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What Does Due Process Have To Do With Jurisdiction?

Jay Conison

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I. INTRODUCTION

The law of personal jurisdiction is an established part of constitutional law. For about a century, the United States Supreme Court has reviewed state court assertions of jurisdiction[1] over non-residents for compliance with the Fourteenth Amendment Due Process Clause.[2] For about half that time, since the Supreme Court's decision in *International Shoe Co. v. Washington*,[3] the basic test for compliance has been whether the non-resident defendant has contacts with the forum state such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[4] Although the test has been phrased in varying ways with varying emphases, its grounding in the Fourteenth Amendment has rarely been questioned.[5]

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1. Throughout this Article, "jurisdiction" means "personal jurisdiction" unless stated otherwise. This Article is concerned with personal jurisdiction in state court cases and in those federal court cases that require adherence to the jurisdictional standards governing state courts.

2. *See* Riverside & Dan River Cotton Mills, Inc. v. Menefee, 237 U.S. 189 (1915); *see also* Pennoyer v. Neff, 95 U.S. 714 (1877).

3. 326 U.S. 310 (1945).

4. *Id.* at 316.

5. For expressions of doubt to varying degrees about the test's Fourteenth Amendment grounding, see State *ex rel.* White Lumber Sales, Inc. v. Sulmonetti, 448 P.2d 571, 577 (Or. 1968) (O'Connell, J., dissenting); Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again* 24 U.C. DAVIS L. REV. 19 (1990); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit Clause and Due Process Clauses* (pt. 2), 14 CREIGHTON L. REV. 735 (1981).

Yet there are reasons it should. The law of due process is usually thought to have two components: procedural due process and substantive due process. The constitutional law of jurisdiction resembles neither. It differs from the law of procedural due process, which ensures fairness in the decision-making procedures used by judicial, administrative and other governmental bodies. Procedural due process requires that before any person is deprived of life, liberty or property through an official proceeding, he be given notice and a meaningful opportunity to protect his interests.[6] By contrast, the law of jurisdiction is not concerned with notice and the opportunity to be heard.[7] Rather, its stated concerns are the power of a court to determine a defendant's obligations and the propriety of the court's doing so.[8]

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6. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

7. Because methods for asserting jurisdiction, such as service of process, also commonly function as methods for giving notice of suit, the assertion of jurisdiction may generate questions about the adequacy of notice. However, issues of jurisdiction and of notice are distinct. *See* Frank R. Lacy, *Service of Summons and the Resurgence of the Power Myth*, 71 OR. L. REV. 319, 344-45 (1992). Notice of the commencement of judicial proceedings is a genuine concern of the law of procedural due process, *see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985); *Mullane*, 339 U.S. at 313-20; and the standards for the validity of such notice differ from the standards for the validity of the exercise of jurisdiction.

8. A thought experiment may help one appreciate the difference between jurisdictional due process and procedural due process. Suppose that State *X* enacts a statute providing that any resident of any state may be sued in its courts. Assume that the statute also provides that when a resident of another state is named as a defendant: (a) the defendant shall be provided with a copy of the summons and complaint through personal service or first class mail; (b) if the defendant fails to appear and defend, a representative shall be appointed and provided with an attorney, at the state's cost, to defend the suit on behalf of the non-appearing defendant; and (c) procedural safeguards, modeled on class-action rules, are instituted to ensure that the defendant's interests are adequately protected. The statute fully provides the defendant with notice and hearing, and thus meets procedural due process concerns. *Cf.* Hansberry v. Lee, 311 U.S. 32, 42-43 (1940) (absent class member may be bound by judgment if he is adequately represented and his interests are fairly protected). However, the statute likely would be held unconsti-

The law of jurisdiction also differs from the law of substantive due process, which prevents excessive government encroachment on fundamental rights and interests. There is no identifiable, fundamental right threatened by exercises of jurisdiction.[9] Fundamental rights protected by the Due Process Clause are generally found in the first eight amendments to the Constitution or else by implication from its other parts. Yet the Constitution betrays no concern, express or implied, to protect individuals from having to defend lawsuits in states where they do not live. Quite the contrary. The Constitution's Article III grant of diversity jurisdiction presumes that individuals will litigate, both as plaintiffs and as defendants, away from their homes, and facilitates that litigation by providing a neutral forum. When the Supreme Court discusses the supposed right protected by the constitutional law of jurisdiction, it invariably speaks in circles. For example, it refers to a person's "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"[10] Since the presence or absence of "meaningful contacts" can be defined only by reference to the right or interest invaded, this characterization lacks any substantive content.

Thus there is good reason to ask: In what respect is the law of personal jurisdiction a due process jurisprudence? That is the question this Article pursues. The answer has two parts.

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tutional with respect to those defendants lacking minimum contacts with State *X*. *Cf. Phillips Petroleum*, 472 U.S. at 812 (requiring that absent plaintiff class members who have no minimum contacts with state be given the right to "opt out").

9. Moreover, unlike the due process law of fundamental rights, *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-3 to -4, at 1308-14 (2d ed. 1988), the law of jurisdiction contains no presumption against the legitimacy of governmental encroachment. For example, the Supreme Court has held that "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985). The clear historic trend has been to expand the permissible scope of state court jurisdiction.

10. *Burger King*, 471 U.S. at 471-72 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

First, the law of jurisdiction is anachronistic due process jurisprudence. It is a body of law that is based on doctrines of natural justice and natural rights, and that rests on assumptions about the Supreme Court's role in protecting those rights, all inherited from the regimes of economic due process and general common law. These doctrines and assumptions were repudiated by the Court around the time of its *International Shoe* decision. It is an irony of constitutional history that at the time the Supreme Court was renouncing any general responsibility to protect extra-constitutional rights and to oversee state policy-making, it was consolidating that responsibility in the particular context of jurisdiction.

Second, the law of jurisdiction is spurious due process jurisprudence. It was constitutionalized without any serious analysis: a customary law based on state practice was simply replaced with a federal law based on *a priori* dictates of reasonableness and natural right having little real content. The cases through which the law was transformed were shallowly reasoned and conceptually confused. The legacy is a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined.

This Article shows that there is good reason to end the current approach to jurisdiction law. The argument proceeds as follows. First, the Article reviews some basic features of early nineteenth-century American jurisprudence, in particular its natural-law orientation (Section II), and then examines the way in which the pre-constitutional law of jurisdiction fits into that framework (Section III). The Article next traces the developments in both the Supreme Court's role and its jurisprudence that facilitated changes in the framework for the law of jurisdiction (Section IV). Those changes ultimately led to the constitutionalization of the law of service of process (Section V) and a parallel development in the law of jurisdiction over corporations (Section VI). In time, the two lines of development merged in *International Shoe* to produce a fully constitutional law of jurisdiction (Section VII). That constitutional law, however, is a hodge-podge whose status as constitutional law has inhibited principled development (Section VIII.A). Finally, the Article suggests ways in which a more principled, non-due process law of jurisdiction can be allowed to develop (Section

VIII.B).

II. THE CHARACTER OF EARLY NINETEENTH-CENTURY COMMON LAW

In order to understand the present law of jurisdiction, one must appreciate what that law might have been. To do so, one must comprehend its character at the beginning of its modern development.

The modern law of jurisdiction began to take form in the first half of the nineteenth century. Unfortunately, it is today difficult to understand early jurisdiction law because the prevailing conceptions of law in that period differ significantly from today's conceptions. To make full sense of early jurisdiction law, one must appreciate some distinctive features of early nineteenth-century common law in general. One must also understand that era's views on the nature of law and the sources of its validity. While a complete explanation of these matters would be a massive task, for purposes of this Article only a brief account is required.

A. Common Law and Natural Law

In the early part of the nineteenth century, law was understood mainly as common law, since it had developed largely through judicial decisions. Yet discourse and argument about "common law" was often muddled by the term's sundry interpretations. For example, its meaning ranged from the highly specific—referring to the law developed in certain courts of England—to the most abstract—referring to a "methodology by which judges . . . gradually adapted principles to new contexts and conditions."[11] One use, however, appears to have been primary: common law as *jus non scriptum*,[12] a body of law

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11. G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 128 (1988).

12. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *63-64:

> [A]t present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to

that rests on fundamental principles[13] and whose rules lack settled formulation.[14] This core understanding of common law long persisted. In 1903, Roscoe Pound, then Commissioner of the Nebraska Supreme Court, restated the prevailing view in words that might have been used a century before:

> The theory of our system [of common law] is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. We may look to American as well as English books, and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law. They are only evidence of law.[15]

This was a natural-law outlook. "Natural law," like "common law," is a term with a cluster of related meanings. Its foundation, however, rests on a firm belief that not all law is merely conventional—that some may be objectively right.[16] The

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> us from the times of highest antiquity. However I therefore style these parts of our law *leges non scripte*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

13. *See generally* William P. LaPiana, Swift v. Tyson *and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771 (1986).

14. 1 BLACKSTONE, *supra* note 12, at *70-71; *see* A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 77, 91-94 (A.W.B. Simpson ed., 1973); Karl N. Llewellyn, *One "Realist's" View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3, 7 (1939).

15. Williams v. Miles, 94 N.W. 705, 708 (Neb. 1903).

16. This recognition traces back at least to Aristotle. *See* ARISTOTLE, NICOMACHEAN ETHICS bk. V, ch. 7, at 131-33 (Martin Ostwald trans., 1962). The term "natural" does not mean "innate." Rather, it refers "to those rules which can be known to be correct and binding . . . in virtue of their own nature; rules that are 'natural' in this sense contrast with the arbitrary dictates which those in power may happen to lay down." FRANZ BRENTANO, THE ORIGIN OF OUR KNOWLEDGE OF RIGHT AND

source of objectivity is the law behind law, which, when grasped, can guide the correct decision of a case. A natural-law outlook involves a belief that the legal rules of a particular time are governed by, and are subordinate to, more fundamental principles. Such priority of principle arguably is seen in courts' frequent reliance on notions of justice or reasonableness where no existing rules apply.[17] In addition, this priority is arguably evident in those areas of law, e.g., negligence and restitution,[18] where standards are flexible and designed to do justice in individual cases, even at the expense of rules to guide conduct.[19]

The central philosophical problem for natural-law views is epistemological. How does one know what the objectively valid principles are? How does one know what the law should be? The traditional response, and an essential part of most natural-law jurisprudence, is that what is or should be law can be determined through rational means.[20] The guiding standards for law are said to be ones of reasonableness and morality—standards that ordinary human beings can discover and correctly apply. According to some natural-law theories, while rules validated by fundamental principle may change with

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WRONG 4 (Roderick M. Chisolm & Elizabeth H. Schneewind trans., 1969).

17. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14-46 (1977); Frederick Pollock, *The Expansion of the Common Law*, 4 COLUM. L. REV. 171, 188-89 (1904).

18. *See* Frederick Pollock, *A History of the Law of Nature: A Preliminary Study (Second Article)*, 2 COLUM. L. REV. 131, 135-36 (1902).

19.

> [W]hat I think is not to be tolerated in any system of law, is actual *injustice*: it is in vain to say that the law is so established and that it is better that it should be certain than that it should be just; I answer that no laws can be certain that are not founded on the eternal and immutable principles of right and wrong . . . .

PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES xvi (photo reprint 1972) (Philadelphia, Abraham Small 1824).

20. *See generally* John Dickinson, *The Law Behind Law*, 29 COLUM. L. REV. 113 (1929); Charles Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617 (1915); John W. Salmond, *The Law of Nature*, 11 L. Q. REV. 121 (1895); *see also* 1 BLACKSTONE, *supra* note 12, at *41.

time and societal condition,[21] there is a rational basis for identifying what is proper law at any given juncture.

The view that law can be determined rationally has a corollary: that law is a rational, ongoing process, rather than a determinate whole. Specifically, law is seen as a process of striving for what is reasonable and just.[22] On the one hand, such an outlook may have the great practical virtue that emphasis on law's striving can unleash its progressive and liberalizing features,[23] particularly in eras of social change and innovation.[24] On the other hand, it presents a danger in that an emphasis on the ideal, rather than on the process, may lead to rejection of laws that fail to meet that high standard. A natural-law perspective can thereby serve as a force for legal fixity.[25] It is often said that the effect of the natural-law outlook was liberalizing in the early nineteenth century, and conservative in the latter half.[26]

B. Natural-law Concepts in Early Nineteenth-century Law

The natural-law approach to common law involved more than a vague belief in underlying principles. Specific sources of principle and objectivity were identified and often invoked. There were three such sources: natural justice, custom, and

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21. *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 113 (1940); Morris R. Cohen, *Jus Naturale Redivivum*, 25 PHIL. REV. 761, 772-73 (1916); Llewellyn, *supra* note 14, at 3; B.F. Wright, Jr., *American Interpretations of Natural Law*, 20 AM. POL. SCI. REV. 524, 545 (1926).

22. Llewellyn, *supra* note 14, at 3; Roscoe Pound, *The Theory of Judicial Decision* (pt. 1), 36 HARV. L. REV. 641, 651-60 (1923).

23. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 608 (1911); *see* DU PONCEAU, *supra* note 19, at xxv ("The common law contains within itself almost every thing that is requisite to raise it to the highest degree of perfection."). *Cf.* FULLER, *supra* note 21, at 110 ("The illusion characteristic of natural law is the belief that there is no limit to what human reason can accomplish in regulating the relations of men in society.").

24. On the influence of natural-law theories on legal development at the American frontier, see B.F. Wright, Jr., *Natural Law in American Political Theory*, 4 SW. POL. & SOC. SCI. Q. 202, 206-10 (1923).

25. *Id.* at 212-15.

26. *See* CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 212, 212, 216, 219-20 (1930); Roscoe Pound, *The Theory of Judicial Decision* (pt. 2), 36 HARV. L. REV. 802, 802 (1923).

natural rights. Although they were not always distinguished clearly, they had different characteristics and served different aspects of law.

1. Principles of Natural Justice

Throughout the nineteenth century, courts appealed to principles of natural justice to help decide cases. Both courts and scholars treated these principles as binding truths of social order. As Story explained: "In the very formation of society, the principles of natural justice, and the obligations of good faith, must have been recognized before any common legislature was acknowledged."[27] Among the principles were maxims such as: a person is entitled to the fruit of his own labor;[28] for every wrong there is a remedy;[29] promises should be kept;[30] and no one should take advantage of his own wrong.[31] These principles are familiar, as even today courts invoke them. However, courts now might describe them as matters of "public policy,"[32] rather than of natural justice.

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27. His explanation continued:

> Debts were contracted, obligations created, property, especially personal property, acquired, and lands cultivated, before any positive rules were fixed, as to the rights of possession and enjoyment growing out of them. The first rudiments of jurisprudence resulted from general consent or acquiescence; and when legislation began to act upon it, it was rather to confirm, alter, or add to, than to supersede, the primitive principles adopted into it.

Joseph Story, *Law, Legislation and Codes*, *in* ENCYCLOPEDIA AMERICANA app. VII, at 576-92 (F. Lieber ed., 1831), *reprinted in* JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION app. III at 363 (1971).

28. Atchison v. Peterson, 87 U.S. 507, 512-13 (1874).

29. Cutting v. Seabury, 6 F. Cas. 1083, 1085 (D.C. Mass. 1860) (No. 3521).

30. Magee v. McManus, 12 P. 451, 452 (Cal. 1886).

31. The Brutus, 4 F. Cas. 490, 498 (C.C.D. Mass. 1815) (No. 2060).

32. *E.g.*, Black v. TIC Inv. Corp., 900 F.2d 112, 114 (7th Cir. 1990) (estoppel principles apply in ERISA actions as a matter of "public policy"). Nevertheless, natural justice is invoked by courts even today. Some very recent examples include: Lee v. Delta Air Lines, Inc., 797 F. Supp. 1362, 1369 (N.D. Tex. 1992) (applying the law of another state which limited damage remedy would not violate natural justice); Brooks v. Resolution Trust Corp., 599 So. 2d 1163, 1165-66 (Ala. 1992) (purpose of subrogation is to "effect the administration of natural justice between all

For common law, natural justice was not only a source of useful maxims; it provided a basic and adaptable norm. Common law is pervaded by the notion of reasonableness and, as Frederick Pollock emphasized, common law's reasonableness is natural law's right reason with a more practical-sounding name.[33] The common-law standard of reasonableness indeed functions in a natural-law manner. As applied to particular cases, it is not so much a rule of decision as a guide for individualized justice. (This is the role it plays in the modern law of jurisdiction.) As applied to rules, reasonableness functions as a validating principle, a standard for either choosing among competing rules or assessing a proposed rule's legitimacy.[34]

2. Common Law and Custom

American legal theory inherited the English credo that common law is customary law. It also inherited the corollary belief that common law is "common" because the customs in question include ones that prevail throughout the entire land. The canonical description is Blackstone's:

> This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.[35]

The view of common law as customary was intertwined with the natural-law understanding.

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parties concerned"); Newhouse v. Citizens Sec. Mut. Ins. Co., 489 N.W.2d 639, 645 (Wis. Ct. App. 1992) (an intentional tortfeasor has no right of contribution since "contribution is founded on principles of equity and natural justice").

33. Pollock, *supra* note 17, at 187; Pollock, *supra* note 18, at 136.

34. Joseph Raz has pointed out that principles function not only to decide particular cases, but also to make new laws and to interpret and modify existing laws. Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 839-42 (1972).

35. 1 BLACKSTONE, *supra* note 12, at *67.

a. Custom as Rational Basis for Law

Custom is the regular, accepted conduct of a group of people. In the jurisprudence of the early nineteenth century (and before), custom was not merely a sociological phenomenon, but was the functional equivalent of natural justice. It was treated as an objective and rational basis for law.[36] A body of principles or precepts, or a method of resolving disputes, can constitute law only if it is binding. Natural justice was thought to be binding because it reflected the dictates of rationality. Custom was thought to be binding because of its long acceptance and the expectation that it would continue to be followed.[37]

Although custom originates and initially draws its normative force apart from any formal process of adjudication,[38] judicial decisions can formalize and assist the process of customary norm-making. It is natural for courts to draw on custom as norms for resolving disputes,[39] particularly when the law or

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36. *See* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1330 (1991): "For Westerners from the Dark Ages onward, custom was the fundamental legitimate source of rights. Custom formed the 'basic norm,' the fundamental source of legitimacy upon which 'legal reality,' the subjective understanding of the world as including rights, was founded. What was not customary, was not right."

37. FREDERICK POLLOCK, *Laws of Nature and Laws of Man*, *in* ESSAYS IN JURISPRUDENCE & ETHICS 42, 53-54 (London, MacMillan 1882); Simpson, *supra* note 14, at 86.

38. For recent examples of judicial recognition of bodies of customary common law, see Perry v. Sinderman, 408 U.S. 593, 602-03 (1972) (common law of a public university is protected by due process clause); Adickes v. S.H. Kress & Co., 398 U.S. 144, 166-67 (1970) (settled state practice as a basis for liability under 42 U.S.C. § 1983); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579-80 (1960) (common law of a particular shop is to be enforced in arbitration); Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 368 (1940) (longstanding practice may establish aspects of state tax law).

39. *See* Cohen, *supra* note 21, at 766:

> The domains of life . . . not provided for in the positive law are regulated by the customary rules of what people think fair, and thus constitute a natural or non-positive law. Where such rules, though non-legal, are fairly well established, judges will be bound by them (except in cases where their own sense of fairness asserts itself) . . . . [E]thical views as to what is fair and just are,

legal system is in early stages of development.[40] In so doing, the court must identify the governing custom, confirm that it should be followed, and then proceed to apply it. Through this process, the court reinforces the custom's validity.[41] As a result of this interaction of courts and custom, common law easily comes to be viewed as customary law.

Such a process makes interaction between custom and natural justice inevitable.[42] The interaction has two forms. First, a legal system for a complex society cannot possibly be based on custom alone. Since customs do not govern all human affairs and can provide only a small portion of the necessary rules,[43] gaps appear that courts must fill by appealing to the familiar standards of reasonableness and natural justice.[44] Second, even if custom as to a particular matter exists, it may conflict with other customs. In choosing which to uphold as law, courts appeal to reasonableness or other antecedent principles. Therefore, any supposedly customary system actually must be a mixed system, where the customary foundation is supplemented by reasonableness and other principles. The common law derived from England evolved as, and was widely recognized to be, just such a combined system of custom and natural justice.[45]

> and always have been, streaming into the law through all the human agencies that are connected with it, judges and jurists as well as legislature and public opinion. Indeed, the body of law could not long maintain itself if it did not conform in large measure to the prevailing sense of justice.

40. For a case where appeal to custom was required, see Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (federal statute requiring adverse mining claims to be determined by "local customs or rules of miners in the several mining districts").

41. *Cf.* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 104 (1971) (international treaties have a corresponding impact on the customary behavior of states).

42. *See* Pollock, *supra* note 18, at 132.

43. Pound, *supra* note 26, at 812.

44. Dickinson, *supra* note 20, at 125-41.

45. *See* 1 BLACKSTONE, *supra* note 12, at *77-78; Jesse Root, Introduction, *in* 1 Root ix-xv (Conn. 1789-93); *Customs and Origin of Customary Law*, 4 AM. JURIST & L. MAG. 28, 46-63 (1830). On the historic interaction between custom and reason in English common law, see Whitman, *supra* note 36, at 1354-61, 1363-65.

b. General Law

English common law was said to consist mainly of general law: "general" because it supposedly represented customs of England as a whole. In truth, England's general legal customs were national norms only because the common-law courts had worked to abolish local variations and to encourage and maintain national uniformity.[46] The generality of English common law depended on a court system with the power to promote and preserve such uniformity.

General law of this type was impossible in the United States. In contrast to England, the states—the localities with differing customs—were to a great extent sovereignties, only partially subject to central judicial authority. Federal courts had no power to eliminate state variations in the common law. In part for this reason, the Supreme Court repeatedly announced that "there can be no common law of the United States."[47]

Yet this rule had exceptions and commercial law, which consisted of the law merchant and maritime law, was the leading example. In the nineteenth century, commercial law was considered part of the law of nations,[48] having in fact developed from the practices of international traders and from methods and institutions for settling their disputes.[49] Its evolution was long independent of English and other national courts, and it achieved a large measure of uniformity without those courts' guidance. In England, commercial law ultimately was absorbed by the common law. But it became special, rather than general common law, because it was not the customary law of the entire realm. Rather, the law merchant was treated as a special body of customary law for merchants,[50] and mari-

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46. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 1), 42 HARV. L. REV. 149, 171 (1928).

47. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834).

48. Pollock, *supra* note 18, at 135.

49. On the evolution of the law merchant and maritime law and their integration into English common law, see GRANT GILMORE & CHARLES L. BLACK, JR., LAW OF ADMIRALTY 3-11 (2d ed. 1975); 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 60-154 (1966).

50. *See* Mandeville v. Riddle, 5 U.S. (1 Cranch) 290 (1803); 1 BLACKSTONE, *supra* note 12, at *75.

time law was treated as the special customary law of a particular court (the Admiralty).[51]

In the United States, commercial law had a different character. In contrast to England, the United States lacked a national common law to absorb it. Instead, because the United States was conceived as a collection of sovereigns, commercial law, understood as international law prevailing of its own force throughout the civilized world, seemed appropriate without change as an interstate law of the United States. It was in this respect that commercial law in the United States was "general": it was international, rather than "state" or "federal."[52] Thus, as Chief Justice Marshall explained, "[a] case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."[53]

This general law was a peculiarly American construct.[54] On the one hand, it was "general" in the English sense, because it was the customary law of the entire country. Unlike English general law, however, it was general—indeed, could be general—only because it was the customary law of the civilized world as a whole. In theory, there was nothing national about it.[55]

Non-positivist general law of this kind is not usually ac-

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51. 1 BLACKSTONE, *supra* note 12, at *83.

52. Charles A. Heckman, *The Relationship of* Swift v. Tyson *to the Status of Commercial Law in the Nineteenth Century and the Federal System*, 17 AM. J. LEGAL HIST. 246, 249-50 (1973); Stewart Jay, *Origins of Federal Common Law* (pt. 2), 133 U. PA. L. REV. 1231, 1278-79 (1985).

53. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545-46 (1828).

54. *See* Robert G. Street, *Is There a General Commercial Law Administered by the Courts of the United States Irrespective of the Laws of the Particular State in Which the Court is Held?*, 12 AM. L. REG. (n.s.) 473, 478 (1873).

55. With time, there was an increasing tendency to view general commercial law as a distinctively American law, the same from state to state, but not necessarily the same as in other nations. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1520-21 (1984). For detailed descriptions of the jurisprudential underpinnings of this general law, see Stewart Jay, *Origins of Federal Common Law* (pt. 1), 133 U. PA. L. REV. 1003 (1985); Jay, *supra* note 52.

knowledged to exist today. Hence, its character and status are likely to be unfamiliar. Yet, it was vitally important in the nineteenth century and, as we shall see, vital to the development of the modern law of jurisdiction. Its character can be appreciated by examining the Supreme Court's leading general law decision, *Swift v. Tyson*.[56]

Swift was a diversity case. The substantive issue was whether, under applicable law, satisfaction of a preexisting debt was value sufficient to make the holder of an instrument a holder in due course.[57] To resolve the issue, the Court first had to determine what law applied. The relevant choice of law principle was contained in the Rules of Decision Act, which specified that, except where the Constitution or other federal law otherwise required or provided, "the laws of the several states" should govern "in cases where they apply."[58] If state law were to apply, it would be New York law.[59]

To modern eyes, the proviso in the statute, that state laws should be chosen in "cases where they apply," seems tautologous. The statute appears to say only that, with certain exceptions, state laws apply when they apply.[60] But that is not how the *Swift* Court understood it. Rather, the Court, per Justice Story, read the statute against a background in which there were two possible choices for non-federal law in a diversity case: state law (or, as the Court referred to it, "local" law) or general law. The importance of the statute lay in what it did not say. For while it required federal courts in diversity cases to apply state law (what we would now call the positive law of the state) to matters governed by it, the statute did not require courts to apply state decisions on general law to matters governed by general law. Thus, said the Court:

> In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed, that the true interpretation of the [Rules of Decision Act] limited its

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56. 41 U.S. (16 Pet.) 1 (1842).

57. *Id.* at 15.

58. *Id.*

59. *Id.* at 10.

60. *See, e.g.*, Louise Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 867 (1989).

> application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation . . . .[61]

The Rules of Decision Act was not tautologous because the law prevailing in a state included both state law and general law. In the case at hand, the law of negotiable instruments in New York was general, not state, law: "the courts of New York do not found their decisions upon this point, upon any local statute, or positive, fixed, or ancient local usage; but they deduce the doctrine from the general principles of commercial law."[62] Thus, New York decisions did not have to be followed.

The Court's reading of the Rules of Decision Act explains the statement—puzzling to modern ears—that the Act's reference to "laws of the several states" does not include state judicial decisions. What the Court surely meant is that the phrase does not include state decisions on general law. The Court could not have meant to exclude all state court decisions, since it expressly counted the following as "laws of the several states": state court decisions construing statutes; "rights and titles to things having a permanent locality"—matters fixed by judicial decision; and "local customs having the force of laws"—which most likely meant customs enforced through judicial decisions.[63] On the other hand, exclusion of state court decisions

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61. *Swift*, 41 U.S. (16 Pet.) at 18-19.

62. *Id.* at 18; *see also* Joseph Story, An Address Delivered Before the Members of the Suffolk Bar at Their Anniversary (Sept. 4, 1821), *in* 1 AM. JURIST & L. MAG. 1, 15-16 (1829):

> The commercial law of the Atlantic states has indeed already attained to a very striking similarity in its elements . . . . If the law be differently administered, it is not, because there is any intention to deviate from the general doctrines of that law, but because the nature and extent of those doctrines have been differently understood.

63. Justice Story's other writings are inconsistent with any view that

on general-law matters is sensible, because such decisions cannot themselves be law: general law is made binding by general acceptance, rather than by any single court's decision.[64]

Hence *Swift* rests on a fundamental distinction between two types of law: local (or state) law and general law. Although the Court used the common-law terminology of "local" and "gener-

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judicial decisions are not law. In a popular encyclopedia article, he wrote that:

> When . . . in America and England, it is asked what the law is, we are accustomed to consider what it has been declared to be by the judicial department, as the true and final expositor. No one is at liberty to disregard its exposition. No one is deemed above or beyond its reach, as thus declared.

Story, *supra* note 27, at 358. Indeed, in the same article he emphasized the contribution of judicial decisions to certainty in the law:

> In countries where the common law prevails, it is deemed of infinite importance, that there should be a fixed and certain rule of decision, and that the rights and property of the whole community should not be delivered over to endless doubts and controversies . . . . All this (it seems) is different in the civil law countries. There, the celebrity of a particular jurist may introduce a decisive change in the rule, or at least in the administration, of the law; and even different schools of opinion may prevail in different ages. Precedents have not, as with us, a fixed operation and value; and judicial tribunals consider, that a prior decision governs only the particular case, without absolutely fixing the principles involved in it. The practice under the common law has been found to be very beneficial; and, experience having given it a sanction and value which supersede all theory and reasoning about it, it is not often that the matter is discussed upon abstract or philosophical views. But there are many grounds, which might be urged in support of the practice, which are capable of vindicating it in the most philosophical discussions.
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> . . . .
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> In the first place, the rule has the advantage of producing certainty as to rights, privileges, and property.

Id. at 358-59.

64. As the Court explained, on matters of general law:

> [T]he state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

Swift, 41 U.S. (16 Pet.) at 19.

al" for the distinction, its model was the distinction in international law between municipal law—the law of a sovereign state, binding only in that state—and public law—the law of nations, prevailing universally.[65] Commercial law, like general law, was international.[66] Hence commercial law was the same law no matter which court applied it, notwithstanding different conceptions of it by different courts.[67]

Swift also makes clear the basis of general commercial law in custom and reason. What is striking is the extent to which the Court relied, in analyzing the substantive issue, on considerations of commercial dealing and rational needs of commerce. After briefly noting that the rule it found controlling "is according to the known usual course of trade and business,"[68] it continued with a thoroughly rational, virtually instrumental justification:

> And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts . . . . What, indeed, upon [the opposite] doctrine would become of that large class of cases, where new notes are given by the same or other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable instruments for

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65. *Id.* at 18.

66. *See* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 2), 101 U. PA. L. REV. 792, 796-97 (1953).

67. *See Swift*, 41 U.S. (16 Pet.) at 19-20; *see also*, Stalker v. McDonald, 6 Hill 93, 95 (N.Y. 1843); Atkinson v. Brooks, 26 Vt. 569, 578 (1854). On the then-increasing need for uniformity in American commercial law and the influence of that need on the decision in *Swift*, see TONY A. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979).

68. *Swift*, 41 U.S. (16 Pet.) at 20.

pre-existing debts.[69]

To be sure, the Court also relied on precedent from several jurisdictions. But it did so largely to corroborate the conclusion it had reached on other grounds.

3. Natural Rights

The doctrine of natural rights was another natural-law feature of nineteenth-century law. It also was a doctrine that influenced the development of the modern law of jurisdiction. Natural rights were conceptually intertwined with natural justice and custom, yet differed from them in a basic respect. Natural justice and custom primarily supplied rules for essentially private disputes. Natural rights, by contrast, were understood as political rights, whose main role lay in disputes about what laws can legitimately be enacted and what executive action can be taken. Natural justice and custom reflect a concern with reasonableness, morality, and social need. Natural rights reflect a concern with legislative power and political legitimacy.

A theory of natural rights can take many forms.[70] Yet there exists a common core: the doctrine that individual human beings have rights that exist independently of any government's grant or express recognition. These rights can be thought to arise from a person's membership in a society or community, or even from rational human nature itself. Their practical importance is that governments have no general or presumptive authority to infringe them. They may be invoked to explain limitations on governmental power or to justify opposition to an assertedly illegitimate exercise of such power.

A popular (i.e., philosophically untechnical) natural rights theory prevailed in nineteenth-century America, the form of which was shaped by two additional doctrines. One was the theory of republican government. The other was the doctrine that fundamental rights are law.

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69. *Id.*

70. *See, e.g.*, RICHARD TUCK, NATURAL RIGHTS THEORIES (1979). On natural rights theories having special relevance to American constitutional and political theory, see A CULTURE OF RIGHTS (Michael J. Lacey & Knud Haakonssen eds., 1991).

The crux of the theory of republican government is that government results from free and politically equal individuals voluntarily ceding power over themselves—not to other individuals, but to society as a whole. The ceded power is exercised through the new institution of government, established for the sole and express purpose of securing protection of the individuals' natural rights.[71] That is the premise of the Declaration of Independence, specifically the "self-evident" truth "that all Men are created equal, and that they are endowed by their Creator with certain unalienable Rights . . . —That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed."[72] It also underlies the Preamble to the Constitution, which makes plain that it is the "People of the United States" who are establishing the government for their own benefit.[73]

This theory of governmental power and its relationship with natural rights has several important corollaries. To begin, the theory entails that legitimate government power cannot exceed what the people have conferred. Hence, a constitution is not a limitation on initially unbounded authority, but a memorial of a limited concession by sovereign individuals.[74] What is not conferred, the people presumptively retain. In principle, no express statement of rights is needed to limit governmental power, because any exercise must be justified by reference to power expressly conferred.[75] A written constitution with express protections for fundamental rights has the virtue of promoting certainty as to the protected rights. Yet the rights would be fundamental and beyond infringement even had they not been

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71. *See, e.g.*, CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES § 1 (St. Louis, F.H. Thomas Law Book Co. 1886).

72. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

73. In particular, "to establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." U.S. CONST. pmbl. *See also* THE FEDERALIST No. 2 (John Jay).

74. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

75. *See, e.g.*, *In re* Dorsey, 7 Port. 293, 369-78 (Ala. 1838) (Ormond, J.); THE FEDERALIST No. 84 (Alexander Hamilton).

included in the written constitution.[76]

This theory of inherent limits on government power, especially legislative power, is reflected in nineteenth-century judicial decisions, commonly in judicial assertions that not every act of a legislature is genuine law-making activity.[77] An early and leading statement is that of Justice Chase in *Calder v. Bull*:

> The nature, and ends of legislative power will limit the exercise of it . . . . There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[78]

The principle, in part, is one of separation of powers; a

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76. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810); Young v. McKenzie, 3 Ga. 31, 41-45 (1847); Bradshaw v. Rogers, 20 Johns. 103, 106 (N.Y. 1822); State Bank v. Cooper, 10 Tenn. (2 Yer.) 599, 603 (1831); *see generally* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914) [hereinafter Corwin, *Basic Doctrine*]; Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 394-404 (1929) [hereinafter Corwin, *Higher Law*]; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

77. *See* Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 646 (1829); *Fletcher*, 10 U.S. (6 Cranch) at 136; Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310-11 (1795); *accord, e.g.*, Ham v. McClaws, 1 S.C.L. (1 Bay) 93, 98 (1789); *see generally* Francis W. Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, 13 COLUM. L. REV. 37 (1913); Haines, *supra* note 20, at 628-31; Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583, 590-96 (1930). A similar distinction between genuine legislative activity and other activity of legislators continues to be important in the context of legislative immunities. *See* Hutchinson v. Proxmire, 443 U.S. 111 (1979); Tenney v. Brandhove, 341 U.S. 367 (1951).

78. Calder v. Ball, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.).

paradigmatic violation would be legislation retrospectively affecting an individual's rights. Legislation, by its nature, must be general and prospective. To enact general rules for the regulation of future conduct and controversies "is in its nature a legislative act; [but] if these rules interfere with the past or the present and do not look wholly to the future, they violate the definition of a law."[79] Thus it would transgress first principles for a legislature to grant a new trial in a pending or past case.[80]

This theory of limited government power does not automatically lead to a doctrine of judicial authority to remedy abuses and violations. Such authority was not accepted in England.[81] Blackstone, while praising English law for its preservation and protection of natural rights, nonetheless concluded that no court could prevent Parliament from enacting any law it pleased.[82] For the view to be tenable that courts have authority to enforce fundamental rights (whether in a written constitution or not) the second thesis is needed, that fundamental rights are law.[83]

The role of this additional premise is easy to understand. A corollary to the view of law as based on natural justice and custom is the view that the judicial role is one of "finding" and "declaring" existing law. This corollary in part reflects the seeming truism that courts cannot make law—i.e., create customs, invent new principles of reasonableness and justice, or enact positive laws. But it also emphasizes that law is that which courts declare. "When . . . in America and England it is asked what the law is," said Story, "we are accustomed to consider what it has been declared by the judicial department, as the final expositor."[84] Under this view of the judicial role, if

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79. Merrill v. Sherburne, 1 N.H. 199, 204 (1818).

80. *Id.*

81. Corwin, *Higher Law*, *supra* note 76, at 374-76; Pollock, *supra* note 17, at 181-82.

82. 1 BLACKSTONE, *supra* note 12, at *91.

83. For a fuller explanation of the factors contributing to the development of the American doctrine of judicial review, see CHARLES G. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 287-311 (1914).

84. Story, *supra* note 27, at 358.

natural rights and legislative limitations are law, courts by nature have the power and the duty to enforce them.[85] Precisely to justify the role of courts as ultimate arbiters of the Constitution, Story, in his *Commentaries on the Constitution of the United States*, insisted that the Constitution be understood as law and not as a mere voluntary compact or contract.[86]

One further consequence of the view of natural rights as law should be mentioned. Natural rights, unlike principles of natural justice, seemed to generate no epistemological problems. Said Justice Washington, it would be "more tedious than difficult to enumerate" those rights.[87] The reason is that the rights were thought to be found in English common law.[88] Blackstone had stated, and all seemed to agree, that the "absolute" rights of man are "the right of personal security, the right of personal liberty, and the right of private property."[89] Descriptions of natural rights in American commentaries and

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85. *See, e.g.*, Merrill v. Sherburne, 1 N.H. 199, 201 (1818) (citations omitted):

> It must be admitted that courts ought to decide, according "to the laws of the land," all cases, which are submitted to their examination. To do this, however, we must examine those laws. The constitution is one of them, and "is in fact, and must be regarded by the judges as a fundamental law."

See also, e.g., Goshen v. Stonington, 4 Conn. 209, 225 (1822); Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 8 (1833).

86. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 306-96, at 279-381 (Fred B. Rothman & Co. 1991) (1833).

87. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

88. *See, e.g.*, Young v. McKenzie, 3 Ga. 31, 41-45 (1847) (right that private property not be taken without compensation is fundamental right found in common law); *see also* 1 BLACKSTONE, *supra* note 12, at *125; *see generally* Corwin, *Basic Doctrine*, *supra* note 76, at 254; Corwin, *supra* note 46, at 170. Some historians have argued that, at the time of the Revolution and drafting of the Constitution, natural rights discourse was mere rhetoric, and that the rights sought to be vindicated and protected were the rights of Englishmen. "The truth is [that] there was very little substantive difference between natural rights and positive rights. To dissect a natural right was to find a British right and it was natural because the British possessed it." JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 95 (1986).

89. 1 BLACKSTONE, *supra* note 12, at *125.

case law usually were little more specific. Story, for example, was content to explain that:

> We call those rights natural, which belong to all mankind, and result from our very nature and condition; such are a man's right to his life, limbs, and liberty, to the produce of his personal labor, at least to the extent of his present wants, and to the use, in common with the rest of mankind, of air, light, water, and the common means of subsistence.[90]

Yet some courts and scholars did tend to be more detailed. Justice Washington was one, and his description of natural rights in *Corfield v. Coryell* was often quoted. There are rights, he said:

> which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .[91]

Particularity, though, had consequences. The more natural rights were described in detail as traditional rights found in common law, the more constitutional law could be treated as a

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90. Joseph Story, *Natural Law*, *in* ENCYCLOPEDIA AMERICANA 150-58 (F. Lieber ed., new ed. 1836), *reprinted in* MCCLELLAN, *supra* note 27, app. I, at 314.

91. *Corfield*, 6 F. Cas. at 551-52.

part of common law, and constitutional questions as common-law questions, to be settled by courts through common-law means.

III. NATURAL JUSTICE, GENERAL LAW AND JURISDICTION

Natural justice, natural rights, and general law formed the matrix within which nineteenth-century rules of jurisdiction and allied matters took shape. In this Section we examine three of those subjects: the requirement that there be notice of suit, the distinction between domestic and international rules of jurisdiction, and the relationship between jurisdiction and notice. The focus is on law in the first half of the nineteenth century. Later we trace how and why that law came to change.

A. Notice and Natural Justice

A judicial proceeding is invalid unless the person whose rights are affected has received notice and an opportunity to participate. This principle of natural justice was often invoked,[92] and courts explained it as an essential feature of adjudication. A judgment rendered without notice "deserves not the appellation of a judgment; it seems to be rather a silent and unnecessary act of the court."[93] As Justice Story observed:

> It is a rule, founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned . . . . If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence, as an arbitrary sovereign edict. It has none of the elements of a judicial

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92. "[I]t is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him." The Mary, 13 U.S. (9 Cranch) 126, 143 (1815) (Marshall, C.J.). *See also, e.g.*, Dearing v. Bank of Charleston, 5 Ga. 497, 516 (1848): "[A]t the door of every temple of the laws in this broad land, stands justice, with her preliminary requirement upon all administrators—'you shall condemn no man unheard.'"

93. Rogers v. Coleman, 3 Ky. (Hard.) 422, 425 (1808) (Trimble, J.).

> proceeding, and deserves not the respect of any foreign nation . . . . [U]pon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law; and it is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding.[94]

Today, the requirement of notice is a matter of procedural due process.[95] As such, it functions as a safeguard for individual rights. Yet, in the first half of the nineteenth century, the corresponding natural justice principle was seldom understood this way. In rare cases, a court might invoke it to overturn a judgment rendered by another court of the same state, which had dispensed with notice.[96] However, this requirement, unlike a natural right, did not restrain legislatures.[97] In fact, as one mid-century commentator concluded,

> If it is the will of the law-making power of a state that all manner of judgments should be rendered against non-residents and absentees upon constructive service of process . . .

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94. Bradstreet v. Neptune Ins. Co., 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839) (No. 1793). *Cf.* Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing that adjudication has an essential character).

95. Sometimes, though, it is identified as a principle of natural justice. Connecticut courts say that "[w]hile proceedings before zoning and planning boards and commissions are informal and conducted without regard to the strict rules of evidence . . . ; nevertheless, they cannot be so conducted as to violate the fundamental rules of natural justice." Palmisano v. Conservation Comm'n, 608 A.2d 100, 102 (Conn. App. Ct. 1992). *See also* Pizzola v. Planning & Zoning Comm'n, 355 A.2d 21, 24 (Conn. 1974). The requirements of natural justice appear to be those of due process.

96. For an apparent instance of this, see Webster v. Reid, 52 U.S. 459, 11 How. 437 (1850), in which the Supreme Court, exercising appellate jurisdiction over a case from the Iowa territorial courts, invalidated a judgment divesting parties of title to land. Notice of the proceedings had been given only by plainly ineffective publication, addressed to "the Owners of the Half-breed Lands lying in Lee County." *Webster*, 52 U.S. at 461, 11 How. at 438. For another possible example, see Jack, A Freedman v. Thompson, 41 Miss. 49 (1866).

97. *Cf.* Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466, 472 (1830) ("This principle is dictated by natural justice; and is only to be departed from in cases expressly excepted out of the general rule.").

> the courts [of the state] would not be justified in declaring it void as opposed to natural justice or the principles of international law.[98]

Yet the principle of notice was no idle wheel in the machinery of justice. In domestic law, it was used to interpret statutes: a construction that permitted judgments without notice was to be avoided.[99] But its main use was in the international law of judgment enforcement.[100] Here, notice was a prerequisite to a state's enforcement of another state's judgment. According to Justice Story:

> If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice. If they choose to proceed without . . . notice to the parties, or those, who represent them, without any hearing upon the facts, and without giving the party an opportunity to contest the charges, or to know, what in particular those charges are; it is but just, and conformable to the rights of other independent nations, to disregard such sen-

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98. Alexander Martin, *Actions Against Non-residents and Absentees*, 15 AM. L. REG. 1, 12 (1866). Professor Hazard concluded that state courts in the early nineteenth century were "churning out default judgments against unserved absent defendants, no doubt in continuing response to the felt need to provide local creditors and property claimants with final determinations against actually or allegedly departed debtors, partners, and kinfolk." Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 250. *Cf.* Oakley v. Aspinwall, 4 N.Y. 513, 518 (1851): "It is a first principle in the administration of justice, that no one shall be condemned . . . before he has had an opportunity to be heard in his defense . . . . [T]his principle is not always properly regarded in framing laws."

99. *E.g.*, *Oakley*, 4 N.Y. at 521, 525; *see also* Earle v. McVeigh, 91 U.S. 503, 508 (1875).

100. *See, e.g.*, Rogers v. Coleman, 3 Ky. (Hard.) 422, 425 (1808) ("[w]here . . . defendant has been condemned unheard, and without any other than a constructive notice . . . it would be too rigid and unjust to say that such cases were contemplated by the [C]onstitution"); Hall v. Williams, 23 Mass. (6 Pick.) 232, 240 (1828) (judgment rendered without notice unenforceable in another state, "for it is manifestly against first principles, that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defence").

> tences, as mere mockeries, and as in no just sense judicial proceedings. Such sentences ought to be deemed . . . to be mere arbitrary edicts, or substantial frauds.[101]

As a rule of international law, the notice requirement governed a state's dealings with other states, rather than its dealings with individuals. A judgment rendered without notice, while enforceable within the rendering state, was unenforceable outside.

However, this is not to say that state and federal law afforded no protection to individuals against proceedings without notice. The Due Process Clause of the Fifth Amendment and comparable clauses in state constitutions were construed as protecting individuals "from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."[102] Courts examined procedures newly devised by legislatures and tested them for compliance with the requisites of due process. The main criterion for compliance was whether the procedure conformed with "those settled usages and modes of proceeding existing in the common and statute law of England."[103] Since the common law's "settled usages" generally involved notice and opportunity for a hearing, individuals received some protection.[104]

However, the protection was weak. Due process, as a procedural requirement, was invoked mainly to demand regularity and even-handedness, rather than a specific procedure.[105] Thus, in his argument to the Supreme Court in *Trustees of Dartmouth College v. Woodward*, Daniel Webster explained due process in words later turned into canon: "By the law of the land [i.e., due process] is most clearly intended the general

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101. Bradstreet v. Neptune Ins. Co., 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839) (No. 1793).

102. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).

103. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1855); Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843); *see also, e.g.*, Vanzant v. Waddell, 10 Tenn. (2 Yer.) 260 (1829).

104. *See Vanzant*, 10 Tenn. (2 Yer.) at 264-65. On the scope and meaning of procedural due process before the enactment of the Fourteenth Amendment, see Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMM. 339 (1987).

105. *See* Whitten, *supra* note 5, at 795-98.

law; a law, which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial."[106] To the extent a due process clause was construed to impose specific requirements, they were primarily ones governing trial by jury. It is telling that Story and Kent, in their treatises on constitutional law, paid little attention to due process, treating it mainly as a guarantee of indictment and trial by jury in criminal prosecutions.[107]

Because notice was not a central demand of due process, courts allowed legislatures enormous discretion to choose the form of actual or purported notice. The New York Court of Appeals in *In re Empire City Bank* noted:

> We have not been referred to any adjudications, holding that no man's right of property can be affected by a judicial proceeding unless he have personal notice. It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon a purely *ex parte* proceeding, without a pretence of notice or any provision for defending, would be a violation of the constitution, and be void; but where the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and as opportunity is afforded to defend, I am of the opinion that the courts have not the power to pronounce the proceeding illegal.[108]

In practice, a legislature's choice of a method of notice would be respected unless the method was illusory.[109]

This lack of emphasis on notice in the due process context was but one aspect of an even more general lack of emphasis

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106. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819).

107. 3 STORY, *supra* note 86, § 1783 (1833); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 9-10 (Boston, Little, Brown & Co. 1827).

108. *In re* Empire City Bank, 18 N.Y. 199, 215 (1859).

109. Thus, the court in *Empire City Bank* recognized that:

> A case may be supposed where the reason for departing from the more safe rule of the common law [requiring personal notice] is so plainly frivolous, or the provision for notice is so clearly colorable and illusory, that the courts would be called upon to declare the enactment a fraud upon the constitution.

Id. at 216.

on procedure.[110] Under the due process rubric, courts' main concern was separation of powers—the concern addressed by the doctrine of natural rights.[111] The most important aspect of due process was thought to be a requirement that legislation be general and prospective, and that it not divest individuals of vested rights. According to Daniel Webster, "The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land."[112] On this basis, courts sometimes invalidated legislation that was not general or that was retrospective.[113] But they agreed that a general law "prescribing remedies and modes of redress to enforce existing liabilities, can certainly be constitutionally passed."[114] Prior to the latter part of the century, the Supreme Court never invalidated a congressional innovation in procedure under the Fifth Amendment, and few state courts invalidated procedures under corresponding state constitutional provisions.[115]

B. Jurisdiction and Comity

In the law of interstate judgment enforcement, a requirement as important as that of notice was the requirement that a court rendering judgment have jurisdiction over the person or thing affected. And, as was the case with notice, the requirement of jurisdiction had different meaning for domestic and for international law. Indeed, "jurisdiction" in the nineteenth century had two distinct meanings, one for domestic law, the oth-

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110. *See* Bird, *supra* note 77.

111. *See, e.g.*, Hoke v. Henderson, 15 N.C. (1 Dev.) 1, 13-16 (1833); *see generally* Howe, *supra* note 77, at 601-04; Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125 (1956).

112. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819).

113. *See* Mendelson, *supra* note 111, at 126-27.

114. Vanzant v. Wadell, 10 Tenn. (2 Yer.) 260, 271 (1829) (Catron, J.).

115. *See, e.g.*, Mason v. Messenger & May, 17 Iowa 261 (1865); New Orleans v. Cannon, 10 La. Ann. 764 (1855); Janes v. Reynolds' Adm'rs, 2 Tex. 250 (1847); *see generally* Eberle, *supra* note 104, at 346-59; Whitten, *supra* note 5, at 770-95.

er for international law.

1. Domestic and International Jurisdiction

In the domestic sense of the term, a court's jurisdiction was a matter of statute or state common-law rule. The lack of any statutory or common-law basis for a court to proceed against a person would render a judgment against him void under state law. Each state, as sovereign, was the sole judge of the validity of its courts' exercise of jurisdiction in this sense.[116]

By contrast, jurisdiction in the international sense was not a matter of any state's law. Rather, it was a matter of the law of conflicts, another part of general law. The general law of conflicts, like general commercial law, was a body of law that was applied by states without being the law of any of them.[117] Its jurisdiction rules helped determine whether a judgment entered in one state was effective in another.[118] The general-law rules and principles of jurisdiction did not supersede domestic rules of jurisdiction.[119] Rather, the two bodies of law addressed different problems.

Although the distinction between domestic and international jurisdiction has disappeared from the internal law of the United States, it was fundamental in the nineteenth century. It accounts for a striking feature of nineteenth-century law that is now hard to understand: a judgment might be enforceable in the rendering state, but unenforceable elsewhere because of lack of jurisdiction.[120] This difference in enforceability (like that based on notice, described above) resulted from the fact that enforceability in-state and out-of-state were governed by different bodies of law.

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116. Rose v. Himely, 8 U.S. (4 Cranch) 241, 276 (1808).

117. The Venus, 12 U.S. (8 Cranch) 253, 297 (1814); *see* Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 805-12 (1955).

118. *See, e.g.*, Bissell v. Briggs, 9 Mass. 462, 468 (1813); Steel v. Smith, 7 Watts & Serg. 447, 450 (Pa. 1844).

119. RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 68-78 (1977); Martin, *supra* note 98, at 12.

120. *E.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); Ewer v. Coffin, 55 Mass. (1 Cush.) 23 (1848); *Steel*, 7 Watts & Serg. at 450.

2. The Nature of the International Law of Jurisdiction

The international-law requirement of notice was a principle of natural justice. The international-law requirement of jurisdiction had a different status. To understand the latter, one must understand the character of nineteenth-century conflicts law.

a. Comity and Conflicts of Laws

Initially, the Constitution and federal statutes had limited influence on the legal relations among the American states. The Full Faith and Credit Clause[121] and its implementing act,[122] as well as the Privileges and Immunities Clause,[123] were virtually the only federal constraints on interstate legal relations. The bulk of the law of interstate relations was drawn from other sources. Because it seemed obvious to treat the United States as a collection of interrelated but sovereign states,[124] it was natural for courts to turn to the law of nations for appropriate principles and rules.[125] As a result, the international law of conflicts became part of the general law of the United States.

However, it was not only rules of conflicts that were incorporated into American jurisprudence, but theory as well. The

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121. U.S. CONST. art. IV, § 1.

122. Act of May 26, 1790, 1 Stat. 122 (1790). The current version of the act is codified at 28 U.S.C. § 1738 (1992).

123. U.S. CONST. art. IV, § 2.

124.

> The states being independent sovereignties, judgments recovered in the courts of one state would be *foreign judgments* in every other, but for that clause in the [C]onstitution of the United States which declares that "full faith and credit shall be given in each state to the acts, records and judicial proceedings of every other state."

Starbuck v. Murray, 5 Wend. 148, 154 (N.Y. Sup. Ct. 1830) (quoting U.S. CONST. art. IV, § 1).

125. *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 176 (1850); Steel v. Smith, 7 Watts & Serg. 447, 451 (Pa. 1844); *see generally* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26 (1952); Rheinstein, *supra* note 117. No developed body of English common law could supply jurisdictional rules and principles. Hazard, *supra* note 98, at 258.

theory adopted was first articulated by the Dutch judge and scholar, Ulrich Huber. In his short and popular exposition, *De Conflictu Legum*,[126] Huber advanced a theory of how the laws and transactions of one state, can have "force and effect" in another.

Most other scholars had identified categories of laws having supposedly intrinsic efficacy beyond the state. Huber, instead, took the position that no state's law had any intrinsic efficacy beyond the state. Central to his theory were two axioms about state authority: "(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond . . . . [and] (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof . . . ."[127]

Yet these axioms merely state the problem of interstate efficacy of law; they do not answer it. Huber's solution was that the efficacy of a state's law outside its own borders could result only from other states' treating the law as efficacious, and that states did so in accordance with intersovereign norms.[128] He explained that:

> [T]he solution of the problem must be derived . . . from convenience and the tacit consent of nations. Although the laws of one nation can have no force directly within another, yet nothing could be more inconvenient to commerce and international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.[129]

For Huber, comity was the source of interstate norms. By comity, he did not mean just mutual courtesy among states. Huber's comity was normative; it consisted of practices that facilitated commerce and attained the status of binding rules.

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126. For one translation and commentary, see Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1918). For another, see D.J. Llewellyn Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 64-78 (1937). We shall follow Lorenzen's translation in this Article.

127. Lorenzen, *supra* note 126, at 403.

128. *See* Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 25 (1966).

129. Lorenzen, *supra* note 126, at 407.

Thus, Huber's third, and most important, axiom was that: "(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or its subjects."[130]

Thus viewed, the law of conflicts is a body of customary law, analogous to common law as understood by nineteenth-century Americans. Moreover, it is a practical law, the rules of which are worked out by experience. It is this practical, rather than theoretical, view of the law of conflicts that may have been a significant factor in its appeal to American judges and scholars.[131]

Huber's theory influenced American law from the beginning. It appears to have entered English law in the mid-eighteenth century through Judge Mansfield,[132] and several early American decisions restate Huber's axioms without attribution. For example, in *Green v. Sarmiento*, an 1810 decision, Justice Washington stated as obvious truth that "[t]he laws of one country, can have in themselves no extraterritorial force, except so far as the comity of other nations may extend to give them effect."[133] Furthermore, a translation of *De Conflictu Legum* was appended to a report of a 1797 case by the Supreme Court reporter, A.J. Dallas.[134]

But it remained for Story, in his *Commentaries on the Conflict of Laws*, to systematize the American law of conflicts on the basis of three "general maxims" drawn substantially from

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130. *Id.*

131. On the influence of Huber in England and America, see Davies, *supra* note 126; James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73 (1990).

132. *See* Robinson v. Bland, 96 Eng. Rep. 141 (K.B. 1760); *see also* Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775) ("The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him.").

133. Green v. Sarmiento, 10 F. Cas. 1117, 1117 (C.C.D. Pa. 1810) (No. 5760). *See also* Miller v. Hall, 1 U.S. 229, 231-32, 1 Dall. 229, 232-33 (Pa. 1788); Blanchard v. Russell, 13 Mass. 1, 4, 6 (1816).

134. Emory v. Greenough, 3 U.S. (3 Dall.) 369 (1797). See also the reporter's note on conflicts of laws appended to Andrews v. Herriot, 4 Cow. 508, 510-31 (N.Y. Sup. Ct. 1825).

De Conflictu. Like Huber, Story began by clarifying the context for the problem of extra-state efficacy of laws. He, too, postulated that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory"[135] and that "no state or nation can, by its laws, directly affect, or bind property out of its territory, or persons not resident therein."[136] Continuing to follow Huber, he argued that the foundation for the law of conflicts must be comity and state practice.[137] Thus:

> The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done in return.[138]

Even more expressly than Huber, Story compared the law of conflicts to common law, understood as a body of custom and reason:

> There is, then, not only no impropriety in the use of the phrase "comity of nations," but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter . . . . It is not the comity of the courts, but the comity of the nation, which is administered, and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.[139]

Thus, the American understanding of conflicts law as general law, and the understanding of conflicts rules as rules based on state customs and practices, appeared to have firm theoretical grounding.

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135. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 18.I., at 19 (Boston, Hilliard, Gray & Co. 1834).

136. *Id.* § 20.II., at 21.

137. *Id.* § 33, at 33-34.

138. *Id.* § 35, at 34 (citation omitted).

139. *Id.* § 38, at 37 (citations omitted).

b. Comity and Jurisdiction

A corollary of the Story-Huber theory is that rules of judgment recognition are matters of custom and practice among sovereign states.[140] Just as no law has intrinsic efficacy outside the state, neither does a judgment, and comity must be invoked.[141] And because of the linkage between judgment enforcement and international jurisdiction, the latter, too, is a matter of custom and practice.[142] Ultimately, whether a court "could" or "could not" legitimately exercise jurisdiction in the international sense was a matter of how other states would treat the resulting judgment.

Case law reflected this understanding. Although courts agreed that they generally had jurisdiction only over persons and things within the state's territory,[143] they understood jurisdiction and judgment enforcement to be based ultimately on comity.[144] For example, the Georgia Supreme Court began an elaborate analysis of jurisdiction with the proposition that "by the general law, and by the comity of States, the citizen of a foreign State cannot be made a party to a suit in Georgia, so as to be estopped by a judgment against him, without his consent."[145]

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140. *Id.* §§ 540-55, at 451-67.

141. *Id.* § 540, at 452.

142. *Id.* § 542, at 453.

143. Picquet v. Swan, 19 F. Cas. 609, 611 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.); Dearing v. Bank of Charleston, 5 Ga. 497, 515 (1848); Smith v. McCutchen, 38 Mo. 415, 417 (1866).

144. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1850) ("That countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court, is the familiar rule; national comity is never thus extended."); Rose v. Himely, 8 U.S. (4 Cranch) 241, 276-77 (1808); *Picquet*, 19 F. Cas. at 611 (Story, J.); *Dearing*, 5 Ga. at 511; Hall v. Williams, 23 Mass. (6 Pick.) 232, 240 (1828); Bissell v. Briggs, 9 Mass. 462, 479 (1813) (Sewall, J., dissenting); *see* Martin, *supra* note 98, at 4-5 (principle limiting jurisdiction to persons and things in territory "has its source in the comity of nations"). *Cf.* Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co., 30 Barb. 159, 171 (N.Y. Sup. Ct. 1859) (declining jurisdiction as matter of comity).

145. *Dearing*, 5 Ga. at 505-06. In the case, the Georgia Supreme Court invalidated a judgment that had been rendered against a non-resident, over whom no state statute authorized the exercise of jurisdiction.

In order to appreciate later developments in the law, three points should be noted about this view of judgment enforcement and jurisdiction. First, scholarship tends to emphasize the territorial character of the era's jurisdiction law and to suggest that it was driven by *a priori* conceptions of sovereignty. This picture is far from accurate. Territoriality was a part of the jurisdictional structure, but it arguably was the lesser part since alone it provided no norms. The rules of international jurisdiction derived from state practices within a territorial framework.

Even the basic territorial rule, that courts can assert judicial power only over persons and things within their territory, stated a comity-based norm.[146] While it was rooted in a conception of sovereignty, sovereignty alone did not explain why it was a norm. In fact, the rule was not rigid—both scholarship and case law left room for extraterritorial assertions of authority. Many, if not most, states recognized the validity of divorce decrees obtained by a resident of the rendering state against a non-resident who had not been served with process in the state.[147] Still other cases suggested that a state's exercise of extraterritorial jurisdiction over its own citizens might be recognized as valid in other states.[148]

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146. *E.g.*, Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855); *D'Arcy*, 52 U.S. (11 How.) at 175-76; *Dearing*, 5 Ga. at 505, 515-17; Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N.J.L. 222, 232 (1853), *aff'd*, 25 N.J.L. 57 (1855); *see* Martin, *supra* note 98, at 5 (requirement of territoriality "has its source in the comity of nations").

147. *E.g.*, Thompson v. State, 28 Ala. 12 (1856); Harding v. Alden, 9 Me. 140 (1832); Burlen v. Shannon, 115 Mass. 438 (1874); Holmes v. Holmes, 57 Barb. 305 (N.Y. Sup. Ct. 1870); *see also* Beard v. Beard, 21 Ind. 321, 328 (1863); Martin, *supra* note 98, at 6 (divorce exception to territorial limitations on jurisdiction "is not acquiesced in by the best authorities"). In many cases, notice was personally served on the non-resident out of the state. *Harding*, 9 Me. at 141; *Burlen*, 115 Mass. at 447; *Holmes*, 57 Barb. at 305. These decrees against non-residents were enforceable only with respect to dissolution of marital status; a decree of alimony would not be recognized in other states.

148. Mills v. Duryee, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting) ("jurisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not . . . found within their limits"); *Rose*, 8 U.S. (4 Cranch) at 279 ("the legislation of every country is territorial; . . . beyond its own

Second, although interstate judgment enforcement was substantially a matter of general law, in the United States it was also a matter of federal law. Under pure international law, there could be many legitimate reasons for a court to refuse to enforce a foreign judgment—that the result was unjust, for example.[149] But the Full Faith and Credit Clause and its implementing statute were construed to limit the power of a state to refuse to enforce another state's judgment. Specifically, they barred all grounds for refusing enforcement except lack of jurisdiction in the international sense and fraud.[150] As a result, the American law of (international) jurisdiction and judgment enforcement was hybrid, a general law with a federal law background.

Third, because the law of international jurisdiction governed relations between states, an exercise of jurisdiction in violation of international norms violated the rights, if of anyone, of some other state.[151] The law of international jurisdiction did not deal specifically with individuals and individual rights, and there was very little suggestion that the extraterritorial assertion of jurisdiction violated the rights of the individual defendant.[152] The proper description of a non-resident's jurisdictional relationship with a state was that he was immune or exempt from the state's jurisdiction, not that he had any right to prevent its exercise.[153]

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territory, it can only affect its own subjects or citizens"); Sim v. Frank, 25 Ill. 125, 127-28 (1860); *Hall*, 23 Mass. (6 Pick.) at 240; STORY, *supra* note 135, §§ 21-23, at 22-24, § 540, at 451-52; Martin, *supra* note 98, at 7-8. For a later suggestion, see Knowles v. Gaslight & Coke Co., 86 U.S. (19 Wall.) 58, 61-62 (1873). For criticism of the practice of granting extraterritorial validity to judgments against residents absent from the state, without personal service of process, see Martin, *supra* note 98, at 7-10.

149. *See* STORY, *supra* note 135, §§ 597-608, at 499-508.

150. *D'Arcy*, 52 U.S. (11 How.) at 176; *Dearing*, 5 Ga. at 513; Bissell v. Briggs, 9 Mass. 462, 466-67 (1813).

151. Picquet v. Swan, 19 F. Cas. 609, 613 (C.C.D. Mass. 1828) (No. 11,134) (Story, J.); *Dearing*, 5 Ga. at 509, 511; Steel v. Smith, 7 Watts & Serg. 447, 448, 451 (Pa. 1844) (Gibson, C.J.).

152. A rare reference to individual rights in this context is found in *Bissell*, 9 Mass. at 479 (Sewall, J., dissenting).

153. *See* Warren Mfg. Co. v. Etna Ins. Co., 29 F. Cas. 294, 298 n.4 (C.C.D. Conn. 1837) (No. 17,206); *Piquet*, 19 F. Cas. at 612 ("personal

3. Jurisdiction and Notice

As previously explained, two principles of interstate judgment enforcement were that the court must have jurisdiction over the person to be affected and that notice of the proceeding must be given. It was not inevitable that these principles should be thought necessarily connected. That a person has been given notice of a proceeding does not entail that there is jurisdiction over him.[154] That a court has jurisdiction over a person or his property does not entail that he has been given notice. Yet the two principles were seen to be connected. The link between them was process.

English and American law, unlike continental law, made jurisdiction contingent on service of process—in particular, on personal delivery to the defendant. Process thereby fulfilled two functions: it provided notice to the defendant and it formally asserted the authority of the court. Hence the rule of general law that, for a judgment to be valid, the defendant must receive notice and be brought within the court's jurisdiction by personal service of process within the state.[155] A statute might authorize notice and the exercise of jurisdiction by other means,[156] but a judgment entered on such a basis risked having its validity limited to the rendering state.[157]

The conservatism of common-law courts led them to assume that notice of suit and the assertion of jurisdiction always had to form a package.[158] It was easy to forget that notice and the assertion of jurisdiction are separable,[159] and some very odd

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immunity"); *Dearing*, 5 Ga. at 510, 519 (foreign citizen is "not liable" to service of process, and could "waive his exemption from the jurisdiction").

154. *See Piquet*, 19 F. Cas. at 612; *Dearing*, 5 Ga. at 506, 517; Ewer v. Coffin, 55 Mass. (1 Cush.) 23, 28 (1848).

155. Galpin v. Page, 85 U.S. (18 Wall.) 350, 368-69 (1873); Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466, 472 (1830); *Dearing*, 5 Ga. at 516; Martin, *supra* note 98, at 6-7.

156. Harris v. Hardeman, 55 U.S. (14 How.) 333, 339-41 (1852); *Hollingsworth*, 29 U.S. (4 Pet.) at 472, 475.

157. *Picquet*, 19 F. Cas. at 612.

158. *Cf.* E. Merrick Dodd, Jr., *Jurisdiction in Personal Actions*, 23 ILL. L. REV. 427, 428 (1929).

159. *E.g.*, Earle v. McVeigh, 91 U.S. 503, 503-04 (1875) ("Due notice to the defendant is essential to the jurisdiction of all courts."); *see also* Whitten, *supra* note 5, at 803. Yet confusion was not inevitable. For

statements resulted. For example, it was common for courts to confuse notice with notice-through-process.[160] Since process could not be served outside the state, it appeared to follow that notice could not be given outside the state, either.[161] Additionally, treating the notice requirement as a matter of natural justice resulted in further confusion: it was easy to think that in-state service of process was required by natural justice.[162]

This belief was unfortunate. It tended to obscure the comity foundations for the law of jurisdiction and tended to invest the rules with an aura of immutability. Viewing rules of jurisdiction as matters of natural justice tended to suggest that courts should require state practice to conform to the rule, rather than to develop rules which conform to practice. In particular, it suggested that the requirement of in-state service might be a

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example, in Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 406 (1855), the Supreme Court referred to "that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; [and] those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another."

That courts were confusing two distinct matters was not appreciated until well into the twentieth century. For early recognitions of it, see Maurice S. Culp, *Process in Actions Against Non-Residents Doing Business Within a State*, 32 MICH. L. REV. 909, 927 n.55 (1933-34); G.W.C. Ross, *The Shifting Basis of Jurisdiction*, 17 MINN. L. REV. 146, 150-52 (1933).

160. *E.g.*, *Hollingsworth*, 29 U.S. (4 Pet.) at 475; Aldrich v. Kinney, 4 Conn. 380, 386 (1822); Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N.J.L. 222, 244 (1853), *aff'd*, 25 N.J.L. 57 (1855).

161. *Picquet*, 19 F. Cas. at 612.

162. *E.g.*, *Hollingsworth*, 29 U.S. (4 Pet.) at 472, 475; Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813) (Johnson, J., dissenting) (territorial limits of jurisdiction are "eternal principles of justice"); Warren Mfg. Co. v. Etna Ins. Co., 29 F. Cas. 294, 297 (C.C.D. Conn. 1837) (No. 17,206); Dearing v. Bank of Charleston, 5 Ga. 497, 511 (1848); Hall v. Williams 23 Mass. (6 Pick.) 232, 240 (1828); Starbuck v. Murray, 5 Wend. 148, 156-57 (N.Y. 1830); *see* Galpin v. Page, 85 U.S. (18 Wall.) 350, 368 (1873) ("a rule as old as the law"); *see also Moulin*, 24 N.J.L. at 232:

> By the law of comity, and by the [C]onstitution and laws of the United States, as not interpreted, the question will be, whether . . . the court had *properly* jurisdiction, or, in other words, did it obtain jurisdiction in a way consonant with natural justice; for, in the absence of positive law, that is the only standard.

precept that should not, or could not, be altered by changing practices of the states.[163]

IV. THE SUPREME COURT AND JURISDICTION

Until the late nineteenth century, there was essentially no constitutional law of jurisdiction. Most Supreme Court cases treating jurisdiction issues were diversity cases from federal circuit courts, and the controlling law was general, not federal. The Full Faith and Credit Clause operated only in the background, and there was no Due Process Clause governing the states.

The Supreme Court had no power to make binding pronouncements on matters of general jurisdiction law. Its decisions, in theory, had no greater force than the decisions of any other court of last resort. Yet even before the law of jurisdiction became constitutionalized, the Supreme Court began to assume considerable authority over it.

A. The Supreme Court and General Law

In general commercial law, the Supreme Court's prestige had invested it with great *de facto* authority.[164] Because federal law constrained the law of conflicts, one might expect the Court to have had even greater influence with respect to jurisdiction. Yet originally it did not. A major reason was the 1813 opinion by Justice Story in *Mills v. Duryee*,[165] the Court's first decision on interstate judgment enforcement. For, while the Court's seminal decision on general commercial law in *Swift* announced a rule with which most state courts agreed,[166] *Mills* was more controversial.

The holding of *Mills* was that the Full Faith and Credit

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163. *See, e.g.*, Oakley v. Aspinwall, 4 N.Y. 513, 521-22 (1851).

164. *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1, 23 (1842) (Catron, J., dissenting in part); Riley v. Anderson, 20 F. Cas. 801, 802 (C.C.D. Ohio 1841) (No. 11,835); Carlisle v. Wishart, 11 Ohio 172, 191-92 (1842); Atkinson v. Brooks, 26 Vt. 569, 580-81 (1854); *see also* Fletcher, *supra* note 55, at 1561, 1573-75; Heckman, *supra* note 52, at 253-54.

165. 11 U.S. (7 Cranch) 481 (1813).

166. *See, e.g.*, Bank of Mobile v. Hall, 6 Ala. 639 (1844); Allaire v. Hartshorne, 21 N.J.L. 665 (1847).

Clause and its implementing act required courts to give another state's judgment the full effect it would be given in the rendering state. This resulted in ouster of the rule of international law by which a foreign judgment was admissible only as *prima facie* evidence of an obligation.[167] This much of *Mills* was generally acceptable. But the Court also suggested a broader rule: that lack of jurisdiction (in the international sense) could not be raised as a defense to the interstate enforcement of judgments.[168] Such a rule, if accepted, could be problematic. As the dissenting Justice warned, "the states are at liberty to pass the most absurd laws . . . and we admit of a course . . . which puts it out of our power to prevent the execution of judgments obtained under those laws."[169] The Court ignored the warning and subsequently retained the possibility of the broader rule in *Hampton v. McConnell*.[170] State courts, by contrast, unanimously rejected it. They concluded that federal law left the rules of international jurisdiction intact as prerequisites for judgment enforcement.[171]

The widespread rejection of the broader implications of *Mills* tempered the Supreme Court's influence in jurisdiction matters.[172] Instead of *Mills*, the opinion of the Massachusetts Supreme Court in *Bissell v. Briggs*[173] was probably the most widely cited jurisdiction decision in the first half of the nineteenth century. *Bissell* anticipated the holding of *Mills*, but

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167. *Mills*, 11 U.S. (7 Cranch) at 482.

168. *Id.* at 484. In *Mills*, jurisdiction was not questioned, and so the validity of the broader rule was not put in issue.

169. *Id.* at 486 (Johnson, J., dissenting).

170. 16 U.S. (3 Wheat.) 234 (1818). Justice Washington expressly approved the broad rule in several circuit court decisions. *See* Field v. Gibbs, 9 F. Cas. 15 (C.C.D. N.J. 1815) (No. 4766); Green v. Sarmiento, 10 F. Cas. 1117 (C.C.D. Pa. 1810) (No. 5760).

171. *See* Hall v. Williams, 23 Mass. (6 Pick.) 232, 242-46 (1828) (reviewing cases).

172. *See id.* at 242-43 (lamenting occasions on which state court had made a "too prompt submission to the decision of the Supreme Court of the United States"); Wilcox v. Kassick, 2 Mich. 165, 171 (1851) (stating that "while some [courts] seem to have yielded a reluctant assent to the principles established in *Mills v. Duryee*, and *Hampton v. McConnel*, others have either boldly questioned their soundness, or adopted them with much qualification").

173. 9 Mass. 462 (1813).

also retained lack of jurisdiction as a defense to enforcement.[174]

With time, the United States Supreme Court moved toward the interpretation prevailing in the states. But it was not until 1850, in *D'Arcy v. Ketchum*,[175] that the Court squarely held federal law not to have changed the rule by which foreign judgments could be challenged for lack of jurisdiction.[176] Observing that "countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court . . . ; national comity is never thus extended,"[177] the Court found no reason to think Congress had "intended to overthrow this principle."[178] There was "no evil in this part of the existing law" that required a remedy.[179]

In reaching this conclusion, the Court intimated that it had a special role in the general law of jurisdiction. The Full Faith and Credit Clause lay in the background; as the Court emphasized, Congress could have exercised its constitutional power to alter the rules of jurisdiction. Hence, the law of jurisdiction, though general law, was a matter of federal concern. Thus, it was arguably a matter for which the Court, as supreme federal court, should have special responsibility.

Indeed, after *D'Arcy*, the Court did have greater influence over jurisdiction-related matters. An example is its resolution of the question whether jurisdictional findings in a judgment are conclusive in subsequent proceedings—an issue on which courts had disagreed.[180] In *Thompson v. Whitman*,[181] the

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174. *Id.* at 464.

175. 52 U.S. (11 How.) 165 (1850).

176. It had previously intimated approval of this position in Hollingsworth v. Barbour, 29 U.S. (4 Pet.) 466 (1830) and McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839).

177. *D'Arcy*, 52 U.S. (11 How.) at 174.

178. *Id.* at 176.

179. *Id.*

180. *See, e.g.*, Lincoln v. Tower, 15 F. Cas. 544 (C.C.D. Ill. 1841) (No. 8355) (record not subject to challenge); Warren v. Lusk, 16 Mo. 102 (1852) (record not subject to challenge); Wilcox v. Kassick, 2 Mich. 165 (1851) (record facts not subject to contradiction, but jurisdiction may be challenged where record silent); Westcott v. Brown, 13 Ind. 83 (1859) (record facts showing jurisdiction cannot be controverted); Downer v.

Court held that record assertions of jurisdiction over the defendant could be challenged in the enforcing court, reasoning that a contrary rule would undermine *D'Arcy*. It is debatable whether the *Whitman* rule should be considered one of federal law. Federal full faith and credit requirements apply only if the rendering court had jurisdiction, a general-law matter; *Whitman* dealt with challenges to jurisdiction. Nonetheless, state courts treated *Whitman* as having settled the issue.[182]

For present purposes, it is the Court's assumption of authority over jurisdiction that is of interest, rather than others' recognition of it. This assumption of authority was based on more than just the background of federal full faith and credit law. In fact, it reflected a broader development in general law.

Throughout most of the nineteenth century, federal courts heard primarily diversity suits: general federal question jurisdiction did not exist until 1875.[183] Just as the preeminence of federal question jurisdiction today suggests that the essential role of federal courts is to protect federal rights, the former preeminence of diversity jurisdiction suggested that the federal courts' essential role was to protect non-residents from unfair treatment by states. Thus, in *D'Arcy*, the Supreme Court rationalized jurisdictional challenges in terms of preventing unfairness to non-residents, explaining:

> It is a question of great stringency. If it be true that this judgment has force and effect beyond the local jurisdiction where it was rendered, joint debtors may be sued in any numbers, and if one is served with process, judgment may be rendered against all; by which means the debt will be established: and . . . this mode of proceeding against citizens of other States and persons residing in foreign countries may have operation in all parts of the world, and especially the United States. If New York may pass such laws, and render

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Shaw, 22 N.H. 277 (1851) (record jurisdictional facts are only prima facie evidence); Foster v. Glazener, 27 Ala. 391 (1855) (record subject to challenge); Price v. Ward, 25 N.J.L. 225 (1855) (record subject to challenge).

181. 85 U.S. (18 Wall.) 457 (1873).

182. *See* Kingsbury v. Yniestra, 59 Ala. 320, 321 (1877); Isett v. Stuart, 80 Ill. 404, 409-10 (1875); Eager v. Stover, 59 Mo. 87, 88 (1875); Chunn v. Gray, 51 Tex. 112, 114 (1879).

183. *See* Act of March 3, 1875, ch. 137, 18 Stat. 470.

> such judgments, so may every other State bind joint debtors who reside elsewhere, and who are ignorant of the proceeding.[184]

Around the time of *D'Arcy*, federal courts were developing a constitutional rationale for this diversity-centered view of their role. The emergent theory was that Article III conferred on non-residents a right to adjudication in federal court, through which they could obtain an unbiased view of the law.[185] The theory posited that federal courts should resolve diversity cases "correctly," without regard to state law or precedent. Thus, in *Rowan v. Runnels*,[186] the Court refused to follow a recent Mississippi Supreme Court decision. The state court decision had interpreted a state constitutional provision differently than had the United States Supreme Court in an even earlier decision. Following its own prior decision, the Court upheld a contract that had been entered into prior to the state court decision, and under which it would be invalid. The Court reasoned:

> Undoubtedly, this court will always feel itself bound to respect the decisions of the State courts, and from the time they are made will regard them as conclusive in all cases upon the construction given their own constitution and laws.
>
> But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made. For, if such a rule were adopted and the comity due to State decisions pushed to this extent, it is evident that the provision in the [C]onstitution of the United States which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory.[187]

Even more striking is *Watson v. Tarpley*.[188] There, the Court refused to apply a Mississippi statute that it found in-

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184. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1850).

185. *See, e.g.*, Pease v. Peck, 59 U.S. (18 How.) 595, 599 (1855); Rowan v. Runnels, 46 U.S. (5 How.) 134, 139 (1847). On the development of this view, see TONY A. FREYER, HARMONY & DISSONANCE 45-100 (1981).

186. 46 U.S. (5 How.) 134 (1847).

187. *Id.* at 139.

188. 59 U.S. (18 How.) 517 (1855).

consistent with general commercial law. To do so, it explained, would deprive litigants of a constitutional right:

> The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several States, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by the general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to devest the federal courts of cognizance therefor, in their fullest acceptation under the commercial law, must be nugatory and unavailing.[189]

The common-law power to determine and apply general law thus became a constitutional obligation to protect non-resident rights.

A link between the emerging jurisprudence of diversity and the Court's emerging role in jurisdiction can be seen in *Williamson v. Berry*,[190] a case contemporary with *D'Arcy* that dealt with subject matter jurisdiction. *Berry* involved a life beneficiary under a testamentary trust which held land. The beneficiary had been unable to support his family on the rents and profits, and petitioned the New York legislature for permission to sell some of the property. The legislature passed a series of private acts granting permission to sell upon consent of the Chancellor. The Chancellor (John Kent) subsequently authorized sale of some of the property; the proceeds were to be used to pay the beneficiary's debts and any surplus was to be held in a fund for support of the beneficiary's children. The beneficiary sold part of the property to a creditor, who later transferred it to others.[191] After the beneficiary's death his children (who would have taken the property in fee under the will establishing the trust) instituted a series of lawsuits challenging the disposition of the property.[192] *Berry* was one of

189. *Id.* at 521.
190. 49 U.S. (8 How.) 495 (1850).
191. *Id.* at 497-505.
192. *Id.* at 505-11.

these suits; it was a federal court ejectment action by the beneficiary's daughter against one of the later purchasers. The main issue was whether the Chancellor had had subject matter jurisdiction to authorize the sale of the property for the purpose of satisfying the beneficiary's debts.[193]

The Supreme Court held that the Chancellor had lacked such jurisdiction. It first considered whether the plaintiff could collaterally attack the chancery decree for lack of jurisdiction, and determined that she could. Apparently viewing jurisdiction as a univocal concept, the Court relied on the "settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject matter may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings."[194] As authority for the rule, it cited cases allowing collateral challenges to personal jurisdiction over non-residents.[195]

The Court then expansively construed its authority to decide jurisdiction questions, and disregarded rulings of the New York Court of Appeals that had upheld the Chancellor's jurisdiction. As it explained,

> we cannot admit that the rule hitherto observed in the court, of recognizing the judicial decisions of the highest court of States upon State statutes relative to real property as part of local law, comprehends private statutes or statutes giving special jurisdiction to a State court for the alienation of private estates . . . . Whatever a court in a State may do in such a case, its decision is no part of local law.[196]

Deciding the issue for itself, the Court found that the Chancellor had not had jurisdiction.

Not only does the case show the assertion of Supreme Court authority over jurisdiction, it also raises the question of the basis of such authority. The importance of the question is heightened by the fact that, unlike as in the treatment of international jurisdiction, the Court's assumption of authority

193. *Id.* at 540.
194. *Id.*
195. *Id.* at 541-42.
196. *Id.* at 542.

here limited the power of a state (i.e., to determine the jurisdiction of its courts). A dissent argued that the Court was arrogating to itself a power nowhere found in the Constitution or federal laws, and one that had no evident limits.[197] As we shall see, this problem of the basis of authority recurred as the Court's authority over jurisdiction expanded.

B. The Supreme Court and Corporations

Corporations have posed special problems for the law of jurisdiction. The traditional common-law rule was that a corporation could be served with process only by service on its principal officer and only within the territory of the chartering state.[198] The rule seems also to have functioned as a general-law rule of judgment recognition, so that a judgment entered without in-state service on a principal officer lacked jurisdiction (in the international sense) and was unenforceable elsewhere.[199]

The traditional rule was based on a conflicts approach that treated corporations as legal artifacts, existing only by virtue of state law. Because state law could have no efficacy outside the state, it followed that an officer's status "would not accompany him, when he moved beyond the jurisdiction" whose laws conferred the status on him.[200] It might even be thought to follow that the corporation could not exist outside that state. This conceptualism might have been adequate for a regime in which most corporations were municipal corporations, or even private corporations operating roads and bridges in the state of incorporation.[201] But it lost plausibility when corporations

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197. *Id.* at 564-65 (Nelson, J., dissenting).

198. *See, e.g.*, Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N.J.L. 222, 244 (1853), *aff'd*, 25 N.J.L. 57 (1855); *see generally* EDWIN M. DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860, at 51 (1954).

199. S.F.D., *Note to Article II, Containing the Opinion of Mr. Justice Thompson, in the Case of the W.M. Co., Against the Etna Insurance Company*, 10 AM. JURIST & L. MAG. (n.s.) 414, 417-19 (1843). Justice Story's treatise on conflicts says nothing about jurisdiction over corporations.

200. McQueen v. Middletown Mfg. Co., 16 Johns. 5, 7 (N.Y. 1819).

201. *See* William F. Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 HARV. L. REV. 676, 687 (1917).

chartered for insurance, banking and commercial purposes began to conduct extensive business interstate.[202]

In mid-century, the Supreme Court developed a new approach that could accommodate activity by corporations outside the state of incorporation. The conflicts rules that emerged were rules of general law, but they were rules which the Court assumed the power to announce, and that were, at least *de facto*, authoritative.

1. The General Law of Corporations

The new conflicts approach was based on the principle of comity.[203] State courts contributed to its development, but the approach received definitive expression by the Supreme Court in *Bank of Augusta v. Earle*.[204]

Bank of Augusta was a diversity case. It dealt with the validity of business contracts entered into by foreign corporations. Corporate contracts executed in the state of incorporation were regularly enforced in other states. However, contracts executed within those other states were more problematic. While the business world seemed to take the enforceability of such contracts for granted,[205] the Virginia decision, *Bank of Marietta v. Pindall*,[206] had raised some doubts. The objectionable contracts in *Pindall* had related to banking, a heavily regulated domestic business; it was Virginia's policy to prevent in-state banking operations by corporations not chartered under state law.[207]

Bank of Augusta, too, involved local contracts of foreign banking corporations. In the original proceeding, the Circuit Justice had gone beyond the Virginia decision and sweepingly

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202. Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and in Personam Principles*, 1978 DUKE L.J. 1147, 1169-70.

203. *See generally* GERALD C. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 36-49 (1918).

204. 38 U.S. (13 Pet.) 519 (1839).

205. DODD, *supra* note 198, at 54; *Bank of Augusta*, 38 U.S. (13 Pet.) at 561 (argument of Daniel Webster).

206. 23 Va. (2 Rand.) 465 (1824); *see also* Pennington v. Townsend, 7 Wend. 276 (N.Y. 1831).

207. *Pindall*, 23 Va. (2 Rand.) at 474.

held that no corporation had any power to contract outside the state of incorporation.[208] The decision, in the words of Justice Story, "frightened half the lawyers and all the corporations of the country out of their proprieties."[209] On appeal, the Supreme Court reversed. In doing so, it laid down a framework for recognizing contracts of foreign corporations.

The Court began by dismissing conceptual objections to the possibility of corporate transactions outside the chartering state. In highly quotable language, it accepted an extreme version of the common-law theory of corporations:

> It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.[210]

But the Court nonetheless held that a corporation's "residence in one state creates no insuperable objection to its power of contracting in another."[211] A natural person can enter into contracts in another state through agents; so, too, can corporations. Moreover, the Court noted, each state that had addressed the issue had concluded that foreign corporations could sue in its courts.[212] Thus, states had implicitly accepted the existence of local activity by foreign corporations.

Yet this established only the possibility of a corporation entering into enforceable contracts out of state. The question remained whether such contracts would in fact be allowed—whether a foreign corporation's power to contract would be given effect in the place of the transaction. This seemed an issue of comity. As the Court explained:

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208. *Bank of Augusta*, 38 U.S. (13 Pet.) at 585.

209. DODD, *supra* note 198, at 56 (quoting Letter from Joseph Story to Charles Sumner (June 17, 1838)).

210. *Bank of Augusta*, 38 U.S. (13 Pet.) at 588.

211. *Id.*

212. *E.g.*, Williamson v. Smoot, 7 Mart. 31, 32 (La. 1819); Portsmouth Livery Co. v. Watson, 10 Mass. 91, 92 (1813); Bank of Marietta v. Pindall, 23 Va. (2 Rand.) 465, 471-72 (1824).

> Every power . . . which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied. And this brings us to the question which has been so elaborately discussed; whether, by the comity of nations and between these states, the corporations of one state are permitted to make contracts in another.[213]

Had the Court stopped at this point, the opinion would have been unexceptional and gone little beyond existing case law. It would merely have extended Story's conflicts theory to corporations and left to the states the authority to decide when comity would be accorded. Instead, the Court proceeded to decide the issue for itself.

In doing so, the Court presumed that every state recognizes the power of out-of-state corporations to contract within that state. This presumption—a new one—was said to be justified by the nature of the United States and the needs of commerce:

> The intimate union of these states, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations . . . . [T]he history of the past, and the events which are daily occurring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent. Money is frequently borrowed in one state, by a corpo-

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213. *Bank of Augusta*, 38 U.S. (13 Pet.) at 589. The force of the argument can be appreciated by comparison with Bank of Marietta v. Pindall, 23 Va. (2 Rand.) 465 (1824), the Virginia case that had cast doubt on the enforceability of in-state contracts by foreign corporations. On the issue of the power of a foreign corporation to sue, even the *Pindall* court agreed that:

> Every argument in favor of entertaining, in our Courts, suits by corporations created by the laws of a country not forming part of the American confederacy, applies with double force to corporations of our sister States. It is rendered doubly necessary by the intimacy of our political union, and by the freedom and frequency of our commercial intercourse.

Id. at 473-74.

> ration created in another. The numerous banks established by different states are in the constant habit of contracting and dealing with one another. Agencies for corporations engaged in the business of insurance and of banking have been established in other states, and suffered to make contracts without any objection on the part of the state authorities. These usages of commerce and trade have been so general and public, and have been practiced for so long a period of time, and so generally acquiesced in by the states, that the court cannot overlook them when a question like the one before it is under consideration.[214]

As additional justification, the Court pointed to the universal recognition of foreign corporations' power to sue, and to state statutes and a federal statute which seemed to presume the general validity of contracts entered into by foreign corporations.[215]

Of course, as the Court recognized, a state might decline to recognize some or all contracts entered into by foreign corporations.[216] But the determination had to be clear; in the event of silence, the presumption of comity would operate.[217] In the case at hand, the Court found insufficient evidence that Alabama policy prohibited business transactions by out-of-state banks.[218] Thus, comity would be presumed to have been extended, and the contracts were enforceable.

There are several important aspects to the Court's opinion. First, the Court assumed that it had the power to enforce the presumption and find that comity had been extended in the case at hand. This subtly changed the character of general law and the role of federal courts. Previously, the Court had supposed that it could apply general commercial and jurisdiction law in diversity cases. But to do so was not to apply state law or implement state policy—it was merely to apply international norms based on established practice.[219] Moreover, applying

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214. *Bank of Augusta*, 38 U.S. (13 Pet.) at 590-91.
215. *Id.* at 591.
216. *Id.* at 591-92.
217. *Id.* at 592.
218. *Id.* at 594.
219. In matters of foreign judgment enforcement, federal courts did not have to decide whether a state would recognize the judgment as a mat-

that law in theory affected only private interests—for example, a judgment debtor's title to property. Enforcing the presumption of comity for corporate contracts was different. As Justice Story had emphasized, the comity of the law of conflicts is the comity of states, not courts, and to extend or not extend comity is to implement state policy.[220] For this reason, comity was not ordinarily understood as something capable of being extended on behalf of a state by a court unconnected with the state. Yet, under *Bank of Augusta*, federal courts were authorized to do precisely that; the result would be the federal determination of each state's positive law.

For this reason, and because recognition of foreign banking contracts seemed a matter for the state legislature, the dissenting Justice argued that the new conflicts approach was a usurpation of power.[221] In his opinion, the Court could enforce the rule of comity regarding corporations only if the Constitution authorized it to do so;[222] however, the Constitution did not authorize such conduct. The Court, for its part, brushed aside the issue with the rhetorical question, "upon what grounds could this Court refuse to administer the law of international comity between these states?"[223] Yet the unstated assumption was that this law of comity was something for it to "administer."

Second, the rule announced was new and immediately authoritative. The rule had been absent from prior case law but prevalent afterwards, and state courts viewed the status of corporate contracts as having been settled by *Bank of Augusta*.[224] Of course, there was nothing new in the Court's announcement of rules of general law. For instance, the Court did

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ter of comity, since the Full Faith and Credit Clause generally required the state to do so. *See supra* section IV.A.

220. STORY, *supra* note 135, § 23, at 24, §38, at 37.

221. *Bank of Augusta*, 38 U.S. (13 Pet.) at 601 (McKinley, J., dissenting).

222. *Id.* at 600 (McKinley, J., dissenting).

223. *Id.* at 590.

224. *See, e.g.*, Union Branch R.R. v. East Tenn. & Ga. R.R., 14 Ga. 327, 341-42 (1853); Ducat v. City of Chicago, 48 Ill. 172, 177 (1868); Land Grant Ry. & Trust Co. v. Board of County Comm'rs, 6 Kan. 245, 253 (1870); Kennebec Co. v. Augusta Ins. & Banking Co., 72 Mass. 204, 208, 6 Gray 17, 18 (1856).

just that in *Swift v. Tyson*.[225] Nor was the Court's methodology unusual. It purported to base the rule on the custom and practice of states and on considerations of the needs of commerce.[226] Nor was it unusual for the rules of general law announced by the Court to be authoritative *de facto*. But the general-law rule developed in this case was different in that it was a rule that significantly affected, even determined, state law and policy.

2. The General Law of Jurisdiction over Corporations

If a corporation, as a matter of comity, could do business in another state and bring suit in that state, it would seem to follow that it ought to be subject to suit in that state. While the conceptual objection could be raised that a foreign corporation cannot be within the territory of the state subjecting it to suit, courts rejected or disregarded that objection and almost unanimously held that foreign corporations, in principle, were amenable to suit. Said one court in an early case:

> [I]f, upon principles of law or comity, corporations created in one jurisdiction are allowed to hold property and maintain suits in another, it would be strange indeed if they should not also be liable to be sued in the same jurisdiction. If we recognize their existence for one purpose, we must also for the other. If we admit and vindicate their rights, even-handed justice requires that we also enforce their liabilities.[227]

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225. 41 U.S. (16 Pet.) 1 (1842).

226. *Cf.* Bushel v. Commonwealth Ins. Co., 15 Serg. & Rawle 173, 176-77 (Pa. 1827):

> There was a time when it was supposed that no suit could be entertained against them, unless upon an express contract under the seal of the corporation. It is now held, that they are liable in trespass, and in case, upon an implied contract . . . . This change in the law has arisen from a change of circumstances, from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome, because it is gradual, and wisely adapted to the peculiar situation, wants and habits of our citizens.

227. Libbey v. Hogdon, 9 N.H. 394, 396 (1838). *See also* Warren Mfg. Co. v. Etna Ins. Co., 29 F. Cas. 294, 299 (C.C.D. Conn. 1837) (No. 17,206); North Mo. R.R. v. Akers, 4 Kan. 453, 469 (1868); Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N.J.L. 222, 234 (1853), *aff'd*, 25

The real problem with suing foreign corporations was serving process on them, and this difficulty was practical, not conceptual. Statutes dispensing with personal service, and providing for attachment jurisdiction, might have been used so long as they could be construed to apply to foreign corporations.[228] But attachment jurisdiction was useful only if there was significant corporate property in the state, and this was unlikely for insurance companies and many other interstate businesses. *In personam* jurisdiction might be secured under statutes providing for service of process on domestic corporations[229] or statutes providing specially for service on a foreign corporation's agent in the state.[230] The problem, however, was that in light of the traditional rule requiring service on a principal agent in the state of incorporation, the statutory method might be deemed constructive service only, thus leaving the judgment unenforceable in other states for lack of jurisdiction.[231]

The process problem was solved in the same way that the contract recognition problem was solved: through a new rule of general conflicts law adapted to changed economic conditions. Yet unlike as in *Bank of Augusta*, there was little custom and practice on which to base such a rule. Thus, courts had to turn to considerations of reasonableness and natural justice. In *Moulin v. Trenton Mutual Life & Fire Insurance Co.*,[232] for example, the Supreme Court of New Jersey considered the enforceability of a judgment, rendered by a New York court against a New Jersey corporation, in which process had been served in New York on the corporation's president. The New Jersey court concluded that, if the mode of service did not violate precepts of natural justice, it would be enforceable in other states.[233] On the controlling issue:

N.J.L. 57 (1855); *Bushel*, 15 Serg. & Rawle at 176; Day v. Essex County Bank, 13 Vt. 97, 101 (1841).

228. *Compare* McQueen v. Middletown Mfg. Co., 16 Johns. 5 (N.Y. 1819) (refusing to apply statute to corporations) *with Bushel*, 15 Serg. & Rawle at 173 (applying statute to corporations).

229. *E.g.*, *Libbey*, 9 N.H. at 394.

230. *Warren Mfg.*, 29 F. Cas. at 298; *Moulin*, 24 N.J.L. at 234.

231. S.F.D., *supra* note 199, at 417-19.

232. 24 N.J.L. 222 (1853), *aff'd*, 25 N.J.L. 57 (1855).

233. *Id.* at 234.

> I am not prepared to say, that if [corporations] choose to avail themselves of this privilege [of doing business in another state], natural justice will be violated by subjecting their officers and agents to the service of process on behalf of the corporation they represent; on the contrary, I think natural justice requires that they shall be subject to the action of the courts of the states whose comity they thus invoke.[234]

On the other hand, the court opined that:

> where a corporation confines its business operations to the state which has chartered it, a law of another state, which sanctions the service of process upon one of its officers or members accidentally within its jurisdiction is unreasonable, and so contrary to natural justice and the principles of international law that the courts of other states ought not to sanction it."[235]

Substantially the same solution was given by the Supreme Court, but more elaborately, in *Lafayette Insurance Co. v. French*.[236] In that case, a party sought enforcement of an Ohio judgment against an Indiana corporation in the Federal Circuit Court for Indiana. The Supreme Court, like the state courts, easily disposed of the argument that corporations, because they are unable to move from state to state, cannot be sued in other states. Tracking the approach of *Bank of Augusta*, it reasoned that, since a corporation can sue in a foreign state through an attorney, it can also defend there through

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234. *Id. See also* Moulin v. Trenton Mut. Life & Fire Ins. Co., 25 N.J.L. 57, 62 (1855):

> The simple inquiry is, whether the statute of the state of New York, which authorizes the service of process in the mode adopted in this case, is so unreasonable, so contrary to natural justice and the principles of natural law, that it ought not to be sanctioned.
>
> The utmost that can be said is, that it is a deviation from the technical rule of the common law. The defendants were not condemned unheard and without an opportunity of making defence. The process was served precisely upon the officer and in the mode that it would have been had the process been served in this state.

235. *Moulin*, 24 N.J.L. at 234.

236. 59 U.S. (18 How.) 404 (1855).

one. The real question, said the Court, was whether the corporation had been "bound to appear or suffer a judgment by default."[237]

Bank of Augusta had held that the Article IV Privileges and Immunities Clause did not apply to corporations. Accordingly, the Court said in *Lafayette*, a state might impose conditions on a foreign corporation's conduct of business in the state. Announcing a new rule of comity, the Court held that any such conditions "must be deemed valid and effectual" by other states, so long as "they are not repugnant to the [C]onstitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence."[238] The condition imposed by Ohio was that the corporation's resident agent should be deemed its agent to receive process in suits founded on contracts entered into in the state. The Court held this condition to be neither unreasonable nor inconsistent with any principle of international law. Thus, the judgment was enforceable in courts of other states.

Just as the Court had done in *Bank of Augusta*, it announced in *Lafayette* new rules of general conflicts law—a new principle of comity and a specific application of it. Furthermore, just as in *Bank of Augusta*, the rules were desirable innovations, needed adaptations of conflicts law to changed economic conditions. But there was an important difference: *Lafayette*'s rule of comity did not purport to be based on actual state practice; instead, it was an *a priori* rule of reasonableness. Additionally, unlike the rule of *Bank of Augusta*, which was framed as a presumption, the rule of *Lafayette* was framed as a state obligation. *Lafayette*, even more than *Bank of Augusta*, suggests a special law-determining role for the Court in matters of general conflicts law, and even more strongly provokes the question of the Court's authority to establish rules in that domain.

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237. *Id.* at 407.
238. *Id.*

C. The Supreme Court and Jurisdictional Rights

Pennoyer v. Neff[239] is commonly considered to be the case that transformed the law of jurisdiction into federal constitutional law.[240] As we shall see, though, it was only a transitional opinion, an initial step toward constitutionalization. Yet the common view is correct to the extent it treats the case as marking a break with prior law. The character of the change can best be appreciated by first examining *Galpin v. Page*,[241] an earlier circuit court opinion by Justice Field that was practically a rehearsal for his opinion in *Pennoyer*.[242]

1. *Galpin* and the New Natural Right

Galpin was a federal court ejectment action between competing claimants to a parcel of land. Defendant's title derived from a prior state judgment sale; plaintiff's from the persons whose interests had purportedly been divested by that sale. On appeal, but after the sale, the state supreme court held the underlying judgment invalid because, *inter alia*, an out-of-state defendant had not properly been served with process.[243] At issue in the federal case was the extent to which the federal court was required to presume that the state court had had jurisdiction, since that issue determined the validity of defendant's title to the land.[244] The federal court refused to be bound by a state supreme court ruling in another case that had greatly limited collateral jurisdictional challenges to the record.[245] Much of Justice Field's opinion was dictum in which he purported to restate the law of jurisdiction. The restatement contained major innovations.

The most significant innovation was a new rationale for the unenforceability outside a state of a judgment rendered with-

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239. 95 U.S. 714 (1877).

240. *E.g.*, STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 61 (3d ed. 1992).

241. 9 F. Cas. 1126 (C.C.D. Cal. 1874) (No. 5206).

242. On Justice Field's development of a "Ninth Circuit law" that anticipated Supreme Court developments, see Howard J. Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 882-87 (1943).

243. *Galpin*, 9 F. Cas. at 1127-30.

244. *Id.* at 1130-37.

245. *Id.* at 1137.

out in-state service of process. As we have seen, such unenforceability was a matter of customary conflicts law. Any extra-territorial effect to a judgment was a matter of comity, and states generally did not accord comity where there had been no in-state service of process. Yet we have also seen factors at work tending to transform the law of jurisdiction into a more inflexible body based on *a priori* conceptions. Field helped further this transformation by reinterpreting the in-state service requirement as a matter of natural right.

The innovation had some faint antecedents. In an 1851 opinion, for example, a judge of the New York Court of Appeals stated that a legislature might not be able to authorize judgments without personal service of process:

> I doubt whether such a judgment is of any force in the state where it was rendered. Under our form of government it is questionable, to say the least, whether the legislature can, in any case, without an express license from the people, authorize a judgment which shall operate *in personam* against a defendant who neither appeared nor was in any way served with process. That state must not boast of its civilization, nor of its progress in the principles of civil liberty, where the legislature has the power to provide that a man may be condemned unheard.[246]

Yet, the judge seems to have viewed the constraint as a matter of natural justice rather than a matter of natural right. His ostensible concern was lack of notice and he intimated that the people could authorize the questionable judgments. Field quoted this language in *Galpin*, but went far beyond its natural justice-based doubts. For Field, the requirement of in-state service was a foundational principle of government which protected individuals from the illegitimate exercise of power. As he explained, the requirement of in-state service (along with related requirements for attachment jurisdiction) "is, in our judgment, the true doctrine, and *the only doctrine which is consistent with any just protection to the citizens of other states.*"[247] The rules of jurisdiction were not contingent, but

246. Oakley v. Aspinwall, 4 N.Y. 513, 522 (1851).

247. *Galpin*, 9 F. Cas. at 1135 (emphasis supplied). In the Supreme Court's prior opinion in *Galpin*, Justice Field explained that a presump-

rather, "essential to the protection of the rights of all citizens, whether resident or non-resident of the state."[248]

No such right had previously been urged as the foundation for the law of jurisdiction and it is not surprising that Field was silent about its nature and source. It is true (as Field pointed out[249]) that English common law had originally refused to enter judgment against a defendant who did not appear. But it is implausible to infer from this a common-law right to be free of involuntary judicial determinations. English common law used powerful means to coerce appearance, including the extreme sanction of outlawry and seizure of all property. And even had such a right once existed, it was surely lost when the common law recognized compulsory process.[250] Even more important, English common law, which was concerned with the rights of Englishmen, is an unlikely source for a supposed right that mainly protects *foreigners*. English common law was slow to recognize rights in aliens,[251] ultimately doing so only through its absorption of the law merchant.[252]

The putative right invoked by Field appears to be a product of semantic fallacy. Recall that a central premise of jurisdictional theory was the sovereign character of states and the limitation of a state's power to its territory. Each state has exclusive power over persons within and no power over persons without.[253] Field reinterpreted a state's lack of extraterritorial *power* over an individual as a matter of the individual's inherent *right* against the state. This confuses two very differ-

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tion against jurisdiction over persons beyond the reach of process is "essential to the protection of parties without the territorial jurisdiction of a court." Galpin v. Page, 85 U.S. (18 Wall.) 350, 368 (1874).

248. *Galpin*, 9 F. Cas. at 1137.

249. *Id.* at 1133-34, 1137-38.

250. For an historical examination of English practices to induce or compel the defendant's participation, see Nathan Levy, Jr., *Mesne Process in Personal Actions as Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968).

251. "[T]here can be little doubt that, in the thirteenth and fourteenth centuries, English law, reflecting insular prejudices, treated aliens as almost, if not wholly, rightless." 9 HOLDSWORTH, *supra* note 49, at 72.

252. *Id.* at 94-96.

253. Field's theory of sovereignty is set out more fully in Pennoyer v. Neff, 95 U.S. 714, 721-23 (1877).

ent legal relations.

Following Hohfeld, one can say that *A* has a power with respect to *B* if *A* can alter the legal relations of *B*.[254] State *A* has power over individual *B*, for example, if the courts of *A* can enter a judgment affecting *B*'s rights and duties (for example, with respect to *C*). According to nineteenth-century jurisdiction theory, a state had power to affect the rights and duties of persons within the territory, and no such power over persons outside: the latter are (to use Hohfeld's term) *immune* from having their legal relations affected by the state.[255] But an immunity is not a right. A right of *X* against *Y* is a claim to action or forbearance on the part of *Y*; it is the counterpart of a duty owed by *Y* to *X*.

Incoherence results when a lack of state power to enter a judgment against an individual (i.e., an immunity) is confused with a right of the individual not to have a judgment entered against him by the state. If an individual has such a right against the state, it follows that the state has a duty not to enter a judgment against him. But it makes sense to speak of a state having a duty not to enter such a judgment only if the state first has the power to do so. Thus, a consequence of Field's transformation of an immunity into a right is to invest states with the very power that, by original hypothesis, they do not have.

The incoherence, if not inconsistency, of Field's new logic of jurisdiction can be seen another way. The right in question appears to be understood as a fundamental right—its significance lies in its limitation on legislative power. But fundamental rights against states were generally understood to be rights of citizens—those persons in an ongoing political relationship with the state.[256] Hence, recognition of a right of non-resi-

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254. *See generally* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

255. *Cf.* Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 170 (1919) ("If a citizen of Connecticut has no land, goods, or business in New York he has an immunity from taxation there. The State of New York has a disability (no power) to tax in such a case.").

256. *See, e.g.*, Bartemeyer v. Iowa, 85 U.S. 129, 137-41 (1873) (Field,

dents entails recognition of a political relationship, at the very least analogous to citizenship, between non-residents and the state. But to say this implies that (contrary to fundamental premises) the state does have some sovereignty over non-residents. The theories of exclusive sovereignty and of a fundamental right to be free of judgments entered by foreign states cannot be consistently maintained.[257] To be tenable, the postulated new right demands radical alteration of the underlying political model.

Field never clarified his views on the nature of the supposed jurisdictional right. Thus, it is hard to know his views on its substance. It seems, however, that Field's belief in this right was tied to a view of judgments as having two aspects: determination of obligations and enforcement. For Field, the determination of obligation may have been a suspect activity, legitimate only as a prelude to enforcement.[258] Wariness of judicial determinations of obligation might lead to a belief in a right to be free of them, or at least to be free of determinations not directly linked with enforcement. Because a judgment rendered against a person who cannot be served with process (and who has no property in the state) is unenforceable by the state, it might seem an unnecessary determination, and thus "an arbitrary declaration . . . as to the liability of a party over whose person and property [the court] had no control."[259] Such a judgment could have no legitimate use.

Basing jurisdictional rules on fundamental rights had important ramifications. Since fundamental rights are inherent limitations on government, it followed that it was not "within the competency of the legislature to invest its tribunals with authority" over non-resident individuals who had not been served

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J., concurring); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 97-98, 106 (1872) (Field, J., dissenting).

257. Jurisdiction is not the only area in which Justice Field tried to extend inherent rights to non-citizens, even aliens. *See In re* Ah Fong, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102); *see also* Ho Ah Kow v. Nunan, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546).

258. This outlook was probably fostered by the common law's unfamiliarity with judgments that merely determine rights. *See* Dodd, *supra* note 158, at 429.

259. Galpin v. Page, 9 F. Cas. 1126, 1133 (C.C.D. Cal. 1874) (No. 5206).

with process.[260] A statute that purported to do so would not be "a legitimate exercise of legislative power."[261] In *Galpin* itself, that conclusion justified the rule of general law invoked: in collateral attacks on state judgments, there could be no presumption of jurisdiction over a non-resident. It also justified disregard of the state court decision to the contrary.[262]

The new approach raised a further question. Non-residents could be protected from improper exercises of jurisdiction in other states through refusal to enforce the judgment. This protection had always been available under general law. Yet, if a fundamental right is involved, the non-residents should have protection within the state purporting to exercise jurisdiction. How could this be done? This question was addressed in *Pennoyer*.

2. *Pennoyer* and the New Jurisprudence of Jurisdiction

Pennoyer, like *Galpin*, took a novel view of jurisdiction as involving fundamental rights and inherent limits to state authority.[263] For example, the Court described the rule requir-

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260. *Id.* at 1135. Thus, in the case at hand:

> [S]o far as the statute authorizes, upon such substituted service, a personal judgment against a non-resident except as a means of reaching property situated at the time within the state, or affecting some interest therein, or determining the status of the plaintiff with respect to such non-resident, it cannot be sustained as a legitimate exercise of legislative power.

Id. at 1133. An earlier case suggesting such a limitation was Beard v. Beard, 21 Ind. 321, 327-28 (1864) (stating that "a State [cannot] give its laws or jurisdiction extraterritorial operation upon Citizens or property of another State").

261. *Galpin*, 9 F. Cas. at 1133.

262. *Id.* at 1133-34.

263. Pennoyer v. Neff, 95 U.S. 714, 726-27, 732 (1877). For similar readings of *Pennoyer*, see Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 704-05 (1983) (noting "[t]he majority's underlying focus on private rights"); Wendy C. Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 502-08 (1987) ("The basic premise of the opinion is that there are limitations on state power that are simply inherent in the nature of government."); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdic-*

ing in-state service of process, or else limitation of the judgment to the property attached, as "the only doctrine consistent with proper protection to citizens of other States."[264] Yet the change in rationale was obscured by the Court's professing only to follow established rules "of public law."[265] Nonetheless, examination shows that the Court was announcing something new.

First, it took pains to clarify what it was *not* holding. "To prevent any misapplication of the views expressed in this opinion," it explained:

> [W]e do not mean to assert, by any thing [sic] we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident.[266]

Nor did it "mean to assert" that a state could not condition a partnership's, association's or corporation's doing business in a state on the latter's subjecting itself to the jurisdiction of state courts. But these were all uncontroversial propositions under prior law. If the Court had not thought it was announcing a new principle that cast doubt on these rules, there would have been no need for clarification.

Second, the requirement of in-state service was now explained as a logical deduction. Supposedly it followed inexorably from two principles stating inherent limitations on government: that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[267] In Story's and Huber's system, by contrast, these principles of sovereignty were not axioms from which rules of jurisdiction could be derived, but simply the background for a comity-based law of

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tion, 65 TEX. L. REV. 689, 706 (1987) (noting that *Pennoyer* preserved the right of out-of-state residents "to be free from ultra vires state authority").

264. *Pennoyer*, 95 U.S. at 726.

265. *Id.* at 730.

266. *Id.* at 734.

267. *Id.* at 722.

jurisdiction. Story's and Huber's system rejected *a priorism*, maintaining instead that rules of jurisdiction emerged from the practice of states.

This *a priorism* continued tendencies visible in prior cases. Its consequence was to make unacceptable any jurisdictional practice that deviated from the axioms. Unfortunately, the traditional comity-based rules, such as the ones concerning divorce jurisdiction and jurisdiction over foreign corporations, did precisely that. That is why the Court had to reaffirm their legitimacy. The price of this reaffirmance, however, was that they became unprincipled exceptions to the basic rules of jurisdiction, rather than basic rules of jurisdiction themselves.[268]

Third, comity and state practice could no longer contribute to the formation of jurisdictional rules. Evidence that states were relaxing traditional restraints would not show the general law to be in transition and new customary rules emerging. Instead, it would demonstrate widespread abuse that had to be stopped. It was wholly irrelevant to the Court that the jurisdictional practice challenged in *Pennoyer*—attachment of property after the commencement of the suit—was, as demonstrated by the dissent, consistent with "the long established practice under the statutes of the States of this Union."[269] Since it violated a deduction from the axioms, it contravened natural right.

Fourth, the rule announced—that attachment jurisdiction requires attachment of the property at the outset of the lawsuit—makes little sense except on a theory that violation of the rule would infringe fundamental rights.[270] The Court ex-

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268. This illustrates the point made by Professor Hazard that the Court's axioms are useless for deciding cases. Hazard, *supra* note 98, at 265.

269. *Pennoyer*, 95 U.S. at 737 (Hunt, J., dissenting).

270. Professor Hazard has argued, Hazard, *supra* note 98, and some other scholars have concurred, *see, e.g.*, John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1028-29 (1983), that the Court's real concern in adopting the rule was that of assuring notice to the out-of-state defendant. This is unlikely, since the Court contented itself with assuming that seizure of property will notify the defendant of suit—an assumption that the very facts of the case show to be implausible. The Court's entire discussion is focused on the theory of jurisdiction; the reference to attachment as a form of notice is little more

plained that the power to adjudicate a defendant's obligations, at least in *quasi in rem* proceedings, derives from the ability to enforce the judgment.[271] On this view, unless property is attached at the outset of the suit, there is no assurance that the judgment can be enforced; and if so, the adjudication would be useless and thereby violate defendant's rights.[272] The rule thus prevents illegitimate adjudication detached from enforcement proceedings.

Finally, and most telling, is the Court's discussion of legislative power. As in *Galpin*, the Court concluded that judgments entered in violation of the right were inherently invalid and that state legislatures lacked the authority to permit them:

> [I]f the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, it is difficult to see how the judgment can legitimately have any force within the State . . . . [I]t [is] beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction over the party, is not entitled to any respect in the State where rendered.[273]

This conclusion was obviously unprecedented; the Court lamented that such invalidity "always ought to have been" recognized, but admitted that it had not.

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than an aside.

271. *Pennoyer*, 95 U.S. at 723, 728, 731. But what of actions *in personam*, which do not presuppose the existence of property within the state? A hint of the Court's distrust of any adjudication detached from enforcement may be reflected in its curious reference to suits "merely" *in personam*, *id.* at 727, and suits that "involve[] merely a determination of the personal liability of the defendant," *id.* at 733.

272. *Cf.* Dodd, *supra* note 158, at 429 (describing the view that "a judgment for the plaintiff is necessarily something to be enforced and that a state which is physically impotent to enforce its judgment should be treated as legally incompetent to adjudicate").

273. *Pennoyer*, 95 U.S. at 732.

Because the Court's innovations were not emphasized, the dissenting judge failed to appreciate them. Justice Hunt approached the law of jurisdiction traditionally, as a part of the law of conflicts. He did not discuss any fundamental right limiting the authority of a state to exercise jurisdiction. To the contrary, Justice Hunt concluded that the only inherent limitation on rules of jurisdiction was the obligation to afford notice and opportunity to defend: "if reasonable notice [is] given, with an opportunity to defend when appearance is made, the question of power will be satisfied."[274] Thus, his dissent emphasized that the mode of asserting attachment jurisdiction was well established in American law and afforded reasonable notice. Yet, that conclusion, even if undisputable, was irrelevant since the Court's holding was based on a supposed violation of fundamental rights.

The new theory of jurisdiction demanded a new theory to account for the Court's role. Prior cases had begun to invest the Court with authority to develop rules of comity in the general law of jurisdiction. But the law of jurisdiction was now based on fundamental rights, rather than on comity in interstate relations; the Court did not yet have a special responsibility to protect such rights. The Court, though, seemed to believe it *must* have an authoritative role in this area. The evidence was unmistakable—as Justice Hunt indirectly showed at length—that states were violating the fundamental rights of non-residents, and that state courts would not protect those rights. If there was to be any protection, it would have to come from the Supreme Court. Thus, the right would have to be one that the Court had authority and responsibility to protect.

In dictum, the Court addressed the question of how a violation of the right could be challenged in the rendering state. Its answer was to construe the right as an aspect of due process of law under the Fourteenth Amendment. As the Court explained:

> Whatever difficulty may be experienced in giving to those terms [i.e., "due process of law"] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no

274. *Id.* at 748 (Hunt, J., dissenting).

> doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established . . . for the protection and enforcement of private rights . . . . [I]f that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or by his voluntary appearance.[275]

The inclusion of in-state service as a requirement of due process was novel. Very likely, it was facilitated by the habitual confusing of notice, which was a traditional due process concern, with jurisdiction, which was not. Yet the treatment of a jurisdictional rule as a matter of due process was unprecedented nonetheless.[276] Since the Court was the final authority on matters of constitutional law, it could be the final authority on matters of jurisdiction as well.

V. THE CONSTITUTIONALIZATION OF *PENNOYER*

Pennoyer—surprisingly from today's perspective—was long regarded as a decision about natural justice and international jurisdiction. For example, an 1883 article on the enforcement of judgments by Thomas Cooley, the preeminent constitutional scholar, cited the decision only for the traditional rules that out-of-state service of process would be a violation of a state's sovereignty and that a *quasi in rem* judgment is not enforceable outside the rendering state.[277] The article nowhere refers to *Pennoyer* as a constitutional decision. In fact, Cooley seems to have rejected *Pennoyer*'s constitutional dictum; he adhered to the traditional view that a judgment obtained without personal service might be invalid outside the state but valid within.[278] As late as 1898, a *Harvard Law Review* article on per-

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275. *Id.* at 733.

276. *See generally* Whitten, *supra* note 5.

277. Thomas M. Cooley, *The Remedies for the Collection of Judgments Against Debtors Who Are Residents or Property Holders in Another State, or Within the British Dominions*, 22 AM. L. REG. (n.s.) 697, 701 (1883).

278. *Id.* at 702. This is all the more striking because the Supreme Court in *Pennoyer* relied on Cooley's treatise, *Constitutional Limitations*, for the dictum that a judgment rendered without service of process contravenes due process and is unenforceable within the rendering state.

sonal jurisdiction was citing *Pennoyer*, not for any constitutional pronouncement, but only for the proposition that "[i]t is a principle of natural justice that a judgment cannot be rendered without giving an opportunity for defence, and that service of process within the State is necessary to give jurisdiction in an action *in personam*."[279]

These scholarly treatments reflected the state of the law. For nearly forty years, courts, including the Supreme Court and even including Justice Field, largely failed to treat *Pennoyer* as a constitutional decision.[280] Instead, they treated it as a decision about natural justice and international law, and persistently distinguished between the enforceability of a judgment in a state and its enforceability without. It was not until the Supreme Court's decision in *Riverside & Dan River Cotton Mills v. Menefee*,[281] nearly forty years after *Pennoyer*, that the case's status as a constitutional decision was retroactively confirmed.[282]

A. Pennoyer *as a Non-constitutional Decision*

In the four decades after *Pennoyer*, many Supreme Court cases dealt with state court jurisdiction. Some arrived from the lower federal courts, others from state courts. To appreciate the role the Constitution played in jurisdiction law, it is best to examine the two categories separately.

1. Diversity Cases and General Law

Many of the diversity cases involved challenges to state statutes authorizing jurisdiction without in-state service of process. The Court did not invalidate any of those statutes;

Pennoyer, 95 U.S. at 734.

279. Edward Q. Keasbey, *Jurisdiction Over Foreign Corporations*, 12 HARV. L. REV. 1, 2 (1898).

280. For an early case that does treat *Pennoyer* as a constitutional decision, see Eliot v. McCormick, 10 N.E. 705, 709-10 (Mass. 1887) (citing *Pennoyer* and noting that the Fourteenth Amendment is violated if defendant does not appear nor is personally served).

281. 237 U.S. 189 (1915).

282. *Id.* at 193-94 (noting that *Pennoyer* established the doctrine that "the Courts of one State cannot, without a violation of the due process clause, extend their authority beyond their jurisdiction").

instead, it held them inapplicable in federal court. For example, in *Insurance Co. v. Bangs*,[283] the first significant post-*Pennoyer* decision, a state court judgment against a non-resident minor had been rendered without service of process.[284] A statute had permitted service instead on the minor's in-state guardian.[285] The Supreme Court refused federal court enforcement. Justice Field, without citing *Pennoyer*, said of the statute that it:

> does not change the necessity of service of process upon the defendants in a case before a court of the United States where a personal contract alone is involved. It may be otherwise in the State courts; it may be that, by their practice, the service of process upon the general guardian, or his appearance without service, is deemed sufficient for their jurisdiction. We believe that in some States such is the fact; but the State law cannot determine for the Federal courts what shall be deemed sufficient service of process or sufficient appearance of parties. Substituted service, by publication, against non-resident or absent parties, allowed in some States in purely personal actions, is not permitted in the Federal courts.[286]

There was no suggestion that the statute was unconstitutional in light of *Pennoyer*.[287]

In the jurisdiction cases from federal courts, *Pennoyer* was treated as a general-law decision stating a rule for diversity cases that did not supersede any rule of the forum state. For example, in *St. Clair v. Cox*,[288] yet another opinion by Justice Field refusing federal enforcement to a state court judgment, the Court characterized *Pennoyer* as a decision about the effect of state court judgments in federal courts. Said the Court: "In *Pennoyer v. Neff* we had occasion to consider at length the

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283. 103 U.S. 435 (1880).

284. *Id.* at 437.

285. *Id.* at 439. The state court had declared the service on the guardian proper. *Id.* at 437.

286. *Id.* at 439.

287. *Pennoyer* was cited only for the following proposition: "that constructive service will not give jurisdiction . . . is the established doctrine of this court." *Id.* at 441.

288. 106 U.S. 350 (1882).

manner in which State courts can acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in Federal courts."[289]

Even more telling is *Goldey v. Morning News*.[290] There, the Court began its analysis by citing *Pennoyer* for traditional rules of jurisdiction and for the principle that "[w]hatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."[291] It then held that federal courts may dismiss a removed case for want of personal jurisdiction even if the mode of service in state court had been authorized by state statute.[292] Although the Court refused to follow the New York statute because it contravened established principles of jurisdiction, the Court did not hold the statute unconstitutional. This was not an idiosyncratic decision. In *Conley v. Mathieson Alkali Works*,[293] a case decided twenty-six years after *Pennoyer*, the Court again refused to follow, but still did not invalidate, the same New York statute.[294]

2. State Cases and Constitutional Law

In jurisdiction cases reaching the Court from state systems, there necessarily were constitutional (or other federal) ques-

289. *Id.* at 353. For another case involving federal court collateral attack on a state court judgment, see Cooper v. Newell, 173 U.S. 555 (1899).

290. 156 U.S. 518 (1895).

291. *Id.* at 521.

292. *Id.* at 522. The principal holding of the case was that a petition for removal to a federal court did not waive objections to jurisdiction. *Id.* at 525-26.

293. 190 U.S. 406 (1903).

294. A further, striking demonstration of the general-law character of the law of jurisdiction is the rule that a federal court in diversity cases is not limited in exercising jurisdiction to what is sanctioned by state statute. Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898). Echoing Watson v. Tarpley, 59 U.S. (18 How.) 517 (1856), the Court explained that federal courts had a constitutional obligation to ensure impartial resolution of disputes between citizens of different states, and "[t]he fact that the legislature of the State . . . has not seen fit to authorize like suits to be brought in its own courts . . . cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States." *Kane*, 170 U.S. at 112-13.

tions. Otherwise, there could be no basis for Supreme Court review. Yet even in these cases, *Pennoyer* was treated primarily as a general-law decision.

This group of cases can be subdivided into two categories: those arising under the Full Faith and Credit Clause and those arising under the Due Process Clause.

a. Full Faith and Credit Cases

Cases from courts other than the rendering state typically involved challenges to enforcement. In this respect they were analogous to enforcement challenges from lower federal courts. The cases ostensibly raised issues under the Full Faith and Credit Clause—the basis for reviewability. But the real issue was the existence *vel non* of jurisdiction (in the international sense) over a non-resident—a general-law issue not governed by federal full faith and credit law.

These cases were treated much like the analogous cases from lower federal courts. An example is *Grover & Baker Sewing Machine Co. v. Radcliffe*.[295] There, the petitioner objected to a state court's refusal to enforce a judgment against the respondents rendered by a court of a state where they did not reside. No process had been served in the original case—the judgment was by confession.[296] The Supreme Court observed that the Full Faith and Credit Clause had left intact the rules of international jurisdiction.[297] Applying those rules, it held the rendering court to have lacked jurisdiction; thus, the judgment did not have to be enforced.[298]

In resolving the case, the Court proceeded under the general law of jurisdiction, not federal law. It clearly understood that it was doing so. After citing *D'Arcy* and *Pennoyer* for the proposition that "a personal judgment is without validity if rendered by a State court in an action upon a money demand against a non-resident of the State, upon whom no personal service of process within the State was made, and who did not

295. 137 U.S. 287 (1890).
296. *Id.* at 288-92.
297. *Id.* at 294-95.
298. *Id.* at 298.

appear,"[299] the Court continued:

> The rule is not otherwise in the State of Pennsylvania, where the judgment in question was rendered; nor in the State of Maryland, where the action under review was brought upon it. And the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State, is recognized by the highest tribunals of each of these States.[300]

There was no suggestion that the judgment was invalid or, more generally, that a judgment unenforceable for lack of service of process was unenforceable in the rendering state as well.[301]

b. Due Process Cases

Several cases reached the Court from states that had rendered the challenged judgment. In some of these cases, the Court stated or implied that the Fourteenth Amendment Due Process Clause placed limitations on state court jurisdiction. Yet the limitations were very different from those the Court sought to impose in *Pennoyer*.

The leading case in this area is *York v. Texas*,[302] which held that, with respect to jurisdiction, the Due Process Clause governs *only* the enforcement of a judgment and not the proceeding in which it is issued. In *York*, the Court upheld a Texas statute making any appearance a general appearance; the Court rejected the argument that the Due Process Clause requires a defendant to be able to contest jurisdiction in the original proceeding.[303] Without citing *Pennoyer*, the Court explained that there could be no due process violation until the

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299. *Id.* at 294-95.

300. *Id.* at 295 (citations omitted).

301. Many of the cases in this category were concerned with the enforceability of a divorce decree. *See, e.g.*, Haddock v. Haddock, 201 U.S. 562 (1906); Atherton v. Atherton, 181 U.S. 155 (1901); Bell v. Bell, 181 U.S. 175 (1901); Laing v. Rigney, 160 U.S. 531 (1896). Others were concerned with jurisdiction over foreign corporations. *See, e.g.*, Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573 (1910); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907).

302. 137 U.S. 15 (1890).

303. *Id.* at 19-21.

judgment was enforced because there was no deprivation of liberty or property until that time:

> The Fourteenth Amendment . . . forbids a State to "deprive any person of life, liberty or property, without due process of law." And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. *But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon or the judgment is sought to be enforced that liberty or property is in present danger.* If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint.[304]

Several other cases were to the same effect.[305]

The Court's explanation in *York* of how the Due Process Clause limits jurisdiction is incompatible with that in *Pennoyer*.[306] To the Court in *Pennoyer*, the deprivation of liberty triggering application of the Due Process Clause is the improper assertion of jurisdiction: that alone violates a fundamental right. *York*, however, recognizes no fundamental right to be free of an improper exercise of jurisdiction. On its view, the Due Process Clause is inapplicable until the threat of a deprivation of property arises. To use contemporary terminology, *York* states a theory of procedural due process, *Pennoyer* a theory of substantive due process.[307]

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304. *Id.* at 20 (emphasis added).

305. Connecticut Mutual Life Ins. Co. v. Spratley, 172 U.S. 602, 604, 609 (1899) (federal question was "whether the court obtained jurisdiction to render judgment in the case against the company so that to enforce it would not be taking the property . . . without due process of law"); Dewey v. Des Moines, 173 U.S. 193, 202 (1899) (enforcement of personal judgment obtained without service of process would violate due process clause); *see also* Edward Q. Keasby, *Jurisdiction Over Nonresidents in Personal Actions*, 5 COLUM. L. REV. 436, 454-55 (1905) (stating that *Pennoyer* "does not preclude the State courts from entering judgment so long as no property is taken in execution").

306. *York*, 137 U.S. at 19. Justices Bradley and Gray dissented without opinion. Justice Field joined in the majority opinion. *Id.*

307. A few other decisions apply the Due Process Clause to jurisdiction with another procedural perspective. These cases blur the distinction be-

A few other cases contain dictum suggesting that due process requires in-state service. The statements, however, are confused and the cases themselves undermine the suggestion. For example, in *Haddock v. Haddock*,[308] the Court cited *Pennoyer* for the proposition that the Due Process Clause invalidates, in the rendering state, a judgment over a non-resident without personal service of process. Yet, having made this point, the Court went on to explain that the doctrine of *Pennoyer* merely "expressed a general principle expounded in previous decisions," and cited a pre-*Pennoyer* case in which a judgment was held unenforceable "whatever validity it may" have where it was rendered.[309] In the end, the Court concluded that the divorce decree whose out-of-state enforceability was at issue might be enforceable in the rendering state even though it did not have to be accorded full faith and credit elsewhere. Hence Justice Holmes's dissent:

> I am unable to reconcile with the requirements of the Constitution, Article 4, section 1, the notion of a judgment being valid and binding in the State where it is rendered, and yet depending for recognition to the same extent in other States of the Union upon the comity of those States.[310]

B. Jurisdiction and the New Law of Fundamental Rights

Thus one finds a seeming anomaly: the *Pennoyer* Court relying, almost unanimously, on a theory of jurisdictional rights, followed by decades of disregard for the theory. Yet both phe-

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tween jurisdiction and notice, and treat the due process requirement of notice as a restriction on the exercise of jurisdiction over non-residents. *See, e.g.*, Laing v. Rigney, 160 U.S. 531, 545 (1896) (involving the enforcement of a state court judgment in another state); Scott v. McNeal, 154 U.S. 34 (1894).

308. 201 U.S. 562 (1905).

309. *Id.* at 568-69 (citing Bischoff v. Wethered, 76 U.S. (9 Wall.) 812, 814 (1869)); *see also Dewey*, 173 U.S. at 203.

310. *Haddock*, 201 U.S. at 632 (Holmes, J., dissenting). Justice Brown also dissented, lamenting, "I regret that the court in this case has taken what seems to me a step backward in American jurisprudence, and has virtually returned to the old doctrine of comity, which it was the very object of the full faith and credit clause of the Constitution to supersede." *Id.* at 627-28 (Brown, J., dissenting).

nomena can be explained by broader trends.

The last third of the nineteenth century saw a revival of judicial concern with fundamental rights.[311] A striking example is *Loan Ass'n v. Topeka*,[312] a general-law diversity case in which the Supreme Court held void certain municipal bonds issued to aid private industry. Echoing *Calder v. Bull*,[313] the Court stated that "[t]here are limitations on [legislative] power which grow out of the essential nature of all free governments,"[314] and that these limitations are matters of fundamental right:

> It must be conceded that there are . . . rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.[315]

Indeed the fundamental rights were the same ones with which courts had been concerned earlier in the century. In *Loan Ass'n*, the bonds, since funded through taxes, were held to violate the right not to have one's property taken and given to others.[316]

Along with the revival of fundamental rights came entrenchment of the Court's belief in its role as their protector.[317] So vital was this role, thought the Court, that one Justice admitted:

> [T]he courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy,

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311. For an account of the pervasiveness of the concern with fundamental rights, see generally Robert P. Reeder, *Constitutional and Extra-Constitutional Restraints*, 61 U. PA. L. REV. 441 (1913).

312. 87 U.S. (20 Wall.) 655 (1874).

313. 1 U.S. (3 Dall.) 386 (1798).

314. *Loan Ass'n*, 87 U.S. (20 Wall.) at 663.

315. *Id.* at 662. For state court cases to the same effect, see, e.g., Barbour v. Louisville Bd. of Trade, 82 Ky. 645, 648 (1885); Commonwealth v. Perry, 28 N.E. 1126, 1126-27 (Mass. 1891).

316. *Loan Ass'n*, 87 U.S. (20 Wall.) at 664-65.

317. *E.g.*, Brown v. New Jersey, 175 U.S. 172, 175 (1899); Mugler v. Kansas, 123 U.S. 623, 661 (1887).

> consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.[318]

The Court's concern with fundamental rights and with its role as their protector manifested itself most strongly in two areas: a new general law and a new law of due process.

1. The New General Law

The new general law was first to develop and reach maturity. As described above, in the mid-nineteenth century there emerged a new, diversity-centered account of the role of the federal courts. Non-resident litigants were said to have a right to an unbiased, federal court determination of the law, and federal courts were said to have an obligation to provide that independent determination.[319] "We shall never immolate truth, justice, and the law," said the Court, "because a State tribunal has erected the altar and decreed the sacrifice."[320] This theory of non-resident rights and judicial obligations received encouragement after the Civil War from the statutory expansion of diversity and removal jurisdiction, in part based on Congress's fear of prejudice against certain litigants. One Reconstruction statute, for example, allowed removal from a state court in certain cases where a party believed that "from prejudice or local influence, he will not be able to obtain justice in such state court."[321]

With protection of litigant rights its new rationale, there was no longer reason for general law to be confined to commercial subjects and other matters based on custom and practice.

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318. Monongahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910).

319. For an early twentieth-century defense of the Article III basis for general law, see generally Henry Schofield, Swift v. Tyson: *Uniformity of Judge-Made State Law in State and Federal Courts*, 4 ILL. L. REV. 533 (1910).

320. Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 206-07 (1863).

321. Act of March 2, 1867, 14 Stat. 558; *see also* Act of March 3, 1875, 18 Stat. 470 (pt. 3); Act of July 27, 1866, 14 Stat. 305, 305-06.

Its scope grew to encompass tort law,[322] riparian rights,[323] liability of railroads to employees,[324] municipal bond law,[325] and a panoply of other subjects.[326] Indeed, as the Court expansively stated, general law potentially included all instances where "private rights are to be determined by the application of common law rules."[327]

As is well known and will be discussed below, the late nineteenth century also witnessed the development of a new constitutional jurisprudence of fundamental rights. But for a long time, the new general law was broader and more protective of fundamental rights than was the new constitutional law. For example, in *Davidson v. New Orleans*,[328] the Court rejected an argument that the Due Process Clause requires payment of compensation when a state takes private property for public use. In reaching this conclusion, the Court observed that such taking "may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States as we were in *Loan Ass'n v. Topeka*."[329] The reason for the greater willingness to rely on general law is not hard to fathom. To vindicate fundamental rights under the Fourteenth Amendment, the Court would have to strike down a state law: action inconsistent with the traditional relation between the Court and the states and inconsistent with the historical view of states as primary guardians of individual rights. By contrast, in protecting fundamental rights under general law, the Court simply refuses to give effect to a state's law in the case before it. The impact is on the litigants alone; the state remains free to adhere to the law and apply it in its own courts.[330]

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322. *See* City of Chicago v. Robbins, 67 U.S. (2 Black) 418 (1862).

323. *See* Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1870).

324. *See* Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 374-75 (1893).

325. *See* Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 206-07 (1863).

326. *See generally* Charles A. Heckman, *Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the* Swift *Doctrine*, 27 EMORY L.J. 45 (1978); FREYER, *supra* note 185, at 57-71.

327. City of Chicago v. Robbins, 67 U.S. (2 Black) 418, 428 (1862).

328. 96 U.S. 97 (1877).

329. *Id.* at 105 (citing Loan Ass'n v. Topeka, 87 (20 Wall.) 655 (1874)).

330. *See generally* Edward S. Corwin, *The Supreme Court and the*

2. The New Law of Due Process

The possibility of a new constitutional jurisprudence of fundamental rights was demonstrated soon after the adoption of the Fourteenth Amendment in the *Slaughterhouse Cases*.[331] This decision, the Court's first regarding the Amendment, did not itself advance the new jurisprudence. Rather, the Court concluded that the Amendment's "pervading purpose" was to secure the freedom and remedy the "grievances" of former slaves. In light of that purpose, and in light of constitutional language, the Court held that the Privileges and Immunities Clause did not generally protect fundamental rights such as those identified in *Corfield v. Coryell* as protected under the Article IV Privileges and Immunities Clause.[332] However, this narrow reading was shared by only five members of the Court. In dissent, Justice Field vigorously argued that citizens of the United States had inherent rights which it was the purpose of the Fourteenth Amendment to protect.[333] In particular, he argued that the rights, privileges and immunities it protected are those which of right belong to the "*citizens of all free governments*,"[334] and that the ones protected can be identified as those protected by the common law and said to be inalienable by the Declaration of Independence.[335] Justice Field thus read into the Fourteenth Amendment a natural rights theory very much like that which prevailed earlier in the century. Justice Bradley, also in dissent, took a similar approach.[336]

Fourteenth Amendment, 7 MICH. L. REV. 643 (1909).

331. 83 U.S. (16 Wall.) 36 (1872).

332. *Id.* at 71-77.

333. *Id.* at 83 (Field, J., dissenting). Both Justice Field and Justice Bradley, who also dissented, accepted Justice Washington's account of fundamental rights set out in Corfield v. Coryell, 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230).

334. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 97 (Field, J., dissenting).

335. *Id.* at 105 (Field, J., dissenting).

336.

> The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights them-

Field's vision of the Fourteenth Amendment as securing antecedent fundamental rights is consistent with the view he soon after expressed in *Pennoyer*. In fact, the doctrine of fundamental rights identifiable from the common-law tradition was probably accepted by most, if not all, members of the Supreme Court in this period. It is noteworthy that the majority opinion in the *Slaughterhouse Cases* was written by Justice Miller, who wrote the opinion in *Loan Ass'n* for a nearly unanimous court the following year. Throughout the remainder of the century, Supreme Court opinions, especially concurring and dissenting opinions, bristle with references to fundamental rights protected by the Fourteenth Amendment and, in particular, its Due Process Clause.[337]

Nonetheless, it was the narrow reading of the Fourteenth Amendment taken by the *Slaughterhouse Cases* majority that prevailed, and the Court was long inclined not to invalidate state legislation under that Amendment as contrary to fundamental rights. The admitted reason was reluctance to "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people," and "constitute this court a perpetual censor upon all legislation of the States."[338]

Yet, the Court ultimately overcame these inhibitions,[339]

> selves. I speak now of the rights of citizens of any free government . . . . In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the States.

Id. at 114 (Bradley, J., dissenting).

337. *E.g.*, Holden v. Hardy, 169 U.S. 366, 389-90 (1898); Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 236 (1897); Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893); *In re* Kemmler, 136 U.S. 436, 448 (1890); United States v. Cruikshank, 92 U.S. 542, 554 (1875).

338. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 78.

339. Explanations are manifold. *See, e.g.*, ARNOLD W. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1969); Corwin, *supra* note 330; Stephen A. Siegel, Lochner *Era Jurisprudence and the American Con-*

and by the mid-1890's the Due Process Clause became a vehicle for protecting fundamental rights and establishing limitations to legislation. Due process of law was taken to refer "to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized."[340] A new constitutional doctrine emerged that, at bottom, substituted reliance on the Due Process Clause for reliance on natural rights.[341] "[F]or all the change in application, and for all the differences in terminology which from time to time appear, the basic idea [was] identical with the philosophy underlying many of the decisions and much of the juristic writing of the period of Marshall, Kent, and Story."[342]

Still, the effect of this revived natural rights jurisprudence should not be overstated, for much of the Court's talk about fundamental rights was just that: talk. It was not until 1896 that the Court held that the Due Process Clause prevents the taking of property without compensation.[343] And it was not

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stitutional Tradition, 70 N.C. L. REV. 1 (1991).

340. Hurtado v. California, 110 U.S. 516, 536 (1884) (quoting Brown v. Commissioners, 50 Miss. 468 (1874)).

341. *See generally* TRIBE, *supra* note 9, § 8-1, at 560-67.

342. Wright, *supra* note 21, at 540. *See* Haines, *supra* note 20, at 638-39:

> A basis for their application having been gradually discovered in constitutions by broadening the scope of due process, it became unpopular with lawyers and judges to refer to fundamental rights, natural law and justice or to the general principles of republican government. But fundamental rights remain about the same, whether used as an extra-constitutional doctrine to invalidate acts or whether read into due process in order to give the decision a cloak of constitutional sanction. It is noteworthy that courts continue to refer to the doctrine of natural and inalienable rights long after due process has been extended to cover all possible cases of legislative power which might be considered by judges as arbitrary or oppressive.

See also Bird, *supra* note 77; L.B. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238, 265 (1911) ("As it is now used by our courts, . . . [due process of law] means substantially the same thing that was meant by 'natural justice,' 'principles of liberty and justice' and similar expressions in the earlier days of our constitutional history."); Corwin, *Basic Doctrine*, *supra* note 76, at 252 (stating that "[i]t is no longer good form, because it is no longer necessary, for a court to invoke natural rights and the social compact in a constitutional decision").

343. Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896) (prohib-

until 1897, in *Allgeyer v. Louisiana*,[344] that the Court held freedom of contract to be a fundamental liberty under the Due Process Clause. Even after those decisions, the Court repeatedly emphasized that the rights protected by the Fourteenth Amendment are not absolute[345] and, more often than not, upheld challenged state legislation. The Court did not begin to invalidate legislation in a substantial proportion of cases until about 1920.[346]

More significant for present purposes, the fundamental rights initially held protected were mainly economic rights concerning property and contract, rather than non-economic liberties.[347] The Court in *Allgeyer* explained that:

> The liberty mentioned in that amendment . . . is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[348]

It was not until the 1920's that the Court began to protect personal liberties (such as might include jurisdictional liberties) under the Due Process Clause.[349]

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iting the taking for private use); *see also* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 258 (1897) (prohibiting uncompensated taking for public use).

344. 165 U.S. 578, 589 (1897).

345. *E.g.*, Holden v. Hardy, 169 U.S. 366, 389-90 (1898); Jacobson v. Massachusetts, 197 U.S. 11, 29-30 (1905).

346. *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944-45 (1927).

347. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78, 113-14 (1908) (Bill of Rights not incorporated in Fourteenth Amendment); *see also* Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property"*, 4 HARV. L. REV. 365, 381-92 (1891).

348. *Allgeyer*, 165 U.S. at 589.

349. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of speech and the press); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (right to teach and learn foreign languages); *see also* Bartels v. Iowa, 262 U.S. 404, 411 (1923).

3. The Evolution of the New Law of Jurisdiction

The character and evolution of the jurisprudence of rights helps explain why acceptance of the constitutional theory articulated in *Pennoyer* was so long delayed.

To begin, *Pennoyer* was a general-law case and it is hardly surprising that it continued to be treated as such. To the extent federal courts wished to protect rights of non-residents against improper assertions of jurisdiction, it was sufficient to rely on general law. Indeed, it was preferable to do so, since it allowed courts to protect non-resident rights without intruding on state law-making prerogatives.

Second, a constitutional jurisprudence of fundamental non-economic liberties developed slowly. It would have been extraordinary had a liberty to be free of improper exercises of jurisdiction become established before the Court had secured protection for property-oriented rights (in the late 1890's) and other rights with a more plausible common-law pedigree.

Third, it was often corporations that challenged jurisdiction.[350] While corporations were protected by the Due Process Clause and could enjoy rights based on positive enactments, they were creations of the state and could not have any *inherent* rights against it. And while it was easy to understand how corporations could have rights relating to property or contract, it might be difficult to see how they could have a fundamental personal liberty, such as a right not to be subjected to a state's jurisdiction.[351]

One last consideration deserves mention. Although the theory of jurisdictional due process suggested in *Pennoyer* was not one of procedural due process, jurisdiction and procedural due process are connected concerns. For example, issues of jurisdiction and notice—a core concern of procedural due process—often overlap. At the time the Court was developing its due process jurisprudence of fundamental rights, it was also developing a new jurisprudence of procedural due process. But there was an important difference between the two lines of development. While fundamental rights due process was nota-

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350. In St. Clair v. Cox, 106 U.S. 350, 356 (1882), the Court extended the rule requiring in-state service of process to corporations.

351. *See* HENDERSON, *supra* note 203, at 173-74.

ble for the limitations it imposed on state legislation, procedural due process was notable for the freedom it gave states to experiment with innovations.

For example, the Court in *Hurtado v. California*[352] upheld the constitutionality of prosecution by information rather than indictment. It rejected the argument that only procedures having "the sanction of settled usage" could meet the requirement of due process.[353] Emphasizing that "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law,"[354] and noting that in other countries the standard of due process is satisfied by procedures different from those traditionally found in English and American common law, the Court held that a legal proceeding, "whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves [the fundamental] principles of liberty and justice, must be held to be due process of law."[355] On this same basis, the Court upheld innovations in both civil and criminal procedure in subsequent cases.[356]

This liberalizing, adaptive approach to due process is the exact opposite of the rigid, *a priori* approach underlying *Pennoyer*. It may well have had an impact on the developing law of jurisdiction. It clearly applied to the jurisdictional accompaniment—notice.[357] And in *York v. Texas*,[358] the Court expressly relied on the new procedural due process principles to uphold the deferral of jurisdictional challenges to the time of enforcement: "The State has full power over remedies and procedure in its own courts, and can make any order it pleases

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352. 110 U.S. 516 (1884).

353. *Id.* at 528-29.

354. *Id.* at 530.

355. *Id.* at 537.

356. *E.g.*, Rogers v. Peck, 199 U.S. 425, 437 (1905) (criminal procedure); Turpin v. Lemon, 187 U.S. 51, 61 (1902) (procedures regarding sale of land for delinquent taxes); Antoni v. Greenhow, 107 U.S. 769, 782 (1882) (procedure for resolving disputes over certain tax payments).

357. *See, e.g.*, *Turpin*, 187 U.S. at 60 (notice standards in tax assessment and collection proceedings); Arndt v. Griggs, 134 U.S. 316 (1890) (upholding service by publication on non-residents in quiet title actions).

358. 137 U.S. 15 (1890).

in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants."[359] This liberalizing strain in the law of due process may have been a counterweight to the rigidity attendant upon recognition of jurisdictional rights.

C. Pennoyer *as Constitutional Decision*

It was not until 1915, in *Riverside & Dan River Cotton Mills v. Menefee*,[360] that the Court squarely held that the mere exercise of jurisdiction over a non-resident without service of process violates the Due Process Clause. *Menefee* was a case similar to *Goldey*[361] and *Conley*,[362] in that jurisdiction was asserted over a foreign corporation under a statute which did not provide for service of process on it. The important difference, however, is that *Menefee* reached the Supreme Court from the state court rendering the judgment, whereas *Goldey* and *Conley* were diversity cases. In *Menefee*, the state supreme court had sustained the judgment, relying on the statements in *Goldey* and *Conley* that, "[w]hatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."[363] The Supreme Court reversed; it disingenuously asserted that the rule requiring in-state service as a matter of due process "was long ago established by the decision in *Pennoyer v. Neff* . . . , and has been without deviation upheld by a long line of cases."[364] This was the extent of its constitutional analysis.

The Court also rejected the argument, based on *York*,[365]

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359. *Id.* at 20.

360. 237 U.S. 189, 196-97 (1915); *see also* McDonald v. Mabee, 243 U.S. 90, 92-93 (1917). For prior suggestions, see Scott v. McNeal, 154 U.S. 34, 46 (1894).

361. Goldey v. Morning News, 156 U.S. 518 (1895); *see supra* notes 290-92 and accompanying text.

362. Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903); *see supra* notes 293-94 and accompanying text.

363. Menefee v. Riverside & Dan River Cotton Mills, 76 S.E. 741, 743 (N.C. 1912), *rev'd*, 237 U.S. 189 (1915).

364. *Menefee*, 237 U.S. at 193.

365. York v. Texas, 137 U.S. 15 (1890); *see supra* notes 302-07 and

that there could be no violation of the Due Process Clause without enforcement. Yet again, it offered no credible rationale. It flatly stated that, if the Due Process Clause prohibits enforcement, it must also prohibit rendition of the judgment sought to be enforced. But this is a non sequitur: the theories of due process violation by enforcement and due process violation by exercise of jurisdiction are based on different views of the relationship between due process and jurisdiction. The Court also pointed to the supposed fact that a judgment rendered without in-state service of process is necessarily "judicial action without a hearing."[366] But the assertion is false unless "hearing" is used idiosyncratically, to mean hearing without service of process.

To the extent one can extract any explanation for the Court's holding, it appears to be the view, also underlying *Pennoyer*, that adjudication without in-state service of process is an illegitimate "manifestation of power."[367] But as in *Pennoyer*, this illegitimacy was presumed rather than explained. The Court must have understood the exercise of jurisdiction over nonresidents without service of process to violate a fundamental right; but what the nature of that right could be was never made clear.

Thus was the general law regarding in-state service of process transformed into constitutional law. A postulated, but unexplained, right that protects individuals and corporations from the "manifestation of power" of a foreign state court was enshrined as a right protected by the Due Process Clause. And at last the statutes that were disapproved, but tolerated, in *Goldey* and *Conley*, could be held unconstitutional.

VI. THE CONSTITUTIONALIZATION OF JURISDICTION

Concurrent with the just described transformation of jurisdiction law[368] was a separate transformation of the law of jurisdiction over corporations. The due process law that emerged from the latter differed greatly from the law of jurisdictional

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accompanying text.

366. *Menefee*, 237 U.S. at 196.

367. *Id.*

368. *See supra* section V.A.

rights. To understand this development, one must understand some additional features of late nineteenth- and early twentieth-century federal court jurisprudence.

A. *The New Law of Natural Justice*

1. The New Federal Common Law

Incidental to the growth of interstate business activity in the late nineteenth century was the emergence of a new meaning for "general," as in general law. This law expanded beyond the bounds previously described, to encompass subjects "in which the nation as a whole is interested" or which "enter[] into the commerce of the country."[369] Federal courts believed those matters demanded a uniform national law.

The paradigm of "general" law in this new sense was the law of railroads. Suits involving railroads often raised novel issues or called for new applications of existing principles, and federal courts in diversity cases had many opportunities to decide what the law should be. A general law of railroads emerged. It dealt with commercial topics, such as contracts of carriage,[370] liability to shippers,[371] and liability for wrongful ejectment.[372] And it dealt with far more—for example, tort liability to employees[373] and to persons on the railroad's premises.[374]

A notable feature of this interstate general law was its *a priori* character. In exercising independent judgment as to the law, courts necessarily relied on considerations of natural justice.[375] A rule of general law came to be seen as a rule that

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369. Baltimore & O.R.R. v. Baugh, 149 U.S. 369, 378 (1893).

370. *E.g.*, Myrick v. Michigan Cent. R.R., 107 U.S. 102, 109 (1882).

371. *E.g.*, Eells v. St. Louis, Keokuk & N.W. Ry., 52 F. 903, 907-08 (C.C.S.D. Iowa 1892).

372. *E.g.*, Baltimore & O.R.R. v. Thornton, 188 F. 868, 878 (4th Cir. 1911).

373. *E.g.*, *Baugh*, 149 U.S. at 370; Pennsylvania R.R. v. Hummel, 167 F. 89, 94 (3d Cir. 1909); Newport News & Miss. Valley Co. v. Howe, 52 F. 362, 370 (6th Cir. 1892).

374. *E.g.*, Union Pac. Ry. v. McDonald, 152 U.S. 262, 283-84 (1894).

375. *See Baugh*, 149 U.S. at 370; Bennett v. Railroad Co., 102 U.S. 577, 580 (1880).

> does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of rules and principles known as the "common law."[376]

Indeed, general law was often characterized as "general jurisprudence,"[377] a body of deductions from, and applications of, the principles of natural justice.[378]

As general law evolved, it more and more took on the character of common law: a comprehensive body of decisions based on custom and natural justice. As it did, it generated jurisprudential and constitutional problems, for its existence became hard to square with the Court's longstanding position that there is no federal common law. Said the Court around the time of *Swift*, and on many later occasions, "there can be no common law of the United States . . . [except] by legislative adoption. When . . . a common-law right is asserted, we must look to the state in which the controversy originated."[379] The general commercial law of *Swift* did not contravene this precept, since it was international law by another name.[380] But the new general law, if sufficiently like common law, was of doubtful legitimacy.

Doubts about the nature and legitimacy of general law increased toward the end of the nineteenth century,[381] partially as a result of a revolution in federal law. In its 1886 decision in *Wabash, St. Louis & Pacific Railway v. Illinois*,[382] the Supreme Court read the Commerce Clause as stringently limiting state regulatory power. The Court held that, under the Commerce Clause, states could regulate only transportation that

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376. *Baugh*, 149 U.S. at 378.

377. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 360 (1910); Burgess v. Seligman, 107 U.S. 20, 33 (1882).

378. Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 101-02 (1901); Robert von Moschzisker, *The Common Law and Our Federal Jurisprudence* (pts. I-III), 74 U. PA. L. REV. 109, 270, 367 (1925).

379. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834). *See also, e.g.*, Smith v. Alabama, 124 U.S. 465, 478 (1888).

380. *See Smith*, 124 U.S. at 478.

381. *See, e.g.*, Street, *supra* note 54.

382. 118 U.S. 557 (1886).

begins and ends in their territory.[383] Thus, it invalidated a state law prohibiting rate discrimination for the in-state part of interstate railroad transport; only Congress could enact such regulation. The Court explained:

> [T]his species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear . . . . [I]t must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the [C]ommerce [C]lause of the Constitution.[384]

Shortly after the decision, Congress enacted the Interstate Commerce Act, marking the beginning of significant federal regulation of commerce.[385] But for a long time the amount of such regulation was small. This posed a problem. Since the Commerce Clause preempted state laws, enormous gaps remained: areas in which railroads and other interstate enterprises might operate without governing law. The result was untenable. The solution was for courts to apply some type of general law in the gaps. Whether they could, and if so, the nature of that law, were much debated questions.[386]

A few courts suggested that no law operated where Congress had failed to legislate.[387] But the Supreme Court ruled otherwise, holding in *Western Union Telegraph Co. v. Call Publishing Co.*[388] that "the common law" governed interstate commerce when Congress had failed to legislate.[389] Yet the Court was vague about the nature of this "common law." On the one hand, it reaffirmed that "[t]here is no body of Federal common

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383. *Id.* at 577.

384. *Id.*

385. Interstate Commerce Act, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

386. *See* E. Parmalee Prentice, *Federal Common Law and Interstate Carriers*, 9 COLUM. L. REV. 375 (1909).

387. Swift v. Philadelphia & Reading R.R., 64 F. 59, 68 (C.C.N.D. Ill. 1894); Gatton v. Chicago, Rock Island & Pac. Ry., 63 N.W. 589 (Iowa 1895).

388. 181 U.S. 92 (1901).

389. *Id.* at 103.

law separate and distinct from the common law existing in the several states," and that the general law governing interstate transactions is not "distinct from the common law enforced in the States."[390] But on the other hand, it reaffirmed that states generally cannot regulate commerce. The dilemma was evaded rather than resolved: the Court explained that "the principles of the common law," rather than state or federal common law, were the norms "operative upon all interstate commercial transactions."[391] This raised obvious questions about the nature of those "principles of the common law," their connection with state and federal law, and their binding effect.

No workable theory emerged to explain and legitimize general law.[392] Most courts, as in *Call*, invoked a jurisprudential model consisting of a body of principles underlying judicial decisions, of which all American common law is a further elaboration.[393] But beyond this, there was dispute. Some courts further postulated that the Constitution had implicitly allocated common-law-making responsibility—sometimes exclusively, sometimes concurrently—between federal and state courts.[394]

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390. *Id.*

391. *Id.* at 102.

392. State courts largely rejected the notion of general law, at least as concerns relations between state courts. Where a conflict of laws question arose, they generally applied the law of the state of the transaction or wrong. Said one state court, in rejecting the federal court approach, "the law declared by state courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States courts is to be regretted, and certainly not to be followed." Forepaugh v. Delaware, Lackawanna & W. R.R., 18 A. 503, 505 (Pa. 1889). State courts even went so far as to enjoin citizens of the state from suing a fellow citizen in courts of other states in an effort to avoid application of the first state's law. *See, e.g.*, Weaver v. Alabama Great S. R.R., 76 So. 364 (Ala. 1917); Sandage v. Studebaker Bros. Mfg. Co., 41 N.E. 380, 382-83 (Ind. 1895); *see also* Cole v. Cunningham, 133 U.S. 107, 133-34 (1890) (upholding constitutionality of such injunctions under the Full Faith and Credit Clause and the Article IV Privileges and Immunities Clause).

393. *See, e.g.*, Moore v. United States, 91 U.S. 270, 274 (1875) (proceedings in Court of Claims should be governed by "the common law" in absence of legislation); Murray v. Chicago & N.W. Ry., 62 F. 24, 45 (C.C.N.D. Iowa 1894), *aff'd*, 92 F. 24 (8th Cir. 1899).

394. *E.g.*, *Call*, 181 U.S. at 103; *Murray*, 62 F. at 45.

This postulate involved a new view of the federal courts' role, in which there would be "national control over subjects affecting the country and the people as a whole, and wherein uniformity of rule and control is desirable, if not indispensable, and . . . state control over subjects of local interests."[395] The theory, if developed, might explain what we now call *federal* common law—federal, judge-made law in areas where state authority had been ousted but no federal statute governs.[396] Yet it had little to say about the vast area within the *concurrent* jurisdiction of state and federal courts—diversity jurisdiction—where most of the general law was made.[397]

The more common theory was a positivistic reinterpretation of *Swift*. On this view, all law was the law of a state or nation, and there was a multiplicity of common laws: one for each state[398] and an extremely limited one for the United States. Each such common law had both a general and a local component.[399] The general component was based on principles of natural justice; it was evidenced by the decisional law of the state. A constitutional role of the federal courts was to provide an independent, unbiased determination of the states' general law; and in making their determinations, federal courts were not bound by state court decisions except in specifically identified classes of cases.[400] Federal and state court differences as to matters of general law were explained as disagreements about true state law.[401] For example, the Court in *Chicago,*

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395. *Murray*, 62 F. at 31-32.

396. *See* Kansas v. Colorado, 206 U.S. 46 (1907); *Call*, 181 U.S. at 100-02; *Murray*, 62 F. at 38-39; Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 23-24 (1910).

397. For an example of the problem, see von Moschzisker, *supra* note 378, at 367-72. The author develops the theory that a body of federal common law exists that includes diversity decisions in disregard of state law. The existence of two distinct and potentially inconsistent bodies of law governing every person is treated as an irreducible datum.

398. *See, e.g.*, Smith v. Alabama, 124 U.S. 465, 475-76 (1888).

399. *E.g.*, Baltimore & O.R.R. v. Baugh, 149 U.S. 369, 394-95 (1893) (Field, J., dissenting); *Smith*, 124 U.S. at 478; Gatton v. Chicago, Rock Island & Pac. Ry, 63 N.W. 589, 598, 600 (Iowa 1895); *see* Edward C. Eliot, *The Common Law of the Federal Courts*, 36 AM. L. REV. 498, 521 (1902); Street, *supra* note 54; *see generally* FREYER, *supra* note 185.

400. *See* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 360 (1910).

401. Newport News & Miss. Valley Co. v. Howe, 52 F. 362, 365 (6th

Milwaukee & St. Paul Railway v. Solan[402] explained that:

> The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is . . . one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State . . . .[403]

Like the first theory, this one ultimately failed to explain the relationship between federal and state courts in matters within diversity jurisdiction and the role of federal courts in determining state law. It failed to answer the question of when federal courts should follow state courts, and when state courts should follow federal courts. Lacking any explanation, courts fell back on a vague notion of comity[404] and commentators of-

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Cir. 1892) (Taft, J.):

> Upon questions of the general common law of a state, the courts of the United States, exercising a jurisdiction concurrent with that of the state courts, are vested with the constitutional power of rendering and enforcing their independent judgment as to what the law is, even if this judgment is not in accord with the conclusions of the ultimate tribunal of the state whose law they are administering.

See also Smith, 124 U.S. at 478 (stating that federal courts "administer the law of the State in which they sit" and exercise their independent judgment as to such law); Swift v. Philadelphia & Reading R.R., 64 F. 59, 65-66 (C.C.N.D. Ill. 1894); Eliot, *supra* note 399.

402. 169 U.S. 133 (1898).

403. *Id.* at 136.

404. *See* Burgess v. Seligman, 107 U.S. 20, 34 (1883):

> [F]or the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be sup-

fered bromides such as that:

> State courts should pay great respect to the decisions of the United States[] courts relating to the same subject matter; in that they represent the unbiased judgment of those tribunals with respect to the law of the State. And . . . if upon any subject-matter the Federal courts find themselves at variance with the weight of authority and reason, evidenced in the decisions of the several States, they should yield their position to this authority.[405]

The boundary between federal and state judge-made law remained obscure.

2. Common Law and Constitutional Law

Constitutional law, as well as general law, increasingly resembled common law. It did so in two respects.

a. Common-law Method

The Supreme Court had always relied on common law and the common-law tradition to help clarify constitutional provisions.[406] But it now went further, treating constitutional law as a species of federal common law to be developed by the Court. In *Smith v. Alabama*,[407] for example, the Court explained that:

> There is . . . one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this

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posed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.

405. Eliot, *supra* note 399, at 525.

406. *E.g.*, Schick v. United States, 195 U.S. 65, 69 (1904); United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898); Munn v. Illinois, 94 U.S. 113, 125-26 (1876); *see* Siegel, *supra* note 339, at 78-96.

407. 124 U.S. 465 (1888).

> court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.[408]

This common-law perspective suggested that constitutional law should be developed on a case-by-case basis—especially common-law concepts such as due process. Thus, in one of its early due process cases, the Court rejected the very possibility of defining "due process of law," stating that "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require . . . ."[409] Decades later, the Court still reminded litigants that, in marking the scope of due process, "as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on opposing sides."[410] Inevitably, due process decisions turned on the facts of the case, often generated forceful dissents, and as a whole yielded a confused and inconsistent body of law.[411]

b. Reasonableness

Under the rubric, "due process of law," the Court assumed the power to assess legislation for reasonableness.[412] In some respects, this development was an instance of the first, since the standard of reasonableness here was substantially the natural justice standard found in common law. Initially, a due process standard of reasonableness was used to protect individuals (and especially corporations) from unreasonable state regulation of railway and other rates. Invalidation of state regulations under this test began with the 1890 case of *Chicago,*

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408. *Id.* at 478-79.

409. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

410. Noble State Bank v. Haskell, 219 U.S. 104, 112, *amended by* 219 U.S. 575 (1911).

411. *See, e.g.*, Brown, *supra* note 346, at 966-67; Reeder, *supra* note 311.

412. *E.g.*, McLean v. Arkansas, 211 U.S. 539, 546-47 (1909); Lochner v. New York, 198 U.S. 45, 56 (1905); Holden v. Hardy, 169 U.S. 366, 392-95 (1898); *see generally* Robert P. Reeder, *Is Unreasonable Legislation Unconstitutional?*, 62 U. PA. L. REV. 191 (1914).

Milwaukee and St. Paul Railway v. Minnesota,[413] in which the Court held the reasonableness of railway rates set by a railway commission to be "eminently a question for judicial investigation, requiring due process of law for its determination."[414] The standard was subsequently extended to state exercises of police power. For example, in *Lochner v New York*,[415] the eponym of the era's jurisprudence, the Court invalidated a state law regulating bakers' hours. It held that when a state enacts legislation affecting the health, safety, morals or general welfare of its people, due process of law requires that the legislation be reasonable, and that reasonability is a question for the courts:

> In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ?[416]

Thus, in constitutional law, reasonableness was in the air. The Court had assumed a jury-like role and deemed it appropriate to develop a body of jurisprudence requiring close evaluation of the facts. Indeed, the Court saw its role in some areas to be that of performing just such fact-intensive inquiry.

B. Jurisdiction over Foreign Corporations and the New General Law

The post-*Pennoyer* development of the law of jurisdiction over corporations began with *St. Clair v. Cox*,[417] yet another opinion by Justice Field. *St. Clair* initially held (without analysis) that *Pennoyer* applied to corporations, so that an *in personam* judgment over a foreign corporation required in-state

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413. 134 U.S. 418 (1890).

414. *Id.* at 458. *See also, e.g.*, Smyth v. Ames, 169 U.S. 466, *mod.*, 171 U.S. 361 (1898) (state regulations limiting railway carrier's compensation struck down as violating Due Process Clause).

415. 198 U.S. 45 (1905).

416. *Id.* at 56.

417. 106 U.S. 350 (1882).

service of process.[418] For present purposes, however, three other aspects of the case are more significant.

First, the Court emphasized the natural justice relationship between a corporation's doing business and incurring liabilities in a state, and its amenability to suit there. Said the Court:

> The doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked . . . . [W]hen a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.[419]

Second, the Court reaffirmed its holding in *Lafayette*[420] that a state may condition a foreign corporation's privilege to do business on its consent to service of process on a local agent, and that other states must give effect to these conditions so long as they do not transgress principles of natural justice.[421] In fact, the Court extended the principle of *Lafayette*. That case had involved a statute imposing such a condition, whereas *St. Clair* held that "such condition and stipulation may be implied as well as expressed."[422]

Finally, and most important, the Court followed *Moulin*[423] and required, for interstate enforceability, evidence that the corporation was engaged in business in the rendering state. But departing from *Moulin*, the Court did not require this

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418. *Id.* at 353.

419. *Id.* at 355.

420. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); *see supra* notes 236-38 and accompanying text.

421. *St. Clair*, 106 U.S. at 356.

422. *Id.*

423. Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N.J.L. 222 (1853), *aff'd*, 25 N.J.L. 57 (1855); *see supra* notes 232-35 and accompanying text.

evidence in order to establish the fairness of exercising jurisdiction over the corporation. Instead, the Court required it as "prima facie evidence that the agent [through whom the corporation received process] represented the company in the business," and thus that service of process on the agent was just.[424] Quoting *Moulin*, the Court explained that, if the agent was in the state only "accidentally," rather than on corporate business, service of process on him as a way of serving the corporation would be "'so contrary to natural justice and to the principles of international law that the Courts of other States ought not to sanction it.'"[425]

1. The Decline of Natural Justice

St. Clair thus confirmed the jurisdictional importance of a corporation's business activity in a state where it is served with process. Yet the opinion connected jurisdiction with in-state business activity in a problematic way. In *Lafayette*, the basis for jurisdiction had been an agent's doing business on behalf of the corporation; in *St. Clair*, by contrast, the basis was the corporation's doing business generally. "Doing business" was detached from the activities of particular agents and then reified. This left it with a dangerous abstractness.[426]

This abstractness, moreover, approached vacuity when the Court tried to explain why doing business was a prerequisite for jurisdiction. It explained that effective service on a corporation through an agent presupposes that the agent represents the corporation in the state, and that "[t]his representation

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424. *St. Clair*, 106 U.S. at 359.

425. *Id.* (quoting Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N.J.L. 222, 234 (1853), *aff'd*, 25 N.J.L. 57 (1855)).

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> The decision in [*Lafayette*] was subsequently maltreated in *St. Clair v. Cox* where the court made as the requisite of jurisdiction, not an agent doing business for (that is, merely representing or acting for) a foreign corporation, but some vague and previously (and as yet) undefined requirement that the corporation must be "doing business" in the state.

Louis P. Haffer, *Personal Jurisdiction over Foreign Corporations as Defendants in the United States Supreme Court*, 17 B.U. L. REV. 639, 640 (1937).

implies that the corporation does business, or has business, in the State for the transaction of which it sends or appoints an agent there."[427] Thus, a corporation's doing business in a state is a *logically* necessary condition for an agent's representation of it there. The Court converted this logically necessary condition into a legally significant one: doing business became *prima facie* evidence of the agent's representation. But this tack generates a problem: how does one know when the necessary condition obtains, i.e., when the corporation is doing business in the state?

The Court ignored the question. That it did suggests that it took "doing business" to be a straightforward matter of fact.[428] But it is no such thing. To determine whether a corporation is doing business in a state, one ordinarily would look at the activities of the corporation's agents in the state. In part, this is a factual inquiry, but only in part, for the relevant activities must be ones on behalf of the corporation.[429] "On behalf of" is a legal relationship. And by turning to the notion of agent representation to explain doing business, one would go in a circle: the original point of invoking "doing business" was to determine when the agent was acting on behalf of the corporation.[430] Some other basis for identifying and evaluating the relevant facts is needed to make it possible to determine when a corporation is doing business in a state. But what could that

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427. *St. Clair*, 106 U.S. at 359.

428. *See id.* at 360: "In the record . . . there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the State when service was made on Colwell."

429. *See, e.g.*, Earle v. Chesapeake & Ohio Ry., 127 F. 235, 236 (C.C.E.D. Pa. 1904):

> The corporation cannot be here for any purpose unless it is transacting the business for which it was organized. The mere presence of some of its officers or agents does not justify the conclusion that they have brought the corporation with them. That invisible and intangible entity only exists in thought, and is regarded as present in a foreign jurisdiction only when its officers or other agents cross the line of that jurisdiction for the purpose of carrying on the corporate enterprise, and actually do carry it on, within the foreign boundaries.

430. *Cf.* Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566, 569 (E.D. Ky. 1922) (noting interrelationship between notions of doing business and representation of corporation in state).

basis be? Thus the flaw in the Court's invocation of doing business as a jurisdictional concept: either it is circular or it presupposes criteria that the Court failed to spell out.[431]

It would have been less troublesome had the Court adhered to the *Moulin* approach, and used "doing business" as proxy for justice and fairness in the exercise of jurisdiction. True, there would remain uncertainty and looseness in the concept, but the approach would still provide *some* intelligible standard. At the least, actual practice of states in subjecting corporations to jurisdiction would evidence what is and what is not fair, and thus what does and does not count as doing business.

In fact, there were indications after *St. Clair* that a law of corporate jurisdiction more directly based on fairness or natural justice might develop. Several lower court decisions treated a corporation's doing business as tantamount to implied consent to service of process—"implied" in the quasi-contractual sense of imposed by law as a matter of justice.[432] And in *Barrow Steamship Co. v. Kane*,[433] the Supreme Court held that a corporation doing business in a state could be sued in the local federal court, even if no state statute allowed the exercise of jurisdiction by the state's courts.[434] In reaching this conclusion it emphasized "[t]he manifest injustice which would ensue,

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431. The problem can be seen clearly in cases dealing with service on a corporate officer while he is present in a state to settle the controversy giving rise to the action for which service is made. A few cases held the officer's activities themselves to constitute the corporation's doing business in the state, and service to be effective. Bush Creek Coal & Mining Co. v. Morgan-Gardner Elec. Co., 136 F. 505, 507 (C.C.W.D. Mo. 1905); Houston v. Filer & Stowell Co., 85 F. 757, 758 (C.C.N.D. Ill. 1898). Most courts, though, held otherwise, requiring more of the corporation's doing business in the state to legitimate service of process. Hoyt v. Ogden Portland Cement Co., 185 F. 889, 899 (C.C.N.D. N.Y. 1911); Wilkins v. Queen City Sav. Bank & Trust Co., 154 F. 173, 173-74 (C.C.S.D. N.Y. 1907); Louden Mach. Co. v. American Malleable Iron Co., 127 F. 1008, 1009 (C.C.S.D. Iowa 1904). No court was able to give a principled explanation for the result.

432. *E.g.*, United States v. American Bell Tel. Co., 29 F. 17 (C.C.S.D. Ohio 1886); Moch v. Virginia Fire & Marine Ins. Co., 10 F. 696 (C.C.E.D. Va. 1882).

433. 170 U.S. 100 (1898).

434. *Id.* at 112-13; *see also* Hayden v. Androscoggin Mills, 1 F. 93 (C.C.D. Mass. 1879).

if a foreign corporation, permitted by a State to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens, of the laws of the State . . . ."[435]

But the overt tie between doing business and natural justice was eventually severed. In the Court's opinion in *Connecticut Mutual Life Insurance Co. v. Spratley*,[436] doing business in the state was uncritically made a freestanding requirement for jurisdiction. The Court there listed two independent requisites for jurisdiction over a corporation:

> In a suit where . . . the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the State; . . . and if so, the service of process must be upon some agent so far representing the corporation in the State that he may properly be held in law an agent to receive such process in behalf of the corporation.[437]

It then proceeded to evaluate separately the evidence that the corporation was doing business in the state, and the evidence that the agent on whom process was served represented the corporation such as to make it proper to serve process upon him.[438] No standards were offered to guide either evaluation. Instead, as to each, facts were listed and a conclusion peremptorily drawn.[439] The Court was not entirely oblivious to the potential impact of fairness considerations. It observed that:

> A vast mass of business is now done throughout the country by corporations which are chartered by States other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the State where the business was done, out of which the dispute arises.[440]

But it made no use of the insight.

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435. *Kane*, 170 U.S. at 107.
436. 172 U.S. 602 (1899).
437. *Id.* at 610.
438. *Id.* at 610-12.
439. *See id.* at 605-12.
440. *Id.* at 619.

2. The General Law of Doing Business

Doing business thus became an autonomous requirement for jurisdiction over corporations.[441] Yet, divorced from its original connection with fairness, it remained a requirement without a rationale. Courts tried to supply one; two emerged. One rationale, hewing to the approach of *Lafayette*, was that a corporation's doing business in a state justified the inference that it had consented to jurisdiction.[442] The other was that doing business in a state was the equivalent of presence for purposes of the rule requiring in-state service of process.[443] The explanations were sometimes merged. For example, in *People's Tobacco Co. v. American Tobacco Co.*,[444] the Court offered the portmanteau explanation:

> The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted.[445]

But consent and presence were only metaphors, and unsatisfactory ones at that. Consent, if understood to mean consent as a matter of fact, was plainly fictional.[446] And reliance on it

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441. *E.g.*, International Harvester Co. v. Kentucky, 234 U.S. 579, 583 (1914) ("It has frequently been held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the state.").

442. *E.g.*, Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court, 289 U.S. 361, 364-65 (1933); St. Louis Sw. Ry. v. Alexander, 227 U.S. 218, 226 (1913); Old Wayne Life Ins. Ass'n v. McDonough, 204 U.S. 8, 22-23 (1907). For a systematic treatment of this approach, see JOSEPH H. BEALE, JR., THE LAW OF FOREIGN CORPORATIONS §§ 261-86 (1904).

443. *E.g.*, Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917); Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917 (N.Y. 1917) (Cardozo, J.).

444. 246 U.S. 79 (1918).

445. *Id.* at 87.

446. *See* Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917) (Holmes, J.) ("consent is a mere fiction, justified by holding the corporation estopped to set up its own wrong [failure to appoint an agent for service] as a defense"); Smolik v. Philadelphia &

generated troubling results. For example, the consent metaphor yielded the rule that, in a state requiring appointment of an agent for service of process, a corporation complying with the statute could be sued for claims arising outside the state, while a corporation disregarding the law could be sued only for claims arising within.[447]

The presence metaphor was equally empty, since additional criteria were needed to determine whether a corporation is present in a certain place.[448] It also was inconsistent with the very premise that gave rise to the problem of corporate jurisdiction: the dictum in *Bank of Augusta* that corporations could not exist outside their chartering state.[449] And it was inconsistent with many decisions, such as those rejecting jurisdiction on claims arising outside the state, notwithstanding a corporation's doing business, and thus presence, in a state,[450] and those upholding jurisdiction, after the corporation had ceased business in the state, for claims arising before the withdrawal.[451]

Reading Coal & Iron Co., 222 F. 148, 151 (S.D. N.Y. 1915) (Hand, J.) ("The court, in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent."); Bagdon v. Philadelphia & Reading Coal & Iron Co., 111 N.E. 1075, 1076 (N.Y. 1916) (Cardozo, J.); Austin W. Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 881 (1919).

447. *Pennsylvania Fire Ins. Co.*, 243 U.S. at 95-96. For general criticism of the consent metaphor, see Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 578-82 (1958).

448. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930):

> It scarcely advances the argument to say that a corporation must be "present" in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered. Indeed, it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes.

See also Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566, 570-71 (E.D. Ky. 1922).

449. *See supra* note 210 and accompanying text.

450. *E.g.*, Simon v. Southern R.R., 236 U.S. 115, 121-22 (1915).

451. *E.g.*, American Ry. Express v. Royster Guano Co., 273 U.S. 274,

Because the metaphors were empty, neither yielded a principled basis for determining when a corporation was doing business in a state. With nothing to guide analysis, decisions were often impressionistic, turning on nuance, and had little precedential value. As in due process cases, the Supreme Court abjured general rules, taking instead a case-by-case approach. In *St. Louis Southwestern Railway v. Alexander*,[452] it concluded:

> [T]his case is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is doing business within the district in such sense as to subject it to suit therein. This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction.[453]

As a result, said Learned Hand, "[i]t is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[454]

3. The Partial Rediscovery of Natural Justice

Nonetheless, several courts and scholars rediscovered the natural justice basis for the doing business requirement.[455] As they found, no principle other than reasonableness or justice could rationalize the cases.[456] The leading statement was

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279-80 (1927); Mutual Reserve Fund Life Ins. Co. v. Phelps, 190 U.S. 147, 158 (1903).

452. 227 U.S. 218 (1913).

453. *Id.* at 227. *See also* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (Supreme Court's "review extends to findings of fact as well as to conclusions of law"); International Harvester Co. v. Kentucky, 234 U.S. 579, 583 (1914).

454. Hutchinson v. Chase & Gilbert, Inc., 45 F. 2d 139, 142 (2d Cir. 1930).

455. *E.g.*, Scott, *supra* note 446, at 882-84.

456. *Hutchinson*, 45 F.2d at 141; Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566 (E.D. Ky. 1922); *see also* Note, *What Constitutes Doing Business By a Foreign Corporation for Purposes of Jurisdiction?*, 29 COLUM. L. REV. 187, 188 (1929).

by Learned Hand, in *Hutchinson v. Chase & Gilbert, Inc.*,[457] where he explained that:

> There must be some continuous dealings in the state of the forum; enough to demand a trial away from . . . home.
>
> This . . . appears to us to be really the controlling consideration, expressed shortly by the word "presence," but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts . . . . This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is "present," but at least it puts the real question, and that is something.[458]

Yet Hand's explanation, and similar explanations of others, had little direct impact. Some other courts agreed that, in principle, the fundamental consideration in the law of corporate jurisdiction was reasonableness or fairness. Yet they almost never applied it as the standard for deciding cases.[459] Instead, courts preferred to develop and apply ostensibly specific rules—for example, that "[t]he promotion of local trade and the making of contracts on behalf of a foreign corporation by an agent within a State [are] . . . substantial evidence that it was doing business therein."[460] Yet rules of this ilk were

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457. 45 F.2d 139 (2d Cir. 1930).

458. *Id.* at 141. For another, similar opinion, see *Farmers' & Merchants' Bank*, 286 F. at 577:

> [T]here is a single fundamental principle at the bottom of each one of these cases which necessitated the decision made. That principle is this. The existence of jurisdiction in a case of this kind depends upon whether, in view of the ultimate facts thereof, the exercise of jurisdiction would be reasonable.

459. *See* Frene v. Louisville Cement Co., 134 F.2d 511, 519 (D.C. Cir. 1943) (Edgerton, J., concurring); Moore Mach. Co. v. Stewart-Warner Corp., 27 F. Supp. 526, 529 (N.D. Cal. 1939); Hurley v. Wells-Newton Nat'l Corp., 49 F.2d 914, 919 (D. Conn. 1931); Dahl v. Collette, 279 N.W. 561, 567 (Minn. 1938); International Shoe Co. v. Washington, 154 P.2d 801, 812 (Wash.), *aff'd*, 326 U.S. 310 (1945).

460. Eastern Livestock Coop. Mktg. Ass'n v. Dickenson, 107 F.2d 116, 119 (4th Cir. 1939).

never justified on principle—they were merely efforts to summarize prior decisions without analysis—and they never seemed to make determinations as to the propriety of jurisdiction any easier.[461]

C. *The Status of the Law of Corporate Jurisdiction*

Although the rediscovered natural justice approach was not immediately influential, it ultimately prevailed as the constitutional standard of *International Shoe*.[462] To understand how *Hutchinson*'s natural justice standard became *International Shoe*'s constitutional standard, one must understand the jurisprudential status of the law of jurisdiction over corporations.

The law of corporate jurisdiction of the early twentieth century is hard to categorize. In the nineteenth century, corporate jurisdiction law was part of general law, and it seems to have retained this status well into the twentieth century. Occasionally, the fact was stated expressly, as in *Tauza v. Susquehanna Coal Co.*,[463] where Judge Cardozo described a corporation's doing business in a state as a matter "of private international law."[464] More often, however, the status remained implicit—for example, in a general-law-type assumption of a single body of law and principle governing jurisdiction over corporations, subject to minor statutory variations from state to state. It was easy for courts to take this view. "Doing business" supposedly referred to a fact, and the various tests were supposedly directed toward ascertaining an objective state of affairs. The tests, moreover, seemed to have nothing to do with any policies or principles as to which states might disagree, and seemed immune from intractable interstate differences. Hence,

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461. *See, e.g.*, Annotations, *Solicitation within state (or District of Columbia) of orders for goods to be shipped from other state as doing business within state within statutes prescribing conditions of doing business or providing for service of process*, 146 A.L.R. 941 (1943), 101 A.L.R. 126 (1936), 60 A.L.R. 994 (1929).

462. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

463. 115 N.E. 915 (1917). *Cf.* Roark v. American Distilling Co., 97 F.2d 297, 298 (8th Cir. 1938) ("It is unnecessary to examine how far federal courts are bound in determining their jurisdiction by State statutes . . . or by State statutes construing such statutes").

464. *Tauza*, 115 N.E. at 917.

courts freely and indifferently cited each other's cases for guidance in drawing conclusions about facts under review.[465] Scholars treated "doing business" as a univocal concept, which all courts were engaged in a common enterprise to clarify and understand.

Yet there was a puzzling feature to this law. What distinguished it from the rest of general law was the authoritativeness state courts gave Supreme Court decisions. The extent of such deference was remarkable. For example, state courts often relied on the Supreme Court's general-law pronouncements concerning doing business to help decide whether the facts of a case fell within the language of a state statute basing jurisdiction on doing business within the state.[466]

One likely reason for the Court's authority was its *de facto* preeminence, at least since *D'Arcy*,[467] in the general law of jurisdiction. Another reason, increasingly significant after *Menefee*,[468] was the impact of the Due Process Clause.[469] Courts often assumed that, because due process lay in the background of the law of jurisdiction, the incidents of jurisdiction somehow presented federal, even constitutional, issues, on which the Supreme Court had the ultimate say.[470] Yet the precise bearing of due process on the issue of a corporation's doing business in a state remained vague—necessarily so,

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465. *E.g.*, Frene v. Louisville Cement Co., 134 F.2d 511, 516 (D.C. Cir. 1943); Vilter Mfg. Co. v. Rolaff, 110 F.2d 491, 496 (8th Cir. 1940); Mas v. Owens-Illinois Glass Co., 34 F. Supp. 415, 420 (E.D. Va. 1940); American Asphalt Roof Corp. v. Shankland, 219 N.W. 28, 29 (Iowa 1928); Tignor v. L.G. Balfour & Co., 187 S.E. 468, 470 (Va. 1936).

466. *E.g.*, *American Asphalt Roof Corp.*, 219 N.W. at 30; Atlantic Nat'l Bank v. Hupp Motor Car Corp., 10 N.E.2d 131, 134 (Mass. 1937); Mikolas v. Hiram Walker & Sons, 76 N.W. 36, 36 (Minn. 1898).

467. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); *see supra* notes 175-80 and accompanying text.

468. Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915); *see supra* section V.C.

469. *E.g.*, West Publishing Co. v. Superior Court, 128 P.2d 777, 780 (Cal. 1942), *cert. denied*, 317 U.S. 700 (1943); *Atlantic Nat'l Bank*, 10 N.E.2d at 133.

470. *E.g.*, Cahill, *supra* note 201, at 692: "The course of decision of the United States Supreme Court . . . is particularly instructive as it controls to a great extent the decision of state tribunals since the question of jurisdiction is usually raised on the Fourteenth Amendment."

because, as we have seen, whether a corporation was doing business in a state was also treated as a question of fact. Courts thus contented themselves with nebulous statements such as: "Whether . . . a corporation is doing business in the state is a question of jurisdiction, and in its last analysis it is one of due process of law, under the Constitution of the United States."[471] As a result, "doing business" was jurisprudentially ambiguous. The concept was both general and federal, both fact and law. It was connected to constitutional law, but in a very uncertain way.

Given such a framework, and given the blurriness of the distinction between federal and state judge-made law, the notion that corporate jurisdiction was ultimately a matter of reasonableness held great potential. After all, reasonableness was an established standard of due process. Thus, if one did not demand analytical rigor, one could use reasonableness to clarify the connection between due process and the law of corporate jurisdiction. For one might conclude not only that the law of doing business was governed by a reasonableness standard, but that it was governed by a reasonableness standard *because* due process so required.[472] The Court in *International Shoe*[473] took this step.

VII. *INTERNATIONAL SHOE* AND THE NEW CONSTITUTIONAL LAW

The Supreme Court in *International Shoe* professed to rationalize, not change, the law of jurisdiction. It purported to clarify the foundations of existing law. To that end, it followed *Hutchinson*, agreeing that "doing business" and "presence" were not simple facts but conclusions; in particular, conclusions that a more basic standard for the validity of jurisdiction was satisfied.[474] Regarding that fundamental standard, the

471. North Wisconsin Cattle Co. v. Oregon Short Line R.R., 117 N.W. 391, 392 (Minn. 1908).

472. The first judicial suggestion of this appears to have been in Farmers' & Merchants' Bank v. Federal Reserve Bank, 286 F. 566, 577 (E.D. Ky. 1922). The suggestion, though, had little apparent influence on the development of the law.

473. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

474. *Id.* at 316-17.

Court also followed *Hutchinson*, agreeing that reasonableness and fairness were essential elements.[475] Like others before it, the Court returned to the natural justice foundations of the law.

In these aspects of the opinion, the Court appeared to say little new. Yet despite the purported adherence to existing law, the Court actually made enormous changes.

A. The Approach Taken

Hutchinson's fundamental standard for corporate jurisdiction was simply that of reasonableness;[476] *International Shoe*'s was that of "satisfy[ing] the demands of due process."[477] But the demands of due process were here understood to be demands of reasonableness.[478] Thus the Court could identify the reasonableness standard implicit in the jurisdiction case law with the due process standard. In this way, the law of corporate jurisdiction—in particular, the law of doing business—was retrospectively constitutionalized.

This move alone probably would have done little to transform the law. Reasonableness, after all, is reasonableness, and the Court was already the *de facto* authority in this branch of law. However, constitutionalizing reasonableness was not the only change the Court made. In a critical move, it conflated the new constitutional standard for corporate jurisdiction with the established constitutional requirement of in-state service, ostensibly creating a *single* constitutional standard. The Court announced that, with respect to jurisdiction, "due process requires" *either* that the defendant be "present within the territory of the forum"[479]—the *Pennoyer-Menefee* rule—*or* that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"—the new rule based on reasonableness.[480] In-state service and reasonableness were treated as alternative ways to satisfy the same constitutional

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475. *Id.* at 317.

476. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

477. *International Shoe*, 326 U.S. at 317.

478. *Id.* at 316.

479. *Id.*

480. *Id.*

demand.[481]

This blending of the two due process requirements is questionable: they are very different and have little to do with each other. The *Pennoyer-Menefee* requirement is rooted in a theory of fundamental rights. It deals primarily with jurisdiction over individuals and is designed to protect them against illegitimate exercises of state power. It underlies the Court's epigram that the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against [a] . . . defendant with which the state has no contacts, ties, or relations."[482] The reasonableness requirement, by contrast, is grounded in principles of natural justice, and is concerned mainly to protect corporations against inconvenience and unfairness. It underlies the Court's observation, echoing *Moulin*, that:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[483]

The requirements, thus, have different foundations, and they are concerned with different types of persons and with different aspects of jurisdiction. Only in the most attenuated way can they be considered aspects of a single, more basic requirement.

By treating the requirements as alternatives, the Court was led to assimilate the concerns and rationales of each into the other. One consequence was to attenuate the supposed fundamental right underlying the requirement of in-state service. For if the legitimacy of jurisdiction can be a matter of reason-

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481. Professor Kevin Clermont also sees two constitutional themes in *International Shoe*. One he characterizes as reasonableness, and the other as power. Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 415-16 (1981).

482. *International Shoe*, 326 U.S. at 319 (citing Pennoyer v. Neff, 95 U.S. 714 (1877)).

483. *Id.*

ableness and convenience, the supposed right not to be subject to jurisdiction cannot be absolute after all. This attenuation can be seen in the epigram quoted above. Note that it subtly reinterprets *Pennoyer*'s concern to be that of the defendant's "contacts, ties, or relations" with a state, rather than the single tie of physical presence.

Conversely, the assimilation of the two requirements injected a new set of factors into the reasonableness calculus: fundamental rights and international law. From this emerged *International Shoe*'s hybrid test for jurisdiction, requiring contacts "with the state of the forum [such] as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[484] The "our federal system" factor is novel and its meaning in this context anything but clear.

The inevitable result of the Court's purported restatement of the law was not to clarify and rationalize, but to plant the seeds of confusion. Despite the praise generally given the opinion, the reasoning is questionable and the rules stated make little sense.

B. The Approach Not Taken

The *International Shoe* opinion can thus be criticized for confusing distinct constitutional tests. It can also be criticized on the ground that its new approach to jurisdiction is inconsistent with then-prevailing jurisprudential trends. Justice Black, in dissent, objected that the decision greatly extended the Court's power and discretion to supervise state court jurisdiction. He complained that the Court henceforth "will 'permit' the State to act if . . . we conclude that it is 'reasonable' to subject [a defendant] to suit,"[485] and thought it "a judicial deprivation to condition [the] exercise of [state power] upon this Court's notion of 'fair play.'"[486] It is surprising that the other Justices did not agree, for the Court at the time was in the process of repudiating its authority to supervise or second guess exercises of state power.

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484. *Id.* at 317.
485. *Id.* at 324 (Black, J., dissenting).
486. *Id.* at 324-25 (Black, J., dissenting).

With respect to general law, the seminal case is *Erie Railroad v. Tompkins*.[487] Holding that positivism is the canonical jurisprudence of federal courts,[488] the Court in *Erie* banished general law forever. Henceforth, in any case where federal law did not apply, federal courts were to apply state law, including state common law as announced by state courts, rather than law as federal courts thought it should be.[489] Subsequent cases made it clear that *all* general law was banished, even the earlier, less controversial variety that courts understood as international law. The most important case in this regard is *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[490] a pre-*International Shoe* case in which the Court held that the principles of *Erie* extend to the law of conflicts. No longer would there be a general, or international law, of conflicts; instead, federal courts in diversity cases were to apply state choice of law rules.[491] Since the law of jurisdiction is understood to be part of the law of conflicts, *Erie* and *Klaxon* undermined the case for continued federal court supervision of the law of jurisdiction.[492] They certainly disallowed its continued treatment as a branch of general law.

Thus, the jurisprudence of *Erie* seemed to require that the law of jurisdiction become state law or federal constitutional law. But concurrent developments in constitutional law seemed to preclude the latter. In a string of decisions beginning with *West Coast Hotel Co. v. Parrish*,[493] the Court repudiated its substantive due process jurisprudence; it renounced the gener-

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487. 304 U.S. 64 (1938).

488. "[B]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it . . . . [T]he authority and only authority is the State." *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533, 535 (1928) (Holmes, J., dissenting)).

489. *Erie*, 304 U.S. at 78.

490. 313 U.S. 487 (1941).

491. *Id.* at 496.

492. Although the Supreme Court has not considered the issue, federal courts of appeals have unanimously agreed that federal courts in diversity cases must apply state statutes and court rules governing the scope of jurisdiction over non-residents. *See, e.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (en banc).

493. 300 U.S. 379 (1937).

al power to invalidate state legislation as violating fundamental rights. Shortly after *International Shoe*, the Court summarized this development by affirming the "power [of states] to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."[494] The only residual authority the Court expressly allowed itself was to protect individuals against the invasion of liberties found in the Bill of Rights.[495]

This change in the character of constitutional law, like the change in the nature of law applied in diversity cases, had a direct impact on jurisdiction and conflicts of law.[496] The Court began consistently to uphold the exercise of state legislative jurisdiction over non-residents whenever the state had an interest in regulating the activities in question. One such line of cases dealt with insurance regulation[497] and broadly upheld the power of a state to regulate the activities of an insurance company that did any business in the state. Another line dealt with taxation, and upheld state power to tax intangibles irrespective of any supposed out-of-state situs.[498] Yet another line of cases upheld the broad discretion of states to apply their own law in situations where application of foreign law would contravene state policies.[499]

Had the Court in *International Shoe* taken the approach of these cases, it would have been led to adopt a position of deference toward state court exercises of jurisdiction over non-residents. A state's exercise of judicial jurisdiction would be deemed a matter of state policy relating to the protection of its

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494. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949).

495. United States v. Carolene Prods. Co., 304 U.S. 144, 152 & n.4 (1938).

496. *See* Rheinstein, *supra* note 117, at 789-90.

497. *See* Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); Osborn v. Ozlin, 310 U.S. 53 (1940).

498. *See* Greenough v. Tax Assessors, 331 U.S. 486 (1947); State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942); Curry v. McCanless, 307 U.S. 357 (1939).

499. *See* Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201 (1941); Griffin v. McCoach, 313 U.S. 498 (1941).

citizenry, and not a matter for Court concern. Inexplicably, the Court ignored this possibility.

C. The Trend to Deconstitutionalize

Deconstitutionalization of the law of jurisdiction was not a mere theoretical possibility. Although the Court declined to take that approach in *International Shoe*, subsequent jurisdictional decisions moved toward a position highly deferential to state interests and policies. In *Mullane v. Central Hanover Bank & Trust Co.*,[500] the Court upheld the exercise of jurisdiction over non-resident trust beneficiaries in a proceeding to settle accounts in common trust funds. Jurisdiction was proper, the Court held, not because of minimum contacts, not even because of "reasonableness," but simply because of the state's interest:

> [T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident . . . .[501]

There was no suggestion of any fundamental interest in freedom from adjudications by foreign courts. The only individual right the Court recognized was the procedural due process right to notice and an opportunity to be heard.[502]

This deferential approach was pursued for about a decade. The most expansive, and the last, in the line of cases was *McGee v. International Life Insurance Co.*[503] Noting a trend "toward expanding the permissible scope of state [court] jurisdiction over foreign corporations and other nonresidents,"[504] the Court held that a foreign insurer was subject to jurisdiction in a suit on an insurance contract issued to a state resident. Again, the rationale was state interest, here in insurance contracts:

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500. 339 U.S. 306 (1950).
501. *Id.* at 313.
502. *See id.*
503. 355 U.S. 220 (1957).
504. *Id.* at 222.

> It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State . . . . The contract was delivered in California, the premiums were mailed from there and the insured 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.[505]

Again, there was no reference to any right to avoid litigation in foreign courts. The insurer's argument about the inconvenience of suit in California was peremptorily brushed aside.[506]

These cases treated constitutional questions about jurisdiction very much as the Court has come to treat such questions about choice of law.[507] In matters of choice of law, the Court took, and continues to take, the position that a state may constitutionally apply its own law to a case so long as it has some interest that makes the choice of domestic law neither arbitrary nor fundamentally unfair.[508] Since jurisdiction and choice of law are closely related areas of conflicts law, the convergence of standards is not surprising.

However, the movement toward a highly deferential standard for jurisdiction was abruptly terminated by the decision in *Hanson v. Denckla*.[509] Specifically repudiating the approach, and even the relevance, of the choice of law cases,[510] the Court uncritically revived the hybrid approach of *International Shoe*. It mandated a fact-intensive reasonableness inquiry, modified by concerns with individual rights and international law; and held it "essential . . . that there be some act by which the defendant purposefully avails itself of the privilege

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505. *Id.* at 223 (citations omitted).

506. *Id.* at 224.

507. *See, e.g.*, Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Carroll v. Lanza, 349 U.S. 408 (1955); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947).

508. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1985) (plurality opinion); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1981).

509. 357 U.S. 235 (1958).

510. *Id.* at 253-54.

of conducting activities within the forum state."[511] The Court insisted that:

> [I]t is a mistake to assume that this trend [toward expanding jurisdiction over non-residents] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. 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.[512]

Thus was the constitutional amalgam of *International Shoe* reinstated as the framework for the law of jurisdiction.

VIII. PERSONAL JURISDICTION AND THE ROLE OF THE SUPREME COURT

This Article's account of the development of the law of jurisdiction paints a distressing picture. Lack of state power has been converted into fundamental right; natural right has been confused with reasonableness or natural justice; customary law has been stultified through *a priori* constraints; general law has been transmuted into constitutional law; standards have been built through wooden manipulation of concepts. One is left unsure what the law of jurisdiction really is, or should be, about. State power? Individual rights? Reasonable state conduct? The very meaning of "jurisdiction" is unclear and there are no obvious sources of enlightenment.[513]

Questions of what "jurisdiction" really means and what the law really should be about are deep and difficult ones. They must be left for another day. Here, we examine more practical questions that emerge from the foregoing discussion, viz.: Should the law of jurisdiction continue to be treated as a branch of the law of due process? What should be the role of

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511. *Id.* at 253.

512. *Id.* at 251 (citations omitted).

513. *See* Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 101-02 (1988).

the Supreme Court in the law of jurisdiction? and How should the law of jurisdiction be reformed?

A. Due Process and the Contemporary Law of Jurisdiction

The contemporary law of jurisdiction is not a part of the law of procedural due process. Notice, opportunity to be heard, and fairness in decision-making are not its subjects. Rather, as a result of *International Shoe* and its reaffirmation in *Hanson*, the due process law of jurisdiction has three main concerns: federalism and state sovereignty; a liberty interest of the defendant; and reasonableness. None of these is a legitimate basis for a due process law. Alone and in combination, they help make current law a muddle.

1. Federalism and Sovereignty

International Shoe demands that the reasonableness of an exercise of jurisdiction be determined "in the context of our federal system of government."[514] Yet the Court has never methodically explained what aspects of the federal system are relevant to the determination. Nor has it ever explained just how federalism considerations are to be taken into account. And, most problematic, it has never explained why concerns with federalism should be read into the Due Process Clause.

Instead of explaining, it has temporized. For example, in *World-Wide Volkswagen Corp. v. Woodson*,[515] the Court flatly stated that federalism and state sovereignty were central, independent concerns of jurisdictional due process. In *ipse dixit* it announced that a function of the minimum-contacts standard was "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."[516] Yet, two years later, the Court changed its mind, explaining that "[t]he restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process

514. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).
515. 444 U.S. 286 (1980).
516. *Id.* at 292.

Clause."[517] As the Court recognized, the Due Process Clause "makes no mention of federalism concerns."[518] But then, in *Burger King Corp. v. Rudzewicz*,[519] the Court reintroduced federalism, once again as a factor bearing on the reasonableness of the exercise of jurisdiction. Quoting *World-Wide Volkswagen*, it permitted consideration of "'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.'"[520] In *Asahi Metal Industry Co. v. Superior Court*,[521] the Court even generalized these factors, permitting the reasonableness determination to take into account "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the [state] court."[522]

There is good reason to believe that considerations of sovereignty and interstate relations ought to play some role in the law of jurisdiction.[523] After all, that law derives from the law of nations, the law governing relations among sovereign states.[524] Even today the international law of jurisdiction—although much different from the nineteenth-century law—remains principally a law of intersovereign relations.[525]

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517. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982).

518. *Id.*

519. 471 U.S. 462 (1985).

520. *Id.* at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

521. 480 U.S. 102 (1987).

522. *Id.* at 115.

523. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966): "[J]urisdictional rules ordinarily presuppose, and are designed to ensure, not only that other concerned jurisdictions will not take serious offense at the assertion of jurisdiction in the original proceeding, but that they will not act affirmatively to frustrate the results reached in the original proceeding."

524. Observe, however, that the need for a law of jurisdiction within the United States arises not so much from the independence of the states as from the independence of their court systems. If state judicial systems were integrated through a mechanism for interstate transfer of cases, the law of jurisdiction, if needed at all, would look very different, notwithstanding the continued independence of the states.

525. Jurisdiction issues under international law usually arise in the

But from this it does not follow that due process must incorporate considerations of sovereignty and federalism. Rather, what follows is the contrary: that the law of jurisdiction cannot plausibly be treated as a part of the law of due process.[526]

There is no historical or interpretive basis for reading into the Fourteenth Amendment any concern with safeguarding the role of states as sovereignties in the federal system.[527] Indeed, it is odd to suppose that a constitutional provision designed to limit state sovereignty should be read to protect it. Considerations of sovereignty and federalism crept into due process jurisprudence—but only into the part dealing with jurisdiction—because of Justice Field's confusion of individual rights with lack of state power, and because of the traditional association of acquiring jurisdiction with providing notice (a genuine due process concern). To persist in believing that sovereignty and interstate federalism are concerns of due process is to perpetuate illogic and confusion.

Indeed, to persist in treating interstate federalism as a concern of due process is to perpetuate obstacles to the rational evolution of the law. Before *Pennoyer*, state rules of jurisdiction evolved and were understood as practical accommodations between interests in asserting and resisting jurisdiction. The prevailing standards for international jurisdiction were standards of comity, and they changed as state practices changed. *Pennoyer* substituted for this practical and evolutionary framework a scheme of supposedly timeless truths that disregarded the needs and practices of states and litigants. Its *a priori* framework proved to be utterly unworkable. So much is shown

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context of proceedings to enforce foreign judgments. *See, e.g.*, von Mehren & Trautman, *supra* note 523, at 1126-27. Treaties and conventions often govern the issue. *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 15-16 (1987). For other ways in which sovereignty concerns affect international jurisdiction, see 28 U.S.C. §§ 1330, 1605-11 (1988 & Supp. 1992) (Foreign Sovereign Immunities Act of 1976).

526. This is not to say that a person cannot be deprived of due process in connection with an exercise of jurisdiction, through deprivation of notice or an opportunity to be heard. But that is denial of procedural due process, not denial of any special kind of jurisdictional due process.

527. *See* Redish, *supra* note 5, at 1124-33; Clermont, *supra* note 481, at 447 n.161.

by the continued evolution of state jurisdictional practices after *Pennoyer*, even after *Menefee*, in the shadow of the timeless framework—through elaboration of the comity-based exceptions that *Pennoyer* offhandedly and inexplicably allowed. Indeed, the unworkablility of the abstract framework is shown though its ultimate rout by those later-evolved practices. Today's reliance on theories of interstate federalism, even progressive ones, as constraints on jurisdiction, generates the same untenable consequences as did reliance on *Pennoyer*'s theory of sovereignty. For example, the Court in *World-Wide Volkswagen* stated that:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[528]

Thus results the incredible conclusion that a prohibition on jurisdiction may be absolute and unchallengeable even if the prohibition *serves the legitimate interest of no one*.[529] It is difficult to understand how such a wooden, purposeless law could be developed and applied in any coherent way.

Constitutionalizing federalism and sovereignty in this way tends to undermine the very institutions they seek to protect. As one treatise concludes, "[t]he theory of state sovereignty, in elevating the position of the states individually to something like that of independent nations, has had the paradoxical effect of constricting the judicial authority of the state court systems as a whole."[530] Constitutionalizing the law of jurisdiction, and thus making the Supreme Court the final arbiter of legitimacy, interferes with the states' ability to work out rules that practi-

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528. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

529. *See* Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 109-10 (1983).

530. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 2.21, at 91 (4th ed. 1992).

cally and consensually accommodate their interests (and the interests of their citizens) in asserting and resisting jurisdiction. Rather than permitting states to develop a satisfactory theory of sovereignty through practice and experiment, constitutionalization results in the judiciary selecting a theory and imposing it on the states. Yet, on what basis are courts to make the selection?

Even the Supreme Court has repudiated such a self-defeating approach to federalism and sovereignty in a different, albeit related, context. *Nevada v. Hall*,[531] decided shortly before *World-Wide Volkswagen*, involved a state court's refusal to uphold another state's assertion of sovereign immunity in a tort action. The Supreme Court, in contrast to its approach in *World-Wide Volkswagen*, rejected the view that the Constitution mandates any particular theory of interstate sovereignty.[532] Instead, it held that one state's recognition of another's sovereignty is primarily a matter of comity, which the states must work out among themselves.[533] As the Court explained, imposing federal limitations on one state's choice of conditions for recognizing the sovereignty of other states, "by inference from the structure of our Constitution and nothing else," would "constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union."[534]

Of course, these arguments would be moot if, as the Court has suggested, the Due Process Clause were concerned with sovereignty and federalism only indirectly, by protecting a liberty interest involving considerations of federalism and sovereignty. But there is no such liberty interest underlying the law of jurisdiction.

2. Liberty Interest

In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[535] the Supreme Court reinstated fundamental rights as a key to jurisdiction law, noting that "[t]he personal juris-

531. 440 U.S. 410 (1979).
532. *Id.* at 426-27.
533. *Id.*
534. *Id.*
535. 456 U.S. 694 (1982).

diction requirement recognizes and protects an individual liberty interest."[536] In *Burger King Corp. v. Rudzewicz*,[537] this liberty interest moved to center stage; the Court began its analysis by stating: "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'"[538] This emphasis on a liberty interest is understandable; it tends to justify application of the Due Process Clause, which protects fundamental rights and interests.

Yet despite the emphasis, the Court has never, in all the cases subsequent to *Pennoyer*, defined this supposed right or interest, or explained why it should be protected by the Fourteenth Amendment. The Court's casual statement in *Burger King*, quoted above, is typical of the Court's lack of attention to the matter. It is also circular. The term "meaningful contacts" is not independently meaningful; which contacts are meaningful must be determined by reference to the liberty interest protected. Hence, the statement is little more than the tautology that there is a jurisdictional liberty interest in not being deprived of one's jurisdictional liberty interest.

Although efforts have been made to give content to this supposed liberty interest, generally in terms of convenience or fairness,[539] they have been unsuccessful. It is implausible to define the purported interest as one of not having to litigate in inconvenient fora. First, the definition does not reflect current law. For example, "meaningful" contacts that serve as the basis for jurisdiction may be entirely past contacts,[540] which have

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536. *Id.* at 702.

537. 471 U.S. 462 (1985).

538. *Id.* at 471-72 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). The interest, though, may now be back in the wings; it went unmentioned in two important subsequent cases. *See* Burnham v. Superior Court, 495 U.S. 604 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

539. *See, e.g.*, Harold S. Lewis, Jr., *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769 (1982). Professor Lewis argues that "the sole proper concern of due process in the personal jurisdiction context is to assure the parties a fair forum." *Id.* at 771.

540. *See, e.g.*, Witbeck v. Bill Cody's Ranch Inn, 411 N.W.2d 439, 449

no bearing on the present convenience of the forum to the defendant. Or, to take another example, a due process jurisprudence based on convenience should also limit inconvenient *intra*state exercises of jurisdiction (i.e. venue). The law, however, is otherwise.[541]

Of course, one might argue that this only shows the need to set the law straight. Yet even if so, a more basic objection remains: the liberty-interest-in-convenience approach begs the point at issue. Where does this supposed interest come from and why should the Constitution be thought to protect it? Neither text nor history suggests that a constitutionally-protected right or interest in litigation convenience should be recognized. To the contrary, the Article III grant of diversity jurisdiction bespeaks a constitutional expectation that defendants (and plaintiffs) will litigate away from home.[542] It addresses the resulting problem, not of inconvenience, but of potential unfairness. Perhaps for this reason, current law views a defendant's interest in not being sued in an inconvenient forum as so unimportant that it is outweighed by institutional interests.[543] For example, in the federal system, denials of motions to dismiss for lack of personal jurisdiction are not immediately appealable.[544]

Nor does it help to note that *procedural* due process protects

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(Mich. 1987) (contacts long after claim arose are irrelevant to jurisdiction). *Cf.* Zeisler v. Zeisler, 553 S.W.2d 927, 931 (Tex. Civ. App. 1977) (inconvenience of forum is no obstacle to jurisdiction if due process clause otherwise satisfied).

541. *See Burger King*, 471 U.S. at 477-78. *Cf.* Leroy v. Great Western United Corp., 443 U.S. 173, 181 (1979) (addressing propriety of venue first in order to avoid difficult Constitutional question of validity of jurisdiction). Venue may, however, give rise to procedural due process questions. *See, e.g.*, Piwowar v. Washington Lumber & Coal Co., 405 N.E.2d 576, 579 (Ind. Ct. App. 1980); Ramirez v. State, 550 S.W.2d 121, 125 (Tex. Civ. App. 1977).

542. U.S. CONST. art. III, § 2.

543. *See* Lauro Lines v. Chasser, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring).

544. *Id.* at 503 (stating that "the right [not to be sued elsewhere] is not sufficiently important to overcome the policies militating against interlocutory appeals"); Van Cauwenberghe v. Biard, 486 U.S. 517, 526-27 (1988) (holding that motion to dismiss on the ground of immunity from civil process is not immediately appealable).

individuals against extreme litigation inconvenience. For if the inconvenience the supposed liberty interest guards against is inconvenience so severe as to effectively deprive a person of a hearing, then jurisdictional due process simply collapses into procedural due process.[545] There would be no distinct law of jurisdictional due process and no need to hypothesize a liberty interest. Yet, on the other hand, if jurisdictional due process is understood to protect against a lesser, or different, inconvenience, the fact that procedural due process safeguards persons against extreme litigation inconvenience is irrelevant.

It is equally unavailing to explain the supposed liberty interest as one in avoiding assertions of jurisdiction that offend "traditional notions of fair play and substantial justice"—the standard announced in *International Shoe*.[546] This approach assumes that natural justice provides the substance of the jurisdictional right. The assimilation of the two, begun in *International Shoe*, is thereby made complete. The approach has several problems.

To begin, identifying the liberty interest with natural justice or reasonableness makes the purported liberty interest redundant. For if due process already requires fair play and substantial justice, nothing is gained by adding that due process also protects a liberty interest in the very same thing.

There are still other problems with the approach. They depend, however, on how it is refined, since the proposed explication of the liberty interest is ambiguous. To identify "fair play and substantial justice" with the jurisdictional liberty interest could mean any of three very different things. First, it could mean identification of the liberty interest with the reasonableness standard which developed for corporate jurisdiction. This,

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545. *Cf.* Phillips v. Pennsylvania Higher Educ. Assist. Agency, 657 F.2d 554, 561-66 (3d Cir. 1981), *cert. denied*, 455 U.S. 924 (1982) (assessing procedural due process challenge to inconvenient venue). For a discussion of the kind of analysis a procedural due process law of jurisdiction might involve, see Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1321-36 (1983).

546. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Miliken v. Myer, 311 U.S. 457, 463 (1940)); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (discussing defendant's minimum contacts with the state, which accorded with the "traditional conception of fair play and substantial justice").

however, is bizarre: why should the right of natural persons to be free from state court determinations be measured by a standard developed specially for analyzing the activity of non-natural persons? As we have seen, notions of jurisdictional rights and jurisdictional reasonableness developed to solve different problems. *International Shoe*'s assimilation of the two was unmotivated and ill-advised; there is no good reason for taking the next step of identifying them completely.

Second, it could mean identification of the liberty interest with a traditional—in the sense of pre-*Pennoyer*—standard of reasonableness in the exercise of jurisdiction. This would appear to overcome the objections raised to the first interpretation, but at the expense of vacuity. The traditional rules of jurisdiction had their origin as rules of international law, and they were primarily rules governing relations among *states*. Unlike as with rules for giving notice, concepts of reasonableness, fair play and substantial justice toward *individuals* did not shape the traditional standards for jurisdiction. It is highly doubtful that the word "traditional," within the phrase "traditional notions of fair play and substantial justice" means anything in the context of jurisdiction.[547]

Third, it might mean that the liberty interest should be defined by reference to a general notion of reasonableness or justice applied in the jurisdiction context. Yet, what might be the content of such a general notion of jurisdictional reasonableness? The failure of the first two efforts to give a more specific meaning to the notion suggests that this third effort is also unavailing. Indeed, the emptiness of any general notion of jurisdictional reasonableness will be shown in the next Section.

Thus, despite all the references to jurisdictional rights or

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547. Thus, in Burnham v. Superior Court, 495 U.S. 604, 622-23 (1990), Justice Scalia was wrong to conclude that transient jurisdiction satisfied "traditional notions of fair play and substantial justice" because the method was traditional. Fair play and substantial justice were irrelevant to the legitimacy of transient jurisdiction in the nineteenth century. Rather, if anything legitimated transient jurisdiction, it was a theory of state power. This is clear from Murphy v. John S. Winter & Co., 18 Ga. 690 (1855), Peabody v. Hamilton, 106 Mass. 217 (1870), and the other cases cited by Justice Scalia to establish the general historical acceptability of transient jurisdiction. *Burnham*, 495 U.S. at 610-14.

liberty interests, no such right or interest seems to exist. It is sound without sense. Today's liberty interest originated as yesterday's *deus ex machina*: a hypothesized right whose main function may have simply been to justify Supreme Court control over state court jurisdiction. In *Pennoyer*,[548] the right envisioned was a right to avoid certain judicial determinations, most likely ones that were insufficiently linked to the prospect of enforcement. Yet the right was neither explained nor justified. Its grip, moreover, was initially tenuous. After *Pennoyer*, the Court, and even Justice Field, long declined to rest decisions on it. Until *Menefee*,[549] due process was believed to be applicable to jurisdiction because of the potential for deprivation of property in enforcement, not because of a potential for deprivation of liberty in adjudication.

Ultimately, Field's hypothesized protected right was accepted, but without analysis. Furthermore, it was never refined. The Court never explained the right nor why it should be protected by the Fourteenth Amendment. Jurisdiction jurisprudence has relied on the supposition of a right or liberty interest mainly as a basis for invoking the Fourteenth Amendment to control jurisdiction, rather than for substantive content. In effect, the supposition of a jurisdictional right expresses an instinct that jurisdiction must have limits; it is cast as a right in keeping with constitutional rhetoric.

Those who demand a constitutional right or liberty interest to sustain the law of jurisdiction should not only ask themselves what the substance of the right is, but why it is needed at all. In this regard, it is instructive to examine a suggestion made by Professor Brilmayer, who argues that the law of jurisdiction, in its most general sense, is about legitimizing conditions for the exercise of state authority.[550] Its basic concepts are state power and the right of individuals to resist state power; its task is to accommodate the two.[551] The law of judi-

548. Pennoyer v. Neff, 95 U.S. 714 (1877).

549. 237 U.S. 189 (1915).

550. Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) [hereinafter Brilmayer, *Political Theory*]; *see also* Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1 (1991).

551. Brilmayer, *Political Theory*, *supra* note 550, at 294.

cial jurisdiction over non-residents, in particular, is about the "right of a state to assert adjudicatory . . . authority over interstate disputes or over residents of other states who claim to have insufficient contact with the forum court attempting to exercise authority."[552] The answers to its central questions, she argues, must be framed in terms of state power and individual rights.[553]

This much sounds familiar. The additional point Professor Brilmayer makes, however, is that the scope of state power and the nature of the corresponding individual rights must be grounded in political theory, not constitutional law.[554] In other words, the justification for the assertion of jurisdiction or the refusal to assert it must be deduced from theory. Accordingly, she suggests, the law of jurisdiction is a kind of natural law, and courts might protect jurisdictional rights with or without constitutional basis.[555] She then argues that the cause of current legal problems regarding jurisdiction is the lack of a satisfactory political theory.[556]

Professor Brilmayer explains that, if a political theory which was an appropriate basis for a law of jurisdiction could be found, it would not itself be constitutional law.[557] Yet, it could *become* constitutional law because it is "not difficult to impute" an appropriate theory to the elastic language of the Due Process Clause.[558] She further appears to argue that such a theory *should* become constitutional law because constitutional law provides more legitimacy for judicial control of jurisdiction than does natural law.[559]

This perspective on jurisdiction is a sophisticated generaliza-

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552. *Id.*
553. *Id.* at 293-95.
554. *Id.* at 295-96.
555. *Id.* at 313-14.
556. *Id.*
557. *Id.*
558. *Id.* at 313. She emphasizes, though, that any appropriate theory must be "consistent with the norms underlying the American Constitution." *Id.* at 295.
559. *Id.* at 313-14. Professor Brilmayer appears to be less concerned with the Supreme Court's ultimate control of the law of jurisdiction than with the more general issue of judicial control over excessive exercises by other parts of government, be they legislatures or other courts.

tion of Justice Field's.[560] Like Field, Professor Brilmayer believes that jurisdiction must be explained, not on the basis of state practice, but on the basis of an *a priori* theory of state power and correlated individual right.[561] Field relied on a specific political theory about territorial sovereignty;[562] Professor Brilmayer argues that others are possible and that an adequate one remains to be found.[563] Like Field, she assumes that there exist jurisdictional rights limiting the exercise of state power.[564] And finally, like Field, she implicitly finds jurisdictional rights to be important insofar as they subject the law to judicial, particularly Supreme Court, control.[565]

One pedagogic virtue of Professor Brilmayer's proposal is that it exposes the lack of any better link between supposed jurisdictional rights and the Due Process Clause than the convenience of the latter's vague language in facilitating Supreme Court oversight. The proposal fails, however, to take the next logical step, and ask why jurisdictional rights (if they exist) should be protected by constitutional law and why jurisdiction should be a matter of Supreme Court control.[566]

3. Reasonableness

The law of jurisdiction is fact-specific; one case provides little guidance for the next. The Supreme Court largely rejects rules, favoring instead individualized justice.[567] It warns that "'the facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.'"[568] Several of the criteria upon which

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560. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

561. Brilmayer, *Political Theory*, *supra* note 550, at 294.

562. *Pennoyer*, 95 U.S. at 732-36; *see also* Brilmayer, *Political Theory*, *supra* note 550, at 300-01 (discussing Justice Field's political theory about territorial sovereignty).

563. Brilmayer, *Political Theory*, *supra* note 550, at 308-10.

564. *Id.* at 299-300.

565. *Id.* at 312-14.

566. For further criticism of political theory as basis for the constitutional law of jurisdiction, see Wendy C. Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991).

567. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 485-86 (1985).

568. *Id.* (quoting Kulko v. Superior Court, 436 U.S. 84, 92 (1978)).

the Court relies, such as whether the defendant purposefully availed itself of the State's benefits and protections, echo *Moulin*[569] and betray natural justice origins.

Tension exists between the ex ante and the ex post approaches to jurisdiction, and between the desire for rules to guide conduct and the urge to do justice in the individual case. The preference for individualized justice has lately dominated. It has resulted in *Burger King*[570] and *Asahi*,[571] where the Court restructured the jurisdictional analysis to include an initial minimum-contacts inquiry and a subsequent fairness inquiry.[572] Exercises of jurisdiction must satisfy both.

This new approach is questionable. The minimum contacts inquiry of *International Shoe*[573] was intended as a reasonableness inquiry, adapted from *Hutchinson's* restatement of the general law of doing business.[574] Requirements of both minimum contacts *and* reasonableness count reasonableness twice. In fact, they may count it three times since, in *Burger King*, the Court held that the requisite minimum contacts for jurisdiction may be lessened by considerations of "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' '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 social policies.'"[575] These are the very same reasonableness considerations which the Court then used in its second stage inquiry in *Asahi*.[576]

Even more questionable than duplication is the Court's apparent willingness to leave the reasonableness calculus open-ended. Anything having colorable bearing on the reasonable-

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569. Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N.J.L. 222 (1853), *aff'd*, 25 N.J.L. 57 (1855); *see supra* notes 232-35 and accompanying text.

570. 471 U.S. 462 (1985).

571. 480 U.S. 102 (1987).

572. *See id.* at 109-116; *Burger King*, 471 U.S. at 474-78.

573. 326 U.S. 310, 320-21 (1945).

574. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

575. *Burger King*, 471 U.S. at 477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

576. *Asahi*, 480 U.S. at 113.

ness of jurisdiction may be considered; thus, it becomes easy for a judge to rationalize a decision based on instinct. A good illustration is Justice Brennan's concurring opinion in *Burnham v. Superior Court.*[577] Reciting a litany of factors, such as the defendant's protection by the state's police, fire and emergency medical services, and his opportunity to use state roads and state courts, Justice Brennan purported to legitimate the exercise of jurisdiction over a person who was served with process, while briefly visiting California, in a suit unrelated to the visit.[578] Yet if these factors could validate jurisdiction in *Burnham*, they would also validate long-arm general jurisdiction over anyone who briefly visited the state. But that flatly contradicts established law. It is understandable why Justice Scalia insisted on halting the expansion of the reasonableness inquiry with a rule that, reasonable or not, at least had the virtue of certainty.[579]

The current, heightened emphasis on reasonableness may be a response to the failure of liberty interests and federalism to supply content to the law. Reasonableness, however, will not supply content; it is not a universal solvent.[580] For reasonableness to provide a workable standard, there must be either a paradigm, to which any case may be compared, or a defined context for analysis. The decision-maker must also have experience in making the evaluation. Negligence, for example, is based on the paradigm of an ordinary prudent person, and jurors bring to the determination their day-to-day experience in assessing the reasonableness of conduct. Similarly, reasonable price, as a contract term, is ascertained from the context of a specific contract and the parties' actual dealings, and the decision-maker brings to the determination a prior sense of

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577. 495 U.S. 604, 628-40 (1990) (Brennan, J., concurring).

578. *Id.* at 637-38 (Brennan, J., concurring).

579. *Id.* at 626-27. For other criticism of the new reasonableness test, see Linda Silberman, *Reflections on* Burnham v. Superior Court: *Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 578-83 (1991); Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1469-71 (1991) (book review).

580. For a more extensive discussion of the limits to reasonableness as a workable legal standard, see Jay Conison, *ERISA and the Language of Preemption*, 72 WASH. U. L.Q. (forthcoming 1994).

what is commercially reasonable. But how does one determine which exercises of jurisdiction are reasonable? Upon what knowledge or context does the decision-maker rely? What does the standard even mean? What noun does the adjective "reasonable" modify? Is the real issue whether a reasonable court would assert jurisdiction in the case or whether a reasonable legislature would authorize jurisdiction in the case? Perhaps it is whether a reasonable person would foresee that she might be sued in the jurisdiction or that she would foresee that the exercise of jurisdiction over her would be upheld. None of these choices provides any decision-making guidance. Yet what else could "reasonableness" in this context mean?

The trouble with reasonableness in connection with jurisdiction is that there exists no tradition or practice to give it a meaning useful in deciding cases. Reasonableness was a late addition to the law of jurisdiction. It was introduced, not as a standard to guide decision-making but as a rationalization of past decisions ostensibly made on other grounds. Neither in *Hutchinson*[581] nor in *International Shoe*[582] did the Supreme Court explain what reasonableness was supposed to mean in the jurisdiction context or how one could intelligently assess it. The tendency today to invoke an unlimited range of factors strikingly illustrates that no one really knows how to determine whether an exercise of jurisdiction is reasonable; it is not a genuine standard for deciding cases.

Nor is it a well-founded constitutional requirement. Reasonableness is a transplant from general law. Perhaps use of such a standard could be justified under general law, where the accepted role of federal courts was to provide individualized justice because of an Article III responsibility to protect non-residents from unfairness. But such a theory of federal courts' central and special role was repudiated in *Erie*.[583] In protecting non-residents against unreasonable exercises of jurisdiction, the Supreme Court and lower courts serve as living fossils, anachronisms from the pre-*Erie* age.

The result is a law where it is not sufficient that jurisdiction

581. 45 F.2d 139 (2d Cir. 1930).
582. 326 U.S. 310 (1945).
583. Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938).

statutes be fair and reasonable. Rather, each *application* of the statute must be fair and reasonable. The consequence is endless jurisdictional challenges with attendant litigational clog.[584] Yet to what end? Why such a requirement? Nothing about jurisdiction, and nothing in the Constitution, justifies, let alone requires, such an obsession with doing justice on the facts of each case.

B. Alternatives to Existing Law

In the latter part of the nineteenth century, the Supreme Court lost sight of the pragmatic foundation of the law of jurisdiction. It developed a scheme based on fundamental rights and a role for itself as protector of those rights. This transformation stultified the coherent development of the law. The problem was exacerbated when the Court blended into the jurisdictional calculus a requirement of reasonableness and a role for itself as arbiter.

The approach to jurisdiction that derives from *Pennoyer*,[585] *Menefee*,[586] *International Shoe*,[587] and *Hanson*[588] lacks principle, focus, and constitutional basis. It is not genuine due process jurisprudence, and it requires revision. The impediment to improvement, however, is uncertainty over what jurisdiction law is or ought to be. Hence, any proposal must necessarily be tentative, or even experimental.[589]

Nonetheless, several alternatives to existing law seem feasible. Although elaborate analysis is not possible, the alternatives can be sketched enough to show that a more workable

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584. 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS ix (2d ed. 1991) (noting that over a four-year period, over 4,000 cases from the state and lower federal courts had been reported, all of which involved aspects of territorial jurisdiction).

585. 95 U.S. 714 (1877).

586. 237 U.S. 189 (1915).

587. 326 U.S. 310 (1945).

588. 357 U.S. 235 (1958).

589. Moreover, the law of jurisdiction is intertwined with the law of choice of law and enforcement of judgments. Any change in the former would likely necessitate changes in the latter. Changes in the law of jurisdiction might also necessitate changes in other areas, such as *forum non conveniens* doctrine.

body of jurisdiction law might be achieved.

1. Federal Statute

The most straightforward approach would be enactment of a national jurisdiction statute. Either the Full Faith and Credit Clause or the Commerce Clause could serve as a source of authority. At least two kinds of jurisdiction statutes seem plausible. One would establish uniform jurisdictional standards for all United States courts, state and federal.[590] The other would establish maximum or minimum standards (or both), but leave the states with flexibility to take into account their own interests. The former statute would have the virtue of uniformity; the latter would have the virtue of respecting state interests. It is difficult to predict which would be better.[591]

A jurisdiction statute would not be a radical innovation; it would permit courts to continue much as they do now, validating or invalidating exercises of jurisdiction under federal law. But it would serve as the nucleus for development of a federal common law implementing the purposes of the statute. For this approach to be effective, Congress would have to articulate the interests it wished to protect and the policies it wished to further. A statute laying the groundwork for a law of jurisdiction would yield improvement only to the extent that it supplied workable standards and clear policy statements in place of the present confused standards and lack of certainty.

The improvement, however, would not derive from the standards and policies laid down being "correct." At present, it is not possible to judge any set of jurisdiction policies and standards as correct or incorrect. Rather, improvement would come from the courts' clear sense of the law's purpose (whatever it

590. A proposal for Congress to confer nationwide personal jurisdiction on all state and federal courts is made in Israel Packel, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 TEMP. L.Q. 919 (1986).

591. Other, less direct, statutes are also possible. For example, a statute providing for transfer of venue from one state court system to another could lessen the importance of jurisdiction and reduce the amount of satellite litigation over jurisdiction. Or, for another example, a uniform choice of law rule might remove a major reason to dispute jurisdiction.

might be) so that they could develop it rationally and so that, in light of experience, the statute could, if needed, be improved. A statute that simply tracked a conventional long-arm statute would be of little use. Reliance on popular criteria such as "transaction of any business" would merely reintroduce current case law with its shifting and uncertain bases. Worse still would be the approach of the *Restatement*, which predicates all exercises of jurisdiction on reasonableness.[592] Reasonableness, as jurisdiction standard, is mere fatuity.

2. Comity

An alternative would be for the Supreme Court, on its own initiative, to stop supervising jurisdiction under the Due Process Clause. Doing so would leave states free to develop rules that accommodate the interests involved in exercises of jurisdiction. Essentially, this would return the law to a pre-*Pennoyer* framework.[593]

One advantage of this approach is that it would permit clarification of the function and rationale of the law of jurisdiction. If, in practice, state courts were regularly to decline jurisdiction in some cases out of respect for other states' sovereignty, a federalism-related role for jurisdiction would be vindicated. Clarified this way, a federalism-related role would have a far greater claim to legitimacy than it would if proclaimed in a close Supreme Court decision relying, at best, on a vaguely sketched political theory.[594]

A related advantage of this approach is that it would permit states and state courts to work toward an acceptable balancing of interests in asserting and resisting jurisdiction. The current approach is to impose a balance struck *a priori*. A non-constitutional approach would permit the balance to be struck pragmatically, through the natural play of political and litigation

592. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 24, 27, 42 (1971).

593. For suggestions of such an approach, see Oregon *ex rel.* White Lumber Sales, Inc. v. Sulmonetti, 448 P.2d 571, 574 (Or. 1968) (O'Connell, J., dissenting); Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103 (1971).

594. *Cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958).

forces. Again, an important corollary follows regarding legitimacy. A rule of jurisdiction—say, that jurisdiction is always proper over the manufacturer of a defective component in the state where the component caused injury and the product incorporating it was marketed—would have greater claim to legitimacy were it to emerge through experience than were it imposed through ruminations about what is or is not reasonable.[595]

One likely objection to deconstitutionalization is that it is dangerous and implausible. Acts of outrage are easy to imagine—Alaska asserting jurisdiction over any United States citizen on any claim, for example. Out of fear of atrocities, one might conclude that some federal law, be it statutory or constitutional, is necessary to rein in state exercises of jurisdiction. But such a quick conclusion betrays unwarranted distrust of states. There is no historical basis for supposing that, if jurisdiction were not governed by the Due Process Clause, states would run amok exercising jurisdiction over everyone, everywhere in the world. To the contrary, states have been quite conservative in these matters. In the nineteenth century, they relied heavily on attachment jurisdiction as a basis for judgments against non-residents. States innovated cautiously, believing themselves to be bound by constraints of international law. In the past fifty years, they have shown little inclination to extend the bases for jurisdiction beyond conventional ones such as doing business, committing a tort, or owning property in the state. It is striking to note that some states even decline to extend the jurisdiction of their courts to the limits "permitted" by the Due Process Clause.[596]

The objection, moreover, betrays a failure to appreciate how norms can be developed through comity and custom. Nonpositivist jurisdictional norms existed and evolved throughout the nineteenth century. Today, there are areas of broad agreement, albeit amorphous ones, about what is and what is not an acceptable exercise of jurisdiction. Precisely because of such

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595. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

596. *See, e.g.*, Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 209 N.E.2d 68 (N.Y.), *cert. denied sub nom.* Estwing Mfg. Co. v. Singer, 382 U.S. 905 (1965) (applying New York law).

agreement, courts have been able to rationalize the case law through notions of "reasonableness," "fairness," and "minimum contacts" (even if those rationalizations provide little help in deciding new cases). After two centuries of experience, it is obvious that jurisdictional norms do exist. They would simply become deconstitutionalized and allowed to evolve free of artificial constraints.

In any event, extrinsic constraints would still remain. A state that disregarded accepted norms might find that its judgments are not being enforced in other states. The Full Faith and Credit Clause and its implementing act, as interpreted in *D'Arcy v. Ketchum*,[597] allow states to refuse enforcement of judgments violating prevailing jurisdictional norms. That rule does not depend on the norms' being embodied in the Due Process Clause. Moreover, the inapplicability of the Due Process Clause does not mean the end to all federal constraints or federal court guidance. State assertions of jurisdiction might still be invalidated (although probably infrequently) under the Commerce Clause[598] or other appropriate provisions of constitutional and statutory law.[599] It even remains possible that the Supreme Court could acquire, as in the mid-nineteenth century, a role as influential, perhaps *de facto* authoritative, expositor of jurisdictional standards—not because of constitutional demands but because of its status in the federal system.

3. Constitutional Minimalism

Although the approaches described above have substantial advantages, neither currently seems feasible. Congress is unlikely to enact a jurisdiction statute for which there is little present demand. Fear of the unknown—of what states might do—is perhaps the greatest obstacle to judicial

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597. 52 U.S. (11 How.) 165 (1850).

598. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888 (1988) (holding that Ohio statute violates Commerce Clause where it suspends limitations against corporations that have not consented to general jurisdiction).

599. In Calder v. Jones, 465 U.S. 783, 790-91 (1984), the Court brushed aside the argument that the First Amendment provides jurisdictional protection in defamation cases. Arguably, rejection of jurisdictional due process would permit reconsideration of that holding.

deconstitutionalization of the law.

Yet it does not follow that current law remains the only practical choice. A third alternative, one that goes part way toward deconstitutionalization while remaining within the bounds of the familiar, is for the Supreme Court to limit drastically the scope of review in jurisdiction cases. Formally, this is what the Court did immediately after *International Shoe*, where it upheld exercises of jurisdiction so long as they furthered legitimate state interests. It is the approach used in the related area of choice of law.

There are several ways to limit review. One is to return to the approach of cases like *Mullane*[600] and *McGee*,[601] and focus constitutional inquiry on the existence of a legitimate state interest in exercising jurisdiction. The advantage of doing so is that it would discard mythic liberty interests and spurious standards of reasonableness, and largely free the states to work out rules that serve their needs. Furthermore, it could drastically reduce the amount of litigation over jurisdiction by reducing the likelihood of a challenge's success.

Yet this approach draws an objection—indeed, a telling one in light of history. "Legitimate state interest" is just as vague and conclusory as "minimum contacts" and "reasonableness." Any action which a court or legislature takes can plausibly be considered one in pursuit of a state interest. If the standard is to have any substance, limitations on jurisdiction must be based on the qualifier "legitimate." But what is a *legitimate* state interest in the context of jurisdiction? Given any putatively legitimate state interest, one can always ask what makes it "legitimate"—i.e., why it justifies the exercise of jurisdiction. One thus needs criteria for legitimacy. Hence, it is difficult to see how the "legitimate state interest" standard, without more, could provide a basis for principled adjudication and law-making. Yet if there is a "more"—i.e., a more fundamental standard for legitimacy—one can dispense with the conclusory term, "legitimate state interest," just as courts did with the conclusory term, "doing business."

An alternative, suggested by Professor Weinberg, is to limit

600. 399 U.S. 306 (1950).
601. 355 U.S. 220 (1957).

review of jurisdiction to truly outrageous exercises. "[L]et us protect against the horribles," she proposes, "[b]ut let us put an end to the more arbitrary interferences with an interested state's otherwise legal exercise of jurisdiction."[602] The advantage of this approach over the former is that it abjures reliance on *all* spurious standards—minimum contacts, reasonableness, *and* legitimate state interest. If an exercise of jurisdiction is to be struck down, the lack of a handy conclusory term will force a court to articulate plausible and intelligible reasons for its action. Through the common-law process, acceptable and principled limits on jurisdiction might take form.

Professor Weinberg's approach shares many of the advantages of total deconstitutionalization. The practical difference may only be that her approach permits a larger role for the Supreme Court as the *de jure* arbiter of the validity of exercises of jurisdiction. One's view about whether the Supreme Court should have this larger role depends on one's assessment of how well the Court has fulfilled it over the past hundred years.

IX. CONCLUSION

The constitutional law of personal jurisdiction is a hodgepodge of nineteenth-century natural justice and natural rights, early twentieth-century substantive due process, and general law. It is a law whose purpose is endlessly debated and whose foundations have long been superseded. It generates confusion and unnecessary, fact-intensive litigation. It is spurious constitutional law. It ought to be recognized as such and replaced with a law that avoids its obvious flaws.

602. Weinberg, *supra* note 513, at 103-04.