Due Process, Jurisdiction and a Hague Judgments Convention

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ARTICLES

DUE PROCESS, JURISDICTION AND A HAGUE JUDGMENTS CONVENTION

Ronald A. Brand*

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* Professor of Law and Director of the Center for International Legal Education, University of Pittsburgh School of Law. This article was presented as a Working Document on behalf of the U.S. delegation at the March 1998 meeting of the Special Commission on the question of international jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters of the Hague Conference on Private International Law. Portions of the article are developed from Ronald A. Brand, Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention, 26 BROOK. J. INT'L L. 125 (1998), and are used here with the permission of the Brooklyn Journal of International Law. Paul Dubinsky, Arthur Hellman and Rhonda Wasserman provided helpful comments on earlier drafts, and Mark Walter provided valuable research assistance in the preparation of this paper.
Due process is a fundamental concept in the United States' legal system. At the same time, however, it is probably one of the most amorphous and sometimes misunderstood. For lawyers trained in the United States, "due process" becomes a phrase with special meaning resulting from the study of a number of judicial decisions, especially those of the U.S. Supreme Court. For lay persons, and for lawyers from other countries, discussions of "due process" may not always provide a clear un-
derstanding of what that phrase means in the U.S. legal system. This paper discusses the historical development of the concept of due process in U.S. law, particularly as it relates to issues of jurisdiction and the recognition and enforcement of judgments in U.S. courts.

It is important from the outset to note that, like many aspects of amendments to the United States Constitution, the Due Process Clauses of the Fifth and Fourteenth Amendments provide limitations on the federal and state governments. They exist to protect individuals from excessive exercises of governmental authority. In a discussion of judicial jurisdiction, this means the Due Process Clauses restrict the extent to which courts may exercise jurisdiction over a defendant. In a discussion of treaty negotiations, these clauses place similar limitations on the ability of the United States government to agree to rules of jurisdiction that might result in the denial of due process to a defendant in specific litigation. Any treaty to which the United States becomes a party is subject to the U.S. Constitution, and a court may refuse to apply a treaty provision if to do otherwise would deny a right granted in the Constitution.

In an effort to clarify the concept of due process as it applies to judicial jurisdiction in U.S. courts, and the limits that concept places on the United States government in its relations with other nations, this paper begins with a historical look at the term itself, including a discussion of the major U.S. Supreme Court decisions applying the Due Process Clauses to the exercise of jurisdiction to adjudicate. Each decision is considered in enough detail to acquaint the reader with both the facts and the major elements of the opinion. The next section discusses the due process implications of jurisdictional issues under the Brussels Convention (including specific types of jurisdiction noted with disfavor in Article 3), and considers whether a U.S. court could constitutionally exercise jurisdiction on some of the bases dealt with in the Brussels Convention. The final section of the paper explains that due process limitations on jurisdiction result also in limitations on the negotiating authority of the United States in the effort to achieve a multilateral convention on jurisdiction and the recognition and enforcement of judgments at the Hague Conference on Private International Law. These limitations will have an effect on the lists of required and prohibited bases of jurisdiction contained in any such convention.

Due process is, of course, a concept important beyond the borders of the United States, and the positions taken by the U.S. Supreme Court may not reflect what some believe to be international standards discussed under the rubric of due process. The discussion in this paper is not in-
tended to imply a judgment about the fairness of other systems of law. It is offered merely to explain the application of the U.S. Constitution in order to let others know and understand the limitations the Constitution, and its interpretation in U.S. courts, places on the United States in the negotiation of a multilateral treaty on jurisdiction and the recognition of judgments.

II. DUE PROCESS AND JURISDICTION IN UNITED STATES COURTS

The history and nature of judicial application of the Due Process Clauses as applied to concepts of jurisdiction to adjudicate sometimes lead to assumptions that those clauses provide for expansive jurisdictional authority. While the language used in some cases may have authorized jurisdiction beyond previously assumed limits, this does not mean the Due Process Clauses can be considered as grants of authority. As the following discussion indicates, most grants of judicial authority in U.S. courts come from state "long-arm" statutes, which set forth specific bases of jurisdiction. The Due Process Clause—particularly that in the Fourteenth Amendment—limits the exercise of such authority. No state or federal court may exercise jurisdiction in a manner that would deny a defendant the fundamental rights of due process. Nor may the United States Government agree to multilateral rules on jurisdiction and the recognition and enforcement of judgments that would allow the exercise of jurisdiction by U.S. courts (or the recognition of judgments resulting from a similar exercise of jurisdiction by foreign courts) in a manner that would deny such fundamental rights.

A. The Origins of Due Process in American Jurisprudence

The concept of due process was not new either to the Fourteenth Amendment,1 or even the earlier Fifth Amendment2 to the U.S. Constitution. Its first prominent use appears to have been in a 1354 English statute, which provided: "[N]o man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."3 Sir Edward Coke tied the use of the term "due process" in

1. The Fourteenth Amendment, ratified on July 9, 1868, provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.
2. The Fifth Amendment, ratified with the first ten Amendments, which comprised the Bill of Rights and became effective December 15, 1791, provided that, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.
3. 28 Edw. Ill, ch. 3 (1354) (Eng.). For a discussion of the history of due process, and specifi-
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this provision, not to specific writs allowed in the courts, but rather to the phrase "Law of the Land" in the *Magna Charta*, which provides that,

[n]o Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him, but by lawful Judgement of his Peers, or by the Law of the Land.4

Thus, "[i]n Coke’s view, the phrase ‘due process of law’ referred to the customary procedures to which freemen were entitled by ‘the old law of England.’ "5 This concept was evident in the constitutions in the new states formed from former colonies. For example, the North Carolina Constitution of 1776 provides that: "[N]o freeman ought to be taken, imprisoned or disseized of his Freehold, Liberties or Privileges, or outlawed or exiled, or in any Manner destroyed or deprived of his Life, Liberty, or Property, but by the Law of the Land."6 Thus, the first U.S. Due Process Clause, that in the Fifth Amendment, traces its lineage to the *Magna Charta*, in providing that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."7

The Fifth Amendment Due Process Clause received little judicial attention in the early years of U.S. history. The first Supreme Court discussion of any length came in 1856, in *Murray’s Lessee v. Hoboken Land & Improvement Co.*8 While this case dealt with the validity of a federal statute, and not with issues of judicial jurisdiction,9 the Supreme Court spe-

4. 2 Sir Edward Coke, *Institutes* 50 (London, Flesher & Young, 1642). This phrase is found in Chapter 29 of the *Magna Charta* (Chapter 39 of the original *Magna Charta* signed by King John at Runnymede in 1215). See 9 Hen. III, ch. 29 (1225) (Eng.).
5. *Haslip*, 499 U.S. at 28 (Scalia, J., concurring) (citing *Coke*, supra note 4, at 50).
6. N.C. Const. art. XII (1776). See also *Mass. Const.* art. XII (1780) ("[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.").
7. *Haslip*, 499 U.S. at 29 (Scalia, J., concurring) (citing 2 William Blackstone, Commentaries 133 nn.11, 12 (S. Tucker ed., 1803); 2 James Kent, Commentaries on American Law 10 (1827); 3 Joseph Story, Commentaries on the Constitution of the United States 661 (1833)).
9. The federal statute challenged in *Murray’s Lessee* authorized the issuance of distress warrants by the government to collect debts without providing a debtor with notice or any opportunity for a hearing. See id. at 278-279. In this regard, the "process" addressed has parallels to the notice element of jurisdictional discussions. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
cifically noted that the words "due process of law" in the Fifth Amend-
ment have "the same meaning as the words, 'by the law of the land,' in
Magna Charta," thus imposing "a restraint on the legislative as well as
on the executive and judicial powers of the government." This concept
of due process as a limitation on government is fundamental to the un-
derstanding of its use in decisions on judicial jurisdiction.

Justice Scalia has focused on the portion of the opinion in Murray's
Lessee that emphasizes a long history of uninterrupted practice as evi-
dence of what constitutes due process. Thus, if we have done it a cer-
tain way for a long time (and particularly if it was done that way in En-
gland even before we did it in the U.S.), then it meets the test of due
process. Scalia supports this position by tracing the analysis from Fifth
Amendment to Fourteenth Amendment cases, including Hurtado v. Cali-

1. Murray's Lessee, 59 U.S. at 276. See also Walker v. Sauvinet, 92 U.S. 90, 93 (1876)
   ("Due process of law is process due according to the law of the land.").
2. See Haslip, 499 U.S. at 30 (Scalia, J., concurring).
3. Hurtado, 110 U.S. at 516 (1884).
4. Haslip, 499 U.S. at 31-32 (Scalia, J., concurring).
5. See id. at 31 (quoting Hurtado, 110 U.S. at 528-529).

The real syllabus of [the relevant portion of Murray's Lessee] is, that a process of law, which
is not otherwise forbidden, must be taken to be due process of law, if it can show the sanc-
tion of settled usage both in England and in this country; but it by no means follows that
nothing else can be due process of law. . . . [T]o hold that such a characteristic is essential to
due process of law, would be to deny every quality of the law but its age, and to render it
incapable of progress or improvement. It would be to stamp upon our jurisprudence the un-
changeableness attributed to the laws of the Medes and Persians.

6. Id. at 38.
7. See, e.g., the discussion of jurisdiction over defendants in a mobile society, infra note 62
   and accompanying text.
the context for Justice Scalia’s dissertation on the history of due process, has experienced a change sufficient to see Scalia’s historical approach more recently stated in a dissent rather than in a concurring opinion.  

B. The Fourteenth Amendment Due Process Clause and Questions of Jurisdiction

1. Pennoyer v. Neff: territorial concepts of jurisdiction

The application of the Due Process Clauses to jurisdictional decisions in cases involving foreign defendants in U.S. courts requires an understanding of certain elements of the federal system. First, concepts of vertical federalism (i.e., federal-state relations) require that unless the matter before a court is based on a federal statute, the relevant Due Process Clause is that in the Fourteenth Amendment, which is applicable to the states. Second, concepts of horizontal federalism (state-state relations) are implicated in that the vast majority of cases that apply the Due Process Clause to “foreign” defendants deal with defendants from other U.S. states, not defendants from other nations. Thus, rules applicable to non-U.S. defendants have been developed largely in cases involving parties from different U.S. states, applying the clause as a limitation on the “sovereignty” of the U.S. state exercising judicial jurisdiction.

The discussion of due process and jurisdiction in U.S. courts generally begins with the 1877 case of Pennoyer v. Neff. A resident of California (Neff) had acquired title to land in Oregon through a grant from the government, issued in 1866 under the 1850 Donation Law of Oregon. When Pennoyer purchased the same property at a sheriff’s sale resulting from an Oregon lawyer’s execution on the property to satisfy unpaid fees, Neff brought an action to recover possession, claiming that the sale had resulted from proceedings in which service was effected by publication, and not by personal service, with no appearance in the action by

17. While Scalia’s historical approach quoted above was set forth in an opinion concurring with the majority opinion which upheld a punitive damages award in Haslip, 499 U.S. at 28–40 (Scalia, J., concurring), his historical analysis led to his dissent in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), where the majority of the court held a punitive damages award to be so excessive as to violate due process. See id. at 598–607 (Scalia, J., dissenting).

18. 95 U.S. 714 (1877). “Rightly or wrongly, Pennoyer v. Neff, linked American jurisdictional law with the Fourteenth Amendment’s Due Process Clause, and however questionable that linkage may be, it has become part of American conventional wisdom.” Friedrich K. Juenger, Constitutionalizing German Jurisdictional Law, 44 Am. J. Comp. L. 521, 521 (1996) (book review) (footnotes omitted).

Neff.20 Justice Field’s opinion for the U.S. Supreme Court focused on a territorial approach to jurisdiction over the defendant,21 looking for the presence of the defendant within the territory, and enunciating “two well-established principles of public law respecting the jurisdiction of an independent State over persons and property”: “One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.”22 On appeal, the Supreme Court held that the Oregon court rendering the judgment against Neff, upon which the sheriff’s sale had been based, was without jurisdiction over Neff, and thus the judgment was invalid.23 This was required by the application of the Fourteenth Amendment’s Due Process Clause to in personam jurisdiction.24 Justice Field suggested that territorial concepts did not forbid service by publication where jurisdiction was in rem (i.e., limited to the property involved), even if the property involved was that of a non-resident.25 As to jurisdiction that would bind the defendant beyond the interest in the property used to establish in rem jurisdiction, however, due process clearly required something more.

20. See id.
21. See id. at 720.
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.

Id.
22. Id. at 722.
23. See id. at 734.
24. See id. at 733.
Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.

Id.
25. See id.
Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem.

Id.
In *Milliken v. Meyer*, the Court held that a Wyoming domiciliary, served personally in Colorado, was properly subject to the jurisdiction of the courts of Wyoming on the basis of domicile:

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. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state . . . as well as where he was personally served without the state.  

Thus, a rule was established similar to the general jurisdictional rule found in Article 2 of the Brussels Convention: a defendant is subject to jurisdiction at his or her domicile, regardless of where service occurs.  

2. Long-arm statutes and due process analysis

Analysis of in personam jurisdiction in U.S. courts generally involves a two-step process. The first step is the application of the state long-arm statute, to determine if there is statutory jurisdiction. These statutes differ, but they generally can be categorized as list-type provisions, providing specific bases of jurisdiction, and the constitutional limits

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26. 311 U.S. 457 (1940).
27. *Id.* at 462-63 (citations omitted).
29. New York and Pennsylvania both have such statutes.

§ 302. Personal Jurisdiction by Acts of Non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

   (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
   (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
owns, uses or possesses any real property situated within the state. N.Y. C.P.L.R. 302 (McKinney 1990). Section 302 is limited to what has become referred to as “specific jurisdiction” (“transacting business” in New York terminology) in which the cause of action must “arise out of” the defendant’s connection with the state. See infra note 44 and accompanying text. Section 301 of the Civil Practice Laws & Rules incorporates “general jurisdiction” (“doing business” in New York terminology) by authorizing a court to “exercise such jurisdiction over persons, property, or status as might have been exercised” before the enactment of the C.P.L.R. Id. § 301. Thus, if the cause of action does not arise out of a transacting of business in New York, “jurisdiction may be acquired only if the foreign corporation is doing business in the traditional sense, i.e., it must do business ‘not occasionally or casually, but with a fair measure of permanence and continuity.’ ” Id. C301:2, at 9 (quoting Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917 (1917)).

The first provision of Pennsylvania’s long-arm statute limits jurisdiction to actions arising out of the jurisdictional nexus, but then a second provision extends the reach as far as permitted under the United States Constitution.

§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth

(a) General rule.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

(v) The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

(5) Having an interest in, using, or possessing real property in this Commonwealth.

(6) (i) Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.

(ii) Being a person who controls, or who is a director, officer, employee or agent of a person who controls, an insurance company incorporated in this Commonwealth or an alien insurer domiciled in this Commonwealth.

(iii) Engaging in conduct described in section 504 of the act of May 17, 1921 (P.L. 789, No. 285), known as “The Insurance Department Act of 1921.”

(7) Accepting election or appointment or exercising powers under the authority of this Commonwealth as a:

(i) Personal representative of a decedent.
statutes, providing that a court in the state can exercise in personam jurisdiction to the limits of the Due Process Clause. The process of applying a list-type long-arm statute is not unlike the application of the jurisdictional rules of the Brussels Convention.

The second step in the United States is the constitutional analysis by which it is determined whether the exercise of jurisdiction allowed by state statute in the particular case is within the limits of the Due Process Clause. Because it usually is a state long-arm statute that is being considered, it is the Fourteenth Amendment we are most often concerned with.

(ii) Guardian of a minor or incompetent.
(iii) Trustee or other fiduciary.
(iv) Director or officer of a corporation.

(8) Executing any bond of any of the persons specified in paragraph (7).
(9) Making application to any government unit for any certificate, license, permit, registration or similar instrument or authorization or exercising any such instrument or authorization.

(10) Committing any violation within the jurisdiction of this Commonwealth of any statute, home rule charter, local ordinance or resolution, or rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit.

(b) Exercise of full constitutional power over nonresidents.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of jurisdiction.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

(d) Service outside this commonwealth.—When the exercise of personal jurisdiction is authorized by this section, service of process may be made outside this Commonwealth.

(e) Inconvenient forum.—When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

42 PA. CONS. STAT. ANN. § 5322 (West 1981).

30. California's long arm statute and paragraph (b) of Pennsylvania's long-arm statute are examples of constitutional limits statutes. See CAL. CIV. PROC. CODE § 410.10 (West 1973) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); 42 PA. CONS. STAT. ANN. § 5322(b) (West 1981).

31. See Brussels Convention, supra note 28, arts. 5 et seq.

32. Jurisdiction in the federal courts is governed by Rule 4(k) of the Federal Rules of Civil Procedure. This Rule provides three principal jurisdictional authorizations:

(1) Rule 4(k)(1)(A) authorizes a district court to borrow the jurisdictional powers of state courts in the state where it is located;

(2) Rule 4(k)(1)(D) confirms the availability of any applicable federal statute granting personal jurisdiction; and

(3) Rule 4(k)(2) grants district courts personal jurisdiction to the limits of the [Fifth Amendment] due process clause in certain federal question cases.
3. International Shoe: *jurisdiction for a mobile society*

Understanding the current status of due process analysis in jurisdictional decisions begins with two cases: *International Shoe Co. v. Washington*,[^33] and *World-Wide Volkswagen Corp. v. Woodson*.[^34] *International Shoe* opened up jurisdiction beyond the territorial limits of *Pennoyer v. Neff*, and *World-Wide Volkswagen* then furnished language asserting anew the limits of due process, but no longer in terms of territoriality. While neither case involved a defendant from outside the United States, later cases involving such foreign defendants have relied on their analyses.

*International Shoe* involved an action brought in a Washington state court, by the State of Washington Office of Unemployment Compensation, to collect delinquent contributions from a Delaware corporation that had its offices in St. Louis, Missouri.[^35] The corporation had no offices in Washington, made no contracts there, and maintained no inventory in

[^33]: 326 U.S. 310 (1945).
[^34]: 444 U.S. 286 (1980).
Washington.\textsuperscript{36} It did employ eleven to thirteen salesmen in Washington from 1937 to 1940, all of whose principal sales activities were confined to Washington, and whose combined commissions amounted to more than $31,000 per year.\textsuperscript{37}

Drawing on both \textit{Pennoyer v. Neff} and \textit{Milliken v. Meyer}, the Court noted the importance of a nexus between the defendant and the forum state.\textsuperscript{38} While \textit{Pennoyer} represented the historical focus on the presence of the defendant within the jurisdiction as a "prerequisite to its rendition of a judgment personally binding him,"\textsuperscript{39} \textit{Milliken} was the source of the requirement that something less was necessary, and that
due process requires only that in order to subject a defendant to a judgment \textit{in personam}, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."\textsuperscript{40}

The need for rules accommodating the fiction of the corporate personality led the Court to focus on the conduct of persons acting on behalf of the corporation.\textsuperscript{41} It noted two variables in determining the constitutionality of jurisdiction over non-resident defendants. The first is the extent and intensity of the defendant's activities in the forum state, and the second is the connection between those activities and the cause of action.\textsuperscript{42} "Continuous and systematic" activity supports general jurisdiction over a defendant, allowing a court to consider actions against the defendant whether or not they arise out of those activities.\textsuperscript{43} A "single or isolated" contact, on the other hand, will (at most) support only specific jurisdiction, and the action must arise out of the contact.\textsuperscript{44}

\begin{itemize}
  \item 36. \textit{See id.}
  \item 37. \textit{See id. at 313.}
  \item 38. \textit{See id. at 316.}
  \item 39. \textit{Id.}
  \item 40. \textit{Id. (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).}
  \item 41. \textit{See id.}
  \item 42. \textit{See id. at 316-20.}
  \item 43. \textit{Id. at 317.}
  \item 44. \textit{Id. The distinction between general and specific jurisdiction was first suggested in Arthur}
\end{itemize}
Ultimately, the Court found that the activities of the defendant in the State of Washington were "systematic and continuous," and resulted "in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state," and that the obligation sued upon "arose out of those very activities." Thus, it was "evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice," to permit jurisdiction.

One problem with the minimum contacts test of International Shoe is that there is no bright line rule for determining when the threshold is crossed on the spectrum from activities not sufficient to support general jurisdiction to those that are sufficient. Further, even though the Court stated that "substantial and continuous" activities existed, and that such activities were sufficient to justify jurisdiction even in the absence of a direct nexus with the cause of action involved (i.e., general jurisdiction), it also stated that the cause of action sued upon did arise out of those very activities (i.e., specific jurisdiction). Thus, the facts supported the assertion of either general or specific jurisdiction.

4. The road from International Shoe to World-Wide Volkswagen

After International Shoe, and on the way to World-Wide Volkswagen, the Supreme Court decided several cases that also play roles in the semantics of due process jurisdictional analysis. A case dealing more with concepts of notice, but also important to jurisdictional analysis, is Mullane v. Central Hanover Bank & Trust Co. A trust company in New York petitioned for judicial settlement of its accounts for a common trust...
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fund under a New York statute that required only notice by publication.\textsuperscript{49} Mullane, appointed as a special guardian for known and unknown parties, alleged that the court lacked jurisdiction over those parties because the notice procedures were unconstitutional under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{50} Citing the need for some reasonable method of settling the accounts, the Court weighed the interests of the state in such a settlement against the individual interests "sought to be protected by the Fourteenth Amendment."\textsuperscript{51} The Court found it to be a "fundamental requirement of due process in any proceeding" that there be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."\textsuperscript{52} As to unknown persons, notice by publication was upheld.\textsuperscript{53} As to known persons, however, the Court required that "within the limits of practicability notice must be such as is reasonably calculated to reach interested parties."\textsuperscript{54}

Two years after Mullane, the Court decided \textit{Perkins v. Benguet Consolidated Mining Co.},\textsuperscript{55} stating a "doing business" test in finding jurisdiction to exist over a Philippine corporation sued in Ohio, where suit in the Philippines during World War II was difficult, and where all of the defendant's files and employee records were located in the corporate president's Ohio home.\textsuperscript{56}

In \textit{McGee v. International Life Insurance Co.},\textsuperscript{57} a Texas court refused to recognize a California judgment against a Texas insurance company on behalf of a California insured, where jurisdiction was based on the existence of an insurance policy originally issued by a predecessor Arizona corporation to the California insured. Neither corporation had offices or agents in California, and the policy was purchased by mail, with all premiums paid by mail from California to the successor insurance company's Texas office.\textsuperscript{58} The beneficiary sued for the proceeds when the insurance company claimed suicide of the insured as a defense to

\textsuperscript{49} See id. at 309.
\textsuperscript{50} See id. at 311.
\textsuperscript{51} Id. at 314.
\textsuperscript{52} Id.
\textsuperscript{53} See id. at 317.
\textsuperscript{54} Id. at 318.
\textsuperscript{55} 342 U.S. 437 (1952).
\textsuperscript{56} See id. at 438-39, 447-48.
\textsuperscript{57} 355 U.S. 220 (1957).
\textsuperscript{58} See id. at 221-22.
payment.59

The McGee Court returned first to the territorial concepts of Pen-
noyer, noting that the Fourteenth Amendment places "some limit on the
power of state courts to enter binding judgments against persons not
served with process within their boundaries."60 It then noted the evolu-
tion of due process concepts, acknowledging a "continuing process of
evolution [in which the] Court accepted and then abandoned 'consent,'
'doing business,' and 'presence' as the standard for measuring the extent
of state judicial power over [foreign] corporations."61 The Court con-
cluded that the limitations of Pennoyer had given way to constitutional
acceptance of expanded jurisdiction and gave the reasons for this acceptance:

Looking back over this long history of litigation a trend is clearly discernible
toward expanding the permissible scope of state jurisdiction over foreign corpora-
tions and other nonresidents. In part this is attributable to the fundamental transfor-
mation of our national economy over the years. Today many commercial transac-
tions touch two or more States and may involve parties separated by the full
continent. With this increasing nationalization of commerce has come a great in-
crease in the amount of business conducted by mail across state lines. At the same
time modern transportation and communication have made it much less burden-
some for a party sued to defend himself in a State where he engages in economic
activity.62

In a holding not unlike the Brussels Convention provisions designed to
protect insurance consumers,63 the Court held that the Due Process
Clause did not prevent jurisdiction in the California court, and that "[i]t
is sufficient for purposes of due process that the suit was based on a con-
tract which had substantial connection with that State."64

59. See id. at 222.
60. Id.
61. Id.
62. Id. at 222-223.
63. See Brussels Convention, supra note 28, arts. 7-12a.
64. McGee, 355 U.S. at 223. The Court further elaborated as follows:
The contract was delivered in California, the premiums were mailed from there and the in-
sured was a resident of that State when he died. It cannot be denied that California has a
manifest interest in providing effective means of redress for its residents when their insurers
refuse to pay claims. These residents would be at a severe disadvantage if they were forced
to follow the insurance company to a distant State in order to hold it legally accountable.
When claims were small or moderate individual claimants frequently could not afford the cost
of bringing an action in a foreign forum—thus in effect making the company judgment proof.
Often the crucial witnesses—as here on the company's defense of suicide—will be found in
the insured's locality. Of course there may be inconvenience to the insurer if it is held amena-
ble to suit in California where it had this contract but certainly nothing which amounts to a
In *Hanson v. Denckla*, Chief Justice Warren weighed in with an opinion on the question of jurisdiction in a Florida court over a Delaware trustee, in order to consider the validity of a trust established by a Delaware settlor who later moved to, and died domiciled in, Florida. The decision commented on the status of pre-Fourteenth Amendment jurisdictional jurisprudence in leading to a holding that the Florida court lacked jurisdiction:

Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity, but the matter remained a question of state law over which this Court exercised no authority. With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction was void within the State as well as without.

Noting the evolution from the "rigid rule" of *Pennoyer v. Neff* to the more "flexible standard" of *International Shoe*, Justice Warren refused to acknowledge "the eventual demise of all restrictions on the personal jurisdiction of state courts." Instead, he returned to the territorial concepts of *Pennoyer*, finding the Due Process Clause to be "more than a guarantee of immunity from inconvenient or distant litigation," and no contacts sufficient to subject the Delaware trust company to Florida court jurisdiction.

Two other aspects of Justice Warren's opinion in *Hanson v. Denckla* are worth particular note. First, he specifically rejected the idea that conflicts of law concepts be applied to jurisdictional analysis. Thus, even denial of due process.

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Id. at 223-224.


66. See id. at 238-39.

67. Id. at 249-50.

68. Id. at 251.

69. Id.

70. Id.

Those restrictions . . . are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Id.

71. See id.

The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail.

Id.

72. See id. at 254.
though it might be possible for Florida law to apply to the questions involved in the case, that was not sufficient to result in Florida court jurisdiction. Second, in reverting to a territorial orientation, he reiterated the need for a nexus between the conduct of the defendant and the forum state: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Nearly twenty years after Hanson v. Denckla, the Court decided Shaffer v. Heitner, a case in which a nonresident shareholder of a Delaware corporation (Greyhound Corp.) brought a shareholder’s derivative suit in Delaware, alleging violations of fiduciary duties owed by corporate officers in actions resulting in antitrust damages assessed against the corporation. Under a Delaware statute, the court sequestered property (shares of stock) of the individual defendants, even though none of the defendants appeared to be resident in or domiciled in Delaware. Justice Marshall, speaking for the Court, noted the Court’s departure from Pennoyer’s concepts of sovereignty, in favor of a focus on “the relationship among the defendant, the forum, and the litigation.” He then clearly extended the International Shoe analysis for in personam jurisdiction to in rem jurisdiction.

In Kulko v. Superior Court, the Court addressed the question of jurisdiction over a parent in a child custody action under the Due Process Clause. The mother had moved to California after a Haitian divorce and a New York agreement that the father (a New York resident) would have

73. See id. at 253. “The issue is personal jurisdiction, not choice of law.” Id. at 254.
74. Id. at 253.
76. See id. at 189-90.
77. See id. at 190-91.
78. Id. at 204. “The immediate effect of this departure from Pennoyer’s conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants.” Id.
79. See id. at 207.
primary custody of the children.\textsuperscript{81} She brought an action in California to establish the Haitian divorce decree and modify the judgment as to child custody.\textsuperscript{82} When she sued for custody in California, the father, who had been in California only twice for a total of four days, argued that the court lacked jurisdiction over him.\textsuperscript{83}

Neither the extremely limited contacts of the defendant with California nor the nature of the case was sufficient to justify jurisdiction in the eyes of the Court.\textsuperscript{84} The idea that the defendant must have contacts which in some manner indicate a benefit from the relationship with the forum state was stated as an important factor: "[T]he mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain or expectancy of receiving a corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction."\textsuperscript{85}

5. World-Wide Volkswagen to Asahi: reasserting and redefining the limits of jurisdiction under the Due Process Clause

World-Wide Volkswagen Corp. v. Woodson\textsuperscript{86} was a products liability lawsuit brought in Oklahoma based on an automobile accident that occurred in that state. An automobile sold in New York to New York residents was being driven through Oklahoma when the accident occurred.\textsuperscript{87} The plaintiff sued both World-Wide Volkswagen Corp., a regional distributor with its office in New York, who distributed to retail dealers in New York, New Jersey, and Connecticut, and Seaway Volk-

\textsuperscript{81} See id. at 87.
\textsuperscript{82} See id. at 88.
\textsuperscript{83} See id.
\textsuperscript{84} See id. at 93-94.
\textsuperscript{85} "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . . ." Id. (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
\textsuperscript{86} We cannot accept the proposition that appellant's acquiescence in [his daughter's] desire to live with her mother conferred jurisdiction over appellant in the California courts in this action. A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws.
\textsuperscript{87} Id. at 94 (quoting Shaffer, 433 U.S. at 216).
\textsuperscript{85} Id. at 101.
\textsuperscript{86} 444 U.S. 286 (1980).
\textsuperscript{87} See id. at 288.
swagen, Inc., the retail dealer in New York from whom the car had been purchased.88 Both of these defendants challenged the jurisdiction of the Oklahoma court.89

In holding that the Oklahoma court did not have jurisdiction over the two defendants, the Supreme Court clearly noted that the Due Process Clause imposed limitations on the ability of states to assert jurisdiction over non-residents.90 Focusing on minimum contacts as a limiting factor on jurisdiction, Justice White's opinion stressed both the rights of defendants and the resulting limitations on state jurisdiction:

As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.91

In World-Wide Volkswagen, the contacts with the forum state were not of the "continuous and systematic" nature of those in International Shoe.92 Thus, the apparently expansive language of that earlier case was no longer appropriate. In fact, the two defendants in question had no real contacts with Oklahoma, other than the fact that an automobile they had sold—one at wholesale and the other at retail—had made its way into Oklahoma without any direction or intention on the part of the defendants.93 Rather than beginning with substantial contacts, the Court was forced to ask what contacts might exist to support jurisdiction.

Minimum contacts is only the first element of the World-Wide Volkswagen analysis. The second element is the concept of reasonableness and fairness:

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with

88. See id. at 288-89. The plaintiffs also sued the manufacturer, Audi NSU Auto Union Aktiengesellschaft, and its importer, Volkswagen of America, Inc., but those defendants did not take the issue of jurisdiction to the Oklahoma Supreme Court. See id. at 288 n.3.
89. See id. at 288.
90. "The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." Id. at 291 (citing Kulko, 436 U.S. at 91).
91. Id. at 291-92 (citation omitted).
92. See id. at 295.
93. See id.
the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.' " The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there."94

This focus on reasonableness led the Court to a balancing test of relevant factors:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.95

The focus on minimum contacts and reasonableness led Justice White through the litany of semantic representations of due process analysis. From International Shoe, he drew support for the importance of contacts with the forum state: "the Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' "96 Minimum contacts and reasonableness, he found, are not controlled by, but are tempered by, the concept of foreseeability: "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."97 However,

[[this is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.98

Ultimately, Justice White made reference to the defendant's own conduct in creating a nexus with the forum state through the concept of "purposeful availment," and raised the later-to-be troublesome phrase, "stream of commerce":

94. Id. at 292 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945)) (citation omitted).
95. Id. (citations omitted).
96. Id. at 294 (quoting International Shoe, 326 U.S. at 319).
97. Id. at 295.
98. Id. at 297.
When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. . . . The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.99

Like the concept of "contacts," which was not troublesome to the International Shoe court because the contacts there were viewed as clearly "systematic and continuous," the concept of a "stream of commerce" into which the defendant intentionally directs its goods was not troublesome when raised by Justice White in World-Wide Volkswagen. He was able easily to dismiss any argument that it was the defendants who sent the automobile on its way to Oklahoma with some related and resulting benefit to the defendants.100 The car found its way to Oklahoma, not in the course of any commercial relationship, but rather as a result of the conduct of the ultimate consumer.

In the end, Justice White's opinion in World-Wide Volkswagen justifies a denial of jurisdiction by using the same language the Court used in International Shoe to justify affirming jurisdiction. The difference is that in judging relevant contacts, reasonableness and fairness, foreseeability of events, purposeful availment of the benefits of the legal system, the various interests of the state and the parties, and the stream of commerce, the analysis in each instance led the Court to the other side of the all-important but difficult to quantify threshold between jurisdiction that can and cannot be upheld under the Due Process Clause.

More recently, the Supreme Court has addressed jurisdictional application of due process analysis to transnational cases, continuing to use the analytical semantics of International Shoe and World-Wide Volkswagen. In Helicopteros Nacionales de Colombia, S.A. v. Hall,101 the Court addressed a situation where the contacts were neither as "systematic and continuous" as in International Shoe, nor as limited as in World-Wide Volkswagen. A wrongful death action was brought in Texas state court against a Colombian corporation (Helicol) as the result of a helicopter crash in Peru, in which four United States citizens died.102 The defendant corporation was the alter ego of a Texas joint venture head-

99. Id. at 297-98 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (citation omitted).
100. See id. at 298-99.
102. See id. at 410.
quartered in Texas. Its chief executive officer had negotiated the purchase in Texas of the helicopters involved in the crash. Other contacts also existed:

Aside from the negotiation session in Houston . . ., Helicol had other contacts with Texas. During the years 1970-1977, it purchased helicopters (approximately 80% of its fleet), spare parts, and accessories for more than $4 million from Bell Helicopter Company in Fort Worth. In that period, Helicol sent prospective pilots to Fort Worth for training and to ferry the aircraft to South America. It also sent management and maintenance personnel to visit Bell Helicopter in Fort Worth during the same period in order to receive "plant familiarization" and for technical consultation. Helicol received into its New York City and Panama City, Fla., bank accounts over $5 million in payments from Consorcio/WSH drawn upon First City National Bank of Houston.

Noting that the Supreme Court could not disturb the Texas Supreme Court's holding that the Texas long-arm statute encompassed jurisdiction over the defendant, the Court turned to the constitutional analysis. While the due process analysis by the Texas Supreme Court had focused on the purchases and related training trips by defendant's employees to Texas, the Supreme Court relied on the 1923 case of Rosenberg Bros. & Co. v. Curtis Brown Co. (which it determined not to have been repudiated by International Shoe), for the proposition that "purchases and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction." Ultimately, the Court held that the combination of existing contacts did not support the constitutional exercise of jurisdiction over the foreign corporation.

Helicopteros has become perhaps best known for its delineation of specific and general "doing business" jurisdiction. The Texas long-arm statute at issue was specifically written to bring within the jurisdiction of its courts those foreign corporations "doing business" in Texas.

103. See id.
104. See id.
105. Id. at 411.
106. See id. at 413 n.7.
107. See id. at 417.
109. See Helicopteros, 466 U.S. at 418.
110. Id. at 417.
111. See id. at 418-19.
112. For the origins of this distinction, see Von Mehren & Trautman, supra note 44, at 1144-64.

Sec. 3. Any foreign corporation . . . that engages in business in this State, irrespective of
specific jurisdiction, Justice Blackmun's opinion noted the following implications of the minimum contacts test of International Shoe: "When a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction." 114 Thus, specific jurisdiction requires that the cause of action in litigation "arise out of," and thus be directly related to, the activities of the defendant within the forum state. 115 The alternative is general jurisdiction:

Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation. 116

Thus, so long as the contacts are "continuous and systematic," they may support jurisdiction even though the cause of action does not "arise out of" the contacts. 117 The Helicopteros Court found the cause of action at issue not to have arisen out of the contacts with Texas, thereby avoiding a discussion of specific jurisdiction. 118 It then ruled that general jurisdiction did not exist under the Due Process Clause. 119

A 1985 case, Burger King Corp. v. Rudzewicz, 120 did not involve any Statute or law respecting designation or maintenance of resident agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation . . . of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation . . . is a party or is to be made a party.

Sec. 4. For the purpose of this Act, and without including other acts that may constitute doing business, any foreign corporation . . . shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State. The act of recruiting Texas residents, directly or through an intermediary located in Texas, for employment inside or outside of Texas shall be deemed doing business in this State.

Id., quoted in Helicopteros, 466 U.S. at 413 n.7.

115. Id. at 415.
116. Id. at 414.
118. See id.
119. See id. at 418-19.
transnational relationships, but is nonetheless instructive. A federal district court in Florida claimed personal jurisdiction over a Michigan resident under a Florida statute providing for jurisdiction of a nonresident who "[b]reach[es] a contract in this state." The Michigan resident had entered a franchise agreement and then failed to pay franchise fees which, by contract, were due in Florida. The franchise contract provided that the franchise relationship was established in Miami and governed by Florida law.

Given the consent evidenced in the franchise contract, Justice Brennan's majority opinion refused to allow use of the Due Process Clause as a "territorial shield to avoid interstate obligations that have been voluntarily assumed." The fact that the franchisee "did not physically enter the forum State," did not prevent the exercise of jurisdiction:

Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.

Once it is shown that a defendant has purposefully established contacts with the forum state—here through agreement to the characterization of its conduct in contract clauses—"these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " Ultimately, even though the franchisee had no physical ties to Florida other than sending a colleague to a brief training course, did not maintain offices in Florida, and had never visited there, the dispute grew out of "a contract which had a substantial connection with that State," including "a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida."

The most recent significant case in the U.S. Supreme Court is transnational in its facts, and offers both guidance and confusion. Asahi Metal

121. Id. at 463-64 (quoting Fla. Stat. ch. 48.193(1)(g) (Supp. 1984)).
122. See id. at 464.
123. See id. at 465-66.
124. Id. at 474.
125. Id. at 476 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 476 (1984)).
126. Id. (quoting International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945)).
127. Id. at 479-80 (quoting McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957)).
Industry Co. v. Superior Court,\textsuperscript{128} brought two four-justice plurality opinions, taking divergent positions on the "stream of commerce" language of World-Wide Volkswagen. Asahi, a Japanese manufacturer of valve stems, sold them to Cheng Shin, a Taiwanese tire manufacturer, who used them as components in tire tubes, including one that ultimately was incorporated into a motorcycle sold and used in California.\textsuperscript{129} When the driver of the motorcycle was injured in an accident, and his passenger killed, the driver brought a products liability claim in California.\textsuperscript{130} All defendants other than Asahi settled with the plaintiff, and the only issue remaining was the liability of Asahi to Cheng Shin for contribution.\textsuperscript{131} Asahi had not been an original defendant, but had been impleaded by Cheng Shin.\textsuperscript{132}

California's long-arm statute authorized the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States."\textsuperscript{133} After reciting the usual language about the Due Process Clause limiting the assertion of jurisdiction, Justice O'Connor's plurality opinion adopted a "stream of commerce plus" approach.\textsuperscript{134} Reflective of the World-Wide Volkswagen holding that a consumer's unilateral action in bringing a product into a jurisdiction would be insufficient to support jurisdiction, Justice O'Connor stated that the mere insertion of a product into the stream of commerce, absent some purposeful act availing the defendant of the benefits of the jurisdiction, also should not support constitutional jurisdiction:

The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.\textsuperscript{135}

Ultimately, Justice O'Connor determined that it was unreasonable to assert jurisdiction over the Japanese defendant simply for purposes of de-

\textsuperscript{128} 480 U.S. 102 (1987).
\textsuperscript{129} See id. at 106.
\textsuperscript{130} See id. at 105-06.
\textsuperscript{131} See id. at 106.
\textsuperscript{132} See id.
\textsuperscript{133} CAL. CIV. PROC. CODE § 410.10 (West 1973).
\textsuperscript{134} See Asahi, 480 U.S. at 111-12 (plurality opinion of O'Connor, J.).
\textsuperscript{135} Id. at 112 (citations omitted).
ciding what was now a dispute only with a Taiwanese party.\textsuperscript{136} The reasonableness analysis was accomplished in a review of the five-factor test of \textit{World-Wide Volkswagen}: 

A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief. It must also weigh in its determination “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.”\textsuperscript{137}

Justice Brennan’s concurrence, joined by Justices White, Marshall and Blackmun, would have accepted a simple stream of commerce test,\textsuperscript{138} and found jurisdiction to exist.\textsuperscript{139}

\textbf{C. Making Sense of the Semantics of Due Process Analysis}

To a lawyer from a civil law system, accustomed to the relative structure of code-type lists of jurisdictional rules, and reasoning from general principles often more certain than the concept of due process, this trip through U.S. case law must seem rather confusing. Ultimately, however, whether the language used is “minimum contacts,” “purposeful availment,” “stream of commerce,” or any other, the test focuses on two elements: (1) whether there is a sufficient nexus between the defendant and the forum state, and (2) whether the circumstances make it fair and reasonable to exercise jurisdiction.\textsuperscript{140}

\textsuperscript{136} See \textit{id.} at 116 (“Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.”).

\textsuperscript{137} \textit{Id.} at 113 (quoting \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 292 (1980)).

\textsuperscript{138} The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. \textit{Id.} at 117 (Brennan, J., concurring).

\textsuperscript{139} See \textit{id.} at 116. While some have suggested a national contacts analysis (rather than reliance only on the contacts with the single U.S. state in which the action is brought), Justice O’Connor specifically avoided addressing this issue:

\textit{We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.} \textit{Asahi}, 480 U.S. at 113 n.* (plurality opinion of O’Connor, J.).

\textsuperscript{140} \textit{Helicopteros} indicates the possibility of a third element, superimposed on these two: the connection between the in-state activities and the cause of action. See \textit{Helicopteros Nacionales de
If we look at results, rather than only at language, the picture is somewhat simpler (at least if we look only at the Supreme Court decisions). Few now argue that the conditions in *World-Wide Volkswagen* should have resulted in a finding of jurisdiction. The distributor and retailer had no connection with Oklahoma other than the fortuitous trip by one of their customers through that state. While it may have been foreseeable that some purchaser of a car in New York would drive to Oklahoma, that is not the foreseeability required under due process analysis. This was not enough to make it foreseeable that a New York dealer or wholesaler would be haled into court there. Nor did it involve a stream of commerce initiated by and beneficial to the defendants.

Similarly, the number of sales persons and level of sales by a Missouri-based company in Washington lend credence to the reasonableness of jurisdiction in *International Shoe*. In *Asahi*, on the other hand (leaving aside the divergent opinions on a "stream of commerce" analysis), it seems reasonable for a U.S. court not to take jurisdiction over a dispute that remains only between Taiwanese and Japanese parties, especially when the product of the Taiwanese party had reached California only as an indirect result of the commercial chain of manufacture and distribution.

*Helicopteros* may be the more difficult case. The Peruvian corporation there had a number of contacts with the state of Texas, and even though the cause of action on an accident in Peru did not arise directly out of those contacts, there was at least an indirect relationship between the purchase of helicopters in Texas, the training of pilots there, and a crash involving those helicopters and those pilots. *Helicopteros* demonstrates that the Due Process Clause remains a constitutional limitation on the exercise of jurisdiction by U.S. courts. It also illustrates how the con-

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Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). A nexus that might be sufficient if the cause of action was closely connected to the in-state activities might not be enough if the cause of action was unrelated. *See id.* at 414-15. Thus, "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that a 'relationship among the defendant, the forum, and the litigation' is the essential foundation of *in personam* jurisdiction." *Id.* at 414 (citing *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). *Helicopteros* was the first case in which the Supreme Court adopted the distinction between "general jurisdiction," based on the systematic and continuous activities of the defendant in the forum state, and "specific jurisdiction," based on lesser activities in the forum state but requiring that the cause of action have a direct connection with those activities. *See supra* text accompanying notes 112-16.

141. *But see* Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 401 (1995) ("If the facts of *Asahi* arose within the framework of the Brussels Convention, the outcome would be different from that reached by the U.S. Supreme Court.").
cept of general jurisdiction serves to limit the jurisdictional reach of courts in the due process analysis. Thus, when the activity sued upon does not arise out of the “minimum contacts” that exist, something more than the threshold of activity required for specific jurisdiction must be met.\textsuperscript{142} The activity threshold is raised to the “systematic and continuous” level, which has proved more difficult to satisfy. While \textit{Asahi} creates difficulty in determining the current application of a “stream of commerce” test, it does combine with \textit{Helicopteros} to indicate that the U.S. Supreme Court will not let a foreign corporation be sued in a state where it has limited activity unless there exists a close connection between the cause of action and the activity. This should reduce significantly the likelihood that jurisdiction can be successfully asserted on claims arising or localized elsewhere.

\section*{III. Due Process Analysis and Jurisdiction Under the Brussels Convention}

While the discussion above sets the framework for analysis of particular bases of jurisdiction that may be included in a Hague jurisdiction and judgments convention, it is useful to provide specific examples of bases of jurisdiction that would and would not be constitutionally acceptable in the United States. The following discussion considers two specific provisions of the Brussels Convention, as well as national jurisdictional rules excluded from application by Article 3 thereof, as illustrations in determining the type of provisions that would withstand constitutional challenge in the United States.

\subsection*{A. Article 5(1) Contract Jurisdiction}

Article 5(1) of the Brussels Convention provides the following rule for specific jurisdiction in contract cases:

\begin{quote}
142. Courts applying specific jurisdiction frequently move away from the “contacts” semantics, applying a tripartite test:

1. The defendant must have done some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of the defendant's forum-related activities; and

3. the exercise of jurisdiction must be reasonable.

\end{quote}
A person domiciled in a Contracting State may, in another Contracting State, be sued:

(1) in matters relating to a contract, in the courts for the place of performance of the obligation in question; . . . .

The European Court of Justice has ruled that it is for the court before which the matter is brought to (1) apply its rules of private international law to determine the law applicable to the contract, and (2) then apply that law to determine the place of performance of the contractual obligation. When such an interpretation is applied to contracts for goods and services ranging from the manufacture and delivery of ski suits to the provision of architectural services, the combinations and permutations for jurisdictional locus become almost endless. Not only does such an interpretation begin by using choice of law to determine jurisdiction (a process not always satisfactory), but it acknowledges that a single contract may involve multiple obligations and that the parties must wait until suit is brought to determine which of those obligations is most important:

The place in which that obligation is to be performed usually constitutes the closest connecting factor between the dispute and the court having jurisdiction over it, and it is this connecting factor which explains why, in contractual matters, it is the court of the place of performance of the obligation which has jurisdiction.

Admittedly, the above rule does not afford a solution in the particular case of a dispute concerned with a number of obligations arising under the same contract and forming the basis of the proceedings commenced by the plaintiff. However, in such a case the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim accessorium sequitur principale; in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction. . . .

. . . [F]or the purposes of determining the place of performance within the meaning of Article 5(1) of the Convention, the obligation to be taken into consideration in a dispute concerning proceedings for the recovery of fees commenced by an architect commissioned to draw up plans for the building of houses is the contractual obligation which forms the actual basis of the legal proceedings.

It is not difficult to hypothesize a contract that might result in jurisdiction under such a rule that would run afoul of the Due Process Clause. For example, assume a seller from state A and a buyer from state B

143. Brussels Convention, supra note 28, art. 5(1).
145. See id. (involving a claim of defective product involving a contract between Italian seller and German buyer for the delivery of women's ski suits).
146. See, e.g., Case 266/85, Shenavai v. Kreischer, 1987 E.C.R. 239 (concerning a suit by a German architect against a Dutch client for recovery of fees for the preparation of plans for the construction of holiday homes in Germany).
147. Id. at 256.
spend substantial time in state B negotiating a contract for the delivery of goods to the buyer in state B. Assume also that the goods are acquired by the seller in State C, with delivery arranged to state B, and that the buyer has never been present in state A. Assume finally that delivery is made and the buyer refuses to make payment. Upon suit brought for payment by the seller in a state A court, if state A's rule of private international law (conflicts of law) results in a finding that the payment obligation (the principal obligation at issue) is to be performed at the seller's place of business (in state A), then state A law governs the obligation, and Article 5(1) places jurisdiction in the courts of state A. The focus on the nexus between the claim and the court, rather than on the nexus between the defendant and the court, would lead to jurisdiction likely in violation of the Due Process Clause under U.S. law. The many possibilities for jurisdiction in states with minimal or no relationship to the defendant under such a rule create obvious problems for U.S. agreement to such a provision in a multilateral treaty on jurisdiction and the recognition and enforcement of judgments.

A first look at state long-arm statutes in the United States may lead one to ask why the United States should have problems with such a provision. Long-arm statutes in the various U.S. states provide a number of formulations of the basic rule of contract jurisdiction—many of which look quite like Article 5(1) of the Brussels Convention. Both the New York and Pennsylvania statutes encompass jurisdiction over contract claims through "transacting business" language and include a specific clause catching defendants that contract "anywhere to supply goods or services in the state."148 Some statutes have permitted jurisdiction based on the place where the contract was made.149 Others look to the place where the contract is to be performed.150 Neither of these tests is wholly satisfactory. Determining where a contract was made is not always an easy task. Some courts look to the final act necessary to create a binding contract, holding that for jurisdictional purposes the place of acceptance


149. An example is the former North Carolina statute providing for jurisdiction over foreign corporation in matters arising out of "any contract made in this State or to be performed in this State." N.C. GEN. STAT. § 55-145, as applied in Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 712 (4th Cir. 1966).

150. See 42 IOWA CODE ANN. § 617.3 (West Supp. 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (West 1997); UNIF. INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(a)(2), 13 U.L.A. 357, 362 (1986).
is the place at which a contract is made.\textsuperscript{151} Thus, even repeated negotiations within the state would not provide jurisdiction if the contract were finally signed in another state. Similar problems arise in determining how substantial the "performance" element must be to support jurisdiction.\textsuperscript{152}

If the long-arm statute contains no specific provision creating jurisdiction where the contract is made, under a "transacting business" provision the mere execution of a contract in the forum state is unlikely to suffice to create jurisdiction.\textsuperscript{153} Even if it is enough under the long-arm statute, courts have ruled that "merely entering into a contract" in a state, or with a resident of the state, will not be enough, without more, to establish the minimum contacts necessary to Fourteenth Amendment due process analysis.\textsuperscript{154} Thus, "an out-of-state party's contract with an in-state party is alone not enough to establish the requisite minimum contacts,"\textsuperscript{155} and "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing' must indicate the purposeful availment that makes litigating in the forum state foreseeable to the defendant."\textsuperscript{156}

The due process portion of the analysis in contract cases in U.S. courts is generally parallel to the analysis in tort cases. Courts use the analytical framework set forth above interchangeably, regardless of the cause of action. Analysis of the due process requirement in contract cases often parallels the general three-part analysis used by many courts to find (1) purposeful availment on the part of the defendant of the privilege of conducting activities within the forum and the protections of the laws of the forum, (2) a claim that arises out of those purposeful activities, and (3) reasonableness in the exercise of jurisdiction.\textsuperscript{157} Thus, in \textit{Burger King Corp. v. Rudzewicz},\textsuperscript{158} Justice Brennan focused on a series of contractual relations with a Florida corporation, including clauses stating that the subject franchise relationship was to be "established" in Florida and governed by Florida law, to find that the defendant had "purposefully es-

\begin{itemize}
\item \textsuperscript{151}See, e.g., Byham v. National Cibo House Corp., 143 S.E.2d 225, 233 (1965).
\item \textsuperscript{152}See, e.g., Bowman v. Curt G. Joa, Inc., 361 F.2d 706, 715 (4th Cir. 1966) (requiring "substantial" performance within the state).
\item \textsuperscript{154}Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir. 1996).
\item \textsuperscript{155}RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1277 (7th Cir. 1997).
\item \textsuperscript{156}Id. (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479 (1985)).
\item \textsuperscript{157}See supra note 142. This tripartite analysis was applied to a contract action in Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1116 (6th Cir. 1994), \textit{cert. denied}, 513 U.S. 962 (1994).
\item \textsuperscript{158}471 U.S. 462 (1985).
\end{itemize}
tablished "minimum contacts" in the forum State." After finding such contacts to exist, the inquiry shifted to whether assertion of jurisdiction over the out-of-state defendant would comport with notions of "fair play and substantial justice." The claim there specifically arose out of the contract relationship.

Satisfaction of the due process analysis in a contract case requires that the connections with the forum be substantial enough that the defendant "should reasonably [have] anticipate[d] being haled into" the forum court. Thus, where the defendant's contacts with the plaintiff in the forum state are merely "superficial," and the parties have engaged in no prior negotiations there and expected no future consequences there, even though mail and telephone communications have taken place, due process will not be satisfied in a contract case.

B. Article 5(3) Tort Jurisdiction

Article 5(3) of the Brussels Convention provides the following rule for specific jurisdiction in tort cases:

A person domiciled in a Contracting State may, in another Contracting State, be sued:

. . . .

(3) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

The seminal case on the interpretation of Article 5(3) is Handelskwekerij G.J. Bier B.V v. Mines de Potasse d'Alsace S.A. A Dutch horticultural business and the Reinwater Foundation sued a French defendant in the court of first instance at Rotterdam. The claim was that the French concern had polluted the waters of the Rhine by the discharge of saline waste from its operations in France, and thus damaged the plaintiff's business (which relied on irrigation from the Rhine river), and forced expensive measures to prevent further damage. When the Rotterdam court held it had no jurisdiction, and the case was appealed to the Gerechtshof.
in The Hague, that court referred to the European Court of Justice the following question:

"Are the words "the place where the harmful event occurred," appearing in the text of Article 5 (3) . . . to be understood as meaning "the place where the damage occurred (the place where the damage took place or became apparent)" or rather "the place where the event having the damage as its sequel occurred (the place where the act was or was not performed)"?" \(^{167}\)

Unlike the U.S. due process focus on contacts between the defendant and the court asserting jurisdiction, the Bier court looked for a "particularly close connecting factor between a dispute and the court which may be called upon to hear it." \(^{168}\) The court found such a connecting factor at the place where the damage is felt as well as at the place where the event giving rise to the damage occurred. \(^{169}\) Thus, the court held that, in an action brought under Article 5(3), "the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage." \(^{170}\) This was an expansive reading of Article 5(3), and in that sense it parallels the role of *International Shoe* in the United States. \(^{171}\) However, Bier has not been followed by a counterpart to *World-Wide Volkswagen* that reasserts limitations on the expansive language of the opinion.

A clear example of the difference between the analysis in Bier and U.S. due process analysis arises by applying the Bier analysis to the facts in *World-Wide Volkswagen*. \(^{172}\) Taking the Bier test literally, if U.S. states operated under a Brussels Convention system rather than the Full Faith and Credit and Due Process Clauses of the U.S. Constitution, then a de-

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167. *Id.* at 1745.

168. *Id.* at 1746.

169. The court found either place to "constitute a significant connecting factor from the point of view of jurisdiction." *Id.* at 1746.

170. *Id.* at 1749. One of the approaches to Article 5(3) not adopted was the assertion of the Government of the Netherlands and the Commission that a choice of law analysis be applied to questions of jurisdiction such that jurisdiction be available in the state with the "most significant relationship" with the harmful event. *Id.* at 1754 (Op. of Advocate General Capotorti). While the court's opinion provided no need to refer directly to this argument, the opinion of Advocate General Capotorti specifically rejected it on the basis that it was "not . . . in accordance with the objective of the Brussels Convention . . . to simplify problems relating to determination of the national court having jurisdiction." *Id.* at 1755.

171. See supra notes 33-47 and accompanying text.

172. A similar analysis of the facts of *Asahi* indicates that countries such as Italy, England and Japan would likely have assumed jurisdiction there where the U.S. Supreme Court found it inappropriate to do so under a due process analysis. See Silberman, supra note 141, at 401-02.
DUE PROCESS AND A HAGUE CONVENTION

 effective automobile causing an accident and injury in Oklahoma could lead to a case being brought (1) at the domicile of the defendant under Article 2, (2) at the place where the automobile was manufactured (the event giving rise to the damage) under Article 5(3), or (3) at the place of the accident (the place where the damage occurred), all at the option of the plaintiff.

Thus, the literal language of the Bier decision would allow jurisdiction in Oklahoma over the New York distributor and retailer. This application of Bier to the facts of World-Wide Volkswagen demonstrates the jurisdiction-limiting function of the Due Process Clause. The clause operates to restrict the plaintiff's choice of forum, and thus to protect the defendant. The post-Bier decisions of the European Court of Justice demonstrate a similar defendant-protection element in the structure of the Brussels Convention. In those cases, the court develops a three-step analysis that, on its face, provides defendants with protection from unreasonable assertions of jurisdiction. First, Article 2 of the Convention provides the general rule that jurisdiction exists in the state of domicile of the defendant. Article 3 then explicitly protects Community defendants from exorbitant, plaintiff-friendly jurisdictional bases otherwise available in the Member States. Finally, all specific bases of jurisdiction are to be restrictively construed, thus limiting the availability of other forums to a plaintiff subject to the Convention, and "militat[ing] against any interpretation of the Convention which, otherwise than in the cases expressly provided for, might lead to recognition of the jurisdiction of the courts of the plaintiff's domicile and would enable a plaintiff to determine the competent court by his choice of domicile." Despite this statement by the court of a restrictive approach to jurisdiction under the Convention, the post-Bier cases provide no language that would help the defendant in a World-Wide Volkswagen set of facts. Thus, tort jurisdiction under Brussels Article 5(3) (as currently interpreted) appears to be broader than U.S. due process analysis would allow.


C. Article 3 Exorbitant Jurisdiction Provisions of National Laws

Article 3, paragraph 2, of the Brussels Convention provides a non-exhaustive list from the laws of each of the Member States of specific statutes that “shall not be applicable” in determining jurisdiction over persons domiciled in a Contracting State. Thus, the Member States have agreed that these provisions are not appropriate for use against defendants domiciled within their territories and some other basis of jurisdiction must be available to bring such a defendant within the jurisdiction of the court in question. A list making reference to specific statutory provisions would be unsuited to a global convention, but the concept is applicable, and thus requires that the types of bases of jurisdiction represented by these statutes be considered and appropriately excluded through the use of descriptive language. The following discussion considers the various types of jurisdiction represented by the provisions listed in Article 3 of the Brussels Convention.\textsuperscript{175}

1. Jurisdiction based on the nationality of the plaintiff

Article 14 of the French Civil Code provides:

An alien, even not residing in France, may be summoned before the French courts for the fulfillment of obligations contracted by him in France toward a French person; he may be brought before the French courts for obligations contracted by him in a foreign country toward a French person.\textsuperscript{176}

Similar rules are provided in Article 14 of the Belgian Civil Code and Article 14 of the Luxembourg Civil Code.\textsuperscript{177} Such a basis of jurisdiction would be impossible for the U.S. to agree to in a multilateral convention. As indicated in the discussion above, in order for due process to be satis-

\textsuperscript{175} Except where specifically provided otherwise, the descriptions of the jurisdictional bases listed in Article 3 contained in this discussion are taken from the following sources: Report by Mr. P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 1979 O.J. (C59) 1, 19-20 [hereinafter Jenard Report]; Report by Professor Dr. Peter Schlosser on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, 1979 O.J. (C59) 71, 99-100 [hereinafter Schlosser Report]; GEORGES R. DELAUME, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES (1990); PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS 265-269 (1987).

\textsuperscript{176} See 2 DELAUME, supra note 175, at § 8.02, at 13.

\textsuperscript{177} A similar provision is found in Article 127 of the Code of Civil Procedure of the Netherlands, but has been rendered moot by a 1940 decision of the Dutch Supreme Court. See KAYE, supra note 175, at 268.
fied, there must be some nexus between the defendant and the jurisdiction asserting judicial authority over the defendant, and that nexus normally must result from the defendant’s conduct. Any provision that establishes jurisdiction based on the mere connection between the plaintiff and the state creates obvious possibilities for use in a manner that would violate the due process rights of a defendant.

2. Jurisdiction based on the mere presence of property belonging to the defendant

Article 23 of the German Code of Civil Procedure provides that,

For complaints asserting pecuniary claims against a person who has no domicile within the country, the court of the district within which this person has property, or within which is found the object claimed by the complaint, has jurisdiction. In the case of claims the debtor’s domicile is considered the place where the property is located, and when the claim is secured, the place where the security is located is also so considered.178

Article 248(2) of the Danish Law on Civil Procedure similarly provides that a foreigner may be sued before any Danish court in whose district he resides or has property on the date on which the action is commenced by service of process,179 and section 3(1) of chapter 10 of the Code of Judicial Procedure of Sweden provides that, on debt obligations, “anyone without a known residence within the realm may be sued at the place in which property belonging to him is located.”180 Using nothing more than the location of tangible property to obtain in personam jurisdiction over the defendant would be unacceptable in the United States. The mere presence of an item of property, no matter how limited in value, does not create the sufficient nexus between the court and the defendant to assure that due process rights will be protected. Nor does it necessarily indicate conduct of the defendant creating a nexus.

The Article 3 list in the Brussels Convention also excludes application of United Kingdom rules “which enable jurisdiction to be founded on: . . . (b) the presence within the United Kingdom of property belonging to the defendant; or (c) the seizure by the plaintiff of property situated in the United Kingdom.”181 While in rem jurisdiction over the prop-

178. See Von Mehren & Trautman, supra note 44, at 1141 n.48 (translation).
179. See Kaye, supra note 175, at 267.
181. Brussels Convention, supra note 28, art. 3.
erty present or seized may be appropriate under a due process analysis, jurisdiction over the defendant based on the mere presence of property would be unacceptable.

3. Jurisdiction based on the nationality of the defendant

Article 15 of the French Civil Code provides that "a French citizen may be brought before a French court in respect of obligations contracted by him in a foreign country, even toward an alien."\(^{182}\) The same rule is found in Article 15 of the Belgian Civil Code and Article 15 of the Civil Code of Luxembourg. In today's mobile society, it is not uncommon to find a citizen of a country who has not been in that country (other than for short visits) for quite some time, and who has both residence and domicile outside the country. Thus, it is possible that such a provision could be used to obtain jurisdiction over a defendant who had no practical contacts with the forum state, thus appearing to violate due process norms.\(^{183}\) Case law in the United States indicates, however, that jurisdiction based on citizenship would not violate due process. In *Blackmer v. United States*,\(^{184}\) the Supreme Court upheld the exercise of jurisdiction over a U.S. citizen resident in Paris. Mr. Blackmer was held in contempt of court for failure to respond to subpoenas, served upon him in France, that required him to appear as a witness on behalf of the United States in a criminal trial.\(^{185}\) A federal statute specifically required that citizens resident abroad appear as witnesses at a criminal trial, upon proper service of a subpoena and a tender of travel expenses.\(^{186}\) Citing earlier cases upholding legislative jurisdiction on the basis of citizenship,\(^{187}\) the Court stated:

\(^{182}\) DE LAU MEE, *supra* note 175, § 8.02, at 13.

\(^{183}\) This discussion assumes that such provisions apply only to natural persons. Thus, if citizenship of corporations is determined by the place of incorporation, it is logical to allow jurisdiction in the state of incorporation as a result of the benefits obtained from the act of incorporation. This is consistent with the diversity jurisdiction statute in U.S. federal district courts, which provides that, for purposes of determining jurisdiction, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1) (1994).

\(^{184}\) 284 U.S. 421 (1932).

\(^{185}\) See id. at 433.

\(^{186}\) See id. at 433-35.

\(^{187}\) See, e.g., Cook v. Tait, 265 U.S. 47 (1924) (holding that the United States may assert jurisdiction over U.S. citizen resident in Mexico to tax income earned in Mexico); United States v. Bowman, 260 U.S. 94 (1922) (U.S. citizen resident abroad is subject to punishment in U.S. courts for disobedience to U.S. laws through conduct abroad); Blair v. United States, 250 U.S. 273 (1919) (U.S. citizen summoned to give testimony before a grand jury in the United States).
The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction in personam, as he is personally bound to take notice of the laws that are applicable to him and to obey them. But, for the exercise of judicial jurisdiction in personam, there must be due process, which requires appropriate notice of the judicial action and an opportunity to be heard.\textsuperscript{188}

\textit{Blackmer} was pre-\textit{International Shoe} and considers only notice and service in its due process analysis. It has, however, been followed in more recent federal cases, and the emphasis on contacts between the defendant and the forum state would not likely change the result in a case today.\textsuperscript{189} The Restatement takes the position that “a state’s exercise of jurisdiction to adjudicate with respect to a person . . . is reasonable if, at the time jurisdiction is asserted: . . . (d) the person, if a natural person, is a national of the state.”\textsuperscript{190} Thus, placing jurisdiction based on the nationality of the defendant on the prohibited bases list might actually cut back jurisdiction currently available under a due process analysis in the United States.

4. Jurisdiction in disregard of a choice of forum clause between the parties

Article 2 of the Italian Code of Civil Procedure provides that an agreement to jurisdiction in a non-Italian court or arbitral tribunal will be valid only if it is between aliens or between an alien and an Italian citizen who has neither residence nor domicile in Italy. This creates obvious problems alongside Article 17 of the Brussels Convention, which respects the parties’ choice of forum for jurisdictional purposes.\textsuperscript{191} It is thus logical to exclude the application of such a provision in a Brussels-type convention. A similar prorogation provision in a Hague convention would

\begin{footnotes}
\item[188] \textit{Blackmer}, 284 U.S. at 438 (citation omitted).
\item[189] See, e.g., Bulova Watch Co. v. Steele, 194 F.2d 567, 571 (5th Cir. 1952) (“For the United States to exercise its jurisdiction over one of its own nationals involves no conflict with the sovereignty of the Republic of Mexico.”). On certiorari to the U.S. Supreme Court, this case was treated more as one of prescriptive jurisdiction, with the focus on whether Congress intended the reach of legislation to extend beyond U.S. borders. See Steele v. Bulova Watch Co., 344 U.S. 280, 285 (1952). A similar focus on prescriptive jurisdiction in citing \textit{Blackmer} is found in Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 (1984).
\item[191] The general rule of Article 17 is that
[i]f the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.

\textit{Brussels Convention, supra} note 28, art. 17.
\end{footnotes}
(and is likely to) avoid the need to consider whether a provision of the Italian type is consistent with U.S. due process jurisprudence. Early doctrine in the United States held that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." The leading case now is *The Bremen v. Zapata Off-Shore Co.* Bremen did not involve a due process analysis per se, but applied a strong presumption in favor of the enforcement of choice of forum clauses in transnational transactions. On its facts, it applied only to admiralty law, but its rationale has been extended to other areas of law. The Restatement notes that

courts in recent years have rarely taken jurisdiction over cases in which a different forum was chosen by the parties, except in situations where the chosen forum had undergone a major revolution or comparable political change, casting doubt on the continuing existence of the forum intended and on the opportunity of a party to secure a fair hearing.

Thus, while due process may not require respect for the parties' choice of forum, a Hague Convention provision respecting proration agreements between parties to litigation will not present a constitutional problem for the United States.

5. Jurisdiction based on the place of contracting or the place of performance of a contract

Article 4(2) of the Italian Code of Civil Procedure authorizes jurisdiction based on the place of contracting or place of performance of the contract. It was necessary to place such a provision in the exorbitant jurisdiction list of Article 3 of the Brussels Convention because of its divergence from the specific jurisdiction contract rules in Article 5(1). As indicated above, long-arm statutes in some U.S. states have language

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194. See id. at 17-20.
195. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). Most recently, the 9th Circuit upheld the choice of law and choice of forum clauses in the standard Lloyd's "Name" contract—which provides for English law to be applied in English courts to any dispute arising out of membership—against allegations that it violated the anti-waiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. See Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998) (*en banc* decision withdrawing earlier decision at 107 F.3d 1422 (9th Cir. 1997)).
197. See *supra* notes 148-56 and accompanying text.
similar to the Italian provision. At the same time, however, the United States could not agree to a provision in a multilateral treaty that requires the availability of such jurisdiction. It is possible that an extension of jurisdiction may fall within the applicable long-arm statute but at the same time violate the Fourteenth Amendment Due Process Clause. While the U.S. Constitution will always override a state statute in domestic law, the relationship between a treaty and domestic law (particularly federal law) will not always create so clear a result. Thus, such a provision in a multilateral treaty would be unacceptable.

6. Jurisdiction based on service during temporary presence in the forum state

"Tag jurisdiction," based solely on service of process on the defendant during his or her temporary presence in the forum state, is available under the rules of jurisdiction in both the United Kingdom and Ireland. Under Article 3 of the Brussels Convention, however, it is not available against persons domiciled in EU Member States. In the United States, the focus on territorial power of the state, as demonstrated by Pennoyer v. Neff, supports jurisdiction based on even temporary presence of the defendant in the state. This comports with Anglo-American common law traditions. Most recently, the U.S. Supreme Court affirmed the exercise of jurisdiction by a California court over a New Jersey defendant served in a divorce proceeding while he was on a trip to California to conduct business and visit his children who lived with their mother in California. Thus, tag jurisdiction remains alive in the United States and has been found by the Supreme Court not to violate due process protections.

IV. DUE PROCESS LIMITATIONS ON THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

As the above discussion indicates, U.S. objections to certain jurisdictional bases in a Hague Convention will many times not represent a

198. See, e.g., Chaiken v. VV Publishing Corp., 119 F.3d 1018 (2d Cir. 1997) (holding that even though the Massachusetts long-arm statute permitted jurisdiction, the limitations of the Fourteenth Amendment Due Process Clause did not), cert. denied, 118 S. Ct. 1169 (1998).
199. See infra notes 202-03 and accompanying text.
200. See Schlosser Report, supra note 175, at 100 (noting that this jurisdictional basis is rarely used in Scotland, where the courts usually require presence for at least forty days, or the presence of property (in addition to service within Scotland) as an accompanying condition).
201. See supra note 18.
judgment that a given basis is "wrong" or "bad," but rather a determination that the Due Process Clauses of the U.S. Constitution protect a defendant from being subject to such a basis of jurisdiction. In this regard, the negotiators for the United States have no discretion. Unlike other countries, in which jurisdiction is a statutory matter dependent upon the bases listed in a code of civil procedure, in the United States, jurisdiction is a constitutional issue. While a statute may be amended by treaty (or implementing legislation may incorporate appropriate statutory amendments),²⁰³ the U.S. Constitution is the supreme law within the U.S. legal system and is not subject to change by treaty or statute.²⁰⁴

It is also important to understand that the Due Process Clauses do not require the assumption of jurisdiction in all instances in which a defendant's due process rights would not be offended. They only prohibit the exercise of jurisdiction when those rights would be offended. Thus, while it is not possible for the United States to agree to provisions that would go beyond the protections of due process, this does not mean that the United States must agree only to provisions that go to the limits of due process. In other words, the United States can agree to limitations on jurisdiction within (but not in excess of) the due process limits. While a treaty may not offend the U.S. Constitution, it may establish rules that will result in changes that will limit the exercise of state and federal statutes (i.e., it cannot expand jurisdiction beyond due process limits, but it can restrict the exercise of jurisdiction where due process is not being denied).

²⁰³ The U.S. Constitution provides that treaties, and "Laws . . . made in Pursuance" of the Constitution, "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It has long been recognized that Congress may enact a statute superseding a prior treaty. See Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799), aff'd on other grounds, 67 U.S. (2 Black) 481 (1862). Although it is difficult to find cases explicitly holding that a treaty may displace a prior act of Congress, Supreme Court dicta clearly indicate this to be so. See, e.g., The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21 (1870).

²⁰⁴ The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. Id. at 621 (footnotes omitted).

²⁰⁴ Reid v. Covert, 354 U.S. 1, 16-17 (1957).

[No agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. . . .

. . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined. Id.; see also Louis Henkin, Foreign Affairs and the United States Constitution 185-189 (2d ed. 1996).
A. First Summary and Conclusions: Limitations on the United States as a Result of the Due Process Clauses in the U.S. Constitution

Analysis of in personam jurisdiction by a U.S. court is a two-step process. First the court determines whether there is jurisdiction under the appropriate long-arm statute. Next, if there is such jurisdiction, the court determines whether the exercise of that jurisdiction in the particular case is within the limits of due process (i.e., whether it affects the defendant in a manner that denies due process rights).

It is not a problem in the U.S. constitutional structure to have in existence state long-arm statutes that might authorize jurisdiction beyond the limits of the Due Process Clause. In any case in which the statute is applied, the second-step due process analysis will limit the exercise of jurisdiction in order to prevent the statute's application in a manner that would violate due process. The language of most long-arm statutes is not the language of due process analysis. It is language similar to the specific jurisdictional provisions of the Brussels Convention. While Brussels Convention-type language in a state long-arm statute is tolerable because it can be negated through due process analysis in the courts, it would be a different matter to have the same language in a multilateral treaty to which the U.S. is a party. This results from the dualist nature of the U.S. legal system in regard to international law.\textsuperscript{205} Having such language in a jurisdiction and judgments treaty applicable in the United States would create (at least) two problems:

1) First, if jurisdiction existed under the treaty, but a second-step due process analysis would determine that the exercise of such jurisdiction was constitutionally impermissible, then there would be divergence

\textsuperscript{205}. See, e.g., Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

As the Supreme Court said in the \textit{Head Money Cases}, a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations . . . [but] with all this the judicial courts have nothing to do and can give no redress." . . . This conclusion reflects the United States' adoption of a partly "dualist"—rather than strictly "monist"—view of international and domestic law. "[D]ualists view international law as a discrete legal system [which] . . . operates wholly on an inter-nation plane." . . .

It is uncertain whether either our republican form of government or our constitution's supremacy clause requires this subordination of treaties to inconsistent domestic statutes. . . . Nevertheless, the "[Supreme] Court's jurisprudence about treaties inevitably reflects certain assumptions about the relation between international law and United States law . . ." . . .

Given that dualist jurisprudence, we cannot find—as a matter of \textit{domestic} law—that congressional enactments violate prior treaties.

\textit{Id.} at 937 (citations omitted).
between the domestic law result and U.S. treaty obligations. Further, such a result might confuse the ability of the parties to find a non-U.S. court in which jurisdiction was appropriate (particularly if the applicable basis of jurisdiction under the convention was exclusive).

2) The second problem relates to the treaty obligation to recognize and enforce judgments from foreign courts based on acceptable bases of jurisdiction as provided in the treaty. If a non-U.S. court was to take jurisdiction over a defendant pursuant to a Brussels-type provision (even one that might be found in a long-arm statute in a U.S. state) that allowed for the possibility of jurisdiction in violation of the due process rights of the defendant, and the resulting judgment was brought to the U.S. for recognition, then the U.S. court might be required to recognize the judgment under international law (i.e., the treaty), but prohibited from recognizing the judgment under the U.S. Constitution. The Constitution would prevail, again leaving the United States in breach of its treaty obligations.

Thus, the United States cannot become a party to a multilateral treaty with jurisdictional provisions that might allow the exercise of jurisdiction beyond the limits of due process. This necessarily sets up much more difficult drafting problems for the treaty negotiators than for legislators in U.S. states who are drafting a long-arm statute. While this may seem ironic, it is what we have to live with.

206. Whether all due process rights under the Fourteenth Amendment are applicable to aliens in the same manner as to citizens is not entirely clear. The following is a representative discussion of this topic found in a case considering the application of the Wisconsin long-arm statute to a Greek defendant:

[The plaintiff] does not argue that [the defendant], as an alien, has fewer rights to challenge the long-arm statute than a nonresident American firm would have. Countless cases assume that foreign companies have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction. . . . The assumption has never to our knowledge actually been examined, but it probably is too solidly entrenched to be questioned at this late date . . . . Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir. 1985) (citations omitted). Whether a U.S. court, in recognition proceedings dealing with a foreign judgment, could analyze jurisdiction in the foreign court's original proceedings in a manner other than through a due process analysis is not clear. Most cases to date have very clearly applied the due process analysis of International Shoe and its progeny to determine whether the foreign court whose judgment is being presented had in personam jurisdiction over the defendant for recognition purposes. See Ronald A. Brand, Enforcing Foreign Judgments in the United States and United States Judgments Abroad 13-15 (1992). No clear example seems to exist of a claim that such a judgment against a foreign defendant should receive any less probing an analysis than if it were against a U.S. citizen or corporate national.
B. Second Summary and Conclusions: Limitations on Other States as a Result of the Due Process Clauses in the U.S. Constitution

Some of the specific bases of jurisdiction contained in the Brussels and Lugano Conventions, as well as others found in the various applicable codes of potential contracting states, make a violation of U.S. concepts of due process possible (even if not probable) in cases brought under these provisions. It may be that due process rights of the defendant will be satisfied in the vast majority of cases brought under such provisions, and that U.S. recognition of the resulting judgments is possible now under a non-treaty procedure. The mere possibility of a due process violation, however, is sufficient to prevent the United States from being constitutionally able to be a party to a convention that would allow the continued exercise of such jurisdiction if there is an obligation under the treaty to recognize the resulting judgment.

The problem faced by the United States in the Hague negotiations creates a corresponding problem for other states involved. An example of this problem is provided by the analysis of Article 5(3) of the Brussels Convention above. As that analysis indicates, U.S. agreement to include such a provision in a convention as a required basis would set up possible due process violations in the exercise of jurisdiction in U.S. courts and in the recognition of judgments resulting from such jurisdiction exercised by foreign courts. At the same time, however, Brussels Convention states may wish to retain such a jurisdictional basis (and other jurisdictional bases that would create similar due process problems for the United States) in the Brussels Convention, or at least in their national laws.

Only three options have been offered for dealing with bases of jurisdiction that create this problem. They are:

(1) a Hague Convention in which such a basis of jurisdiction is a required basis (i.e., a basis upon which assumption of jurisdiction by a national court is allowed under the convention);

(2) a Hague Convention in which such a basis of jurisdiction is a prohibited basis (i.e., a basis upon which assumption of jurisdiction by a national court is not allowed); or

(3) a Hague Convention in which such a basis of jurisdiction is a permitted basis (i.e., a basis upon which assumption of jurisdiction by a national court is allowed, but to which the obligation of recognition does not attach, and recognition is possible under non-convention rules).

207. See supra notes 163-73 and accompanying text.
As the discussion in this paper demonstrates, the United States could not be a party to a convention under the first option, but could be a party to a convention resulting from the second or third option. Brussels Convention states, and other states wanting to retain a basis of jurisdiction that creates due process concerns for the United States, will want to avoid the second option. Thus, a convention carrying out the third option appears to be the only mutually acceptable approach. The only alternative proposed to date that would allow such permitted bases of jurisdiction for which there is no mandatory obligation of recognition in other contracting states is the mixed convention.208


A mixed convention is a hybrid form of the traditional “single” and “double” conventions. Single conventions, like the earlier Hague Conventions, deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment—thus, jurisdiction of the court issuing a judgment is considered “indirectly” by the second court in deciding whether to recognize the judgment of the issuing court. See *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol*, Feb. 1, 1971, 1144 U.N.T.S. 249, reprinted in 15 AM. J. COMP. L. 362 (1967); *Convention on the Recognition of Divorces and Legal Separations*, June 1, 1970, 978 U.N.T.S. 393, reprinted in 8 I.L.M. 31. Double conventions, like Brussels and Lugano, provide direct jurisdiction rules applicable in the court in which the case is first brought—thus addressing the matter from the outset and preempting the need for indirect consideration of the issuing court’s jurisdiction by the court asked to recognize the resulting judgment.

Under the mixed convention approach, there would exist a list of required bases of jurisdiction and a list of prohibited bases of jurisdiction. All contracting states would be compelled to offer jurisdiction founded on required bases, and any resulting judgment would be entitled to recognition and enforcement in other contracting states. Since courts would not take jurisdiction on bases found in the “prohibited” list, only limited exceptions to recognition would apply. Any jurisdictional basis not included on one of the two lists would be permitted, but subject to review in the recognizing court in the manner applicable absent a treaty.