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Against Personal Jurisdiction Law

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AGAINST PERSONAL JURISDICTION LAW

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It is not hard to state goals that a legal system should seek when deciding where civil actions may be brought. The rules should promote the convenience of parties and others. They should treat both plaintiffs and defendants fairly. Prospective litigants should be able to determine with reasonable assurance where their disputes may or may not be heard and should not suffer from expensive jurisdictional disputes. The rules should not be easy to evade. One might ask for more—for example, accurate and effective implementation of substantive law, or assistance to disadvantaged litigants—but these basic goals should not be subject to dispute.

The constitutional patchwork that limits the personal jurisdiction of state and federal courts[1] falls far short of these goals. It excludes from consideration many of the factors that should be relevant to forum choice. It applies an abstract conceptual one-size-fits-all standard to a variety of cases posing different jurisdictional problems. It increasingly favors defendants over plaintiffs. It is set forth in judicial opinions whose authors, writing over more than a century of precedents, have pursued different leanings and different analyses, leading to inconsistency and dubious reasoning. It leaves many fundamental issues undecided while fostering uncertainties that lead to costly disputes. And repeat players have developed ways to manipulate and evade its supposed strictures.

"[I]f way to the Better there be, it exacts a full look at the Worst."[2] By surveying in one place the flaws of personal jurisdiction law, I hope to defamiliarize it and encourage fresh approaches. This portrayal will necessarily be sketchy, omitting subtleties and qualifications as well as citations to all those from whom I have learned over the decades. Admittedly, no earthly law is perfect, and I have no alternative scheme up my sleeve. I assume that readers have some knowledge of personal

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1. With some exceptions, Fed. R. Civ. P. 4(k) imports state personal jurisdictional standards into the federal courts, including the constitutional limits on state court personal jurisdiction. Daimler AG v. Bauman, 571 U.S. 117, 125 (2014).

2. Thomas Hardy, *In Tenebris II*, line 14, in Thomas Hardy 55, 56 (W.E. Williams ed. 1960).

jurisdiction law and can supply some of the "on the other hands" that I have omitted.[3]

I. Excluding Relevant Factors

Under current law, where the plaintiff lives is not a basis for jurisdiction except to the extent that it helps define the defendant's contacts with the forum state.[4] And yet plaintiffs, like defendants, have interests protected by the Due Process Clause,[5] and one might think that depriving plaintiffs of the opportunity to assert a claim in their forums would be considered as weighty as requiring defendants to defend in foreign ones. The Court seems to regard its jurisprudence as a safeguard for defendants against plaintiffs' freedom to choose the most favorable forum—but defendants also have the power to forum shop by suing first, removing an action to federal court, moving to transfer or dismiss, or dictating forum selection clauses and arbitration agreements. An alternative justification for rules protecting defendants might be a very large danger of bias against out-of-state defendants[6]—but when the result of those rules is that many defendants may be sued only in their home states, will not the danger of bias simply be turned against plaintiffs? In any event, existing doctrine views the rights in question as those of defendants.

The courts also disregard relevant factors by applying essentially the same jurisdictional standards to all sorts of claims, torts, contracts, trusts, or whatever.[7] In contrast, the law of the European Union, for example, singles out certain claims by insurance beneficiaries and by

3. For a more complete survey, *see* Robert C. Casad, et al., Jurisdiction in Civil Actions (4th ed. 2014).

4. Walden v. Fiore, 571 U.S. 277, 290 (2014); Keeton v. Hustler Mag., Inc., 465 U.S. 770, 780 (1984). *But see* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957) (relying on forum state's interest in providing a remedy for its residents); Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1028–30 (2021) (intimating similar views). A state's jurisdiction to grant a divorce to that state's domiciliary is an exception. Estin v. Estin, 334 U.S. 541, 544–45 (1948); *and see* In re R.W., 39 A.3d 682, 693 (Vt. 2011) (state can terminate absent parent's parental status if child is in state).

5. Tulsa Pro. Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988); Boddie v. Connecticut, 401 U.S. 371, 380 (1971); John Leubsdorf, *Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 608–12 (1984).

6. Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. of Legal Analysis 245, 246–48 (2014). There is some evidence of bias. Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 Am. L. & Econ. Rev. 341, 352, 368 (2002) (limited to judges chosen by partisan elections); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 Tex. L. Rev. 855, 893–98 (2015).

7. *E.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (contract); Daimler AG v. Bauman, 571 U.S. 117, 117–18, 122 (2014) (tort); Hanson v. Denckla, 357 U.S. 235, 238, 251 (1958) (trust); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877–80 (2011) (products liability).

consumers, allowing them to sue at their own national domicile, and also allowing the joinder of persons roughly equivalent to our indispensable parties who would otherwise not be subject to the court's jurisdiction.[8] Such provisions reflect a more sensitive and flexible balancing of interests than our courts can apply. One exception, *McGee v. Int'l Life Ins. Co.*,[9] might once have been read as recognizing the special needs of life insurance beneficiaries—but then the Court limited it to cases in which an out-of-state insurer solicited an in-state insured.[10]

Personal jurisdiction doctrine also excludes from consideration the law to be applied. States have considerable, though not unlimited, power to decide whether to apply to a case their own law or some other law.[11] But the Court considers that issue unrelated to where suit may be brought[12] even when the decisive issue between the parties and the motive of their jurisdictional dispute is precisely which law will be applied.[13] One may debate whether the relatives of an American citizen killed in Peru should recover wrongful death damages on an American scale or be limited like Peruvians to $2,500; but for the Supreme Court that question simply did not arise under personal jurisdiction law.[14] As they say, "[i]f you think you can think about a thing that is hitched to other things without thinking about the things that it is hitched to, then you have a legal mind."[15]

Two other factors—the relative convenience of the parties and the interests of the forum state—continue to be mentioned in Supreme Court opinions but have a small and diminishing impact on results. True, the Supreme Court did rely on unreasonable inconvenience to a

8. Council Regulation 1215/2012, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 8–9.

9. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223–24 (1957). *See also* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648–49 (1950).

10. Hanson v. Denckla, 357 U.S. 235, 251–52 (1958).

11. *E.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 717, 722–23, 738–39 (1988).

12. *E.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985); Shaffer v. Heitner, 433 U.S. 186, 215–16 (1977); *see* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247–55 (1981) (choice of law almost always irrelevant to forum non conveniens decisions).

13. Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 851, 857–58, 860–61 (1995) (describing Supreme Court cases in which this was so).

14. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 409–10, 414 (1984); Cameron & Johnson, *supra* note 13, at 857.

15. Letter from T.R. Powell to R. Schuyler, on file in Thomas Reed Powell papers in Harvard Law School Manuscripts Division, as quoted in Peter R. Teachout, *Uneasy Burden: What it Really Means to Learn to Think Like a Lawyer*, 47 MERCER L. REV. 543, 543 n.1 (1996). What should be the relationship between choice of law and personal jurisdiction has long been debated. *E.g.*, Maurice Rosenberg, *Forward to the Colorado Symposium*, 59 U. COLO. L. REV. 1, 1–4 (1988).

foreign defendant to deny jurisdiction in one unusual case,[16] and dictum asserts that inconvenience to a plaintiff might support jurisdiction.[17] But the Supreme Court has provided no recent examples of that—if anything, the contrary.[18] In practice, state interests likewise seem to count nowadays[19] for little or nothing.[20] The Court's recent reference to state interests in *Ford Motor Co. v. Montana 8th Jud. Dist. Ct.*[21] might herald a change in this pattern. But it might also be one of the waverings typical of personal jurisdiction jurisprudence, in which any factor once advanced can be either flourished or disregarded in any later opinion.

Lastly, the defendant's infliction of harm within a state has no independent jurisdictional significance except in what appears to be a shrinking class of intentional torts that in some sense target the state.[22] "Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State."[23] Otherwise, wreaking havoc within a state does not suffice.

So, what is left for courts to consider? For general jurisdiction—jurisdiction that extends to any claim against a defendant, even one unrelated to the forum state[24]—discarding relevant factors has at least permitted rules that are clear and simple, albeit defective in other ways. Human defendants are subject to general jurisdiction in states where they are domiciled or served with process.[25] Corporate defend-

16. Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 102–03 (1987). The Court may have resorted to the inconvenience ground as the only way to secure a majority opinion, having divided on the other point at issue.

17. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

18. Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1780 (2017). One can find lower court examples of jurisdiction by necessity with roots in the old in rem and quasi in rem jurisdiction. Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 219–20, 224, 228 (4th Cir. 2002) (jurisdiction where internet domain names are registered to decide dispute as to their ownership when no jurisdiction elsewhere); Fortune Laurel, LLC v. High Liner Foods (USA), Inc., 238 A.3d 1113, 1118–19 (N.H. 2020) (jurisdiction to freeze defendant's in-state property pending litigation elsewhere).

19. For earlier reliance on state interests, *see* Travelers Health Ass'n v. Virginia, 339 U.S. 643, 648–49 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

20. *E.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877–80 (2011) (New Jersey lacks jurisdiction when New Jersey plaintiff is seriously injured in New Jersey by a machine located there and manufactured by defendant).

21. Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1030 (2021).

22. Walden v. Fiore, 571 U.S. 277, 284–90 (2014), *limiting* Calder v. Jones, 465 U.S. 783 (1984).

23. *Id.* at 290.

24. On the distinction between general and specific jurisdiction, *see* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–63 (1966).

25. Burnham v. Super. Ct., 495 U.S. 604, 628 (1990); Milliken v. Meyer, 311 U.S. 457, 462 (1940).

ants are subject to general jurisdiction where they are incorporated or have their main place of business.[26]

When it comes to specific jurisdiction—jurisdiction limited to a specific claim—the rule is likewise simple to state, but far from easy to apply. Granted the nods to convenience and unreasonableness already mentioned, in practice almost everything seems to turn on whether the defendant has "purposefully availed itself" of the benefits of the forum state in a way related to the plaintiff's claim.[27] That is the applicable standard whether the claim is for a tort or breach of contract; whether the plaintiff or defendant is large or small; whether in practice the forum would be convenient for one or both parties; whether the defendant is located a few miles away across the state line or overseas; or whether the plaintiff has many or no other jurisdictional options elsewhere. Such a one-size-fits-all standard cannot be expected to produce sensible results in most instances, nor can it be easy to apply. The Court has been unable to agree on what constitutes the required purposeful availment,[28] while it has until recently avoided considering what connection is required between the defendant's contacts with the forum and the plaintiff's claim.[29] And nowadays, the prevalence of internet interactions makes it harder and less meaningful to tell who is reaching out to whom, threatening to dissolve the purposeful availment test entirely.

II. Favoring Defendants

We have already seen some of the ways in which personal jurisdiction favors defendants. It is defendants who are thought of as having constitutional rights. It is defendants' activities that ground or fail to ground jurisdiction, almost regardless of their impact on plaintiffs. State interests, like those of plaintiffs, take second place. And defendants are free to invoke federalism and state concerns to contest jurisdiction or to erase them from the picture by choosing not to object.[30] This all fits neatly into the Supreme Court's tendency in recent de-

26. Daimler AG v. Bauman, 571 U.S. 117, 138 n.18 (2014). BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558–59 (2017) (Bowing to Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), the Court concedes that in rare circumstances other states might qualify, but so far has been reluctant to find any).

27. *E.g.*, Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1024–25 (2021). The magic words were first used in Hanson v. Denckla, 357 U.S. 235, 253 (1958).

28. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 882–83 (2011); Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 112 (1987).

29. Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1031–32 (2021); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 415 n.10 (1984).

30. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702–04 (1982).

cades to close courthouse doors[31]—here, in the first instance, the doors of state courthouses. The Court has developed several ways to promote this trend. And it should be noted that liberal as well as conservative judges have written some of the decisive opinions,[32] while conservatives have written some opinions keeping courthouse doors open.[33]

For the Court, big guys—or rather corporations—attract the sympathy that others feel for little guys. The Court responds to a foreign corporation forced to defend in distant American courts more than to an injured American worker forced to seek redress abroad.[34] The actual defendant may be a substantial enterprise, but opinions nevertheless worry that subjecting it to specific jurisdiction would allow plaintiffs to drag to some distant forum some other defendant, a soft-drink concessionaire,[35] or the owner of a small farm.[36] Of course, that will be so only if the courts treat large and small defendants alike. And of course, the burden of the resulting standard falls not on the hypothetical soft drink seller but on the actual plaintiffs, often individuals who have suffered bodily injury.

If we turn from specific to general jurisdiction, we find a related discrepancy, this time among defendants: corporate defendants attract the sympathy that should go to human beings, while humans do not. A corporation is subject to general jurisdiction only where it is "at home," in the state of its incorporation or main place of business.[37] Employing two thousand workers on two thousand miles of railroad track in a state is not enough to satisfy this domestic standard.[38] Meanwhile, individuals are subject to general jurisdiction not only at

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31. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

32. *E.g.*, Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 918 (2011) (Ginsburg, J.); Shaffer v. Heitner, 433 U.S. 186, 189 (1977) (Marshall, J.); Hanson v. Denckla, 357 U.S. 235, 238 (1958) (Warren, C.J.).

33. Burnham v. Super. Ct., 495 U.S. 604, 607 (1990) (Scalia, J.) (speaking for four Justices); Calder v. Jones, 465 U.S. 783, 784 (1984) (Rehnquist, J.).

34. *Compare* Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 114 (1987) *with* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 886–87 (2011).

35. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980).

36. J. McIntyre Mach., Ltd. v. Nicastro., 564 U.S. 873, 885 (2011) (plurality opinion). *But see id.* at 891–92 (concurring opinion) (suggesting that differences between defendants and their sales may be relevant); Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1028 n.4 (2021) (likewise).

37. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014). For the hypothetical exception, *see* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558–59 (2017).

38. BNSF Ry. v. Tyrrell, 137 S. Ct. 1549, 1558–59 (2017).

home but wherever they may roam, at least if a process server finds them.[39]

Another concern of the courts tending to favor corporate defendants is the belief that jurisdiction law should give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[40] No doubt, predictability can reduce the costs of quarreling about jurisdiction for both plaintiffs and defendants. But corporate planners will also seek to place suits where it is cheaper for them to defend and where liability and large damages are less likely. By easing the way for corporate planning, personal jurisdiction law will therefore on average tend to increase the litigation costs and decrease the recovery of plaintiffs. In effect, it leaves more of the cost of accidents on their victims.[41] But the courts are thinking of defendants, not victims.[42]

III. Uncertainty and Expense

A number of disputable factual issues bear on whether a defendant satisfies the specific jurisdiction standard of purposeful availment, depriving that standard of predictability and giving rise to costly contests. Who initiated the transaction in question?[43] Which members of a corporate family are subject to suit on the claim in question?[44] Does the defendant engage in other, similar transactions affecting the

39. Burnham v. Super. Ct., 495 U.S. 604, 628 (1990); Milliken v. Meyer, 311 U.S. 457, 462 (1940). By contrast, service on a corporate officer within the forum state is not enough to warrant general jurisdiction over the corporation. *E.g.*, James-Dickinson Farm Mortg. Co. v. Harry, 273 U.S. 119, 122 (1927); C.S.B. Commodities, Inc. v. Urb. Trend (HK) Ltd., 626 F. Supp. 2d 837, 850 (N.D. Ill. 2009). *See* Aaron Tang, *Reverse Political Process Theory*, 70 Vand. L. Rev. 1427, 1452–54 (2017) (noting that favored corporate defendants are better able to protect themselves through the political process than disfavored out-of-state individual defendants).

40. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

41. Daniel Klerman has presented brilliant analyses of how personal jurisdiction law is or could be developed in response to business planning by prospective defendants. Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. Cal. L. Rev. 1551, 1582, 1595 (2012); Daniel Klerman, *Rethinking Personal Jurisdiction*, 6 J. of Legal Analysis 245 (2014); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 244–45 (2016).

42. Similarly, the Court was concerned that subjecting a husband to long-arm jurisdiction over a child support claim would discourage him from letting his children live with their mother as they preferred. Kulko v. Super. Ct., 436 U.S. 84, 93 (1978). But would not denying jurisdiction discourage her from accepting custody?

43. *E.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474–76, 479–80 (1985).

44. *E.g.*, Charles W. Adams, *World-Wide Volkswagen v. Woodson – The Rest of the Story*, 72 Neb. L. Rev. 1122, 1129, 1151–52 (1993).

state?[45] What did it know or intend about its asserted connection to the forum state?[46] To what extent does it use advertising directed at the state, or likely to reach the state?[47] How large are its receipts from the state compared to its total receipts?[48] Often, if these or other issues[49] are raised, discovery will be needed to unearth the evidence.[50] Because the standard turns on what the defendant has done, and because the plaintiff has the burden of establishing jurisdiction when it is contested,[51] it is the plaintiff who will usually be the one seeking discovery.

Current law also leaves basic legal issues open to dispute. When does placing products in the "stream of commerce" support jurisdiction where they wind up?[52] Is it still possible for plaintiffs to bring a class action including persons not involved with the forum state against a defendant not subject to general jurisdiction there?[53] When can the activities of a corporation be attributed to its parent or subsidiary for jurisdictional purposes?[54] Can a corporation doing business in a state be required to appoint an agent for the service of process in cases unrelated to its activities there?[55] Are there exceptional cases in which serving an individual within a state will not support general jurisdiction?[56] How do the standards for a foreign defendant differ from

45. *E.g.*, Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 698–99, 709 (1982).

46. *E.g.*, Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 107 (1987) (plurality opinion); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 480–81 (1985).

47. *E.g.*, Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1022, 1028 (2021).

48. *E.g.*, Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 106–07 (1987) (plurality opinion). It is not clear that the answer to this question will ever be determinative; but since Justices refer to it, prudent litigants will seek to answer it.

49. *E.g.*, Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973 (2006) (issues including whether the defendant in fact performed the act alleged to give rise to jurisdiction).

50. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 708 (1982).

51. *Id.* at 708–09.

52. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 885 (2011) (in which there was no majority opinion).

53. *Compare* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985) (yes) *with* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1782–83 (2017) (suggesting the contrary). Lower courts disagree as to the impact of *Bristol-Myers Squibb*. *Compare* Carranza v. Terminix Int'l Co., 529 F. Supp. 2d 1139, 1144–46 (S.D. Cal. 2021) (one of several cases upholding class actions) *with* Stacker v. Intellisource, LLC, No. 20-2581-JWB, 2021 U.S. Dist. LEXIS 119638 *2, *19, *23 (D. Kan. 2021) (to the contrary).

54. Daimler AG v. Bauman, 571 U.S. 117, 134–35 (2014) (noting that this issue remains open).

55. *Compare* Rodriguez v. Ford Motor Co., 458 P.3d 569 (N.M. Ct. App. 2018) (yes) *with* Genuine Parts Co. v. Cepec, 137 A.3d 123, 125–27 (Del. 2016) (no); *see generally* Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration" Statutes*, 73 N.Y.U. ANN. SURV. AM. L. 159 (2018).

56. *Compare* Burnham v. Super. Ct., 495 U.S. 604, 613–14 (1990) (Scalia, J., speaking for four Justices and mentioning no exceptions if defendant is voluntarily present in state) *with id.* at

those for a domestic one?[57] If a customer buys a product outside the forum state, just what contacts with that state must the seller have to be subject to specific jurisdiction?[58] Where do internet activities give rise to personal jurisdiction?[59] When does the infliction of harm within a state support jurisdiction over the perpetrator?[60]

These uncertainties of fact and law have at least four bad consequences. First, they lead to costly and time-consuming disputes unrelated to the merits of the case. Second, the risk and cost they create discourage plaintiffs from suing in a court where jurisdiction may indeed exist, leaving them with a worse alternative, which in turn may cause them to accept inadequate settlements or even drop their claims. Third, defendants are likewise discouraged from raising even sound defenses against jurisdiction, so that they too may litigate in an undesirable forum or pay excessive settlements. Fourth, unpredictability discourages defendants from exercising their theoretical option to avoid the harm that personal jurisdiction rules are supposed to prevent by staying out of a suit and raising their jurisdictional objections later when the plaintiff tries to enforce the resulting default judgment.[61] That used to be a viable option,[62] but not now. Often today, a defendant's appraisal of whether jurisdiction exists in a given forum is at best a guess. If a defendant stays out of a suit and lets summary judgment be entered, and later the enforcing court finds that the original court did have jurisdiction, the defendant has lost the chance to defend on the merits. In these respects, though not in others, the development of specific jurisdiction under the "purposeful availment"

628–29 (Brennan, J., speaking for four Justices but saying only that jurisdiction is "generally" permissible) *with id.* at 640 (Stevens, J., limiting his concurrence to this particular case).

57. William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1221–22 (2018); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 5, 7 (2006).

58. *Compare* Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1782–83 (2017) *with* Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1022, 1028 (2021).

59. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 890 (2011) (concurring opinion). Zoe Niesel, #*Personal Jurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103, 104 (2019) is one of several good discussions of this problem.

60. Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 389–92 (2015) (considering the doctrine of Calder v. Jones, 465 U.S. 783 (1984) and Walden v. Fiore, 571 U.S. 277, 284–90 (2014)). Thousands of decisions cite the Supreme Court decisions in question. *Id.* at 389–90 n.5.

61. Ins. Corp. of Ir. Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706–07 (1982).

62. *E.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957); Hanson v. Denckla, 357 U.S. 235, 241–43 (1958); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

approach marks a regression from *Pennoyer v. Neff*,[63] most of whose rules raised few difficulties of application.

IV. Evasion

Because of personal jurisdiction law's defects, some have sought to evade its rules and the procedures for applying them. Typically, this is done by large organizations exposed to repeated litigation and capable of planning ahead. For them, this is another example of the search for predictability and reduced expense that the Supreme Court has lauded.[64] No one will be surprised that the results usually favor the organizations doing the planning, which are typically defendants, accentuating the pro-defendant drift already described.

By using a forum selection clause, any organization that contracts with potential adverse parties can ensure that any suit will be brought in the forum it prefers, which may or may not be practical for its adversaries. Personal jurisdiction issues do not arise because the parties are deemed to have consented to the forum, often in a contract of adhesion, and sometimes in a contract to which they are not even parties.[65] The Supreme Court has been receptive to these clauses, even when found in contracts of adhesion with consumers,[66] and so have state courts.[67] The Court noted in *Carnival Cruise Lines, Inc. v. Shute*[68] that forum selection clauses reduce the costs of disputing jurisdiction and even ventured the expectation that the businesses imposing them would then reduce their prices. This is true regardless of the forum designated in the clause.

But it is also true that if the designated forum is more convenient for the business than for its customers, customers will be discouraged from pursuing claims against the business or induced to settle on less

63. 95 U.S. 714, 714–15 (1877). Admittedly, fitting corporate defendants into the *Pennoyer* scheme was not easy. Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. Chi. L. Rev. 569, 577–86 (1958).

64. *See* text at notes 40–42, *supra.*

65. John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 Notre Dame L. Rev. 187, 235 (2021).

66. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 591 (1991); Atl. Marine Constr. Co. v. United States Dist. Ct., 571 U.S. 49, 59–61 (2013).

67. John C. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 Ind. L.J. 1089, 1098, 1105 (2021); John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 Ariz. St. L.J. 65, 87, 118–19 (2021).

68. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–94 (1991). *But see* Cara Reichard, *Keeping Litigation at Home: The Role of States in Preventing Unjust Choice of Forum*, 129 Yale L.J. 866, 871–73, 909–23 (2020) (describing state statutes limiting forum selection clauses).

favorable terms. Businesses are aware of this. Ironically, Carnival later successfully invoked forum non conveniens to avoid defending in Florida—the very forum it had designated in the *Carnival Cruise* case—when it was sued by plaintiffs injured by the wreck of a cruise ship in Italy.[69] Both United States and foreign plaintiffs had to sue in Italy, notwithstanding the increased expense for some of them and the notorious delays of the Italian courts.[70]

A forum selection clause is not the only way in which a business can move disputes with those who contract with it out of courts that personal jurisdiction would otherwise allow, or into forums that it would otherwise forbid. Under the Federal Arbitration Act,[71] as stretched by the Court, most disputes with customers and employees can be designated for arbitration.[72] Those dealing with corporations have usually failed when they challenged the place designated for arbitration in the arbitration agreement, the parties having supposedly agreed to resolve their dispute in that place.[73] Similarly, a business can require those with whom it deals to designate an agent for the service of process in its preferred forum, steering to that forum at least those suits in which it is the plaintiff.[74]

A third way of evading the jurisdictional rules, affecting only federal court cases, is transfer by the Panel on Multidistrict Litigation (MDL), which has consolidated hundreds of thousands of suits, at least one-third of the federal civil caseload, often over the objection of one or another party.[75] In theory, the transfer is for pretrial proceed-

69. Abeid-Saba v. Carnival Corp., 184 So. 3d 593, 597–98 (Fla. Dist. Ct. App. 2016). *Carnival Corporation & plc*, WIKIPEDIA, https://en.wikipedia.org/wiki/Carnival_Corporation_%26_plc#Carnival_Cruise_Line (last visited June 26, 2022, 3:11 AM) (Carnival Corp., the defendant in this case, was founded in 1993 as a parent corporation for Carnival Cruise Lines and other corporations).

70. Lynn Abell, *Disarming the Italian Torpedo: The 2006 Italian Arbitration Law Reforms as a Small Step Toward Resolving the West Tankers Dilemma*, 24 AM. REV. INT'L ARB. 335, 337 (2013). I do not know why Carnival had not included a forum selection clause designating the Italian courts in its cruise agreements. Just such a clause was enforced in Lebedinsky v. MSC Cruises, 789 F. App'x. 196, 199 (11th Cir. 2019).

71. 9 U.S.C. §§ 2 ff.

72. *E.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–26 (2018); American Express Co. v. Italian Colors Rest., 570 U.S. 228, 232–33 (2013).

73. *E.g.*, Peterson v. Minerva Surgical, Inc., No. 19-2050-KHV, 2019 U.S. Dist. LEXIS 185362, at *11 (D. Kan. 2019); Wake Cnty. Bd. of Educ. v. Dow Roofing Sys., LLC, 792 F. Supp. 2d 897, 900 (E.D.N.C. 2011); *see* Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 538 (1995) (enforcing arbitration abroad).

74. Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964).

75. 28 U.S.C. § 1407; Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1716, 1719 (2019). Many states have imitation MDL procedures. Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. U. L. REV. 1649, 1703–06 (2021). Because these procedures transfer only cases between courts within the

ings only.[76] In reality, the process is managed so as to ensure that virtually all cases are finally resolved in the transferee court.[77]

If measured by the usual personal jurisdiction standards, MDL proceedings would often fail to measure up. A defendant may be forced to defend suits by plaintiffs whose dealings with it were unrelated to the transferee state even if that is not the state where it is incorporated or has its main place of business. That would otherwise be forbidden by *Bristol-Myers Squibb Co. v. Super. Ct.*[78] Indeed, an MDL defendant may be forced to defend in a district where it could not otherwise be sued at all.[79] Plaintiffs whose actions are dispatched to an MDL court they did not choose may likewise have cause for complaint. Several factors distinguish such plaintiffs from the members of the nationwide class upheld in *Phillips Petroleum Co. v. Shutts*[80] over claims that personal jurisdiction was lacking over plaintiff class members. Unlike a class action, an MDL does not provide the safeguards that make it unnecessary for class members to retain local counsel;[81] and MDL plaintiffs have no right to opt out of the MDL.[82]

In reality, MDL parties cannot appeal to the jurisdictional rules applicable to state courts because MDL transfers are authorized by a federal statute applicable to the federal courts.[83] MDL typically involves defendants doing business in many or all states, so that Congress can centralize in one federal court mass torts or other claims involving them.[84] Nevertheless, the broad disregard of the state court

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state in question, they raise no personal jurisdiction issues under existing federal constitutional law.

76. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

77. Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014). *Table S-20: Cumulative Summary of Multidistrict Litigation*, ADMIN. OFF. OF THE U. S. CTS., JUD. BUS. (Sept. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_s20_0930.2020.pdf.

78. Bristol-Myers Squibb Co. v. Super. Ct., 137 S. Ct. 1773, 1781, 1783 (2017).

79. In re N.M. Nat. Gas Antitrust Litig., 482 F. Supp. 333, 336 (J.P.M.L. 1979); In re Cont'l Grain Co., 482 F. Supp. 330, 331 (J.P.M.L. 1979).

80. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985).

81. Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 Nw. U. L. REV. 511, 539–41, 551–55 (2013); Stephen J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 LOY. L. REV. 1, 5 (2018); *see* David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 443–44 (2019) (proposing other safeguards).

82. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 124 (2010). The Supreme Court relied on these and other factors in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808–12 (1985).

83. 28 U.S.C. § 1407.

84. It is generally believed that Congress may authorize the federal courts to extend their personal jurisdiction beyond what is permissible for state courts. Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1767 (2020). For a thorough discus-

jurisdictional rules in MDL proceedings raises questions about the rules themselves. If the existing limits on personal jurisdiction are required by "traditional notions of fair play and substantial justice,"[85] does their wholesale disregard in tens of thousands of federal court cases deny litigants fair play and substantial justice? And if, on the other hand, consolidating cases from around the nation in one transferee court is a good thing in more than one-third of federal court civil actions, why is it so terrible for a court to hear a similar collection of cases in other situations? The answer might be that federalism requires stricter limits on state court personal jurisdiction than on federal court proceedings. But the Court has had trouble explaining why this should be so, as we shall now see.

V. Caselaw Confusion

Developing jurisdictional law case by case is both a defect and the cause of other defects. It is a defect because it leaves gaps and inconsistencies in the law, as already described.[86] It causes defects because development by precedent creates risks at every step. Law is pieced together by different judges, having different views, facing different conditions, focusing on one set of facts at a time, trying to resolve one problem with a formula devised for others, and reviewing jurisdictional issues only sporadically. Ronald Dworkin compared precedential law to a novel each of whose chapters is written by a new author,[87] but forgot to add that this form of authorship yields few masterpieces.

The Court's wavering approach to the implications of *International Shoe*'s reordering of personal jurisdiction law provides a familiar example of the resulting confusion. Five years after *International Shoe* was decided, four Justices believed that it still required service within the state on the defendant or its agent.[88] In *Shaffer v. Heitner*,[89] twenty-seven years after that, the Court told us that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." Thirteen years later, four Justices discovered that "all assertions" just meant "*quasi in rem* jurisdiction."[90] But after twenty-one more years, *International Shoe*

sion of the jurisdictional problem, *see* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 Wm. & Mary L. Rev. 1165, 1220–37 (2018).

85. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

86. *See* Parts I–III, *supra.*

87. Ronald Dworkin, Law's Empire 228–32 (1986).

88. Travelers Health Ass'n v. Virginia, 339 U.S. 643, 657–58 (1950).

89. 433 U.S. 186, 212 (1977).

90. Burnham v. Super. Ct., 495 U.S. 604, 620–21 (1990).

was nevertheless "[t]he canonical opinion" invoked to govern general as well as specific jurisdiction.[91] That did not settle the matter: two and perhaps three Justices now seem willing to reconsider large parts of *International Shoe* altogether, and perhaps to embark on a perilous quest for the Due Process Clause's original meaning.[92] Meanwhile, the case and its progeny and principles have had little impact on personal jurisdiction over divorce proceedings.[93]

Confusion and inconsistency have been even greater when it comes to the rationale of personal jurisdiction law. Just why does the Fourteenth Amendment limit the personal jurisdiction of state courts? As often pointed out, decisions have sometimes spoken of state sovereignty or territorial power,[94] sometimes of legitimate state interests,[95] sometimes of the individual liberty of defendants,[96] and sometimes of none of these.[97]

Justice Kennedy's attempt to integrate sovereignty and liberty concerns in *Nicastro* demonstrates the emptiness of current theories. Speaking for himself and three other Justices, he said that a defendant is subject to a state's specific jurisdiction if "it submits to the judicial power of an otherwise foreign sovereign . . . through contact with and activity directed at a sovereign . . . 'in a suit arising out of or related to the defendant's contacts with the forum.'"[98] Of course, the defen-

91. Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 923 (2011).

92. Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017, 1032, 1034, 1038–39 (2021). The rest of the Court still regards it as "canonical." *Id*. at 1024.

93. Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. Rev. 1669, 1699–1700 (2011); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. Ill. L. Rev. 813, 815 (1995).

94. *E.g.*, Hanson v. Denckla, 357 U.S. 235, 251 (1958); Pennoyer v. Neff, 95 U.S. 714, 720 (1877); Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. Rev. 729, 729 (2012).

95. *See generally* Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011); Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., 141 S. Ct. 1017 (2021). *See* Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 Minn. L. Rev. 679, 685–86, 689, 702 (2020) (interpreting modern jurisdiction law as focused on a state's power to protect its community, which to me means to implement its interests).

96. Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–04 (1982). *See* Allan Erbsen, *Impersonal Jurisdiction*, 60 Emory L. J. 1, 20–30, 54–60 (2010) (criticizing this theory); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U. L. Rev. 411, 412–13, 427 (2004) (urging that the real question is what state assertions of jurisdiction implement legitimate regulatory interests in our federal system, with individual liberty simply being what is left after those assertions).

97. Burnham v. Super. Ct., 495 U.S. 604, 604–05 (1990); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction,* 22 Rutgers L.J. 597 (1991). For a listing of other theories advanced by commentators, *see* Erbsen, *supra* note 96, at 3–4. The literature on these subjects is too vast even to summarize; I apologize to the many scholars I am not citing.

98. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 881 (2011) (plurality opinion).

dant's submission is just as fictional as the corporate presence standard that Felix Cohen criticized as "transcendental nonsense" long ago.[99] A defendant is said to submit when a court decides that the circumstances warrant subjecting it to jurisdiction. As Wendy Perdue pointed out, Justice Kennedy based his theory on sovereignty but seemed more concerned with individual rights, while Justice Ginsburg's dissent (joined by two other Justices) spoke of rights but seemed at least as concerned with ensuring safe workplaces in the forum state.[100] Meanwhile, Justices Breyer and Alito, who joined Justice Kennedy's group to form a majority, cagily avoided any rationale, criticized both the other two opinions, and claimed to be relying only on precedent.[101]

Faced with conflicting theories and Justices, the Court has more than once invoked an ad hoc argument never to be seen again. In *Asahi*, ignoring the principle that jurisdiction exists or does not exist when a suit is brought and does not alter after that,[102] the Court cited developments in the course of the litigation to deny jurisdiction over a defendant.[103] In *Shaffer*, the Court considered it a reason to deny jurisdiction that the defendants were denied fair warning when there was no long-arm statute specifically extending jurisdiction over officers and directors of a Delaware corporation,[104] even though in other instances, states' broad assertion of jurisdiction to the constitutional limit has not caused problems.[105] Usually, the Court does not consider the social benefit of a particular defendant's interstate activities, but when it denied jurisdiction in *Kulko*, it relied on the desirability of encouraging a divorced spouse to let his children live with his former wife without suffering burdensome jurisdictional consequences.[106] Usually, Justices treat what state's law will be applied as unrelated to what state can assert personal jurisdiction,[107] but in *Burger King*, a clause providing that Florida law would govern contractual

99. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809–12 (1935). *See also* Learned Hand's similar critique in Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930).

100. Collins Perdue, *supra* note 94, at 740–43.

101. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 887 (2011) (Breyer, J., concurring).

102. Grupo Dataflux v. Atlas Glob. Group, L.P., 541 U.S. 567, 570–71 (2004) (subject matter jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 727–28 (1877).

103. Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 106, 114 (1987).

104. Shaffer v. Heitner, 433 U.S. 186, 213–16 (1977).

105. Daimler AG v. Bauman, 571 U.S. 117, 125 (2014).

106. Kulko v. Super. Ct, 436 U.S. 84, 93 (1978).

107. *E.g.*, Shaffer v. Heitner, 433 U.S. 186, 215–16 (1977).

disputes helped Burger King establish jurisdiction in that state.[108] How are lower courts and litigants supposed to treat such factors?

In short, the theories advanced by courts neither explain the decisions nor provide a guide for the future. That is not in itself a criticism of the judges. If there were a sound theory consistent with existing law, they would have found it. But they have not.

Conclusion

Law is easy to denounce but hard to improve. I will make only one proposal: like Kevin Clermont, I think that Congress should pass a statute regulating personal jurisdiction in state and federal courts,[109] as the Full Faith and Credit Clause and the Commerce Clause empower it to do.[110] Of course, Congress nowadays seems scarcely capable of passing anything,[111] and competing lobbies of plaintiffs' lawyers and defendants and their lawyers would beleaguer any reform effort. But it is not too early to start thinking about the possibilities, as did the American Law Institute when it proposed a federal statute on the recognition of foreign judgments.[112]

A statutory approach would have many advantages over the accumulation of caselaw. A statute could provide different standards for different kinds of cases, as in the European Union.[113] That statute could address with more specificity what is required for each kind of case, as does the existing statute governing jurisdiction in child custody disputes.[114] Different rules could be laid down for different kinds of defendants, for example, foreign defendants[115] or smaller businesses, or for different kinds of plaintiffs. The statute could provide a unified jurisdictional scheme, without the gaps and inconsistencies of existing law. It could introduce changes all at once, without having to

108. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481–82 (1985).

109. Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 Cornell L. Rev. 89, 97 (1999).

110. *Id.* at 127; Israel Packel, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 Temple L.Q. 919, 925 (1986); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 Nw. U. L. Rev. 1301, 1347 (2014); Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 Minn. L. Rev. 75, 93 (1984).

111. *But see* James M. Curry & Frances E. Lee, The Limits of Party: Congress and Lawmaking in a Polarized Era (2020) (arguing that the difficulties of legislating remain what they were).

112. *See generally* American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006).

113. Text at *supra* note 8.

114. 28 U.S.C. § 1738A.

115. *See* authorities cited *supra* note 57.

wait for litigants willing to appeal each issue through the courts, and for the Supreme Court to find room for that issue on its crowded docket. Most importantly, the authors of a statute would not have to derive, or pretend to derive, its provision from a general constitutional formula but would be free to seek practical solutions based on all the relevant concerns. Or at least we can dream of that happening.