvement of the overall system.

Where I do differ from the received wisdom is as to the grounds for defending the current system. The traditional analyst explains jurisdiction in terms of sovereign power that a state exercises over private individuals. In my view, the consent of the parties to select this or that sovereign to resolve their dispute best

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explains the overall situation. Power of course has some role to play, for without it, a court can enter no judgment at all. However, the question of whose power counts is what matters in jurisdictional issues, and on that question, states are in active competition with each other to attract the business of litigants. In that environment, the consent principle neatly explains the dynamics of many of our jurisdictional doctrines.

At the same time, however, a word of caution is appropriate. Properly understood and applied, the idea of consent does not supply a panacea for the law of jurisdiction any more than it does in the law of contracts. All concepts are blurry at the edges, and it seems instructive that the inevitable ambiguities in the law of jurisdiction become most acute just where the traditional notions of consent start to give way—that is, as we move from consensual arrangements to disputes between strangers, especially with international transactions. But difficulties at the margins are not the same as decisive objections to the whole project, unless and until the critic can come up with an alternative that performs better across the full range of cases. In this context, no single legal device, and no set of legal devices taken together, will solve all problems so long as international business and occurrences do not occur under the umbrella of a single sovereign. What is needed, but not easily found, is a resolution of conflicts through cooperation among states whose long-term interests align at best only imperfectly with each other. In these cases, there will be a clash of wills and a conscious effort to tilt the process in favor of one's own nation. So in the international arena, we should expect the worst, and often we will find it. But there is little that one can do to remedy by way of legal reform because the political obstacles loom so large. So I shall begin with the things that we can control and then talk about those which we cannot. More concretely, I start with general jurisdiction in contractual contexts and move on from there to discuss both tort and criminal law.

To set the stage, I shall first summarize what I regard as the appropriate mode of analysis. The problems of jurisdiction cannot be analyzed in any sort of a vacuum but require the use of terminology that is familiar throughout the law. Jurisdiction is thus said to rest on multiple grounds: on consent, benefits conferred or received, presence, activities within the jurisdiction, causal connection between the conduct of the defendant to be charged and the adverse consequences to a plaintiff who resides in or who was hurt inside the forum state. All this terminological profusion is
well enough and good because it reminds us that many of the terms used to analyze disputes over jurisdiction are drawn from the library of terms used to analyze substantive private law. That conclusion is critical because it allows us to link up the study of civil procedure with these substantive principles.

So let us then begin with some private law concepts. First, of course, we have the idea of consent, which plays such a large role in all discussions of individual obligations. The term consent is inextricably linked to the idea of agreement and is, thus, implicated by the proposition that persons who consent to certain obligations are bound because they agree to be bound. The obligation is regarded as legitimate because it is chosen from within, rather than imposed from without. Parties who consent regard themselves as better off on net because they believe that what they receive is worth more to them than what they surrender.

One possible burden that any party might undertake is to risk suit in an inconvenient forum. However, that burden is, in principle, no different from a binding promise to perform some other onerous obligation unrelated to jurisdiction, where, again, the inducement is the benefit obtained in exchange. The principles of exchange work the same in both jurisdictional and non-jurisdictional contexts. The content or weight of the benefits and burdens is not, save in extreme cases, a matter for the court to consider. Certainly, it is wholly inappropriate for any court within the context of the ordinary contractual obligation to split the consideration on one side of the transaction so that it matches the consideration, piece for piece, or dollar for dollar, that the other party to the transaction supplied. The parties are charged with that function, and our job, as a first approximation, is to determine what the division of labor and responsibility is and, then, to enforce those obligations just as they were crafted. The exceptions are likely to be more refined, and I shall address them presently. But, for these purposes, the ordinary rule of contract, as was well stated by our late friend Thomas Hobbes, is that the value of what is received in exchange depends upon the appetites of the parties, not on someone's external validation of the worth of what passes between the parties in the exchange.²

² See Thomas Hobbes, Leviathan 105 (Cambridge 1991) (R. Tuck, ed) (“As if it were Injustice to sell dearer than we buy; or to give more to a man than he merits. The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they could be contented to give.”).
I think that the principle of freedom of contract and the limitations on its use are the best tools to organize our understanding of the problem of jurisdiction. In order to make out that claim, I shall proceed in three stages. First, I shall deal in Part II with the judicial reception of express contracts that contain jurisdictional issues. Second, in Part III, I shall consider the judicial use of principles of implied contracts to confront these same issues. In Part IV, I shall turn to the use of hypothetical contracts to deal with the intractable jurisdictional questions in tort and criminal cases.

II. EXPRESS CONSENT BY CONTRACT

As an initial matter, I do not see any reason why the principle of voluntary exchange should not control when the contract in question specifies the jurisdiction to which either or both parties agree to repair in the event of a dispute. On this point, it is fortunate that the United States Supreme Court generally accepts this sensible attitude toward explicit consent on jurisdictional issues. Exhibit A for this proposition is National Equipment Rental v Szukhent,\(^3\) in which the question before the Court concerned the service of process that was appropriate to bring a defendant, resident of Michigan, who had defaulted on the payments for the delivery under lease of farm equipment made in New York, governed by New York law.\(^4\) The original contract designated as the defendant's agent within New York one Florence Weinberg (our local hero),\(^5\) who happened to be the wife of one of the officers of the plaintiff corporation.\(^6\) Service was delivered to her and was also sent registered mail to the defendants in Michigan so that they were apprised of what they already knew: namely that they had not paid one dime on the contract even though they had already taken delivery of the equipment.\(^7\) Justice Stewart held that this arrangement for service of process, as part of the standard contract, was binding on the plaintiff, notwithstanding the cozy relationship between the plaintiff corporation and Mrs. Weinberg, the defendant's designated agent.\(^8\)

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4 Id at 312–13.
5 Id at 313.
6 Id at 319.
7 Szukhent, 375 US at 314.
8 Id at 314, 317–18.
This business arrangement makes lots of commercial sense. In cases like this, the real risk of loss falls on the seller who performs first and not on the buyer who receives the benefits under the contract before he pays for them. The relative economic size of the parties tells little or nothing about their respective economic positions in this dispute. What really matters is the sequence of performance that, in this case, gave the practical advantage to the Michigan defendant. It was to counter this advantage that Mrs. Weinberg was appointed an agent for the limited purpose of accepting service of process on the defendant. The system would have been oppressive, perhaps, if the defendants had received no notice and could not defend their rights. But, in this case at least, that problem was obviated by the business arrangement that called for that notice to be given.\textsuperscript{9} It is, therefore, a mistake to treat Mrs. Weinberg as a customary agent, who has the right to bind her principal by contract. The unmistakable intention of the contractual system was \textit{not} to have Mrs. Weinberg litigate the case. Rather, it was to ensure that the litigation, when caused by the defendant, had to take place on the plaintiff’s turf and not the defendant’s. In some cases, this might not be appropriate; but in most cases it will be. In most nonpayment cases the creditor should win, and the rules on jurisdiction have to be fashioned in light of overall probabilities and cannot be shifted magically to aid the defendant-buyer only in those cases where he has credible claim for fundamental breach of warranty. So, even if we cast an independent gaze over the transaction, it looks to be an efficient outcome, so long as we rid ourselves of the illusion that only firms and never individuals, only sellers and never buyers, are tempted to take illicit advantage of a contractual partner.

There is a sense, however, in which the solution reached in \textit{Szukhent} is inelegant, for much could be said against the invocation of its agency fiction to secure jurisdiction in the case. Overall, procedural fictions are better eliminated by substantive rules that say what they mean and mean what they say. My own decided preference is for a rule that states that the parties by contract may stipulate that New York is the relevant jurisdiction and dispense with the extra formality of having service go both to the defendant in Michigan and to the designated agent in New York. The latter element is superfluous and possibly mischievous; and the former is an essential part of the overall contractual design. As a business matter, the debtor needs the notice in order to

\textsuperscript{9} Id at 314.
decide how to respond to the challenge. It is for that reason that notice to the party in interest is critical to satisfy the constitutional requirement of notice as outlined in *Mullane v Central Hanover Bank & Trust Co.*

This criticism of the use of fictions, however, is no stronger (or weaker) than the criticism that one makes of any use of fiction in any procedural context. The first question is whether the fiction is one that facilitates the correct result or frustrates its attainment. In this case, the device used helps matters by getting rid of any doubt about the service of process to the party in interest under the *Mullane* doctrine. The second question is whether the fiction in question is too costly or has some adverse collateral consequences that impair its effectiveness. (A straw conveyance, for example, is quite destructive if it results in the imposition of a transfer tax, allows the interposition of third party liens or other claims of title, complicates the title search, or introduces a quit claim deed that may break the chain of warranty deeds.) But it looks in this case as though the parties have seized on an inexpensive formality that removes any doubt as to the overall soundness of the entire procedure. So the legal aesthetics are bad, but the business practice itself turns out to be good. Once validated, it works with a minimum of fuss and bother as a routine part of the standard transaction.

Yet there are objections to this rosy picture that should be at least noted. Justice Black, in *Szukhent*, thought that it was odd that the agent in question did not have any contact with the principal; but he was wrong to voice jurisprudential angst about this dangling agent. All depends on the purpose for which the agent is selected contractually. Agency is an important contractual relationship that allows one person to act for the benefit of another. However, the law is not in the thrall of an implicit set of Aristotelian essences that require a person, in order to fill the role of an agent, either to assume full responsibility for a business or have no role at all. The absence of discretion by contract design makes intelligible the removal of the elements of personal touch and trust that are found in typical working agency relationships.

Justice Black also argued that the agent was not an agent "authorized by appointment," as the Federal Rules of Civil Proce-

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10 339 US 306 (1950) (finding a statute inadequate because it did not provide for means to contact those who could easily be informed by other means or give enough time for those interested to make an appearance).

11 *Szukhent*, 375 US at 319 (Black dissenting).
dure use that phrase. But that proposition is also false, both literally and as a matter of agency law, where the default provisions on the scope of authority can be altered by any ordinary expression of contrary consent. Justice Black then further claimed that from Magna Charta forward ordinary citizens have had a right to have any dispute litigated locally for their benefit. But here comes the rub: local for defendant is distant for plaintiff, and the question is whether the parties have any reason not to pick ex ante the cost-minimizing joint jurisdiction. I cannot see why we should place this ostensible interest in local litigation in the legal pantheon, so long as price and other terms can vary to offset the risk in question. The prospect here is not merely theoretical, because we can identify some real advantages to the Szukhent arrangement. As noted above, the debtor has the initial strategic advantage because the creditor has performed in full. The enforcement of the claim in the creditor's court will materially lower, in my estimation, the probability of breach and, therefore, the need for either side to take legal action in the first place. Also, the defendant-buyer was in willful breach of contract, where the incentives for strategic behavior matter. Finally, the plaintiff-seller is someone who has to do business with lots of people from all quarters of the country. Having to learn and master one body of law lowers his costs. The prospective buyer is not likely to know Michigan's (or any other state's) law in advance, so he has to learn up either way. The contractual arrangement adopted in Szukhent thus promises lower total costs and greater parity between parties than the alternative position championed by Justice Black.

At root, the Black position seems to take a leaf from the contract literature by branding this jurisdictional provision as part of an illicit contract of adhesion, rather than as a bargain hammered out between equals. If that is the case, then this and every other arrangement that seeks to pre-set jurisdiction goes down in flames unless it passes some case-by-case analysis of unconscionability. That prospect requires a detailed examination of whether the terms in question were fully exposed to the buyer, whether reasonable alternatives were offered, and whether the terms were intrinsically fair. That approach is one that I have

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12 Id at 320 (Black dissenting).
13 Id at 325 (Black dissenting).
It could only be a source of infinite mischief for jurisdictional issues because its erratic application will defeat the great advantage of the Szukhent rule: a high level of certainty that removes the basic jurisdictional wrangle from the table. It is, therefore, most welcome that the Supreme Court validated this jurisdictional oasis in the unconscionability desert just three years before the District of Columbia Circuit decided Williams v Walker Thomas Furniture Co, which gave the unconscionability doctrine an undeserved enhanced respectability in consumer transactions.

The contrast between the substantive law and the jurisdictional law seems clear even though the same arguments apply to both cases. It is a mistake on either front to think that the doctrine of unconscionability has any role to play in competitive industries once it is clear that the party bound has received sufficient notice of the relevant terms. For these purposes, it hardly matters what independent decisions any rival firms make. If these firms adopt the same term, then there is further confirmation of the efficiency of the basic arrangement. If they offer a different arrangement, then the wary consumer can switch firms. What matters is market structure, not some independent and unmoored sense about the terms of contract that some disinterested person might think appropriate for the occasion.

Szukhent is not the only case in which the Supreme Court adopted a freedom of contract position (with minor qualifications at the edges) in jurisdictional matters. Eight years later, in The Bremen v Zapata Off-Shore Co, the Court approached the same issue from the other side, and gave full force and effect, subject to some minor qualifications, to a clause that required disputes to be resolved in London under English law. The point makes good sense and for the same structural reasons. So long as freedom of contract is the norm, then the parties should have the same power to remove a case from the jurisdiction as to bring it into that jurisdiction.

Once again, the same logic about mutual advantage through contract applies. The London courts could easily have expertise that works for the benefit of both sides, as seems to be true in

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18 Id at 2, 20.
salvage cases, where they have extensive maritime experience.\footnote{See generally Wayne Brough, Liability Salvage—By Private Ordering, 19 J Legal Stud 95 (1990).} Clearly, a regime which allows—indeed requires—the parties to choose their jurisdiction after the fact will not work as well as one which sets the jurisdiction in advance. Once the incident occurs, each party will have gained some important knowledge of its own prospects. It may well be that both sides will still favor the neutral expertise of the London courts, but it could easily be the case that one party will find that it would be better off to litigate in some other forum, perhaps the courts of its own nation. The ex ante approach means that the parties have chosen their forum behind the veil of ignorance, and that, in turn, means that in the broad run of cases, they have picked the right place to litigate. For the few cases in which they have not, it is still possible for them to negotiate after the fact a settlement that calls for arbitration in some other forum.

As a matter of legal doctrine, one could regard \textit{The Bremen} as a sideshow on the ground that its jurisdictional provisions make sense only because it was an agreement between commercial equals. However, the last of the trifecta came with the decision of that noted free-marketeer, Harry Blackmun, in the well-known case of \textit{Carnival Cruise Lines, Inc v Shute}.\footnote{499 US 585 (1991).} Justice Blackmun took the position that the trial court should enforce a forum selection clause that designated the courts of Florida as the sole place to litigate disputes between a cruise line and its passengers.\footnote{Id at 595.} In that case, the injury took place while the defendant’s ship was on the high seas.\footnote{Id at 588.} The injured party was a resident of the state of Washington,\footnote{Id at 585.} where she filed suit to recover tort damages.\footnote{Carnival Cruise Lines, 499 US at 588.} The defendant had its principal place of business in Florida.\footnote{Id at 585.} This decision is surely notable insofar as this forum selection clause was found in a consumer transaction and was related to the litigation of tort claims—both topics on which the anticontractual forces have made considerable headway in nonjurisdictional cases.

Stripped to its essentials, \textit{Carnival Cruise Lines} raises the same question about the balance of inconvenience between the
parties. In my view, the outcome of the case is so clearly correct that it is hard to understand why it had to be litigated to the Supreme Court in the first place. The answer is the unconscionability doctrine and the particular complications for these particular plaintiffs. But if these individual explanations are allowed to tip the balance, then the whole system starts to unravel. The costs to the defendant are lower from uniform jurisdiction, and the costs pass back through the system. The fact that all consumers get the same deal offers an additional measure of protection. After all, the most sophisticated consumers seem to be willing to accept these provisions, so that it is not too much to hold that the less informed consumers are doubly blessed: they get the same contractual treatment (with its lower price component) without having to incur the search costs that are borne by other consumers.

The fact that this is a consumer transaction, as opposed to a commercial transaction between two firms, does not alter the pattern of joint ex ante advantage. Thus, the law of jurisdiction works reasonably well here because it rejects the idea that standard form contracts are not valid. If there is any concern here at all, it should be with notice—whether the clause was conspicuous—and that was not at stake. Nor should it have been: even though the Court insists on notice as a bona fide requirement, it should take pains to make it a simple matter for any standard form contract to make the matter sufficiently conspicuous so that the issue of surprise, on which the doctrine of unconscionability originally turned, does not have to be litigated on a case-by-case basis. I see no evidence in *Carnival Cruise Lines* that Justice Blackmun paid lip-service to the basic decision to allow contractual selection of the forum only to take it all away by imposing a notice requirement so stringent that no firm could hope to satisfy it in the ordinary course of business.

The analysis is not quite yet complete. In dealing with forum-selection clauses, a court might rightly be troubled if the clause was inserted to evade some requirement of positive law that, independently of the selection provision, restricted freedom of contract. After all, if regulation is valid on a matter of substance, then its reach could perhaps extend to the procedures used to support or evade the right in question. But that dark scenario does not appear to have been the case here. The obvious reason was for cost control and for uniform resolution of disputes. So contract is king.
Now the importance of this approach should be stressed repeatedly. Huge portions of the business of life arise out of a set of contractual arrangements. Hence, the idea of express consent holds out both a promise and a danger. The promise, which matters the most, is this: a clear and emphatic defense of freedom of contract means that more and more cases will fall within the orbit of explicit consent provisions. The ostensible limitations in the name of fundamental fairness are simple enough to obey. Pick any jurisdiction with business ties to the potential defendant, and which is generally accessible, and the game is over. However, at the same time, the emphasis upon consent also gives rise to additional complications, some of which are easily resolvable and others that are not.

III. IMPLIED CONSENT

The difficulties associated with the doctrine of consent in the law of contract carry over to these jurisdictional issues. It is well known that express consent is not the only form of consent available. Indeed, in principle, wherever there is express consent, the possibility arises that the parties could have achieved that same result by implied consent as a matter of fact. Yet determining whether that implied consent has been given, and if so, what is its proper scope, is never an easy task no matter what theory of interpretation the courts adopt.

We have a legion of cases that ask which warranties or conditions should be implied into which contracts. We know, at a minimum, that these are high-risk inquiries. The justification for undertaking them is that we think that there is enough regularity in human events that we can do better than random in deciding which warranties should be incorporated into some standard or customary transaction and which should not. For example, we take a very negative view about the implication of a warranty of cure from the delivery of medical services, because we know that the normal practices are otherwise and understand why that should be the case: there are too many other variables apart from the physician's services that can account for a negative outcome.

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26 For a discussion of the issues with implied conditions in the ordinary contract, see, for example, E. Allan Farnsworth, Contracts § 8(2) (Little, Brown 2d ed 1990). For an early case of an implied condition, see Kingston v Preston, 2 Douglas 689, 99 Eng Rep 437 (KB 1773) (holding that giving a security was an implied condition for the transfer of defendant's stock and business).
in the particular case.\textsuperscript{27} Hence, we revert to a default rule of negligence because that standard ties liability more or less within the control of the individual defendant. On the other hand, we normally imply warranties that standard goods are reasonably fit for the purpose that they were intended because we think that modern manufacturers have the greater capacity to determine what goes in, for example, their sealed containers.\textsuperscript{28}

Yet even if the large number of cases is sensibly decided by some standard presumptions, we are equally confident that the selection of cases for litigation will result in having only the hardest cases—a non-representative sample—come before us.\textsuperscript{29} For those, we have to look back to find the ostensible shared intentions of the parties to see which way the risk of inconvenience on matters of jurisdiction should be understood to have been allocated. But intentions are elusive when unexpressed and often unshared, and the question is what to do when we lack the information ordinarily imparted through explicit contracts. Here we have a strong divergence of thought in the general contract literature, and that doubt necessarily carries over to the jurisdictional question.

The first issue is this: how do we think about default terms in the first place? Do we set the presumption against the stronger party to the transaction (that is, that party that does the drafting of the standard form) to force it to clarify the arrangement, or do we try to find out what terms look, from the ex ante perspective, to create the joint advantage of the parties in question?\textsuperscript{30}

My own view is to stick with the latter, more traditional, test. The first of the reasons is scope: the effort to use default terms to force one party to disclose information to the other does not apply across the board to all kinds of terms or to all sorts of settings. There are some cases where one party may have special information or bargaining advantage. There are also many transactions

\textsuperscript{27} See, for example, \textit{Sullivan v O'Connor}, 296 NE2d 183, 186 (1973) (noting that because of the "uncertainties of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results").

\textsuperscript{28} See, for example, UCC § 2-314 (ALI 1962) ("Goods to be merchantable must be at least such as . . . are adequately contained, packaged, and labeled as the agreement may require.").

\textsuperscript{29} See generally George L. Priest and Benjamin Klein, \textit{The Selection of Disputes for Litigation}, 13 J Legal Stud 1 (1984) (asserting that relatively harder cases will be more likely to be subject to litigation).

in which neither party has a dominant hand, and both sides just want to resort to routine gap-fillers to take care of material that it is too costly to draft explicitly if some serviceable alternatives are available. What might work as a strategy in dealing with contracts between certain customers and their carriers, for example, is not likely to work in simple partnerships or employment contracts.

The advantage of the mimicry approach is its universal application. In contrast, default-forcing rules apply only to a limited class of situations. This point gains salience when one notes that it is not sufficient to the use of the default-forcing approach to have a perceived dominant party. Market structure also matters. Term-forcing does not seem to be a relevant situation in competitive markets with low transaction costs, because the parties face a unique equilibrium situation that renders any discrete bargaining unnecessary. It therefore becomes necessary to draw inferences not only about the kinds of parties but also about the kinds and shapes of markets—a costly and error-prone inquiry.

A powerful selection effect fortifies this conclusion: no default rule will satisfy the general counsels of any corporation that engages in a large volume of transactions. They are fanatic about drafting their own provisions, especially in connection with such critical matters as limiting liability for consequential damages. Large firms cannot tolerate any legal vagaries on the effectiveness of their positions as they move from one state to another. They will not use an incomplete contract that can be fleshed out in different ways in different cases. They strive for uniform provisions to ensure (perceived) equity between customers and low internal administrative costs for a legal staff that has to resolve countless routine disputes long before they edge toward litigation. Such lawyers are not going to rely on any default provision. They will draft exactly what they want (often with firm-specific terms dealing with such matters as the location for lodging complaints, for example).

That strong selection bias should influence our attitude toward default provisions, for we can assume that the default provisions are likely to be called into play exactly in those cases where neither party has the sophistication or inclination to draft expressly. For those parties, the effort to mimic the dominant—that is, the most common solution—makes the most sense. We should therefore stick to the traditional approach, which can eas-
ily make a difference in decided cases, since so many disputes involve large firms that do business with isolated customers.

So the question, then, is how the implied consent approach, for all its mushiness, plays out against the decided cases. The first of those that I would look to is the now discredited decision of Pennoyer v Neff. Mitchell, an Oregon lawyer, sued Neff in Oregon for three hundred dollars owing for legal services that Mitchell rendered to Neff when the latter still lived in Oregon. Neff had moved to California prior to the onset of the suit: notice of the suit was published in Oregon. It was not clear that Mitchell knew of Neff's whereabouts to give him actual notice in California. After a default judgment was entered against Neff, Mitchell purchased Neff's property from a foreclosure sale for little more than the unpaid debt and thereafter sold it to Pennoyer for a price closer to its market value of fifteen thousand dollars. Neff sued Pennoyer in federal court in Oregon to recover the land, claiming that the initial sheriff's sale to Mitchell was invalid. The Pennoyer Court held that jurisdiction failed because service of process ran only within the state, and notice (even personal notice) to a party located outside the state did not make up that deficiency. Oregon and California were separate, self-contained islands within the federal system. In Justice Field's words:

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.

In line with the central theme of this essay, Justice Field seems to be wrong as a matter of principle, by focusing too much on power and too little on consent. The first danger sign is his use of the phrase "necessarily restricted." Few things in this world meet that exacting standard for judgment. In this case, moreover, the phrase seems to be badly misdirected. The power of the court

31 95 US 714 (1877).
32 Note that on the facts Neff might be able to set aside the foreclosure sale because of the manifest inadequacy of the price, an issue that has nothing to do with jurisdiction as such. See, for example, Murphy v Financial Development Corp, 495 A2d 1245, 1250 (NH 1985).
33 Pennoyer, 95 US at 734.
34 Id at 720.
35 Id.
to enforce its own judgments is confined to its own territory. The moment it wishes to assert its authority in some other territory, it has to contend with the courts and legal officials of that jurisdiction. However, it hardly follows that the court can only exercise its power over people who are in, or property that is located in, its own jurisdiction. In *Pennoyer*, the state statute contemplated service by publication of summons to individuals who are outside the state. That notice cannot bind them to come, but it does give them notice (in the same sense that turned out to be so critical in *Szukhent*) of the proceedings against them. Once informed, then the defendants can decide whether to defend themselves within the forum or run the risk of a default judgment. Then once judgment is entered against defendants with notice, it should be possible to proceed in the ordinary matter, both to seize property within the state, or to sue on the judgment elsewhere if that proves necessary. Notwithstanding the occasional procedural pitfall, it is easy to devise procedures to overcome the absence of a defendant so long as it is sensible to hale him into court in the first place.

But why is it legitimate to do so? Suppose that the contract for services at issue in *Pennoyer* had been negotiated and executed in California and that it was Mitchell (the plaintiff-creditor) who moved thereafter to Oregon. In these circumstances, I would be loathe to apply the Oregon statute in ways that force Neff (the defendant), even with personal notice, to litigate in a state to which Mitchell had moved unilaterally after the dispute. That notice does not seem sufficient to drag a party into a state with which he has absolutely no connections at all. How then do we explain the difference between these two scenarios? The simplest approach seems to be to ask what terms the parties would have agreed to if they had explicitly negotiated on the question of jurisdiction at the time they entered into their contract. Here, the uniform answer in both the real case and my additional hypothetical is this: jurisdiction to resolve the dispute exists in the state where both parties resided when they entered into their contract. From the ex ante perspective, this means that neither party can bring the suit in an alien forum even if he obtains physical presence over the other party there. The decision thus curtails the prospect of strategic behavior by both parties and gives a clear and simple rule.

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36 Id at 718.
The issue here is not that of sovereignty in the sense of power to decree rules. Rather, there is a competition between sovereigns to see which one offers services that most fit the needs of the parties. The express contract cases give a clear answer even when one party is out of state. It is hard to imagine that any express contract would pick an arbitrary state to which neither party has connections when it can pick a state to which both parties have strong connections. It seems easy to mimic the terms of the ideal express contract in this situation: and that mimicry calls for Oregon, when the contract is formed in Oregon by both present there, and California, when (as in my hypothetical) both parties are present there. It is odd to believe that the litigation must come to California solely because Neff decides to leave Oregon. At the time of the contract the only state in which it made sense to regulate the transaction (sense enough for this to be binding presumptively) was the state in which all the relevant actions took place.

_Penneoyer_, moreover, does not offer any intelligible stronger/weaker party situation for which the default-forcing rationale is even intelligible. But using an implied consent that mimics the actual consent leads in this case to an outcome so clear that the problem is not worth a second thought. It is only because Justice Field placed the false emphasis on judicial power that the point was missed. In reality, this case is no different from the _Szukhent_ case discussed earlier. The point of notice to the defendant is to let him return to the jurisdiction to defend himself. Because there was no planning in advance, we no longer have the functional equivalent of Mrs. Weinberg to make the fictions work. That being the case, we should just do without that prop altogether. Adequate notice, along the lines of the decision in _Mullane v Central Hanover Bank_, should suffice; and here, that standard means personal notice if possible, since this is a personal action against only a single defendant.

In my view, the strength of the implied consent conception, not its weakness, accounts for what is wrong with _Penneoyer_. By this view, the rule that _International Shoe Co v Washington_
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represents is, as a matter of first principle, a welcome, if imperfect, correction of the earlier decision. *International Shoe* involved the question of whether the state of Washington could assert jurisdiction in Washington to collect local taxes owed with respect to sales activities that *International Shoe* had undertaken within the state.\(^{40}\) Here, Washington made no effort to lever its jurisdiction to cover all activities of the company.\(^{41}\) Indeed, that approach was, if anything, disclaimed by Chief Justice Stone, who limited this decision to transactions that occurred within Washington state.\(^{42}\) So think of this as a contract question: whether the state should be so prejudiced on jurisdictional matters that it cannot replicate ex post the position of lenders, cruise lines and other commercial parties. The party that comes to the state to sell can be asked to remain to pay the taxes on those sales. The state doubtless has lots of entrants from lots of different places, and the rationales that point to the home state as the proper forum in the contract cases carries over here without missing a beat. Litigation of Washington transactions in Washington courts follows the revised *Pennoyer* line perfectly. On this analysis, the famous phrases of “minimum contacts” and “fair play” and “substantial justice”\(^{43}\) are, I think, the source of some real mischief because they tend to make this assertion of jurisdiction look more adventurous than it really is in light the applicable private analogies.

But there is one potentially discordant note in this context, which is that the state has a *monopoly* over the power of taxation. A sound unconstitutional conditions analysis therefore—one that rejects the proposition that the greater power always includes the lesser—suggests that there is some limitation on the power of the state to exact conditions from firms that do business within its boundaries.\(^{44}\) That doctrine always places at least some limits on the conditions that it can exert for consent. But here we do not have a situation where Washington says that if you want to sell in this state, then you have to agree to answer any and all suits within this jurisdiction regardless of where they arise. *Internation-
International Shoe is not a case like either Hammer v Dagenhart or the Child Labor Tax Case in which the leverage element associated with the doctrine of unconstitutional conditions applies in any real sense of the term. We do not have a case where in order to do business in Washington state, a party is asked to concede jurisdiction over all its transactions worldwide. Rather, the well-behaved monopolist is doing just what was required of him, which is to impose conditions that are no more onerous than those demanded by parties who operate in competitive industries without the benefit of the distinctive sovereign power enjoyed by the state. International Shoe thus looks more like the decision of the Supreme Court in Hess v Pawloski, which upheld the idea that simply driving within the state amounts to consent to its jurisdiction for disputes arising out of highway accidents within the state. That decision would be rather different if mere driving within the state were grounds for comprehensive personal jurisdiction over unrelated contract or family disputes.

There is one further way to see the sense in this approach for both state taxation and local highway accidents. As a matter of theory, it is hard to credit any implied consent approach that allows one party to be subject to suit in countless jurisdictions for wrongs that occur anywhere in the world. But so long as we recognize that the state assertion of power only applies to transactions within the state, then we can place this worry easily to one side. These decisions easily generalize in the sense that all other states in which International Shoe does business could require it to answer locally for their sales taxes. Even if all states take advantage of that rule, the company could not claim that it was oppressed by multiple inconsistent commands that it could not respond to simultaneously. The same is true with Hess in the torts context. The decisions again seem easy on the implied consent view.

The question, then, is how far can we push this implied consent logic. One of the early cases after International Shoe that illustrates this problem is McGee v International Life Insurance Co, which upheld the ability to assert jurisdiction based on the

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45 247 US 251 (1918) (holding that Congress could not prohibit the shipment, in interstate commerce, of goods made by young children).
46 259 US 20 (1922) (holding that Congress lacked power to specially tax employers who employed child labor).
47 274 US 352 (1927).
48 Id at 356–57.
solicitation and service of a single life insurance contract within the forum state, to wit: that of the insured. Here we see that the standard analysis that helped explain the Szukhent case makes clear that the insurance company would insist, like lenders and shipowners and state taxing authorities, that the disputes be resolved in the courts of its home state. All the arguments about convenience and uniformity should point in that direction. But it comes out the other way because, in dealing with International Shoe, we find that there is a sufficient contact with the state to justify the use of its own jurisdiction for this one transaction. It looks as though McGee adopts the view that default terms should be forced to spur power parties into action, which is not the test that I would use for the reasons set out above. By the same token, I expect that it is easy for every insurance company to take up the invitation that was proffered them in McGee. I assume that they could, if they so chose, include a forum selection clause in their agreements, which would make their home state the sole forum for adjudicating claims. If so, then we see an important feature of doing business in a regime that respects freedom of contract: explicit provisions in future transactions can easily correct any error judicial rule made in forum selection.

This implied consent rationale also helps explain Hanson v Denckla, decided the next year. There the Court refused to find that a bank that controlled trust funds in Delaware could be haled down to Florida by a disappointed beneficiary when a power of appointment under a will was exercised in Florida. This seems correct. This is a case where the minimum contacts language and the implied consent theory cut in the same direction. The key point with respect to both is that the holder of the power could move anywhere he chose without consultation with, and certainly without the approval of, the bank. So, the issue is why the strategic behavior of C, the holder of the power, should confer jurisdiction on a state for a dispute that involves A, the trustee, and B, the beneficiary. It seems that this bank has all the same interests that we found in the other cases, but with this one variation. There was no discrete transaction with the holder of the power after the creation of the trust. But, by the same token, this is all of minimal importance in the grand scheme of things. A well-executed trust agreement would make the home

50 Id at 223.
52 Id at 251–53.
state of the bank the place for litigation over all issues arising out of it. The key point is that the express contracts can handle all these cases, so we should expect, with time, the domain of implied contracts cases to shrink.

This approach might also work to cover other cases that have generally provoked some uneasiness. Take for example the question found in Shaffer v Heitner, where the plaintiff shareholders in a Delaware corporation sought unsuccessfully to leverage that interest to make Delaware the forum for a derivative suit against the directors of that corporation, which had its headquarters in Phoenix, for activities that occurred in Oregon. The question was whether quasi in rem jurisdiction could survive in Delaware where the property in question, the directors' stock, was not a subject of the suit. It is a peculiarity of Delaware law that it regards all stock issued in a Delaware corporation as being located in Delaware wholly without regard to the location of the parties to the transaction or of the share certificate. As a general matter, quasi in rem jurisdiction gives the state jurisdiction over any dispute whatsoever, so long as the recovery is limited to the value of the property situated within the state. Under that view, Delaware could assert jurisdiction over the defendants so long as they were the owners of any stock in any Delaware corporation, even stock in corporations wholly unrelated to the lawsuit in question.

In dealing with this contention, it is first useful to ask whether Delaware should have jurisdiction solely by ownership of any stock of a Delaware corporation—that is, one whose own internal affairs the lawsuit did not bring into question. As a matter of the theory of implied consent, it is difficult to envision any weaker claim for jurisdiction than this. What possible efficiency gains are there to allowing Delaware to adjudicate a derivative suit against the directors of a corporation whose activities occurred far outside the state's borders? Ex ante it is no more likely that either side would prefer this forum to one in Montana or Hawaii. It seems as though quasi in rem jurisdiction should flunk

54 Id at 189-91.
55 Id at 189.
56 See 8 Del Code Ann § 169 (1991) ("For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purposes of taxation, the situs of ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.").
57 Shaffer, 433 US at 199.
the implied consent test as a general matter. It hardly follows from this, however, that in denying Delaware's jurisdiction, the Supreme Court rightly decided Shaffer on its facts, for here jurisdiction might sensibly rest on the fact that this derivative suit pertained to the affairs of a Delaware corporation. The parties that choose to avail themselves of Delaware law to form their corporation cannot be said as a matter of course to have ruled out the possibility that Delaware could supply a forum to resolve their disputes.

But just how might this problem be resolved? One approach is, of course, to look solely at the parties to the dispute and to ignore the corporate overlay. If that is done, then the location of all relevant events outside of Delaware suggest that it is not a good place to litigate this case and that the right place to litigate the case would have been where the defendants had conducted their business. But suppose, now, that Delaware had enacted a statute that said that it reserved the right to offer a forum to resolve all disputes that arise out of the internal affairs of a Delaware corporation. At this point, we have to ask whether we face the usual unconstitutional conditions question lurking behind such cases as International Shoe or Hess v Pawolski. It does not appear that we do. There is vigorous competition among states for corporate charters, and, if Delaware imposes this condition as a matter of public law, then the parties are free to take their business elsewhere. Ironically, though, the reason why Delaware attracts so much business is that it generally takes the position that all its corporate code provisions are default terms that the parties can contract out of at will.8 If so, then there should be no problem at all with Delaware's position, and this raises the interesting question of whether, and if so, how, a corporate charter would include a forum selection clause among its many provisions.9 Neverthe-

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58 For example, Delaware's business combination statute is not mandatory, but rather has an opt-out provision. See 8 Del Code Ann § 203 (1991).
59 6 Del Code Ann § 2708 (1999) governs Delaware choice-of-law clauses. Sections (a) and (b) of the statute allow any action relating to an agreement which contains a Delaware choice-of-law clause to be maintained in Delaware. The sections provide:

(a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process. The foregoing
less, all these refinements do not eliminate the basic point that quasi in rem jurisdiction is always inappropria
te if the only ground for its assertion is that the defendant owns some property, whether shares or real estate, within the state that wishes to assert its jurisdiction. It makes no sense at all to say that I, as an Illinois resident involved in an Illinois contract dispute, could be sued in Texas if I happened to own (as I do not) a ranch there. To that extent, at least, the attack on quasi in rem jurisdiction in Shaffer makes eminently good sense.

This logic also explains why Shaffer was correct to hold that the situs of property is a proper forum to exercise in rem jurisdiction, that is, jurisdiction over disputes concerning real estate located within its territory. As a matter of first principle, we are looking at default rules. Presumably, two parties to a mortgage on land secured in California could seek to resolve the title disputes in Michigan. But cui bono? Sooner or later, the winning party will have to return to California to make its successful judgment part of the record title; and most, if not all, the evidence on that title is likely to be found in California. The costs of litigation are reduced, without introducing any ex ante tilt in the outcome, by keeping litigation there, so that it is utterly unheard of for anyone to initiate suit to quiet title outside the jurisdiction that contains the land. It is easy to attribute this to an application of the power theory, for in a sense it is: the only sovereign who can protect the property is the one where it is located. The consent theory leads to exactly the same conclusion, for it is in the interest of neither side to go elsewhere. The rule is wholly invariant in practice because no one wants to migrate anywhere else.

For our purposes, however, it is sufficient to note that any dispute over the title to real property is radically different from the quasi in rem theory junked in Shaffer. So, again, the in rem

shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.

(b) Any person may maintain an action in a court of competent jurisdiction in this State where the action or proceeding arises out of or relates to any contract, agreement or other undertaking for which a choice of Delaware law has been made in whole or in part and which contains the provision permitted by subsection (a) of this section.


60 Shaffer, 433 US at 207–08.
arguments make good sense from the implied consent theory. The results are so strong that, even as a matter of hypothetical consent, we should always treat the situs as a focal point in those cases where the disputes are between total strangers as well as between parties to an explicit transaction, for example, a lease or a mortgage, who will make the situs of the property the forum for the resolution of the dispute. If so, then in rem jurisdiction should be treated presumptively like the forum-selection clause found in *Carnival Cruise Lines*.

The jurisdiction where the property lies is the sole place to go as a default matter, unless otherwise agreed. Since that never happens, the rule takes on a strong per se character.

*Burnham v Superior Court of California* offers yet another variation on the same basic theme. Here the marriage in question broke up in New Jersey, and the husband had agreed that he would allow the wife to file for divorce in New Jersey on grounds of "irreconcilable differences." Then, however, she moved to California, and he chose to sue for "desertion" in New Jersey but did not file. I have little doubt that New Jersey was the right place to resolve this divorce and that the wife's moving away did not confer jurisdiction on California any more than the migration of the holder of the power of appointment gave jurisdiction to the Florida courts in *Hanson v Denckla*. In the case, however, he came to visit his children in California, and she sued him there. Justice Scalia then invoked the hoary rule that a party always has jurisdiction over anyone whom he catches within the jurisdiction. The traditional rule, he concluded, was not altered by the Court's decision in *Shaffer*, which only governs those cases in which the defendant was not present in the state, and for which minimum contacts (or implied consent) is used to determine the appropriate jurisdiction.

Justice Brennan's concurrence argued that presence within the jurisdiction should only create a presumption of jurisdiction, such that the quality of the contacts, including the brevity of the stay, should really matter. His last point invites disaster, be-

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61 See text accompanying notes 20–21.
63 Id at 607.
64 Id.
65 See text accompanying notes 51–52.
66 *Burnham*, 495 US at 608.
67 Id at 610–16.
68 Id at 621.
69 Id at 629 (Brennan concurring).
cause jurisdiction is a mass-production business that courts should never resolve by ad hoc exceptions to general rules that require trials of their own. It hardly follows, however, that this case belonged in California without mutual consent, given that the dispute between the parties arose in New Jersey, where they were then domiciled. Since this dispute arose out of a consensual arrangement, the proper implied term is one that confers exclusive jurisdiction on New Jersey. Presence is never the test in consensual cases: consent is. That ground of decision, moreover, leaves the state its usual power to settle disputes between strangers that arose within its jurisdiction. But that principle should not, in my view, be so construed to imply that, if the plaintiff can catch the defendant in an airplane over Arkansas, jurisdiction is proper in Arkansas. 70 But, in most cases, that rule will not lead to any miscarriages of justice, because forum non conveniens will supply a standard corrective to this grotesque assertion of jurisdiction. Ironically, that line was not available in an obvious fashion in Burnham, given the plaintiff’s newly established residence in California.

Yet matters are not always so straightforward because often times we do not have privity between the parties. We have to decide, therefore, what the implicit agreement would be as between the parties whose own understandings of the matter are murky at best. One key line of cases deriving from International Shoe asks what kinds of contacts within a given state allow it to assert jurisdiction not only over the particular transaction, but also over any suit brought against the defendant. Surely some state has to have that power over a given transaction, unless the implied term of a business contract is that one party agrees never to sue its opposite number at all. Since at least one state can exercise jurisdiction, the location of the defendant’s home office is as good as any for the residual jurisdiction, absent any contractual provision to the contrary. It hardly follows, however, that there should only be one such place. The problem here is much more difficult than those we have faced before, because, once we are talking about general jurisdiction, then we are talking about potential tort suits, and these will not usually be governed by explicit or even implicit contracts that select the jurisdiction. So the question of implication necessarily becomes much harder, and we cannot in-

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70 But see Grace v MacArthur, 170 F Supp 442, 443, 447-48 (E D Ark 1959) (defendant served in airplane flying over Arkansas; service held sufficient to establish jurisdiction).
voke a norm of transactional efficiency, because there is no bargain to which it can be appended.

So how then do we proceed? In Perkins v Benguet Consolidated Mining Co,\(^71\) the president and the general manager of a Philippine mining corporation ran their business out of Ohio during the Second World War.\(^72\) It was clear that the Japanese occupation prevented the conduct of their business as usual inside the Philippines; so the Ohio operation covered the full range of actions that the corporation undertook.\(^73\) It seems to me to be the ideal situation for the assertion of general jurisdiction in Ohio. This conclusion is supported by reasons more powerful than the "continuous and systematic" connections with the area, at least as that term was construed in International Shoe.\(^74\) Rather, in Perkins, the contacts were more extensive, given that the defendant had transferred the operation of its business to Ohio.

I also think that the Court came out the right way in Helicopteros Nacionales de Colombia, SA v Hall.\(^75\) The defendant, known as "Helicol," was a Colombian corporation engaged in supplying helicopter transfer services in South America.\(^76\) One of its helicopters crashed in Peru, taking the lives of four United States citizens, who were employed by a Peruvian consortium, Consorcio, working in Peru.\(^77\) Consorcio was the "alter ego" of a joint venture, William-Sedco-Horn, that operated out of Houston.\(^78\) The plaintiffs sued in Houston\(^79\) and claimed that the appropriate contacts existed there by a showing that Helicol's president had flown to Houston to negotiate the terms of the contract for trans-

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\(^71\) 342 US 437 (1952).
\(^72\) Id at 437.
\(^73\) Id at 447–48. In Clermont County, Ohio, the president of the company “maintained an office in which he conducted his personal affairs and did many things on behalf of the company.” There, he kept:

  office files of the company ... carried on there correspondence relating to the business of the company and to its employees ... drew and distributed ... salary checks on behalf of the company ... used and maintained ... two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies ... .

\(^74\) International Shoe, 326 US at 317 (attempting to define "continuous and systematic" presence within the forum).
\(^75\) 466 US 408 (1984).
\(^76\) Id at 409.
\(^77\) Id at 409–10.
\(^78\) Id at 410.
\(^79\) Helicopteros Nacionales de Colombia, 466 US at 412.
port in Peru. The contract further provided that "controversies arising out of the contract would be submitted to the jurisdiction of the Peruvian courts." Both before and after the contract was signed, Helicol purchased some of its equipment in Texas and sent some of its maintenance personnel to Texas for further training. However, Helicol had never been authorized to do business in Texas, and it owned no property in the state.

The Supreme Court, reversing the decision below, held that these facts were not sufficient to create jurisdiction in Texas, even under the Perkins standards. The Court's decision seems correct, but it is important to understand how the argument should have proceeded. The first question that the Court should have asked is whether the contract that allocated these disputes to the Peruvian courts was binding on the individual decedents, who do not appear to have been signatories to it. The normal principle, of course, is that individuals are not bound to contracts to which they are not parties. But it remains an open question whether individual employees in their contracts with Consorcio had agreed to accept jurisdiction in Peru as part of their deal. If so, then Helicol could be regarded as a third-party beneficiary of that agreement, entitled to block an assertion of jurisdiction in the United States. Here the exact pattern of this transaction is not that critical. What is important is that a clear decision be made to allow networks of contracts to determine jurisdiction in disputes between parties who are not in privity with each other. That could easily be done by first having Consorcio bargain with its workers, and then having it enter into contracts consistent with those outcomes with Helicol. Or Consorcio could run the sequential negotiation in the opposite direction. At this point, the linkage among the three parties should lead to a consistent set of express contracts that solve the problem in line with the first section of this paper.

The actual decision in Helicopteros does not, however, pursue this line but, rather, asks the different question of whether the activities that Helicol undertook in Texas were sufficient to subject it to jurisdiction there under the Texas long-arm statute. The Court's negative conclusion on that issue seems to be clearly correct within the traditional framework. Certainly, there is not the

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80 Id at 416.
81 Id at 411.
82 Id.
83 Helicopteros Nacionales de Colombia, 466 US at 411.
84 Id at 415–16.
The slightest indication that Helicol set up a business-in-exile such as that found in *Perkins*. The only thing that could be done to secure jurisdiction is to act as though the set of isolated contacts sufficed to shift the center of gravity to Texas when it seemed so clearly to be lodged in Peru. To put the point in its simplest form, Helicol doubtless made a number of independent forays into the United States in order to pursue clients, order equipment, train staff, and the like. If the Supreme Court had found that jurisdiction attached in Texas, then chances are that twenty other states could have exercised jurisdiction over the defendant because of its local activities unrelated to the accident. Something is amiss here, and the explanation seems clear enough. If (and there is some uncertainty here) the actual contracts signed did not bind the employees of Consorcio, then we have to shift from express to implied consent in order to unravel the jurisdictional elements of this case. In light of the full range of circumstances regarding the location of the decedents' work, the actual contracts with their employer, and the place of the accident, Peru has it over Texas in a landside. There can be no doubt that a string of contracts (with appropriate price adjustments) could have resulted in Helicol agreeing to litigate Peruvian accidents in a Texas court. Short of that, however, the *Helicopteros* decision should stand.

It is one thing to have developed a consistent methodology for dealing with jurisdictional cases and quite another to assume that it yields consistent results across the board. At this point, therefore, we have to confess that the only methodology that we possess starts to exhaust its power, and we should seek other ways to look at the problem. In saying all this, we admit to a very high level of error, which is consistent with the observed differences in the cases. However, here is one argument in favor of the retention of jurisdiction, generally. Obviously, the plaintiff who chooses to sue in a particular location is content with that choice. The question, then, is whether there is an equal or larger inconvenience from the point of view of the defendant that offsets this advantage and could support the implication that if these particular parties had been able to contract in advance, they would have excluded this jurisdiction. Well, you could not make that point about the principal place of business of a defendant, for if that is not a place where it can be sued, then where else is the place for residual claims that do not have a clear home somewhere else? Then, the argument is whether the availability of that one fixed forum means that we do not have to worry about
the creation of a second, because the defendant has expressed a desire that all residual claims go to one place. But that does not seem to be decisive, for if the defendant sets up shop somewhere else and conducts his business in an ordinary fashion there, then he has already signaled some willingness to be sued on a broad range of transactions that relate to this jurisdiction. As a result, the marginal cost of picking this forum is, to the defendant, lower than might otherwise might appear to be the case given the prior preferences as to as to its selection. The broader the range of potential outcomes we have in these matters, the easier it is to infer that this cost is sufficiently low that we should allow jurisdiction.

Now the question is how to apply this insight. Here we have to realize that whenever we talk about the marginal costs and benefits of certain arrangements, we are forced to adopt some decision procedure that says that two points that are arbitrarily close may nonetheless lie on opposite sides of the line. That is the consequence of the geometric truth that it is always possible to cut a line between any two points, however close they appear to be. That sharp discontinuity is, for example, a routine feature of the law of negligence. Although it causes much discomfort, we do not abandon a negligence system simply because we know that the lines cross somewhere when costs rise and benefits decline. It should not force us to abandon the test in this case given the same constraint applies. So the most that we can ask is that we look for cases that arrange the array of relevant facts in a fashion that speaks to the right ordering along the line, knowing full well that we cannot get perfect agreement on the location of that cutoff point. Juries are expected to disagree on how fast is too fast, or how slippery is too slippery. The key task is to array the cases in the right order along the continuum. It would be odd, for example, to reverse the outcomes in *Perkins* and *Helicopteros*. That said, so long as liability turns on questions of degree, then we have to accept the risk of honest disagreement. And we do.

**IV. HYPOTHETICAL CONSENT**

The discussion in the last section has already touched on the risks of hypothetical consent in organizing the legal doctrine on jurisdiction. Here, as always, it is important to begin with the easy cases, if only to establish that the consent doctrine has at least some traction in this most inhospitable terrain.

Thus, as noted earlier, contract cannot solve title disputes over a single tract of land between two strangers, since the par-
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ties have established, by definition, no relations, express or implied, between themselves. Nonetheless, we know enough about the basic dynamics of title disputes to say that if the parties had contracted on this particular question, then in all probability they would have chosen the situs of the property as the place to resolve their dispute. That forum gives, as a first approximation, no advantage to either party; it permits the resolution of the issue to take place in a jurisdiction that can easily make its disposition part of its official title records; and it tracks the jurisdictional rule used by persons (mortgagor and mortgagee) who are in privity with each other.

Likewise, we can use the same argument to explain why any tort (whether or not on the highway) between two individuals should normally be adjudicated in the place of its occurrence. We all move in and out of states all the time. Chosen behind the veil of ignorance, this rule generally assures that at least one person will have his preferred jurisdiction; and the other party can hardly claim that the jurisdiction was utterly inappropriate given that he had already ventured into it on his own. The sensible precaution therefore for any driver to take, as a stranger in a strange land, is to purchase automobile insurance from a national firm—or, when appropriate, take out liability insurance with the rental car company in order to hire in advance an agent to represent the driver before the dispute begins. On this analysis, even without the trappings of implied consent to adjudication within the jurisdiction, Hess looks to represent sound law.

Matters quickly become increasingly difficult, however, in situations where the defendant takes action in one jurisdiction, and the plaintiff suffers injury in another. In principle, it might just be possible to come up with a Kaldor-Hicks efficient solution, by divining perhaps a rule that offers larger gains to the winner than the costs it imposes on the loser. However, it is very difficult to envision on a transaction-by-transaction basis any rule that, after the fact, is likely to bring about a Pareto improvement, that is, one that improves the welfare of both sides simultaneously. The inability to arrange for side compensation between strangers blocks the win-win outcomes achievable with ordinary voluntary contracts.

85 Under the Kaldor-Hicks standard of optimality, a transaction is judged to be efficient only if it produces a net gain, whether or not it improves the economic position of each individual party to the transaction. See Richard A. Posner, Economic Analysis of the Law 12–16 (Aspen 5th ed 1998).
At this point, the language of hypothetical consent forces us to consider the optimal rule, not with respect to a single interaction, but as applied to classes of cases in which various individuals could assume with equal chances the role of either plaintiff or defendant. Thus, if, on average, the gains to plaintiffs from their preferred jurisdictional rule exceed the losses to defendant from the application of that rule, then hypothetically both parties would consent to the arrangement if they had a chance to contract early on, before either knew what would befall him. If someone ventures far enough behind the veil of ignorance, it becomes almost impossible to distinguish between Kaldor-Hicks and Pareto efficiency. Similarly, it is hard to be confident as to which rule advances social welfare by either measure. In one sense, this theoretical impasse is quite disturbing because it exposes the limits of legal and economic theory in solving concrete problems. But, in another sense, it is quite comforting: the weakness of any methodology when we get beyond the cases of express and implied consent should increase our confidence in the techniques in the consensual cases to which it more naturally applies.

What is quite amazing about this impoverished analysis in hypothetical consent cases is how quickly the problem comes to a head even in the simplest of cases. Suppose X in state A shoots a bullet that hits Y in state B. Must Y come to state A in order to sue X, or can Y sue X in Y’s own forum, B, where the effects are most manifest? My own view is that we are most likely to minimize the resort to force by holding that aggressors on jurisdictional issues have to take a back seat to their victims. So with some trepidation, Y should be able to sue in state B where he has suffered the injury, in which case X receives protection by notice. Yet that solution is far from perfect, because it presupposes that X has shot Y. The apparent equities would have cut in exactly the other direction if the evidence revealed that Z, not X, had shot the gun. But here, on balance, we have to assume that the former is the greater probability than the latter, so that it becomes the focal point for the legal rules. Yet even if Y has the advantage of the home forum in B, he may be well advised to chase X down in his home state if only to obtain increased leverage over X on such routine matters as holding depositions and placing interrogatories.

The basic problem, however, only gets worse when cognizable harm is not limited to physical connection but covers injury to reputation, losses from anticompetitive behavior, or fraud over
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the internet. The location of the tort of defamation is virtually impossible to determine for media defendants that broadcast or publish in many places at once. Moreover, there is much to be said for the single publication rule that allows all these publications to be treated as one for legal purposes, for it is hard to see any social gains that come from fragmenting a single cause of action.\textsuperscript{86} It hardly follows, however, that the choice of forum should influence the substantive law to the point where the plaintiff gets the advantage of a state's longish statute of limitations when only a tiny fraction of its total sales took place in that state.\textsuperscript{87} It seems easy enough here to respect the statute of limitations in other jurisdictions by using as a rough proxy the proportion of sales in each state to determine the percentage of damages recoverable for the defamation. The usual rule for class action is that the amalgamation of separate claims should do as little as possible to alter the outcome of each individual claim that is made part of the overall mix.\textsuperscript{88} The choice of law rules should not, for example, be used to allow the plaintiff to claim the benefit of substantive law of that jurisdiction most favorable to him.\textsuperscript{89} Here the general prohibition against strategic behavior seems strong enough to place some sensible limits on the jurisdictional choices generally available to the plaintiff in a manner consistent with the hypothetical consent program outlined above.

A similar problem arises in connection with antitrust injury that occurs when, for example, an antitrust conspiracy takes place in Portugal which has the object of raising prices in the United States. Wholly apart from the impressive choice of law

\textsuperscript{86} See Keeton v Hustler Magazine, Inc, 465 US 770, 777 (1984) (noting that the benefits of the single publication include "reduc[ing] the potential serious drain of libel cases on judicial resources" and protect[ing] defendants from harassment resulting from multiple suits").

\textsuperscript{87} For example, in Keeton, a New York plaintiff brought a libel suit against an Ohio-based magazine publisher in Federal District Court in New Hampshire. Id at 770. The plaintiff filed in New Hampshire because under traditional choice of law provisions, the law of the forum state governs on procedural matters. Id at 778. In New Hampshire, which had a six-year statute of limitations for libel actions, statutes of limitations were considered procedural. Id. The Supreme Court reversed the lower courts' dismissal for lack of personal jurisdiction, noting that any potential unfairness caused by the New Hampshire statute of limitations had nothing to do with the jurisdiction of the New Hampshire court to adjudicate the matter. Id at 778.

\textsuperscript{88} See Reilly v Gould, 965 F Supp 588, 596 (M D Pa 1997) ("If facts are not common to the entire class and there is a need to address each party's claims individually, then a class action would not be an efficient device in doing so.").

\textsuperscript{89} See Nelson v International Paint Co, 716 F2d 640, 643 (9th Cir 1983) (warning of the need to guard against forum shopping by preventing plaintiffs from taking advantage of choice-of-law rules to which they would not have been entitled in proper fora).
problems that arise, it becomes delicate to assert that an American court should take jurisdiction over actions that take place abroad, especially if the defendant only conducts his business in the United States through third party intermediaries. Overall, though, I am satisfied that the victims should be allowed to pursue the action in their home forum where the damage takes place. One way in which to secure this outcome in a wide number of cases is to require each distributor of goods and services in the United States (or anywhere else) to agree to respond for any civil wrongs committed by his suppliers overseas. That low-level fix should have the desired effect of making clear the jurisdictional reach of the power in question and avoiding many of the problems associated with using hypothetical consent to ground jurisdictional decisions in stranger cases.

V. AN INTERNET CODA

Here we should turn to the questions of the internet. In principle, these do not raise any issues different from those associated with the use of telephone conversations that start in one jurisdiction and end in another. But, in practice, the sheer velocity of the transactions in question both exposes and magnifies the weaknesses of any rule that we might choose. The difficulties in question are well illustrated by a problem that is discussed in some detail in Professor Bellia’s article which addresses the many issues that arise now that Yahoo! is caught between American and French law.90 Operating out of its American site, Yahoo! offers for sale Nazi memorabilia.91 Their purchase and sale may well be protected under the First Amendment within the United States,92 and is, in any event, not illegal in California where Yahoo! maintains its site. However, the sale of Nazi memorabilia is illegal in France, where a large number of French subscribers have access to the Yahoo! site.93 The question is the extent to which Yahoo! should be subject to French law on the ground that it does business in France.

To the French authorities, the problem seems simple enough. Yahoo! has to comply with French law or face heavy fines.94 It can

91 See John Tagliabue, French Uphold Ruling against Yahoo on Nazi Sites, NY Times C8 (Nov 21, 2000).
92 US Const Amend I.
93 Tagliabue, French Uphold Ruling Against Yahoo on Nazi Sites, NY Times at C8 (cited in note 91).
94 Id.
do so by making it impossible to access Nazi memorabilia from French sites, which requires Yahoo! to develop and implement technology that allows its listings to be downloaded in some but not all jurisdictions. That technology is, as best I can tell, available today, but difficult and very expensive to implement, since the transmission and retransmission of information is hard for any party to control. So how should the French interest be reconciled with the American? On this question, the analytical distinction seems clear. The greater the power that Yahoo! has to cut off its French users from foreign communications, the stronger France's case is for applying its rule. The ability to tailor a response removes the risk of overbroad application of the law. Most governments routinely assert jurisdiction over transactions that start outside their countries but have effects within it, and this case is no exception.

Where partition is not possible, then the choices are much more difficult to make. Now the great danger of the French rule is that it allows France to set policy for the rest of the world by exposing internet service providers worldwide to the risk of sanctions in French courts. To be sure, some firms may not have assets capable of seizure in France, but many will, in fact, be so exposed. The assertion therefore of French, or indeed any other jurisdiction, could lead to a race to the bottom, which is not the result of pure competitive forces. The converse risk, however, is far smaller, for it does not follow that France's local law will be eviscerated if Yahoo! can continue to post its listings in the United States as before. Nothing prevents France from prosecuting its own citizens for their purchase and sale of Nazi memorabilia.

But, it may be objected, that France may find it difficult to track down its own citizens who engage in these internet transactions. It is hard to believe that this difficulty is any greater for France than it is for transactions in real space. In addition, it may well be possible for Yahoo! to give to the French government any list it assembles of French nationals who purchase Nazi memorabilia from its site. At this point, the French can attack these transactions at the buying end instead of chasing Yahoo! across borders.

On this last point, it could be objected that Yahoo! should be allowed under American law to protect the privacy of its French customers. But here I think that, so long as we wish to secure the

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95 Id.
dispensation of American site operators from French law, we should be prepared to cooperate with French authorities, so long as they agree to use the information supplied only for the limited purpose for which is intended. Whatever the domestic reach of the First Amendment, its scope seems to be restricted in foreign affairs. As a matter of general theory, we can impose a solution that forces each side to relax on matters that are regarded as of vital interest to the other, which is what parties do when they enter into explicit contracts. But we should not hold out undue hope for this solution, even if it is accepted as a default position. In line with the general theory, we should hope that both nations will be able to work out some protocol that turns hypothetical contracts into real treaties to reduce the pressure on the hypothetical doctrines that we have.

Once again, the difficulties that we have in the cases of hypothetical consent should be interpreted, not as a failure of the overall consensual approach, but as a concession to the difficulties that stranger transactions pose to any and all theories. The important message to take away is that, as transaction costs become lower, the scope of first implied, and then express, consent cases grows with time. It is one thing to bewail the failure of a theory to make a dent into a huge class of cases, but here we have to look at the overall picture. Rival theories, as far as I can tell, do not do well in stranger cases either. And they then tend to denigrate the role of consent in those cases where it does work. They wrongly treat all determinations of implied consent as though they were fictional, when many are not. They interpose all sorts of consumer-protection obstacles in the path of express consent cases. But a renewed concern with consent as the determinant of jurisdiction helps to meet these objections. So long as the parties to a contract can convert cases of implied consent into cases of explicit consent, the percentage of jurisdictional cases that rest on a firm footing should increase, not decrease, over time. The difficulties with stranger cases remain; the ambiguities of implied consent cases remain nettlesome, here as in other contractual areas. But the overall direction of the law moves in the right direction as explicit contracts gobble up more and more of the disputed territory. The challenge that I leave to the conference is to come up with a theory that beats this theory, with all its imperfections.