
2021

***Ford Motor Co. v. Montana Eighth Judicial District Court and
“Corporate Tag Jurisdiction” in the Pennoyer Era***

Patrick J. Borchers

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Recommended Citation

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*FORD MOTOR CO. v. MONTANA
EIGHTH JUDICIAL DISTRICT
COURT AND “CORPORATE TAG
JURISDICTION” IN THE
PENNOYER ERA*

Patrick J. Borchers[†]

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INTRODUCTION

A perfectly reasonable response to reading the title might be: who cares? *Pennoyer v. Neff*^a was decided in 1878. Since 1945, the “minimum contacts” test has governed personal jurisdiction.² What difference does jurisdictional law regarding corporations around the time of *Pennoyer* make?³ It’s a fair question. However, Justices Gorsuch and Thomas

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1. 95 U.S. 714 (1878).
2. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
3. *See* Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1251 (2017) [hereinafter Sachs, *Pennoyer*] (noting that *Pennoyer* is often viewed as rendered obsolete by *International Shoe*).

care.⁴ Justice Alito seems to as well.⁵ Other Justices might come to care. If they care enough, it might usher in a revolutionary change in the Supreme Court’s jurisdictional jurisprudence with the promise of greater predictability and fairer results.

Professor Linda Silberman coined the term “tag” jurisdiction to describe the phenomenon of individual defendants being subject to *in personam* jurisdiction if served with process while in the forum state, no matter how briefly or for what purpose.⁶ Once thought to be on the constitutional rocks,⁷ in 1990 the Supreme Court unanimously upheld tag jurisdiction over an individual defendant while in the forum state for three days on personal business.⁸ “Corporate tag jurisdiction”—as I use the term—means obtaining *in personam* jurisdiction over a corporation by serving a corporate officer, agent or representative while the recipient is in the forum state.⁹

Here a distinction between “casual” and “business” corporate tag jurisdiction becomes crucial. Casual corporate tag jurisdiction is the assertion of jurisdiction over a corporation based on forum-state service of a corporate officer or agent, even if that officer or agent is in the state on personal business and the corporation has no significant presence in the forum state.¹⁰ Business corporate tag jurisdiction is the assertion of jurisdiction based upon forum-state service on an officer

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4. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1037 (2021) (Gorsuch, J., concurring in the judgment) (joined by Justice Thomas).
 5. *Id.* at 1032 (Alito, J., concurring in the judgment) (“[F]or the reasons outlined in Justice Gorsuch’s thoughtful opinion, there are grounds for questioning the standard that the Court adopted in *International Shoe Co. v. Washington* . . .”).
 6. See Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 75 (1978) (coining the term “tag” jurisdiction to describe the in-state service rule). In one well-known case, the defendant was held subject to jurisdiction while served on a commercial airplane while flying over the forum state. See *Grace v. MacArthur*, 170 F. Supp. 442, 443 (E.D. Ark. 1959).
 7. See, e.g., *Nehemiah v. Athletics Cong. of the U.S.A.*, 765 F.2d 42, 47–48 (3d Cir. 1985) (holding tag jurisdiction unconstitutional without minimum contacts between the defendant and the forum state); *Harold M. Pitman Co. v. Typecraft Software Ltd.*, 626 F. Supp. 305, 312 (N.D. Ill. 1986) (same). *But see Amusement Equip., Inc. v. Mordelt*, 779 F.2d 264, 270–71 (5th Cir. 1985) (holding tag jurisdiction constitutional).
 8. See *Burnham v. Superior Court*, 495 U.S. 604, 619, 628 (1990).
 9. Cody J. Jacobs, *If Corporations Are People, Why Can’t They Play Tag?*, 46 N.M. L. REV. 1, 2 (2016) (arguing that corporations should be subject to tag jurisdiction).
 10. See, e.g., *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137, 139–41 (1881).

while there on corporate business or on a designated agent for service of process, if the corporation has a significant forum-state presence.¹¹

Corporations are now likely impossible to tag either in the casual or business sense.¹² Some debate continues as to whether Justice Holmes’s century-old opinion in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*,¹³ allowing states to assert business corporate tag jurisdiction, remains good law.¹⁴ Squaring business tag (to say nothing of casual tag) with recent Supreme Court cases drastically limiting state-court general jurisdiction¹⁵ over corporations is—to put it

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11. See, e.g., *Gold Issue Mining & Milling Co. v. Pa. Fire Ins. Co.*, 184 S.W. 999, 1003, 1021 (Mo. 1916) (upholding a state statute permitting service of process on a designated corporate agent), *aff’d*, 243 U.S. 93 (1917); *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075, 1077 (N.Y. 1916) (“[W]hen a foreign corporation is engaged in business in New York, and is here represented by an officer, he is its agent to accept service, though the cause of action has no relation to the business here transacted.”).
 12. See, e.g., *Fidrych v. Marriott Int’l, Inc.*, 952 F.3d 124, 136 (4th Cir. 2020) (holding that general jurisdiction based on a corporate-registration statute cannot be reconciled with modern minimum-contacts analysis); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 641 (2d Cir. 2016) (Connecticut’s corporate-registration statute cannot confer general jurisdiction); *King v. Am. Fam. Mut. Ins. Co.*, 632 F.3d 570, 580 (9th Cir. 2011) (Montana corporate-registration statute cannot confer general jurisdiction); *Aybar v. Aybar*, 177 N.E.3d 1257, 1258 (N.Y. 2021) (New York corporate registration statute does not confer general jurisdiction); *Mallory v. Norfolk Southern Ry. Co.*, No. 3 EAP 2021, 2021 WL 6067172 (Pa. Dec. 22, 2021) (Pennsylvania corporate registration statute purporting to confer general jurisdiction over registrants is unconstitutional).
 13. 243 U.S. 93 (1917).
 14. Compare *Fidrych*, 952 F.3d at 136 (reasoning that *Pennsylvania Fire* was implicitly overruled by modern general jurisdiction cases), with *Cooper Tire & Rubber Co.*, 863 S.E.2d 81 (Ga. 2021) (Georgia registration statute confers general, but not specific, jurisdiction); *Forest Lab’ys., Inc. v. Amneal Pharms. LLC*, No. 14–508–LPS, 2015 WL 880599, at *3–4 (D. Del. Feb. 26, 2015) (holding that Delaware registration statute confers general jurisdiction). See also Charles W. “Rocky” Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 436–41 (2012) (discussing jurisdiction based on registration statutes).
 15. The Supreme Court uses the term “general jurisdiction” to refer to a defendant being subject to personal jurisdiction regardless of the cause of action; the Court sometimes now refers to this as “all-purpose” jurisdiction. See, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Corporations must be “essentially at home” to be subject to general jurisdiction. *Id.* The Court has used the term “general jurisdiction,” and its counterpart “specific jurisdiction” (jurisdiction only on related causes of action, or as it is sometimes called, “case-linked” jurisdiction) for many years. See, e.g., *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414, nn.8–9 (1984). The

mildly—a challenge.¹⁶ But before the Supreme Court’s decision in *Pennoyer*, and well after, corporations were fairly easy to tag. States widely allowed business corporate tag,¹⁷ and some allowed casual tag.¹⁸

*Ford Motor Co. v. Montana Eighth Judicial District Court*¹⁹ provides a reason to think again about corporate tag jurisdiction in all its forms. In its seventh personal-jurisdiction opinion since 2011, the Supreme Court found (in two consolidated cases) that defendant Ford Motor Company had minimum contacts with the forum states in products-liability actions brought by plaintiffs injured there by Ford’s vehicles.²⁰ After six straight Supreme Court victories for defendants,²¹ plaintiffs got one in the win column—this time unanimously. The majority opinion held Ford’s forum-state contacts were purposeful and sufficiently related to the plaintiffs’ suits to allow specific jurisdiction,²² even though the allegedly defective vehicles were initially sold in

terms were invented in a famous law-review article. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

16. See, e.g., *Fidrych*, 952 F.3d at 136 (concluding that *Pennsylvania Fire* was implicitly overruled by modern general-jurisdiction cases). However, some well-known scholars defend corporate jurisdiction by registration, at least in a limited fashion. See, e.g., Jeffrey L. Rensberger, *Consent to Jurisdiction Based on Registering to Do Business: A Limited Role for General Jurisdiction*, 58 SAN DIEGO L. REV. 309, 311 (2021) (arguing that registration should confer jurisdiction if claim is asserted by forum-state plaintiff).
17. See, e.g., *Gold Issue Mining & Milling Co. v. Pa. Fire Ins. Co.*, 184 S.W. 999 (Mo. 1916), *aff’d*, 243 U.S. 93 (1917).
18. See generally *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137 (1881).
19. 141 S. Ct. 1017 (2021).
20. *Id.* at 1031–32.
21. See *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).
22. “Specific jurisdiction” is the term used by the Supreme Court to describe assertions of jurisdiction over defendants if the claims are related to the defendant’s purposeful activities in the state, even if those activities are isolated. *Ford*, 141 S. Ct. at 1024–25. For example, the Supreme Court allowed jurisdiction over a Texas life insurer in a California court where the only known contact between the insurer and the forum state was that the Texas life insurer had sold a single life insurance policy there. See *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957). For a discussion of the contrast between specific and general jurisdiction, see *supra* note 15. The *McGee* claim was to collect on the California policy, creating an obvious relationship between the claim and the defendant’s forum-state contacts. *McGee*, 355 U.S. at 222–23.

another state and reached the forum state via private resales.²³ Justice Alito “quibble[d]” with the majority’s definition of a related contact and so concurred only in the judgment.²⁴

Then came Justice Gorsuch’s concurrence in the judgment, joined by Justice Thomas.²⁵ Justice Gorsuch, like Alito, did not join the majority’s minimum-contacts analysis, even though he concluded Ford Motor Company had minimum contacts with the forum states.²⁶ However, in the second part of his opinion, he questioned on textualist and originalist grounds the foundations of the minimum-contacts test and wondered about the legitimacy of the solicitous treatment corporate defendants receive under modern jurisdictional law.²⁷

In this article I devote little attention to the Court’s competing minimum-contacts analyses. I do not denigrate scholarly attention to this aspect of *Ford*, but it surely will receive thorough examination in other law review articles. Instead, I focus on Justice Gorsuch’s tentative inquiry into the originalist case—or lack thereof—for imposing significant due-process constraints on state-court jurisdiction, particularly over corporations.

In Part I, I review the second portion of Justice Gorsuch’s opinion. In Part II, I review the *Pennoyer*-era Supreme Court jurisdictional cases and related scholarship; I conclude, as I have before, that the conventional view of *Pennoyer*—establishing the Due Process Clause *itself* as a limitation on state-court jurisdiction—might be a “giant misunderstanding.”²⁸ In Part III, I examine state decisions on corporate tag jurisdiction (particularly casual tag) in the time immediately following *Pennoyer* to see what lessons can be learned from the now-severe restraints on state-court long-arm jurisdiction over out-of-state corporations. I focus on New York’s *Pope*²⁹ rule, which allowed casual corporate tag jurisdiction (in *Pope*, the corporate president was served

23. *Ford*, 141 S. Ct. at 1029.

24. *Id.* at 1033 (Alito, J., concurring in the judgment).

25. *Id.* at 1034 (Gorsuch, J., concurring in the judgment).

26. *Id.* at 1035–36.

27. *Id.* at 1037–39.

28. See Patrick J. Borchers, *The Muddy-Booted, Disingenuous Revolution in Personal Jurisdiction*, 70 FLA. L. REV. F. 21, 22 (2018) [hereinafter Borchers, *Muddy-Booted*]; see also 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, 699–700 (1983) (“*International Shoe* should have rendered obsolete both state sovereignty and its cousin, forum state interest, as determinants of personal jurisdiction.”).

29. *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137 (1881).

while passing through New York on family vacation).³⁰ Finally, in Part IV, I address what might come if the Supreme Court were to accept the invitation of Justice Gorsuch—and that of some law professors (including me)—to fundamentally reconsider jurisdictional due process. I suggest that, rather than continuing to attempt to refine the doctrinally suspect minimum-contacts test, it be abandoned and jurisdictional due process be united with procedural-due-process norms.

Justice Gorsuch is on the right track. Termites infest the house of constitutionalized personal jurisdiction and the minimum-contacts test. Recent scholarship has laid bare its practical shortcomings.³¹ A growing body of work shows that the conventional account of *Pennoyer* invoking the Due Process Clause to “fix[] in constitutional amber”³² the then-accepted general bases of personal jurisdiction is at best highly problematic.³³ If the house collapses, something better might be built in its place.

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30. See *Pope v. Terre Haute Car & Mfg. Co.*, 31 N.Y. Sup. Ct. 238, 239 (N.Y. Gen. Term), *aff'd*, 87 N.Y. 137 (1881).
31. See generally Patrick J. Borchers, *The Twilight of the Minimum Contacts Test*, 11 SETON HALL CIR. REV. 1 (2014) [hereinafter Borchers, *Twilight*]; Donald L. Doernberg, *Resolving International Shoe*, 2 TEX. A&M L. REV. 247 (2014); Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23 (2018); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499 (2018) [hereinafter Hoffheimer, *Stealth Revolution*]; Michael H. Hoffheimer, *General Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 KAN. L. REV. 549 (2012); Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589 (2018) (arguing for the revival of pre-minimum contacts bases of jurisdiction such as quasi-in-rem and corporate presence jurisdiction; this proposal is critiqued in Michael H. Hoffheimer, *The Case Against Neo-Territorialism*, 95 TUL. L. REV. 1305 (2021)); Zoe Niesel, *#PersonalJurisdiction: A New Age of Internet Contacts*, 94 IND. L.J. 103 (2019); Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655 (2019); Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U.N.H. L. REV. 65 (2015).
32. *Ford*, 141 S. Ct. at 1036, n.2 (Gorsuch, J., concurring in the judgment) (quoting Sachs, *Pennoyer*, *supra* note 3, at 1255).
33. Aside from Professor Sachs’s article, see generally 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) [hereinafter Borchers, *Constitutional Law*] (arguing that *Pennoyer* can plausibly be read as invoking the Due Process Clause only to ensure that state courts followed state law of jurisdiction); Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071 (1994) (arguing that state-court jurisdiction should not be closely regulated by the Due Process Clause); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1029–31 (1983) (explaining that *Pennoyer* did not necessarily enshrine territorial principles as a matter of due process); Wendy Collins Perdue, *Sin*,

I. JUSTICE GORSUCH’S CONCURRENCE IN THE JUDGMENT

In *Ford*, Justice Gorsuch, joined by Justice Thomas, concurred in the judgment, finding Ford Motor Company subject to jurisdiction in the forum states.³⁴ The second part of his opinion focused on the original understanding of the Fourteenth Amendment and its intended limitations (if any) on jurisdiction over out-of-state corporations.³⁵ Justice Gorsuch wondered why current law allows tag jurisdiction over individuals, but probably not corporations, although it once did in some circumstances.³⁶

Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered, 62 WASH. L. REV. 479, 505 (1987) (noting that *Pennoyer* “strongly suggests that the due process clause is not itself the source of personal jurisdiction principles”); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 876 (1989) (“Justice Field did not contend, nor could he, that the Due Process Clause was the source of the territorial rules of jurisdiction he articulated.”); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 171 (2004) (“The Court has forgotten that the territorially based limitations that it imposes on state court authority, ostensibly under the authority of the Due Process Clause of the Fourteenth Amendment, are in fact direct descendants of federal common law limitations long predating that Amendment.”); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981) (providing an exhaustive review of due-process and full-faith-and-credit law). Not everyone agrees with this, however. Professor Oakley devoted 163 pages to arguing that my limited view of *Pennoyer* was a mirage and that *Pennoyer* could only be understood as the Court now understands it, which is that it imposed jurisdictional restraints directly on state courts. See John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591 (1995). I replied, pointing to contemporaneous commentary and state cases adopting the limited view of *Pennoyer*. See Patrick J. Borchers, *Pennoyer’s Limited Legacy: A Reply to Professor Oakley*, 29 U.C. DAVIS L. REV. 115 (1995) [hereinafter Borchers, *Limited Legacy*].

34. *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment).
35. *Id.* at 1036–37 (noting tag jurisdiction over individuals (citing *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95–96 (1917))).
36. *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment). He also noted that the old implied-consent and presence fictions regarding corporate jurisdiction were not so different from more modern cases. *Id.* at 1038. In some respects, the old fictions were at least as forgiving to plaintiffs as modern applications of the minimum-contacts test. See Borchers, *Twilight*, *supra* note 31, at 3; Jacobs, *supra* note 31 (noting that some modern litigants would have had a better chance of establishing jurisdiction a century ago).

Early in his concurrence, Gorsuch described the “old guardrails” of the minimum contacts test as “look[ing] a little battered.”³⁷ After critiquing the majority’s minimum-contacts analysis, he suggested, “it’s hard not to ask how we got here and where we might be headed.”³⁸ Justice Gorsuch began by observing that, pre-*International Shoe*, “it seems due process was usually understood to guarantee that only a court of *competent jurisdiction* could deprive a defendant of his life, liberty, or property.”³⁹

By “competent jurisdiction” Justice Gorsuch presumably meant a court having both personal and subject-matter jurisdiction, though his emphasis was on the former. However, competence is a commonly used term for subject-matter jurisdiction⁴⁰ and *Pennoyer*—in its famous due-process paragraph—cited personal *and* subject-matter jurisdiction cases.⁴¹ The concurrence continued: “In turn, a court’s competency *normally* depended on the defendant’s presence in, or consent to, the sovereign’s jurisdiction.”⁴²

Pausing here to consider these two critical sentences, Justice Gorsuch must mean that, pre-*International Shoe*, the Due Process Clause was not universally understood to require states to adhere to any particular jurisdictional regime. Otherwise, his use of “normally” would make no sense. State courts don’t just “normally” follow constitutional decisions of the United States Supreme Court; ever since the Supreme Court declared itself the final arbiter of the meaning of the Constitution, states must adhere to its decisions.⁴³ For instance, when the Supreme Court announced a constitutional right to same-sex marriage, it became the rule in all fifty states, regardless of what state law might say.⁴⁴

37. *Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring in the judgment).

38. *Id.* at 1036.

39. *Id.* (emphasis added).

40. RESTATEMENT (SECOND) OF CONFLICTS OF L. § 97 (AM. L. INST. 1971).

41. *See Pennoyer v. Neff*, 95 U.S. 714, 733 (1878); *Perdue*, *supra* note 33, at 505–06 (noting that *Pennoyer*’s due process passage referenced both personal- and subject-matter-jurisdiction cases).

42. *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment) (emphasis added).

43. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803); *see also Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

44. *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015). At least one local official initially refused to issue marriage licenses to same-sex couples, but doing so earned her a trip to jail and caused her to be terminated from her job. *See, e.g.*, Robert Barnes, *Supreme Court Will Not Hear Kim Davis Same-Sex Marriage Case*, WASH. POST (Oct. 5, 2020, 1:40 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-kim-davis-same-sex-marriage/2020/10/05/cd5a74d2-0710-11eb-9be6-

In an important article cited by Justice Gorsuch, Professor Sachs argues that *Pennoyer*’s invocation of the Due Process Clause gave defendants the constitutional right to enforce the general law of jurisdiction on direct—not just collateral—attack, but due process did not create jurisdictional rules.⁴⁵ By general law he means the law—drawn from English common law, customary international law, and other sources—that federal courts heavily participated in developing prior to *Erie Railroad Co. v. Tompkins*.⁴⁶ In a 1990 article, I advanced a related thesis.⁴⁷ I argued that *Pennoyer* is open to a “limited” interpretation.⁴⁸ Under this limited view of *Pennoyer*, due process guaranteed a defendant a chance to challenge state-court jurisdiction under state law.⁴⁹ I suggested that it would be practically wiser, and doctrinally sound, if the Court would pull back due process to invalidate state-court assertions of jurisdiction only if the forum choice put the defendant at a practical disadvantage in defending the case.⁵⁰

Professor Sachs and I are not the first to venture into this territory. Important scholarship has dug deep into the origins of the Due Process

cf25fb429f1a_story.html [https://perma.cc/U4LL-9CS3] (recounting the saga of Kim Davis, a Kentucky clerk who refused to issue same-sex marriage licenses and was briefly jailed and defeated for re-election).

45. See Sachs, *Pennoyer*, *supra* note 3, at 1253–55, *cited with approval in Ford*, 141 S. Ct. at 1036 n.2 (Gorsuch, J., concurring in the judgment) (noting that recent scholarship is asking the “right question” about personal jurisdiction—“what the Constitution as originally understood requires, not what nine judges consider ‘fair’ and ‘just’”).
46. 304 U.S. 64 (1938), *examined in* Sachs, *Pennoyer*, *supra* note 3, at 1255 (“The idea of general law, and our sense of its place in our federal system, has fallen somewhat out of fashion since [*Erie*].”). See also *id.* at 1252. Professor Sachs often uses the phrase “jurisdiction, full stop” to refer to jurisdiction under the judgment-rendering court’s law. *Id.* at 1253. This was often defined by the general law of jurisdiction (and always defined that way in federal courts) but also could be defined by state law where it provided the jurisdictional rule. *Id.* at 1299.
47. Borchers, *Constitutional Law*, *supra* note 33, at 40–43.
48. *Id.*
49. *Id.* at 40.
50. *Id.* at 94. This is one way to understand the banter between the majority opinion and Justice Gorsuch’s concurrence over the “duck decoy” hypothetical. For a description of a duck decoy, see *infra* note 64. In this hypothetical, a Maine retiree carves decoys for duck hunting and sells a few over the Internet. *Ford*, 141 S. Ct. at 1028 n.4. Both the majority and the concurrence agreed that the retiree ought not be subject to jurisdiction in a faraway state if one of the decoys causes injury to a purchaser, but debated whether that result could be justified in a principled fashion under the minimum-contacts test. Compare *id.* (majority opinion), *with id.* at 1035 (Gorsuch, J., concurring in the judgment). A principal difference between Ford and the retiree is that Ford is at no disadvantage defending in the injury state, while the retiree likely would be.

Clause and come away with serious questions as to the historical soundness of constitutionalized state-court jurisdiction, at least in its current form.⁵¹ Though different consequences flow from differing assessments of the historical record, for the moment we can remain agnostic as to the soundness of the varying interpretations of *Pennoyer* and the Fourteenth Amendment, except to stipulate that the Due Process Clause—as originally understood—quite likely did not *itself* supply jurisdictional rules, but rather was a mechanism for enforcing rules that came from elsewhere.⁵² Justice Gorsuch—as discussed more fully below—understands that the conventional notion that *Pennoyer* converted personal jurisdiction to a constitutionalized subject (with the Due Process Clause supposedly guarding against state-court overreaches) is a gross oversimplification.

As Justice Gorsuch noted, the minimum-contacts test came after jurisdictional law drifted far from its historical home and emerged as an attempt to unify corporate jurisdiction.⁵³ As corporations rose in importance in the national economy, courts tried to squeeze them into one of two jurisdictional fictions: either that the corporation did enough business in the forum state to render it present and amenable to jurisdiction, or that the forum state had extracted the corporation’s “consent” to jurisdiction as a condition of doing business.⁵⁴

International Shoe brought the presence and consent fictions under the single banner of “fair play and substantial justice.”⁵⁵ But in so doing, *International Shoe* baked in the advantages that corporations gained in prior decades by being able to do some business while evading jurisdiction in the forum state.⁵⁶ Moreover, as Justice Gorsuch noted, unifying the presence and consent theories deprived states of one of their most important methods of protecting their citizens: requiring jurisdictional consent as a condition of doing business in the forum state.⁵⁷

Justice Black, in his now-mostly-forgotten *International Shoe* separate opinion (which today would be a concurrence in the judgment), warned of this.⁵⁸ Justice Black, like Justice Gorsuch, was a

51. *See supra* note 33.

52. Sachs, Pennoyer, *supra* note 3, at 1252–53.

53. *Ford*, 141 S. Ct. at 1037 (Gorsuch, J., concurring in the judgment).

54. *Id.* at 1036–37.

55. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also* Borchers, *Muddy-Booted*, *supra* note 28, at 23.

56. *Ford*, 141 S. Ct. at 1037–38 (Gorsuch, J., concurring in the judgment).

57. *Id.* at 1037.

58. *Int’l Shoe*, 326 U.S. at 323 (opinion of Black, J.).

textualist.⁵⁹ He noted the “emotional appeal” of terms like fair play, but could find no root for them in the Due Process Clause.⁶⁰ Justice Black argued that “it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere.”⁶¹ His opinion concluded, “I believe that the Federal Constitution leaves to each State, without any ‘ifs’ or ‘buts,’ a power to . . . open the doors of its courts for its citizens to sue corporations whose agents do business in those States.”⁶²

The echo of Justice Black’s opinion is audible in Justice Gorsuch’s concurrence when the latter suggested that maybe “*International Shoe* just doesn’t work quite as well as it once did.”⁶³ He agreed that for a time the minimum contacts test sufficed as a substitute for corporate presence, but criticized the majority’s efforts to distinguish the contacts of Ford Motor Company from a hypothetical retiree making small sales of duck decoys⁶⁴ over the Internet (the former subject to jurisdiction and the latter not).⁶⁵ To distinguish the two, the majority invoked an “affiliation” test based on the volume of the contacts, but Justice Gorsuch dismissed this as a tepid reformulation of *International Shoe*’s “traditional notions of fair play and substantial justice” test.⁶⁶

Referring to the *Ford* majority opinion, he wrote, “I cannot help but wonder if we are destined to return where we began.”⁶⁷ He hypothesized that the Court is “seeking to recreate in new terms a jurisprudence about corporate jurisdiction that was developing before this Court’s muscular interventions in the early 20th century.”⁶⁸ The phrase “muscular interventions” is eye-catching. It was in the early 20th century—1915 to be exact—when the Court first held that due process

59. See, e.g., Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 26 (1994).

60. *Int’l Shoe*, 326 U.S. at 325 (opinion of Black, J.).

61. *Id.* at 323.

62. *Id.* at 324.

63. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1038 (Gorsuch, J., concurring in the judgment).

64. Duck decoys are inanimate and look like ducks. Duck hunters float them in water to fool live ducks into thinking that they are in a safe area. Lauren Drapes, *Object History: A Duck Decoy*, UNIV. OF WIS.-MADISON: WIS. 101; OUR HIST. IN OBJECTS (Sept. 9, 2020), <https://wi101.wisc.edu/2020/09/09/object-history-a-duck-decoy/> [https://perma.cc/9EQ2-N9SM].

65. *Ford*, 141 S. Ct. at 1038 (Gorsuch, J., concurring in the judgment).

66. *Id.*

67. *Id.*

68. *Id.* at 1039.

itself limited state-court assertions of jurisdiction.⁶⁹ While noting that *International Shoe* strove to move past the presence and consent fictions, Justice Gorsuch remarked that “maybe all we have done since is struggle for new words to express the old ideas.”⁷⁰

Justice Gorsuch penned two crucial footnotes on the original understanding of the Due Process Clause. In the first, citing Professor Sachs’s article, he noted scholarship concluding that due process does not *itself* supply jurisdictional rules.⁷¹ Without weighing in on the correctness of the various theories, he stated “they at least seek to answer the right question—what the Constitution as originally understood requires, not what nine judges consider ‘fair’ and ‘just.’”⁷² Then, in a testy response to the majority’s insinuation that he would return us to the horse-and-buggy era,⁷³ he wrote:

The majority worries that the thoughts expressed here threaten to “transfigure our specific jurisdiction standard as applied to corporations” and “return [us] to the mid-19th century.” But it has become a tired trope to criticize any reference to the Constitution’s original meaning as (somehow) both radical and antiquated. Seeking to understand the Constitution’s original meaning is part of our job. What’s the majority’s real worry anyway—that corporations might lose special protections? The Constitution has always allowed suits against *individuals* on any issue in any State where they set foot. Yet the majority seems to recoil at even entertaining the possibility the Constitution might tolerate similar results for “nationwide corporation[s],” whose “business is everywhere.”⁷⁴

One need not subscribe to a full-blown originalist theory of constitutional interpretation to accept the relevance of the history of jurisdiction pre-*International Shoe*. Jurisdictional due process is a doctrinal orphan separated from the rest of due-process law, and going back to its origins to figure out why that is so is worthwhile regardless of one’s preferred mode of construing the Constitution.⁷⁵ Consider that Justice Brandeis—hardly an originalist—in *Erie Railroad* banished general common law from federal court diversity cases, in part because

69. See *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 194–95 (1915).

70. *Ford*, 141 S. Ct. at 1039 (Gorsuch, J., concurring in the judgment).

71. *Id.* at 1036 n.2 (citing Sachs, Pennoyer, *supra* note 3, at 1255).

72. *Id.*

73. See *id.* at 1025 n.2 (“[Justice Gorsuch’s] concurrence proposes . . . a return to the mid-19th century . . .”).

74. *Id.* at 1039 n.5 (citations omitted).

75. See Borchers, *Muddy-Booted*, *supra* note 28, at 22.

historical research suggested that the then-150-year-old Rules of Decision Act had been misinterpreted.⁷⁶

Nor is it fair to insinuate that Justice Gorsuch would put corporations out of the jurisdictional reach of ordinary citizens. As we shall see below, pre-*Pennoyer* and continuing to the early 20th century, corporations were often easier to reach than now. The “special protections” for corporations developed after that.⁷⁷ While *International Shoe* tried to bring corporations back within reach, the ever-morphing minimum-contacts/fair-play test too often put them beyond the grasp of plaintiffs harmed in their home states by multinational enterprises exploiting the forum-state’s market.⁷⁸ If a route exists to redirect jurisdictional law to avoid such obviously unfair results, it is worth exploring.

II. PENNOYER AND ITS MYSTERIES

Parsing for the thousandth time the Delphic and messy *Pennoyer* opinion would unnecessarily lengthen this article and be pointless. I have engaged in two overly long attempts to explain it on its own terms.⁷⁹ Others have made heroic efforts.⁸⁰ Suffice it to say that the historical record is more complex than the current Court’s boilerplate recital—that “[t]he Fourteenth Amendment’s Due Process Clause limits a state court’s power to exercise jurisdiction over a defendant”⁸¹—suggests.

To cast the *Pennoyer* opinion in sharper relief, I invoke a notation that I have used before.⁸² Consider the following permutations on a judgment rendered in State A:

	F-1	F-2
Case 1	State A	State B
Case 2	State A	Federal B
Case 3	State A	Federal A
Case 4	State A	State A

76. *Id.* at 72–73, 73 n.5.

77. *See Ford*, 141 S. Ct. at 1037–38, 1039 n.5 (2021) (Gorsuch, J., concurring) (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517–18 (1923)).

78. *See, e.g., J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 877–79 (2011).

79. *See Borchers, Limited Legacy, supra* note 33, at 118–36; Borchers, *Constitutional Law, supra* note 33, at 32–42.

80. *See, e.g., Perdue, supra* note 33, at 480–508.

81. *Ford*, 141 S. Ct. at 1024.

82. *See Borchers, Limited Legacy, supra* note 33, at 125.

F-1 is shorthand for the first forum, which is the judgment-rendering court. F-2 is the notation for the court being asked to recognize F-1’s judgment—or the judgment-recognizing forum. For a judgment rendered in a state court (in *Pennoyer* it was an Oregon state court),⁸³ there are four possible courts in which F-1’s jurisdiction might be attacked. In Case 1 it’s another state’s court; in Case 2 it’s a federal court in another state; in Case 3 it’s a federal court located in the same state; and in Case 4 it’s the same state court. In Case 4, this now usually takes the form of a direct attack on F-1’s jurisdiction,⁸⁴ but not always. A defendant has no constitutional right to make an appearance without submitting to F-1’s jurisdiction, leaving a collateral attack the only option if no direct challenge is available.⁸⁵ Moreover, a defendant might not get notice of the suit in F-1, leaving the only route to impeach the judgment a collateral attack in F-1.⁸⁶

Prior to *Pennoyer* (1878) and the ratification of the Fourteenth Amendment (1868), the law was settled in Cases 1 and 2.⁸⁷ Early on, the Supreme Court held state-court judgments exceeding the limits of the general law of jurisdiction did not have to be recognized by another state’s courts or by a federal court situated in another state.⁸⁸ However, nothing prevented F-1’s courts from executing the judgment against assets located in State A.⁸⁹ A good example is New York’s “joint debtors” rule, which allowed jurisdiction over all partners and the partnership, even if only one partner was served in New York.⁹⁰ The Supreme Court held the New York rule to be beyond the limits of the

83. *Pennoyer v. Neff*, 95 U.S. 714, 719 (1878).

84. *See, e.g.*, FED. R. CIV. P. 12(b)(2) (allowing a direct attack on personal jurisdiction).

85. *See York v. Texas*, 137 U.S. 15, 16–21 (1890) (holding that a Texas rule requiring a defendant to submit to state-court jurisdiction “if he asks the court to determine any question, even that of service” did not violate the Fourteenth Amendment).

86. *See, e.g.*, *Jones v. Flowers*, 547 U.S. 220, 224–25 (2006) (holding that failed efforts at notifying the property owner of the tax sale allowed the owner to collaterally attack the judicial sale in F-1); *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 81–82, 84–86 (1988) (holding that it is unconstitutional to require a meritorious defense to the underlying action in order to set aside default judgment based on defective service).

87. *See Borchers, Limited Legacy, supra* note 33, at 125–27.

88. *See, e.g.*, *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 483–84 (1813) (interpreting Full Faith and Credit Clause to alter rule that foreign judgments were merely evidentiary).

89. *See D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 173–74 (1850) (pointing out that only “foreign State[s]”—states other than the state that issued the judgment—did not have to enforce the originating state’s judgment if the defendant had not been served with process).

90. *Id.* at 173.

general law of jurisdiction, meaning that other states need not enforce the judgment, but nothing prevented the New York courts from enforcing the judgment against the New York assets of the partnership.⁹¹

Although now unfamiliar in domestic litigation, this is the internationally recognized difference between direct and indirect limitations on jurisdiction. A direct limitation prohibits F-1 from rendering a judgment beyond jurisdictional bounds; an indirect limitation allows F-2 to refuse to recognize F-1’s judgment that reaches too far.⁹² The latter arose at the time of *Pennoyer* (and before)⁹³ and persists today. For example, in *Schibsby v. Westenholz*,⁹⁴ decided by the Queen’s Bench roughly contemporaneously to *Pennoyer*, F-1 was a French court. The French court asserted jurisdiction under a famously exorbitant rule giving a French court jurisdiction if the plaintiff was French, even without any other connection to France.⁹⁵ The plaintiff obtained a judgment in France and attempted to enforce it in England.⁹⁶ The English court refused because the French court did not have jurisdiction under accepted norms of international law.⁹⁷

In the European Union, the Brussels Regulations (and the Conventions that preceded them) act as both direct and indirect limitations on jurisdiction.⁹⁸ Member States agree not to take jurisdiction against defendants from other Member States except on agreed-upon jurisdictional bases. Member States also agree not to enforce judgments not rendered on those bases.⁹⁹

The relationship between states of the United States—as late as the early-20th century—resembled European nations pre-Brussels. States sometimes had jurisdictional statutes or created common-law rules that

91. *Id.* at 174–76.

92. *See, e.g.*, Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT’L L. 125, 128 & n.4 (1998).

93. *See, e.g.*, *Buchanan v. Rucker* (1808) 103 Eng. Rep. 546, 546–47 (KB) (posting of summons at courthouse on the island of Tobago insufficient notice to allow judgment to be recognized by English courts).

94. (1870) 6 L.R. 155 (QB).

95. Adrian Briggs, *Which Foreign Judgments Should We Recognise Today?*, 36 INT’L & COMPAR. L.Q. 240, 240–41 (1987) (discussing *Schibsby*).

96. *Id.* at 241.

97. *Id.*

98. *See* PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, *CONFLICT OF LAWS* 120 n.785, 122 & n.792, 124 (6th ed. 2018) (discussing generally the development of the Brussels Conventions and Regulations); Brand, *supra* note 92, at 127–28, 127 n.4.

99. HAY ET AL., *supra* note 98 at 122 & n.792 (citing *Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters* (EC), 1990 O.J. (C 189) 2).

allowed jurisdiction beyond the general-law boundaries.¹⁰⁰ The risk to the holder of such a judgment came not in the inability to enforce it within the forum-state’s territory; it was in exporting it to another state.¹⁰¹

Pennoyer was different because it was a Case 3. F-1 in *Pennoyer* was an Oregon state court, which asserted jurisdiction over Neff’s land, resulting in the luckless Sylvester Pennoyer holding the sheriff’s deed to it.¹⁰² F-2 was an Oregon federal court sitting in diversity in which Neff brought a trespass action against Pennoyer, attacking the sheriff’s deed as void because the Oregon state court (F-1) had no jurisdiction.¹⁰³ The Supreme Court agreed with Neff because the land had not been attached before the Oregon state court rendered judgment, and therefore the court did not have *in rem* jurisdiction.¹⁰⁴ The majority did not clearly explain what law it applied to determine that the Oregon state court lacked jurisdiction. Early in the opinion, the Court discussed a provision in the Oregon Code that codified the general law of jurisdiction.¹⁰⁵ The Court said that—so construed—the Oregon Code recited “general, if not universal” principles of jurisdiction.¹⁰⁶ An unambiguous holding of *Pennoyer* is that under the general law of jurisdiction (either of its own force or as codified in Oregon state law), *in rem* jurisdiction requires prejudgment attachment of the property.¹⁰⁷ This was not a trivial holding as some state high courts held that

100. See, e.g., *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137, 139 (1881) (corporate tag statute); *Strom v. Mont. Cent. Ry. Co.*, 84 N.W. 46, 47 (Minn. 1900) (holding action may be maintained against foreign corporation based upon property in state without need for prejudgment attachment thereof).

101. See Borchers, *Constitutional Law*, *supra* note 33, at 43–49.

102. *Pennoyer v. Neff*, 95 U.S. 719, 721 (1878). “Luckless” may not be the right word. Sylvester Pennoyer went on to become the Governor of Oregon, but used his inauguration speech to decry his loss in the *Pennoyer* case. See Perdue, *supra* note 33, at 488–89. Maybe “embittered” is a better word.

103. *Pennoyer*, 95 U.S. at 719–22. Strictly speaking, Neff’s suit might be better described as a quiet-title action, but for our purposes nothing turns on this.

104. *Id.* at 727–28.

105. *Id.* at 720.

106. *Id.*

107. *Id.* at 727–28.

prejudgment attachment was not necessary¹⁰⁸ and the *Pennoyer* dissent took the same position.¹⁰⁹

The Constitution arose only late in the majority opinion. The majority first invoked the Full Faith and Credit Clause.¹¹⁰ The Supreme Court had confronted Cases 3 before *Pennoyer*, but disposed of them by holding F-1’s jurisdictional law did not authorize the judgment, thus avoiding the question of whether a federal court sitting in the same state could deny recognition to a neighboring state court’s judgment under the general law of jurisdiction.¹¹¹ But the *Pennoyer* Court extended the full-faith-and-credit principles of Cases 1 and 2 to Cases 3. *Pennoyer*’s clearest constitutional holding is based on this interpretation of the Full Faith and Credit Clause. The Court extends the principles of Cases 1 and 2 to Cases 3 in the following passage:

[T]he courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith

108. See *Jarvis v. Barrett*, 14 Wis. 591, 594–95 (1861) (noting that prejudgment attachment is not required in *in rem* actions); *Strom v. Mont. Cent. Ry. Co.*, 84 N.W. 46, 47 (Minn. 1890) (holding action may be maintained against foreign corporation based upon property in state without need for prejudgment attachment thereof); *Rice, Stix & Co. v. Peteet*, 66 Tex. 568, 569 (1886) (holding pre-judgment attachment not required for *in rem* jurisdiction under Texas attachment statute).

109. *Pennoyer*, 95 U.S. at 747–48 (Hunt, J., dissenting).

110. *Id.* at 729 (majority opinion).

111. Borchers, *Constitutional Law*, *supra* note 33, at 36 n.115. The best example is *Galpin v. Page*, 85 U.S. (18 Wall.) 350 (1873), authored by Justice Field, who would write the majority opinion in *Pennoyer* five years later. *Galpin* was a Case 3, with F-1 being a California state court and F-2 a California federal court. *Galpin*, however, held that the California federal court (F-2) need not recognize the state-court judgment because the state court did not have jurisdiction under *state* law. *Id.* at 364, 369, 371, 373. The only role *Galpin* saw for the general law of jurisdiction (which I call the “territorial principles”) is that California state law must be presumed to conform to the general law unless it clearly stated otherwise under the general principle that statutes are presumed not to derogate from the common law. *Id.* at 368–69. Professor Sachs canvasses the cases I cited and seems to agree that they rested on F-1 not having jurisdiction under state law, but notes that many of them also addressed the general law of jurisdiction. See Sachs, *Pennoyer*, *supra* note 3, at 1296 n.345. I don’t disagree with his assessment of any of these cases, but *Pennoyer*, in my view, was the first case to unambiguously extend full-faith-and-credit principles to Case 3.

and credit which the courts of another State are bound to give to them.¹¹²

The “different sovereignty” language is critical. While in prior cases the Court managed to avoid putting its full weight on full-faith-and-credit principles to decide Cases 3, *Pennoyer* was a clear command to federal courts to not recognize jurisdictionally infirm—under either F-1’s or the general law¹¹³—neighboring state-court judgments. In the Supreme Court’s view, the Oregon state court overstepped the bounds of the general law of jurisdiction by allowing an *in rem* judgment without prejudgment seizure of Neff’s land, meaning the judgment need not be recognized by a court of a different sovereignty.¹¹⁴ Thus, *Pennoyer* held the lower federal court was correct to rule that Sylvester Pennoyer was trespassing, because his sheriff’s deed was a nullity.¹¹⁵

This was plenty to make *Pennoyer* a big case. First, it came down on the side of requiring pre-judgment attachment of property (usually land) before exercising *in rem* jurisdiction. Second, it extended the full-faith-and-credit reasoning of Cases 1 and 2 to Cases 3. Then came *Pennoyer*’s famous due process paragraph:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no 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 in our systems of jurisprudence for the protection and enforcement of private rights.¹¹⁶

112. *Pennoyer*, 95 U.S. at 732–33.

113. I referred to the general law as “general principles of international law”; “common law [of] the federal courts”; “the general principles of territorial jurisdiction”; and “the territorial principles.” See Borchers, *Constitutional Law*, *supra* note 33, at 28–32. For ease of reference, here I adopt the term “general law.”

114. *Pennoyer*, 95 U.S. at 731–33.

115. *Id.* at 719, 734 (“It follows from the views expressed that the personal judgment recovered in the State court of Oregon against the plaintiff herein, then a non-resident of the State, was without any validity, and did not authorize a sale of the property in controversy.”).

116. *Id.* at 733.

This paragraph is now conventionally interpreted to mean due process *itself* limits state-court jurisdiction. In other words, under the conventional view, *Pennoyer* also addressed Cases 4 (even though *Pennoyer* was a Case 3) and made the prejudgment attachment rule one of constitutional, not just general or state, law.¹¹⁷

To embed this rule in the Due Process Clause would have been a big leap for the *Pennoyer* majority. Having resolved the case under full-faith-and-credit principles, “fix[ing] in constitutional amber” the general law of jurisdiction via due process would be unnecessary to the result.¹¹⁸ It also presented a timing conundrum. When the Court referred to “such judgments” it meant the Oregon state court judgment, rendered in 1866—two years before the ratification of the Fourteenth Amendment.¹¹⁹ Nonetheless, the conventional view is that *Pennoyer* did exactly that—fully constitutionalize the rules of jurisdiction.

But *Pennoyer* need not be read so broadly. Professor Sachs calls on courts and scholars “to abandon what many see as the main holding of *Pennoyer*: that the Fourteenth Amendment’s Due Process Clause . . . imposes rules for personal jurisdiction.”¹²⁰ He proposes a “sympathetic reconstruction” of *Pennoyer*.¹²¹ Instead of the rules of personal jurisdiction being constitutionalized, they are “a matter of general law—that unwritten law, including much of the English common law and the customary law of nations, that formed the basis of the American legal system and that continues to govern unusual corners of the system today.”¹²² According to Professor Sachs, the rules of personal jurisdiction come not from the due process *itself*; they come from the more mutable general law. He puts it this way: “Reading *Pennoyer* as requiring jurisdiction, full stop, makes more sense than reading it to treat any particular service rules as written in stone.”¹²³ Thus, in his view, due process creates a federal right to have the judgment rendered by a court having “jurisdiction, full stop”¹²⁴ (with those “full stop” jurisdictional rules coming not from due process), including enforcement by direct review in the Supreme Court.¹²⁵ In his view, the Due Process Clause gave the Supreme Court authority to reverse on direct review any state-court assertion of jurisdiction beyond

117. See Borchers, *Limited Legacy*, *supra* note 33, at 119–20.

118. Sachs, *Pennoyer*, *supra* note 3, at 1255.

119. *Pennoyer*, 95 U.S. at 719; Borchers, *Limited Legacy*, *supra* note 33, at 132 & n.77.

120. See Sachs, *Pennoyer*, *supra* note 3, at 1252.

121. *Id.* at 1289.

122. *Id.* at 1252.

123. *Id.* at 1300.

124. *Id.*

125. *Id.* at 1301–06.

the boundaries of the general law.¹²⁶ *Pennoyer*, he says, gave the Supreme Court this authority because failing to follow the general law was a due-process violation and created a federal issue giving the Supreme Court appellate jurisdiction, thus creating a strong incentive for state courts to “get with the program” (so to speak) in their understanding of the general law.¹²⁷

My “sympathetic reconstruction” of *Pennoyer* is what I call the “limited view” of the opinion.¹²⁸ I formulated the limited view in 1990:

[T]he due process clause . . . provide[s] an avenue for challenging a [court]’s exercise of personal jurisdiction . . . but [does not] . . . dictate the . . . rules of [personal] jurisdiction. Put another way, . . . defendants [must] have at least one chance to ensure that a state followed its own rules of jurisdiction, whatever those rules might be.¹²⁹

The limited view joins Professor Sachs (and some other commentators before us)¹³⁰ in asserting that the Due Process Clause provides a vehicle for enforcing jurisdictional rules, but that those rules come from somewhere else. The difference is that Professor Sachs says “somewhere else” is general law,¹³¹ whereas I think it is state law.¹³²

However, in *Pennoyer*, whether “somewhere else” was general or state law didn’t make any difference. In *Pennoyer*, the majority construed Section 55 of the Oregon Code¹³³ to embrace principles of “general, if not universal” law.¹³⁴ This was the only sensible interpretation of the Oregon statute. The statute declared that a defendant is subject to jurisdiction only if “he appear in the court, or be found within the State, or be a resident thereof, or have property therein; and in the last case [limiting the judgment to the attached

126. *Id.* at 1306–07.

127. *Id.* at 1306 (“Due process requires that state courts have jurisdiction, full stop, which federal courts will assess based on their own view of the general law.”). *See also id.* at 1307 (“After the Fourteenth Amendment, though, a case in state court could be taken to the Supreme Court, on a claim that the underlying judgment lacked personal jurisdiction and so threatened a deprivation without due process. The specific standards to be applied were still drawn from general law . . .”).

128. Borchers, *Constitutional Law*, *supra* note 33, at 40.

129. *Id.*

130. *See supra* note 33.

131. Sachs, *Pennoyer*, *supra* note 3, at 1307 (noting that in reviewing state-court assertions of jurisdiction, “[t]he specific standards to be applied were still drawn from general law”).

132. Borchers, *Constitutional Law*, *supra* note 33, at 40–41.

133. OR. CODE CIV. PROC. § 55 (1874).

134. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

property].¹³⁵ The Oregon Code thus resembles the—perhaps unnecessary—state statutes purporting to receive the common law as of the date of the Declaration of Independence.¹³⁶ Therefore, on the facts of *Pennoyer*, one cannot say whether the Supreme Court was declaring the Oregon state-court judgment void under general law or Oregon state law—they were identical.

An important consequence of the limited view is that states could pass statutes (or adopt common-law rules) exceeding the bounds of the general law of jurisdiction, because due process did not render them unconstitutional. Judgments so rendered were vulnerable to collateral attack in any court of a different sovereignty because of *Pennoyer*'s extension of full-faith-and-credit principles to Cases 3, but those judgments could still be enforced in the forum state, as long as the state court followed state jurisdictional law.¹³⁷

Some commentators, including Professor Sachs, suggest this would lead to judgment debtors racing to federal court in the forum state to attempt to undo the state-court judgment.¹³⁸ Although this might have happened occasionally,¹³⁹ it required a basis for subject-matter jurisdiction for the federal-court attack, with diversity of citizenship being the only candidate.¹⁴⁰ This requires full diversity of the parties and a judgment meeting the amount in controversy, conditions not always met after the liberal joinder rules ushered in by the (David Dudley) Field Code of 1848.¹⁴¹

135. *Id.* at 720 (quotations omitted).

136. *See* Sachs, *Pennoyer*, *supra* note 3, at 1262.

137. Borchers, *Limited Legacy*, *supra* note 33, at 130.

138. *See* Sachs, *Pennoyer*, *supra* note 3, at 1297 (“Why didn’t more out-of-state defendants . . . just default in the state court and then sue the winner right back in federal court . . . ?”). *See also* Oakley, *supra* note 33, at 630 (arguing that collateral attacks on state court judgments “would inevitably be brought in federal court”). For a response, *see* Borchers, *Limited Legacy*, *supra* note 33, at 122–23 (noting the limitations of subject-matter jurisdiction and the practical difficulties in recovering personal property sold to satisfy a judgment).

139. *Cf.* *Flower v. Parker*, 9 F. Cas. 323 (Story, Circuit Justice, C.C.D. Mass. 1823) (No. 4891) (resolving a challenge to a default judgment rendered by a Massachusetts state court).

140. Borchers, *Limited Legacy*, *supra* note 33, at 122–23, 122 n.34.

141. *Id.* *See also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 10 (1989) (“The Code, for example, merged law and equity, abolished the common-law forms of action and extended the more liberal joinder and pleading rules of equity practice to suits at law.” (citing An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, §§ 62, 91–102, 118–52, 1848 N.Y. Laws 497, 510, 515–16, 521–26 (1848))). David Dudley Field

Moreover, even if a federal-court attack were a theoretical possibility, defendants with significant assets in the forum state had a strong incentive to appear and defend the case rather than defaulting and attacking the judgment in federal court. In the time between the state judgment and a possible counter federal decree, fast-moving judgment creditors could execute on the state judgment, making the practicalities of recovering the property a significant enough burden to outweigh the benefit of potentially affecting forum choice. “Possession is nine-tenths of the law.”¹⁴²

As it turned out, the state that was the commercial center of the Nation—New York—authorized broad corporate jurisdiction. An Empire State statute—consistent with a limited view of *Pennoyer*—created corporate jurisdiction far beyond the bounds of the general law. And the New York courts took a devil-may-care attitude as to the extraterritorial effect of the judgments it enabled.

III. NEW YORK’S POPE RULE AND CORPORATE TAG JURISDICTION

I have several reasons for focusing on New York’s *Pope*¹⁴³ rule.¹⁴⁴ First, it clearly exceeded the bounds of general-jurisdictional law.¹⁴⁵ Second, as the commercial center of the United States, New York’s

was the brother of the author of *Pennoyer*, then-Justice Steven Field. See Mark L. Tuft, *For Your Eyes Only*, 25 L.A. LAW. 26, 27 & n.13 (2002).

142. See *United States v. Balt. Museum of Art (In re “Paysage Bords de Seine,”* 1879 Unsigned Oil Painting on Linen by Pierre-Auguste Renoir), 991 F. Supp. 2d 740, 743 (E.D. Va. 2014) (quoting *Willcox v. Stroup*, 467 F.3d 409, 412 (4th Cir. 2006) (determining the ownership of Civil War-era documents)). The adage, however, is ancient. See, e.g., *Corporation of Kingston upon Hull v. Horner*, (1790) 98 Eng. Rep. 807, 815; Lofft 576, 591 (Lord Mansfield). It reflects the reality that whatever the claim of ownership might be, the person in possession of property has a significant advantage, court order to the contrary or not. A legendary American demonstration of this is the Hatfield-McCoy dispute, which began in 1878 over the ownership of a single hog. See *The Hatfield & McCoy Feud*, HISTORY, <https://www.history.com/shows/hatfields-and-mccoys/articles/the-hatfield-mccoy-feud> [<https://perma.cc/9DL8-5NHB>] (last visited Oct. 22, 2021).

143. See *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137 (1881).

144. This discussion of *Pope* and related cases is a refined reprise of my 1995 treatment of this line of cases. See Borchers, *Limited Legacy*, *supra* note 33, at 138–48.

145. Compare *Lafayette Ins. Co. v. French*, 59 U.S. 404, 406–09 (authorizing business corporate tag jurisdiction only when a corporation “act[s]” in another state “for the purposes of making contracts there”), with *Pope*, 87 N.Y. at 139, 141 (authorizing casual corporate tag jurisdiction over a corporation that “transacted no business” in the state). See also Borchers, *Limited Legacy*, *supra* note 33, at 139.

corporate law was of enormous import. Third, nearly four decades of interplay between the New York Court of Appeals (New York’s high court) and the United States Supreme Court revealed the latter’s cautious approach to state law on corporate tag jurisdiction. Fourth (the importance of which is explained below¹⁴⁶), New York’s *Pope* rule rested on a state statute, not the general law. Finally, the New York Court of Appeals—in part due to the quality of its personnel (it would be Judge Cardozo who interred the *Pope* rule) and in part due to the state’s importance—was the most influential state court in the country.¹⁴⁷

A. *Pope in New York*

In *Pope v. Terre Haute Car & Manufacturing Co.*,¹⁴⁸ New York plaintiffs sued an Indiana corporation in a New York state court by serving the defendant-corporation’s president while in New York “on his way to a seaside resort, and not in his official capacity or upon any business of the defendant.”¹⁴⁹ The defendant corporation “had no place of business, and transacted no business, and had no property within this State”¹⁵⁰ Despite lacking any other connection to the forum state, New York’s high court upheld jurisdiction under New York Code of Civil Procedure Section 432, which authorized service on “the president, secretary or treasurer” of a corporation.¹⁵¹

The court read Section 432 as a corporate long-arm statute.¹⁵² This was a natural—in fact the only plausible—reading of the statute. While Section 432 allowed, without limitation, service on the president, secretary, or treasurer of the corporation, Section 432’s third subdivision provided a fallback method of service if none of those officers could be found in New York.¹⁵³ That subdivision allowed service

146. *See infra* notes 250–72 and accompanying text.

147. Judge Posner described the period leading up to Cardozo’s 1916 appointment to the New York Court of Appeals: “In part reflecting New York’s commercial preeminence, in part the quality of its personnel, the New York Court of Appeals was the nation’s most distinguished common law tribunal” RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 3 (1990).

148. 87 N.Y. 137 (1881).

149. *Id.* at 139.

150. *Id.*

151. *Id.* at 140; Code of Civil Procedure § 432, [1877] 2 N.Y. Laws 1, 144–45.

152. Pre-*Pennoyer* cases also so interpreted Section 432 to allow casual corporate tag jurisdiction. *See, e.g.*, *Hiller v. Burlington & Mo. River R.R. Co.*, 70 N.Y. 223, 225, 228 (1877) (upholding service on corporation though officer was “temporarily in this State in the pursuit of his own business”).

153. *Pope*, 87 N.Y. at 140; Code of Civil Procedure § 432.

to “the cashier, a director, or the managing agent of the corporation.”¹⁵⁴ But for that fallback service to be employed, Section 432 required that “either the cause of action must have arisen within the State or the corporation must have property within the State.”¹⁵⁵ The absence of this requirement in the other subdivisions led the Court of Appeals to conclude that the New York legislature meant to authorize casual corporate tag jurisdiction if a sufficiently important corporate officer could be served in-state.¹⁵⁶

The defendant’s counsel cited *Pennoyer* (decided three years before *Pope*) in his argument for denying jurisdiction,¹⁵⁷ but the New York high court’s rejoinder was that *Pennoyer*’s approved jurisdictional bases mattered only if judgment recognition was sought elsewhere.¹⁵⁸ The New York Court of Appeals denied that any serious constitutional issue was raised. The court stated: “It has never been doubted that the legislature could constitutionally authorize the commencement of such an action.”¹⁵⁹ The court noted that the judgment was good in New York and “[i]ts effect elsewhere need not now be determined.”¹⁶⁰

No clearer adoption of *Pennoyer*’s limited view is possible. On direct attack of the judgment, the Court of Appeals saw no constitutional issue. It recognized that the plaintiffs could perhaps enforce the judgment only in New York and conformity with the general law would arise only if the judgment creditors went elsewhere.¹⁶¹ Moreover, *Pope* engaged in a fundamentally different project than the *Pennoyer* majority’s reckoning of the Oregon state court’s reach.

154. *Pope v. Terre Haute Car & Mfg. Co.*, 31 N.Y. Sup. Ct. 238, 239 (N.Y. Gen. Term) (paraphrasing Code of Civil Procedure § 432(3)), *aff’d*, 87 N.Y. 137 (1881).

155. *Pope*, 87 N.Y. at 140. For a later Court of Appeals case considering whether subdivision three of Section 432 was satisfied, see *Tuchband v. Chi. & Alton R.R. Co.*, 115 N.Y. 437 (1885).

156. *See Pope*, 87 N.Y. at 140–41 (noting that an officer has a duty to notify his corporation of lawsuits against it if the officer learns of the suit). Section 432 also went unamended by the legislature for several decades, suggesting that the New York legislature agreed with *Pope*. *See, e.g.*, *Sunrise Lumber Co. v. Homer D. Biery Lumber Co.*, 185 N.Y.S. 711, 712 (App. Div. 1921) (applying Section 432 in the same manner as *Pope*, decided 40 years earlier). Section 432 was ultimately repealed in 1920. Civil Practice Act of 1920, ch. 925, § 1539, [1920] 4 N.Y. Laws 19, 521 (repealing the 1876 Code of Civil Procedure, ch. 448, [1876] 2 N.Y. Laws 1).

157. *Pope*, 87 N.Y. at 137–38. “Neff” is misspelled as “Nett” in the Reporter’s summary of counsels’ citations, but the citation leaves no doubt that it is a reference to *Pennoyer*.

158. *Id.* at 141.

159. *Id.* at 139–40.

160. *Id.* at 141.

161. *Id.*

Oregon state courts adhered to the general law of jurisdiction,¹⁶² but the New York courts had a clear statutory command otherwise. *Swift v. Tyson*¹⁶³—and many cases before and after it—recognized that a state statute took a subject out of the general law and localized it.¹⁶⁴ Thus, unless the statute was unconstitutional, the New York courts were bound to follow it, no matter what violence it did to the general law of jurisdiction.

Pope authorized casual corporate tag jurisdiction. A parallel rule applies to individual defendants.¹⁶⁵ No matter how brief or personal the defendant’s stay, service of process confers *in personam* jurisdiction. So too, said the Court of Appeals, it should be with corporations and their officers.¹⁶⁶ But recall the distinction between casual and business corporate tag jurisdiction.¹⁶⁷ Business corporate tag jurisdiction would later be found constitutional in the Supreme Court’s 1917 *Pennsylvania Fire* decision, which upheld jurisdiction based on service in the forum on an appointed corporate agent.¹⁶⁸

In the late 19th and early 20th centuries, New York courts stuck to *Pope* and continued to allow casual corporate tag jurisdiction.¹⁶⁹ A fascinating collision between *Pope* and federal cases rejecting casual

162. *Pennoyer v. Neff*, 95 U.S. 714, 719 (1878).

163. 41 U.S. 1 (1842). *Swift* was not the origin of the distinction between local and general law, but became the best-known case describing it. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 114–15 (1993) [hereinafter Borchers, *Origins*].

164. See *Swift*, 41 U.S. at 18 (“But, admitting the doctrine to be fully settled in New York, it remains to be considered, whether it is obligatory upon this Court, if it differs from the principles established in the general commercial law. It is observable that 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.” (emphasis added)); see also Borchers, *Origins*, *supra* note 163, at 112 (noting that matters of procedure were considered local law).

165. See *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 628 (1990).

166. *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137, 137 (1881).

167. See *supra* notes 11–12 and accompanying text.

168. *Pa. Fire Ins. Co. of Phila. V. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94 (1917).

169. See, e.g., *Tuchband v. Chicago & Alton R.R. Co.*, 115 N.Y. 437, 439–41 (1889); *Smith v. W. Pac. Ry. Co.*, 139 N.Y.S. 129, 135 (App. Div. 1912); *Johnston v. Mut. Rsrv. Life Ins. Co.*, 93 N.Y.S. 1052, 1058 (App. Div. 1905).

corporate tag jurisdiction¹⁷⁰ came in *Grant v. Cananea Consolidated Copper Co.*¹⁷¹

Thorough consideration of this important case begins with the New York intermediate appellate court’s decision. The first reported decision in *Grant* was an opinion by New York’s revered¹⁷² First Department of the Appellate Division.¹⁷³ The First Department sits in Manhattan, still today the financial capital of the Nation, and indeed the world.¹⁷⁴ *Grant*, like *Pope*, was a casual corporate tag case. The defendant’s president was served on personal business in New York City; the defendant corporation had no other substantial connection to New York.¹⁷⁵ Special Term (the trial court) overruled the defendant’s jurisdictional objection and held, consistent with *Pope*, that Section 432 conferred jurisdiction.¹⁷⁶ The majority Appellate Division opinion, authored by Justice Clarke, discussed *Pennoyer* at length and concluded that the *Pope* rule violated the Due Process Clause.¹⁷⁷ Justice Ingraham dissented, taking the limited view of *Pennoyer*. He began his dissent: “The question presented on this motion is not whether a judgment entered in this action is entitled to be enforced as against the defendant outside the State of New York.”¹⁷⁸ The Appellate Division decision starkly presented the issue of *Pennoyer*’s breadth to the Court of Appeals. Both the now-conventional and limited views of *Pennoyer* were set forth in the competing lower-court opinions.

The Court of Appeals stuck with *Pope* (and the limited view) and reversed the First Department.¹⁷⁹ The Court of Appeals followed *Pope* because otherwise, in its view, corporations would be treated more

170. See, e.g., *Goldey v. Morning News*, 156 U.S. 518 (1895).

171. 82 N.E. 191 (N.Y. 1907).

172. Borchers, *Limited Legacy*, *supra* note 33, at 145.

173. See *Grant v. Cananea Consol. Copper Co.*, 102 N.Y.S. 642, 643 (App. Div.), *rev’d*, 82 N.E. 191.

174. *Appellate Division, First Judicial Department, Supreme Court of New York*, N.Y. CTS. (June 25, 2021), [https://www.nycourts.gov/courts/ad1/\[https://perma.cc/DN2N-9KQ9\]](https://www.nycourts.gov/courts/ad1/[https://perma.cc/DN2N-9KQ9]); see also generally, Duff & Phelps, *Global Regulatory Outlook 2021*, KROLL <https://www.kroll.com/en/insights/publications/financial-compliance-regulation/global-regulatory-outlook-2021> [https://perma.cc/8YXN-8TA4] (last visited Nov. 30, 2021) (surveying financial-services senior decision-makers worldwide, the majority of whom answered that New York City “is the top financial center” in 2021).

175. *Grant*, 102 N.Y.S. at 643.

176. See *id.*

177. *Id.* at 645–46.

178. *Id.* at 646 (Ingraham, J., dissenting).

179. *Grant v. Cananea Consol. Copper Co.*, 82 N.E. 191, 194 (N.Y. 1907).

favorably than individuals.¹⁸⁰ The unanimous New York Court of Appeals wrote: “The great business and commercial transactions of our citizens are now largely conducted through corporations, and no reason is apparent why foreign corporations should be treated differently from foreign individuals.”¹⁸¹ The New York high court then observed: “It must be conceded that . . . the decisions of our own court are not in entire accord with those of the Supreme Court of the United States.”¹⁸² The Court of Appeals rejoined: “While we regret the difference in the views of the two courts, we recognize the fact that arguments may be presented in support of either position.”¹⁸³ The Court of Appeals considered the argument that the *Pope* rule violated due process and said simply, “This we cannot admit.”¹⁸⁴

New York’s high court continued to view casual corporate tag jurisdiction as a matter of state law. If the Due Process Clause limited state-court reach, New York courts would have been bound by the United States Supreme Court’s decisions, but the New York courts did not fall in line. One might discount *Grant* if it had been a stray opinion from a little-regarded court. But *Grant* was of a series of decisions from the most prestigious state court in the Nation’s commercial center.¹⁸⁵ Almost three decades post-*Pennoyer*, New York’s high court believed the Due Process Clause did not require dismissal of a case founded on a casual corporate tag, though the Supreme Court had rejected that jurisdictional rule as a matter of general law.¹⁸⁶ Moreover, the Court of Appeals answered Justice Gorsuch’s question as to why individuals are subject to casual tag and corporations not¹⁸⁷: corporations *should* be subject to casual tag jurisdiction because they ought not receive better treatment than individuals.¹⁸⁸

Three years later, the First Department again confronted the constitutionality of *Pope* in *Sadler v. Boston and Bolivia Rubber Co.*¹⁸⁹ The court, citing *Pope*, noted that “[t]his question [of casual corporate tag’s validity] is one upon which the decision of the federal courts and the courts of this state have been in irreconcilable conflict for many

180. *Id.* at 192.

181. *Id.*

182. *Id.* at 193.

183. *Id.*

184. *Id.*

185. See POSNER, *supra* note 147, at 3.

186. *Grant*, 82 N.E. at 192.

187. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1038 (2021) (Gorsuch, J., concurring in the judgment).

188. *Grant*, 82 N.E. at 192.

189. 125 N.Y.S. 405, 406 (App. Div. 1910), *aff’d*, 95 N.E. 1139 (N.Y. 1911).

years.”¹⁹⁰ The corporate defendant pressed *Pennoyer* and argued that Supreme Court precedent bound the New York courts. But the First Department rejected this argument, followed *Pope* and *Grant*, and upheld the service.¹⁹¹ Justice Clarke—who had three years before held *Pope* unconstitutional—concurring saying that *Grant* settled the question in favor of the limited view.¹⁹² The Court of Appeals affirmed without opinion.¹⁹³ Unsurprisingly, in light of this clear authority, New York courts continued to adhere to *Pope*.¹⁹⁴

190. *Id.* (citing *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137 (1881)).

191. *Id.* at 406–07.

192. *Id.* at 407–08 (Clarke, J., concurring) (citing *Grant*, 82 N.E. at 192).

193. *See Sadler*, 95 N.E. 1139.

194. *See, e.g.*, *Mallory v. Va. Hot Springs Co.*, 141 N.Y.S. 961, 963 (App. Div. 1913) (asserting that action based on corporate tag jurisdiction can “unquestionably be maintainable”); *Smith v. W. Pac. Ry. Co.*, 139 N.Y.S. 129, 135 (App. Div. 1912) (Clarke, J.) (referring to *Pope* as “settled law”); *Heney v. Chartered Co.*, 128 N.Y.S. 436, 438 (Sup. Ct. 1911) (Lehman, J.) (stating that conflict between state and federal decisions is not over “whether a foreign corporation is subject to jurisdiction of the court”); *see also Grubel v. Nassauer*, 103 N.E. 1113, 1114 (N.Y. 1913) (citing *Pennoyer*, 95 U.S. 714, 727 (1878), immediately after stating: “it is settled that a judgment for money recovered in one state without personal service of process on the defendant in that state cannot be enforced without the state.”). Federal courts sitting in New York also noted the divergence between state and federal authority, but for the most part accepted the situation calmly. *See, e.g.*, *Ostrander v. Deerfield Lumber Co.*, 206 F. 540, 545 (N.D.N.Y. 1913) (stating that “it is now settled that service on an officer of a foreign corporation in the state of New York, held good by the courts of that state under the Code of Civil Procedure, is not necessarily good under federal law . . .”); *Phelps v. Conn. Co.*, 188 F. 765, 766–67 (C.C.N.D.N.Y. 1911) (granting defendant’s motion to dismiss and stating, “This service of the summons and complaint on the defendant under the decisions of our Court of Appeals was good in the state court. However, the holdings in the federal courts are the very opposite.” (citations omitted)); *Venner v. Great N.R.R. Co.*, 153 F. 408, 412 (C.C.S.D.N.Y. 1907) (referring to jurisdiction in federal trial courts: “such service . . . confers no such jurisdiction, even though the statutes and decisions of the highest courts of the state say it does.”), *aff’d*, 209 U.S. 24 (1908); *Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 150 F. 666, 669–70 (C.C.W.D.N.Y. 1907) (after discussing New York state court interpretation of Code of Civil Procedure section 432, citing *Pennoyer*, 95 U.S. 714, for the following: “federal courts are the sole judges of their own jurisdiction, which manifestly is derived from a government differing from that which clothes the state tribunals with judicial power.”), *rev’d sub nom.* *Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 215 U.S. 246 (1909); *Good Hope Co. v. Ry. Barb Fencing Co.*, 22 F. 635, 636–37 (C.C.S.D.N.Y. 1884) (“[S]ervice of process upon an agent of a foreign corporation while merely casually present in the state is not equivalent to a personal service upon an individual in conferring jurisdiction upon a court to render a personal judgment; and such a

The United States Supreme Court treated *Pope* delicately. In *Goldey v. Morning News*,¹⁹⁵ a New York resident filed a state-court libel action against a Connecticut newspaper.¹⁹⁶ The newspaper transacted no business in New York, but casual service on the president conferred jurisdiction under *Pope*.¹⁹⁷ The defendant removed the case to the Eastern District of New York, which dismissed for lack of personal jurisdiction.¹⁹⁸ On appeal, the Supreme Court noted a “difference of opinion” between New York courts and federal courts as to casual corporate tag jurisdiction.¹⁹⁹

Goldey invoked the Constitution, but only the Full Faith and Credit Clause.²⁰⁰ Citing *Pennoyer*, it stated 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.”²⁰¹ The Court continued:

So a judgment rendered in a court of one State, against a corporation neither incorporated nor doing business within the State, must be regarded as of no validity *in the courts of another State, or of the United States*, unless service of process was made in the first State upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another State, and only casually within the State, and not charged with any business of the corporation there.²⁰²

The Court thus said that the general law of jurisdiction was relevant only to judgment recognition. Eight years later, in the factually similar case of *Conley v. Mathieson Alkali Works*,²⁰³ the Supreme Court repeated *Goldey*’s distinction between courts of the same and different governments, and again passed on a chance to declare the *Pope* rule

judgment would be treated as void for want of jurisdiction by other tribunals than those of the state where it was obtained.”) *But see* Bentlif v. London & Colonial Fin. Corp., 44 F. 667, 668 (C.C.S.D.N.Y. 1890) (suggesting that *Pennoyer* directly applied to state courts). These authorities are noted in Borchers, *Limited Legacy*, *supra* note 33, at 147, n.151.

195. 156 U.S. 518 (1895).

196. *Id.* at 518.

197. *Id.* at 518–19.

198. *Id.*

199. *Id.* at 520.

200. *Id.* at 521.

201. *Id.* (emphasis added) (citing *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878)).

202. *Id.* at 521–22 (emphasis added).

203. 190 U.S. 406 (1903).

unconstitutional.²⁰⁴ Thus, more than three decades after *Pennoyer*, New York (and other state²⁰⁵) courts continued to assert casual corporate tag jurisdiction. Despite the Supreme Court’s rejection of *Pope* in federal courts, the Court opined only that state-court *Pope* judgments risked nonrecognition elsewhere.²⁰⁶

The fatal blow to the *Pope* rule came indirectly. The North Carolina courts followed a rule similar to *Pope* based on their corporate service statutes.²⁰⁷ In *Riverside & Dan River Cotton Mills v. Menefee*,²⁰⁸ the Supreme Court ruled, on direct attack, that the North Carolina state court’s assertion of casual corporate tag jurisdiction violated the Due Process Clause.²⁰⁹ To my knowledge, *Menefee* is the first U.S. Supreme Court opinion to strike down, on due-process grounds and direct attack, a state-court assertion of personal jurisdiction. Both the direct attack and due-process aspects are important. A collateral attack left open the possibility that the judgment would be enforceable in the forum state and extraterritorial enforcement would bring a full-faith-and-credit challenge, as intimated by *Goldey* and *Conley*.²¹⁰ In turn, this meant that the jurisdictional rules need not be embedded in the Due Process Clause, but might come from somewhere else. But sustaining a direct attack *on due-process grounds* could mean only that by reaching too far the state court violated due process, which has become the conventional view of *Pennoyer*.

Menefee is a disingenuous opinion. The Court discussed *Saint Clair v. Cox*²¹¹ as if it were dispositive, but in that case the forum was a federal court that adhered to the general law of jurisdiction, regardless (at that time) of state law.²¹² From there, the Court reasoned that

204. *Id.* at 410–11.

205. *See infra* notes 222–37 and accompanying text.

206. *Id.* For an example of a case agreeing that New York had jurisdiction under *Pope*, but refusing to enforce it under full-faith-and-credit principles, see *Hochstein v. James W. Hill Co.*, 82 A. 171, 172–73 (N.H. 1912).

207. *See infra* notes 222–31 and accompanying text.

208. 237 U.S. 189 (1915).

209. *Id.* at 193 (“[W]ell settled is it that the courts of one State cannot without a violation of the due process clause, extend their authority beyond their jurisdiction so as to condemn the resident of another State when neither his person nor his property is within the jurisdiction of the court rendering the judgment, since that doctrine was long ago established by the decision in *Pennoyer v. Neff*” (citing *Pennoyer*, 95 U.S. 714 (1878), and cases applying *Pennoyer*).

210. *See supra* notes 195–206 and accompanying text.

211. 106 U.S. 350 (1882).

212. *Menefee*, 237 U.S. at 194–95 (addressing *St. Clair*, 106 U.S. 350); *see* Sachs, *Pennoyer supra* note 3, at 1270.

casual corporate tag must violate the Due Process Clause because it had been rejected by *Saint Clair*.²¹³ But, of course, a federal court is not a state instrumentality and thus is not subject to the Fourteenth Amendment.²¹⁴ The Court attempted to explain away *Goldey*'s and *Conley*'s distinction between the courts of the same and different governments as being a matter of when the judgment was declared unenforceable, which is not so—it's a matter of whether the judgment is enforceable in the forum state.²¹⁵ But regardless of its non sequiturs, *Menefee* imported the general law of jurisdiction into the Due Process Clause, sealed it in constitutional amber, and made it applicable on direct attack to state-court judgments.²¹⁶

Judge Cardozo presided over *Pope*'s burial. In *Bagdon v. Philadelphia & Reading Coal & Iron Co.*,²¹⁷ service on the corporation was made pursuant to New York Code of Civil Procedure Section 432.²¹⁸ Cardozo gently interred *Pope* without mentioning it by name:

It is true that even the president of a foreign corporation may be here without bringing the corporation itself within this jurisdiction. He must be here “officially, representing the corporation in its business.” *Conley v. Mathieson Alkali Works*, 190 U.S. 406[(1903)]; *Kendall v. American Automatic Loom Co.*, 198 U.S. 477[(1905)]; *Goldey v. Morning News*, 156 U.S. 518[(1895)]. To give judgment in violation of that rule is to condemn the corporation unheard, and to ignore the essentials of due process of law. Dicta to the contrary in *Grant v. Cananea Consol. Copper Co.*, 82 N.E. 191[(N.Y. 1907)], must yield to the later decision in *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 192[(1915)].²¹⁹

The ever-clever Cardozo, however, managed to nudge the facts to find that the president was in New York on corporate business, thus making the assertion of jurisdiction constitutional.²²⁰

213. *Menefee*, 237 U.S. at 194–95.

214. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

215. *Menefee*, 237 U.S. at 195; *see supra* notes 197–214 and accompanying text.

216. *Id.* at 196–97.

217. 111 N.E. 1075 (N.Y. 1916).

218. *Id.* at 1077 (citing Code of Civil Procedure § 432, [1877] 2 N.Y. Laws 1, 144–145).

219. *Id.* (parallel citations omitted).

220. *Id.* In *Aybar v. Aybar*, 177 N.E.3d 1257 (N.Y. 2021), the New York Court of Appeals reinterpreted *Bagdon*, and the successor to Section 432, as only authorizing service of process (in the sense of giving notice) and not conferring general jurisdiction by service on a registered agent. *Id.* at

Pope was not forgotten, however. As late as 1927, the First Department remarked that “[t]he process of receding from the doctrine of *Pope* . . . is still going on.”²²¹ The elongated time period is revealing. It took several decades before the mushy *Pennoyer* opinion was dubiously reconstructed to enshrine the Due Process Clause *itself* as the source of jurisdictional rules. Below I consider why this delay might have been. But before doing so, examining *Pope*’s reception—and corporate tag jurisdiction (both casual and business) generally—outside New York is instructive.

B. *Pope and Corporate Tag Jurisdiction Elsewhere*

North Carolina had a statute similar to New York’s Section 432.²²² One of the many North Carolina decisions construing that statute, Section 440 of the North Carolina Revised Statutes, was *Whitehurst v. Kerr*.²²³ Although the North Carolina statute was slightly different from New York’s, for our purposes the differences are immaterial.²²⁴ In-state service “upon the president, treasurer, or secretary” of the corporation was subject to no statutory limitations.²²⁵ However, if a lesser representative of the corporation were to be served in North Carolina, it was good service “only when [the corporation] ha[d] property within this state, or the cause of action arose therein, or when the plaintiff reside[d] in the state”²²⁶ The opinion’s only oblique reference to the Constitution was that “principles of natural justice” required that the person served be a representative of the corporation of sufficient stature so as to give the defendant notice of the suit.²²⁷ Thus, as in *Pope*, *Whitehurst* construed the foreign-corporation-service statute as a

1259–64. The majority repeatedly said that *Bagdon* has to be understood in light of its “historical context.” *Id.* at 1259, 1261, 1263. This was, as the majority admitted, an effort to avoid the constitutional question of whether a state can extract corporate consent to jurisdiction through registration statutes. *Id.* at 1266. *See supra* notes 12–16 and accompanying text. As the dissent convincingly argued, *Bagdon* was inarguably a case allowing business corporate tag jurisdiction. *Id.* at 1271–1280 (Wilson, J., dissenting).

221. Ray D. Lillibridge, Inc. v. Johnson Bronze Co., 222 N.Y.S. 130, 132 (App. Div. 1927).

222. N.C. REV. STAT. § 440 (1905).

223. 68 S.E. 913 (N.C. 1910). North Carolina’s line of cases following *Pope*’s reasoning began with *Jester v. Baltimore Steam Packet Co.*, 42 S.E. 447 (N.C. 1902).

224. *Whitehurst*, 68 S.E. at 913–14.

225. *Id.* at 914 (quoting N.C. REV. STAT. § 440(1)).

226. *Id.* at 913–14 (quoting N.C. REV. STAT. § 440(1)).

227. *Id.* (explaining that a person served must be of a “sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him”).

long-arm statute authorizing casual corporate tag jurisdiction, provided a sufficiently important officer was served in-state.

The North Carolina case that would be casual corporate tag jurisdiction’s undoing was *Menefee v. Riverside & Dan River Cotton Mills*.²²⁸ *Menefee* was a classic casual corporate tag case as “the defendant [was] a Virginia corporation and did not have at the commencement of th[e] action, and ha[d] not [when the court ruled], any office or place of business in this state, and ha[d] never engaged in business [t]here”²²⁹ The North Carolina Supreme Court confronted a due-process challenge to the assertion of jurisdiction, but relying on *Goldey* and *Conley* took the limited view: “the service is sufficient for a valid judgment at least within our jurisdiction. What opportunity or method the plaintiff may have to enforce his judgment is not before us now for consideration.”²³⁰ What likely caught the United States Supreme Court’s attention was the dissent, which urged that the service was ineffective for any purpose unless the corporate agent “was transacting business of the corporation or there was some other fact or circumstance which implied authority to receive service.”²³¹

New York and North Carolina were not the only states to parse their service statutes to allow jurisdiction over corporations with such a slight connection to the forum states as to make the assertion of jurisdiction likely unconstitutional now. Although some decisions arguably were business corporate tag jurisdiction cases, post-*Pennoyer* and pre-*Menefee* decisions in South Dakota,²³² Wisconsin,²³³ Missouri,²³⁴ Michigan,²³⁵ Nebraska²³⁶ (and likely other states) interpreted their service statutes as corporate long-arm statutes. Strikingly, neither the Constitution nor the general law of jurisdiction played any significant role in the decisions, even though they were decided after *Pennoyer*. The pushback against casual corporate tag jurisdiction did not begin in

228. 76 S.E. 741 (N.C. 1913), *rev’d*, 237 U.S. 189 (1915).

229. *Id.* at 742.

230. *Id.* at 743.

231. *Id.* at 744 (Walker, J., dissenting).

232. *See Foster v. Charles Betcher Lumber Co.*, 58 N.W. 9, 10 (S.D. 1894) (noting construction of New York statute and that South Dakota’s statute was modeled on New York’s).

233. *See State v. U.S. Mut. Accident Ass’n.*, 31 N.W. 229, 230–31 (Wis. 1897) (referring to *Pope* in its opinion).

234. *See McNichol v. U.S. Mercantile Reporting Agency*, 74 Mo. 457, 458–59 (1881).

235. *See Shickle, Harrison & Howard Iron Co. v. S. L. Wiley Const. Co.*, 28 N.W. 77, 78 (Mich. 1886).

236. *See Klopp v. Creston City Guarantee Water Works Co.*, 52 N.W. 819, 820–21 (Neb. 1892).

earnest until the first decade of the 20th century and did not succeed until the Supreme Court’s 1915 decision in *Menefee*.²³⁷

The pre-*Menefee* trend of construing corporate-service statutes as long-arm statutes did not escape the attention of a leading commentator on corporate law of the time. Seymour Thompson was the author of a massive multi-volume work on corporate law published in 1895.²³⁸ Thompson, referring to the general law and citing *Goldey*, wrote that it was a “firmly settled” proposition that service in the forum state on a corporate officer did not confer jurisdiction over the corporation unless the corporation was “do[ing] business” there, but “always provided that the local statute law has not changed the practice.”²³⁹ The message could hardly be clearer: Business, but not casual, corporate tag jurisdiction conformed to the general law, but state statutes could authorize casual corporate tag jurisdiction without running afoul of the Constitution.

Where does this leave us? The original understanding of the Due Process Clause—judging by state-court decisions, the Supreme Court’s treatment of them, and commentary in the period extending roughly fifty years from the Fourteenth Amendment’s ratification—is that the Constitution did not invalidate state statutes authorizing casual corporate tag jurisdiction.²⁴⁰ But those laws are unconstitutional today.²⁴¹ Even though *Menefee* limited states to business corporate tag jurisdiction,²⁴² even that basis is likely now unconstitutional.²⁴³ To answer Justice Gorsuch’s query, he is correct that the Supreme Court’s “muscular interventions” on behalf corporate defendants began in the

237. See *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 195-97 (1915).

238. See SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS (1896), cited in Borchers, *Limited Legacy*, *supra* note 33 at 160, n.209.

239. *Id.* § 8030 & n.1.

240. See Borchers, *Limited Legacy*, *supra* note 33, at 35, 148 (explaining that for thirty-seven years after *Pennoyer*, New York continued to hold the view that states could pass statutes allowing corporate tag jurisdiction without violating the Due Process Clause).

241. See, e.g., *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011) (explaining that corporate defendants are only subject to general jurisdiction if “at home” in the forum state).

242. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 191–92, 194–95 (1915); see also, e.g., *Bagdon v. Phila. & Reading Coal & Iron Co.*, 111 N.E. 1075, 1077 (N.Y. 1916).

243. See *supra* notes 11–14 and accompanying text.

early 20th century²⁴⁴ and were folded into the minimum-contacts test.²⁴⁵ The current constitutional rule that corporations are subject to general jurisdiction only in the states in which they have their headquarters or are incorporated is utterly ahistorical and disastrous in practice.²⁴⁶ But what to do?

IV. SOLUTIONS

As I have noted before, the Supreme Court likely “will not roll out of its proverbial bed tomorrow” and decide to no longer have any say as to the reach of state courts.²⁴⁷ But that does not mean we need shrug our collective shoulders and accept fiddling with the minimum-contacts test as the best we can expect. Consider again corporate tag jurisdiction. At the beginning of the 20th century, the battle front was the line between casual and business corporate tag.²⁴⁸ Now, early in the 21st century, even business corporate tag is likely unconstitutional,²⁴⁹ having been replaced by a test that leaves corporations open to general jurisdiction only in the states of their headquarters and incorporation.²⁵⁰ Justice Gorsuch is right to wonder how “special protections” for corporations came to be and how they became so constricting.²⁵¹ But for the first time in over seventy-five years, a crack of daylight from the Court illuminates the minimum-contacts test as pragmatically disastrous, ahistorical, and intellectually vapid.²⁵² Perhaps it might not haunt us forever. But to rid ourselves of it we need something to replace it. Below, I consider some possibilities.

244. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1038–39 (2021).

245. *See supra* note 55.

246. *See Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1784 (2017) (Sotomayor, J., dissenting); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1560 (2017) (Sotomayor, J., dissenting).

247. Borchers, *Muddy-Booted*, *supra* note 28, at 29.

248. *See supra* notes 142–215 and accompanying text.

249. *See supra* notes 12–16 and accompanying text.

250. *See, e.g., Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 919 (2011).

251. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1039 & n.5 (Gorsuch, J., concurring in the judgment).

252. *Cf. Borchers, Muddy-Booted, supra* note 28, at 25, 28 n.71 (noting that jurisdictional due process infuses concepts such as “interstate federalism” and “state sovereignty” that are completely alien to providing a person with “due process of law” (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980))); Hoffheimer, *Stealth Revolution, supra* note 31, at 501–02 (discussing effects of recent personal jurisdiction cases on plaintiffs).

A. General Law

Professor Sachs argues that *Pennoyer* meant to give the Court direct review over state-court interpretations of general jurisdictional law, and thus de facto require state courts to conform.²⁵³ This suggestion is intriguing. The Supreme Court (pre-*Erie*), for example, attempted to settle the law of contributory negligence in crossing railroad tracks by motorists with the “stop, look, and listen” rule.²⁵⁴ This was a general common-law rule that other courts (including state courts) were free to follow or not, and many did not.²⁵⁵ While *Erie* drastically reduced the federal courts’ participation in expounding on general-law subjects, it did not end it. Interstate disputes, admiralty law, and other topics are ones in which the federal courts, including the Supreme Court, resort to the general law.²⁵⁶

If I understand Professor Sachs correctly, his proposal is that the Supreme Court review state-court assertions of jurisdiction via the Due Process Clause. State jurisdictional law, even if statutory (as it was in *Pope*) is—as I understand his position—open to direct review by the Supreme Court on *its* view of general law. As Professor Sachs puts it: “This meant that state courts . . . needed to change their jurisdictional practices. Instead of taking their own view of the general law (let alone abrogating it by statute), states now had to hew to the Supreme Court’s view of things—including its view of the reach of state law.”²⁵⁷ He makes several arguments as to how the general law has evolved and that such review might not look so different from the minimum-contacts test and could be workable in practice.²⁵⁸

Here he and I part ways.²⁵⁹ I concede it is possible that, in the post-*Pennoyer* era, the Supreme Court might have claimed the power to review—under general law—state-court decisions *applying the general*

253. Sachs, *Pennoyer*, *supra* note 3, at 1288.

254. Note, *Aftermath of the Supreme Court’s Stop, Look, and Listen Rule*, 43 HARV. L. REV. 926, 930 (1930).

255. See Jason M. Solomon, *Juries, Social Norms, and Civil Justice*, 65 ALA. L. REV. 1121, 1164–65 (2014); see also Sachs, *Pennoyer*, *supra* note 3, at 1288 (“To the Court, jurisdictional doctrine was just a branch of the ordinary general law, one on which federal and state courts could amicably disagree.”). Professor Sachs is correct that the Supreme Court (and other federal courts) apply general law in some areas of the law. *Id.* at 1255–69.

256. See, e.g., Sachs, *Pennoyer*, *supra* note 3, at 1255–69 (discussing applicability of general law concepts—including the “thalweg” rule—to border disputes between states).

257. *Id.* at 1306.

258. *Id.* at 1314–16.

259. But in so doing, I offer my thanks as he has finally caught the attention of Justices of the current Court on the fundamental question of whether the Due Process Clause and the minimum-contacts test ought to control forum choice between states.

law of jurisdiction. But in *Pope* and like cases, the state courts weren’t applying the general law of jurisdiction; they were applying state statutes that clearly flouted the general law. As is true today, a state court is required to follow state law, unless it is unconstitutional, regardless of whether it’s at war with the general law. Decisions of the *Swift v. Tyson*²⁶⁰ era were pellucidly clear on this point. Once a state passed a statute, it localized the subject and took it out of the general law.²⁶¹

Thus, the idea that an evolving general law, articulated by the Supreme Court, could sit atop the judicial system to referee state-court jurisdiction runs up against some fundamental absolutes. It is possible that the *Pennoyer* Court meant to give state courts an incentive to follow its lead through what Professor Sachs calls its “*in terrorem*” effect.²⁶² He argues that state courts not adhering to the Supreme Court’s view of the general law—on, for example, the necessity of pre-judgment attachment for *in rem* jurisdiction—would fall into line because they risked reversal on direct review if they deviated.²⁶³ Perhaps so if states stuck (as did Oregon in the time of *Pennoyer*)²⁶⁴ to just employing general jurisdictional law. But state-court personal jurisdiction was entering the age of statutes. Some were already in effect, such as New York’s joint-debtors statute²⁶⁵ and the *Pope*-like corporate-jurisdiction statutes.²⁶⁶ Then would come nonresident-motorist statutes²⁶⁷ and the now-ubiquitous long-arm statutes.²⁶⁸

Professor Sachs accuses the New York and North Carolina courts (and presumably the several others) of “obstinately” refusing to follow Supreme Court precedent.²⁶⁹ But those state courts weren’t discerning

260. 41 U.S. 1 (1842).

261. *Id.* at 18.

262. Sachs, *Pennoyer*, *supra* note 3, at 1307.

263. *See id.*

264. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877).

265. *D’Arcy v. Ketchum*, 52 U.S. 165, 173 (1850).

266. *See supra* notes 225–30 and accompanying text.

267. *E.g.*, *Hess v. Pawloski*, 274 U.S. 352, 354 (1927) (discussing a Massachusetts nonresident motorist statute).

268. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 2004); N.Y. C.P.L.R. 302 (McKinney 2010); *see also* Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 496–97 (2004) (noting that all states have long-arm statutes).

269. Sachs, *Pennoyer*, *supra* note 3, at 1311. As I see it, there was nothing obstinate about their behavior. They were applying state statutes and, with good reason, did not see the Due Process Clause as limiting those statutes. *See, e.g.*, *Grant v. Cananea Consol. Copper Co.*, 102 N.Y.S. 642, 643–44 (App. Div.), *rev’d*, 82 N.E. 191 (N.Y. 1907). They had no reason

the general law; they were interpreting state statutes. State statutes trumped and took their subjects out of the general-law realm.²⁷⁰ Aggressive jurisdictional rules that caught the Supreme Court’s attention in the early 20th century were born of state statutes.²⁷¹

A difference of opinion between the Supreme Court and the New York Court of Appeals on a matter of general law was not necessarily grounds for the latter abandoning its view; as Professor Sachs notes, when it came to matters of general law, state and federal courts could “amicably disagree.”²⁷² Thus, the notion of the Supreme Court reviewing state-court assertions of statutory long-arm jurisdiction against the general law undercuts the concept of general law. General law is just that—general. If a state statute commands its courts to take jurisdiction based on casual corporate tag it is a matter of local—not general—law.²⁷³ One need look no further than *Swift v. Tyson*, in which the Supreme Court and the New York courts disagreed as to whether extinguishing a past debt was sufficient consideration to make a bill negotiable.²⁷⁴ New York courts were free to hold to their view of consideration or be persuaded by the Supreme Court’s.²⁷⁵ But as to local

to consider the general law, because they were interpreting statutes. Professor Sachs says that I “interpret this response, and the Supreme Court’s equivocal rhetoric in subsequent cases, as reflecting persistent uncertainty about *Pennoyer*’s commitment to independent review in federal courts.” Sachs, *Pennoyer*, *supra* note 3, at 1311. I do not see it as persistent uncertainty as to independent review in federal courts; I see it as well-justified skepticism that the Due Process Clause rendered the New York, North Carolina, and other statutes unconstitutional as to enforcement of their judgments within their borders.

270. See, e.g., *Swift v. Tyson*, 41 U.S. 1, 16–18 (1842) (differentiating decisions based “upon . . . local statute” from those “deduce[d] . . . from the general principles of commercial law”).

271. See, e.g., *Hess*, 274 U.S. 252 (discussing a nonresident motorist statute in Massachusetts); *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 191–92, 194–95 (1915) (discussing the corporate tag statute).

272. Sachs, *Pennoyer*, *supra* note 3, at 1288 (“To the Court, jurisdictional doctrine was just a branch of the ordinary general law, one on which federal and state courts could amicably disagree.”).

273. See, e.g., *Swift*, 41 U.S. at 18.

274. *Id.* at 16 (“[I]t is further contended, that by the law of New York, as thus expounded by its Courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments.”).

275. See Sachs, *Pennoyer*, *supra* note 3, at 1288. In this important respect, general common law differs from what is now called “federal common law.” In the seminal case of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the Supreme Court announced a federal-common-law rule as to which party bore the burden of loss on a forged endorsement of a check issued by the United States and that *Erie* had no bearing on the

matters (including those localized by statute), state courts had the final say, unless the law was unconstitutional.

The Supreme Court had no warrant to measure the *Pope* rule on direct review against the general law of jurisdiction. *Pope* didn’t articulate a *general-law* rule; it interpreted Section 432 of the New York Code of Civil Procedure.²⁷⁶ This was quintessential state-law matter, over which the Supreme Court has no say.²⁷⁷ In the age of jurisdictional statutes, the Supreme Court’s only method of controlling state-court jurisdiction was to construe *Pennoyer*’s vague due-process paragraph as constitutional authority to regulate state-court assertions of jurisdiction.²⁷⁸

Perhaps this is why *Menefee*, in a blizzard of non sequiturs,²⁷⁹ converted *Pennoyer* from (at most) a procedural due-process case to one limiting state-court jurisdiction as a matter of substantive jurisdictional due process. The Court had, long before *Pennoyer*, announced rules of personal jurisdiction under the general law (on collateral attack) that had to be followed by lower federal courts and might persuade state courts.²⁸⁰ By 1878, when it decided *Pennoyer*, the Supreme Court was beginning to lose its grip on personal-jurisdiction rules a bit; and regained it by invoking what we now call procedural due process to ensure compliance with jurisdictional rules (with, again, those rules coming from elsewhere). But by 1915, the Court’s hands were being pried loose by jurisdictional statutes.²⁸¹

If the Court were to have any say about coming jurisdictional innovations, such as nonresident motorist statutes, substantive jurisdictional due process was its only route. Nonresident motorist statutes addressed a new problem. With automobile ownership rising quickly and auto accidents more numerous, the general law of jurisdiction didn’t work very well. The only reliable method of asserting *in personam* jurisdiction over the nonresident was in-state service of process.²⁸² Nonresident motorists, however, likely would have gone back home after the collision but before suit was filed, meaning victims of careless nonresident motorists would have to sue in the nonresident

matter. That rule, once announced, was pre-emptive—it became the rule in state and federal court.

276. *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137, 140 (1881).

277. *See, e.g.*, *Jankovich v. Ind. Toll Rd. Comm’n*, 379 U.S. 487, 489 (1965) (explaining that the Supreme Court lacks appellate jurisdiction if judgment rests on adequate and independent state grounds).

278. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 194 (1915).

279. *See supra* notes 204–10 and accompanying text.

280. *See* Borchers, *Constitutional Law*, *supra* note 33, at 25–30.

281. *Id.* at 52.

282. *See, e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 724 (1877).

motorist’s home state, a result that seemed unfair to many.²⁸³ The Supreme Court sensibly held these statutes constitutional,²⁸⁴ but it struggled to deal with, in particular, foreign corporations.²⁸⁵

As to foreign corporations, the Court tried to fit them into either the consent or presence fictions.²⁸⁶ Along the way it created mysterious distinctions. A corporation merely soliciting business in the forum state was not subject to jurisdiction, but one doing more than mere solicitation was.²⁸⁷ As Justice Gorsuch noted, decisions of that era tolerated corporations having substantial business connections to the forum state, while still retaining jurisdictional immunity.²⁸⁸ All this led to constitutionalized jurisdiction being an unpredictable muddle, which the Supreme Court tried to set straight in *International Shoe*—with (at best) limited success. While the Court of the late 19th century was competent to tidy up around the edges of the general law of jurisdiction, it found itself in over its head trying to adapt a constitutionalized jurisdictional jurisprudence to swiftly changing societal conditions.

All of which is to say that the general law won’t save us. Practically, in a post-*Erie* world, the skills of federal courts in divining general law rules have deteriorated.²⁸⁹ More fundamentally, state-court jurisdiction is not now a matter of general law. Long-arm jurisdiction is controlled by long-arm statutes—and thus jurisdiction is local, not general, law.²⁹⁰

B. Leave it to the States

If substantive jurisdictional due process is illegitimate, and general law has no large role to play, one option is to push due process back to

283. See, e.g., James J. Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 UCLA L. REV. 198, 213–14 (1958) (discussing expansion of nonresident motorist statutes to vehicles other than automobiles).

284. See *Hess v. Pawloski*, 274 U.S. 352, 354, 356–57 (1927).

285. See *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1036–37 (2021) (Gorsuch, J., concurring in the judgment).

286. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316–17; see also Borchers, *Muddy-Booted*, *supra* note 28, at 23.

287. *Int’l Shoe*, 326 U.S. at 314 (discussing Washington Supreme Court decision below, 154 P.2d 801 (1945)); see also Borchers, *Muddy-Booted*, *supra* note 28, at 23.

288. See *Ford*, 141 S. Ct. at 1036–37 (Gorsuch, J., concurring in the judgment) (citing *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516, 517–18 (1923)). In *Rosenberg Bros.*, an Oklahoma defendant who purchased a large amount of its merchandise from New York sellers was held not to be doing business in New York. 260 U.S. at 517–18.

289. See *Sachs*, Pennoyer, *supra* note 3, at 1319.

290. *Swift v. Tyson*, 41 U.S. 1, 18 (1842); see also Borchers, *Origins*, *supra* note 163, at 112 n.264 (collecting *Swift*-era cases in which state procedural statutes were followed by diversity courts).

the point where it checks only the most excessive assertions of jurisdiction—just as in choice of law it checks only the most excessive of state-court applications of forum law.²⁹¹ I suggested this when I proposed that due process defeat an assertion of jurisdiction only if the forum put the defendant at a practical disadvantage defending the case.²⁹²

I do not think this would cause the chaos some imagine. But it would allow some assertions of jurisdiction that many would find problematic. For example, if two Omahans were involved in a traffic accident close to their homes, filing the case just a few miles away on the Iowa side of the Missouri river (where the juries are more favorable to plaintiffs) would not leave the defendant at much of a practical disadvantage as a matter of geography. After all, there are counties in Nebraska over 400 miles away from Omaha that would be much more inconvenient venues than the Iowa ones just a quick trip across the river.

I suspect state courts and legislatures would move quickly to avoid blatant forum shopping. State courts could employ the doctrine of *forum non conveniens* to steer such cases back to the parties’ homes.²⁹³ State venue statutes might not provide a venue for such a case.²⁹⁴ Federal courts could employ their venue transfer authority in diversity and federal-question cases.²⁹⁵ State legislatures would surely cut back on long-arm statutes going to the constitutional limits for fear of flooding their courts. But a Supreme Court avulsion of this magnitude seems unlikely.

C. Federal Positive Law

Returning to general law would—according to Professor Sachs—give Congress more authority to enact a federal statute that would act

291. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1980) (stating that for a state to apply its law it “must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”). But see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822–23 (1985) (discussing how a complete lack of connection between most claims in a class action and the forum state prevented the forum state from applying its law to the entire dispute).

292. Borchers, *Constitutional Law*, *supra* note 33, at 94.

293. See, e.g., *Stangvik v. Shiley Inc.*, 819 P.2d 14, 16 (Cal. 1991); *Fennell v. Ill. Cent. R.R. Co.*, 987 N.E.2d 355, 357–58 (Ill. 2012); *Chambers v. Merrell-Dow Pharms.*, 519 N.E.2d 370, 372 (Ohio 1988).

294. For personal-injury actions, the Iowa venue statute allows venue “in the county in which the defendant, or one of the defendants, is a resident or in the county in which the injury or damage is sustained.” IOWA CODE § 616.18 (2021). In the hypothetical case in the text, this would yield no Iowa venues.

295. See 28 U.S.C. § 1404(a).

as the Brussels Regulations do in the European Union.²⁹⁶ Congress, however, likely already has this power because it is limited only by the Fifth Amendment’s Due Process Clause. Under current law, the Fifth Amendment probably requires only minimum contacts with the United States as a whole—not with any particular state—for federal-court personal jurisdiction.²⁹⁷ However, despite some federal bills having been introduced to modestly enlarge state-court jurisdiction, the political will to do so is lacking.²⁹⁸ I proposed an amendment to the Federal Rules of Civil Procedure to ensure that U.S. plaintiffs injured at home by foreign-manufactured products have at least one U.S. forum available,²⁹⁹ but it’s not on the agenda of the federal rules advisory committee. At best, these are long-run solutions.

D. Unite Jurisdictional and Procedural Due Process

Here I revive a suggestion I advanced tentatively before.³⁰⁰ Jurisdictional due process is isolated from any other branch of due-process law.³⁰¹ If it were true substantive due process, it would require

296. See Sachs, Pennoyer, *supra* note 3, at 1316–17; Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1315–16, 1328 (2014). I am not entirely clear on why Professor Sachs believes that returning to the general law would enhance Congress’s powers, except perhaps by shoving the Constitution further into the background, given that the general law was not “federal” in the sense of being pre-emptive of state law. However, nothing turns on this as we agree that Congress has the power to enact a national uniform long-arm statute that would act as the Brussels Regulations do in the European Union. See Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, arts. 5, 7–26, 2012 O.J. (L 351) 1, 7–11 (setting out when someone living in one E.U. member state may be sued in another), *amended by* Regulation 542/2014, 2014 O.J. (L 163) 1 (EU), and Commission Delegated Regulation 2015/281, 2015 O.J. (L 54) 1 (EU).

297. See HAY ET AL., *supra* note 98, at 446–50.

298. See Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(K)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 446 (2017) [hereinafter Borchers, *Extending*] (discussing failure of a bill to extend jurisdiction over foreign products manufacturers to advance out of committee). Federal statutes also expand personal jurisdiction under the authority of the Fifth Amendment. See, e.g., 15 U.S.C. § 22 (Clayton Act defendants subject to jurisdiction wherever “found”); 28 U.S.C. § 1391(c)(3) (federal interpleader actions).

299. Borchers, *Extending*, *supra* note 298 at 443–44.

300. See Patrick J. Borchers, *Jones v. Flowers: An Essay on a Unified Theory of Procedural Due Process*, 40 CREIGHTON L. REV. 343, 349–52 (2007).

301. See Borchers, *Muddy-Booted*, *supra* note 28, at 22 (“[J]urisdictional due process is a constitutional outcast.”).

only a showing of rationality,³⁰² and few forum choices (particularly plaintiffs choosing to sue at home) could be said to be irrational.³⁰³ It is no longer part of the “fair notice” branch of due process.³⁰⁴ Personal service of process on the defendant outside the forum state provides excellent notice, but does nothing to give the forum-state’s courts power to hear the case.

The most promising branch of due process law is the “fair procedures” branch. This usually arises in administrative proceedings where it acts to ensure that private parties have an adequate opportunity to be heard when a government benefit is at risk.³⁰⁵ Currently it takes the form of a cost-benefit analysis.³⁰⁶ Persons are entitled to enough process to make the proceeding relatively sure of an accurate result without costs that overwhelm the value of what is at stake.³⁰⁷ Thus, for instance, a welfare beneficiary threatened with loss of her benefits is entitled to an oral hearing before a neutral decision-maker,³⁰⁸ but not to a jury trial or a government-funded lawyer, as she would be if charged with a serious crime.³⁰⁹

Transplanting that framework to assessing state-court jurisdiction would lead to a more workable and just jurisprudence. It would expand

302. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 309, 313–15 (1993) (noting that there must be “any conceivable rational basis justifying” Congressional statutory classifications “for purposes of the Due Process Clause of the Fifth Amendment”).

303. See Weinstein, *supra* note 33, at 232–34; cf. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981) (Stevens, J., concurring in the judgment) (“I question whether a judge’s decision to apply the law of his own State could ever be described as wholly irrational.”).

304. See Effron, *supra* note 31, at 27–28 (discussing the unwinding of notice from jurisdictional power). Current constitutional law regarding notice requires only that the form of notice be “reasonably calculated” to inform the adverse party of the proceedings. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 318 (1950); Cf. *Jones v. Flowers*, 547 U.S. 220, 239 (2006) (holding that notice of tax sale of a house inadequate where taxing authority had reason to know that the attempted notice had failed to reach the property owner).

305. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266–67 (1970) (stating that “fair hearing” is required before welfare recipient’s benefits can be terminated).

306. See *Mathews v. Eldridge*, 424 U.S. 319, 344–45 (1976).

307. See, e.g., *Tavarez v. O’Malley*, 826 F.2d 671, 676 (7th Cir. 1987) (Posner, J.) (stating “the cost-benefit approach of *Mathews v. Eldridge* . . . asks essentially whether the particular procedural safeguard that the plaintiff is urging would save more in costs of legal error than it would add in administrative or other costs”); see also Borchers, *Muddy-Booted*, *supra* note 28, at 28–29.

308. See *Goldberg*, 397 U.S. at 267–68.

309. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963).

the reach of state courts, but state courts and legislatures would likely trim their long-arm statutes to fit the state’s policy choices. It would not be a free-for-all. If the forum choice imposes significant extra costs on the parties or presents a significant risk of an inaccurate resolution—due to remoteness from the evidence or the need to apply an unfamiliar law—it should be unconstitutional. If we look at a few recent Supreme Court cases to estimate the relative costs put on the parties and assess any obstacle to an accurate result, jurisdictional results begin to look a lot more sensible.

To begin with *Ford*, the result is obviously correct. The injury states are the forums that impose the least costs on both parties and allow the finder of fact access to the evidence, giving the best chance of an accurate result. Although the Court did not mention it, likely the state courts would apply their own law, or that of a neighboring state whose law would be reasonably familiar. In the Minnesota *Ford* case, the plaintiff also surely had a suit against the driver that likely could have only been brought there,³¹⁰ so relocating the products case to another state would have been inefficient.

Cases the Court got wrong (on the proposed standard) include *World-Wide Volkswagen Corp. v. Woodson*³¹¹ and *J. McIntyre Machinery, Ltd. v. Nicaastro*.³¹² In both cases, the Court refused to allow plaintiffs in products liability cases to sue where they were injured.³¹³ Those states would have been the most cost-efficient for all parties and would have allowed access to the crucial evidence. Moreover, in *World-Wide*, the decision increased the costs by requiring a separate suit against two dismissed defendants (assuming the plaintiffs wished to do so) and *J. McIntyre* effectively denied the plaintiff any United States forum,³¹⁴ shifting the social costs of the plaintiff’s injury to his home state. In both cases, the state courts likely would have applied their own laws.

But moving to a procedural-due-process model would not always allow jurisdiction. A case that the Court got right (on this test) is denying jurisdiction in *Goodyear Dunlop Tires Operations, S. A. v. Brown*.³¹⁵ In that case, the injury occurred in France because of defective tires produced by a foreign subsidiary of the U.S. tire manufacturer Goodyear.³¹⁶ The suit was brought in North Carolina, whose only connection was that it was home to the families of the boys

310. *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1023 (2021).

311. 444 U.S. 286 (1980).

312. 564 U.S. 873 (2011).

313. *See World-Wide*, 444 U.S. at 288, 299; *McIntyre*, 564 U.S. at 877–78.

314. *See Borchers*, *Extending*, *supra* note 298, at 444–45.

315. 564 U.S. 915 (2011).

316. *Id.* at 918.

killed in the French bus accident.³¹⁷ Most witnesses to the accident were likely in France, and obtaining their testimony would be cumbersome at best.³¹⁸ Expert examination of the accident site and the failed tire would require transporting experts to France.³¹⁹ Evidence of the manufacturing process would likely be abroad as well.³²⁰ The case for applying forum law—or any U.S. law—would have been weak, perhaps unconstitutional.³²¹ One can sympathize with the plaintiffs’ desire to sue at home, but with foreign evidence, a foreign accident site, and foreign law, they sit in a much different position than the *World-Wide* and *J. McIntyre* plaintiffs.

CONCLUSION

I come to bury the minimum-contacts test and not to praise corporate tag jurisdiction. Corporate tag jurisdiction—at least in its casual incarnation—was exorbitant and random in its operation, though one can say the same of tagging individual defendants. Results like *Pope* are obviously unconstitutional under the current at-home test. But as a test of the relationship between the Due Process Clause and state-court jurisdiction, the corporate tag cases are nearly perfect. New York’s *Pope* rule clearly flouted the general law of jurisdiction. It withstood repeated attacks on due-process grounds; the New York courts refused to yield and read *Pennoyer* to bring the general law of jurisdiction into play only if the judgment was attacked outside New York. The *Pope* rule didn’t fly under the radar. The Supreme Court twice encountered *Pope* assertions of jurisdiction and in each case took the same view as the New York courts—the general law would come into play only if the judgment were to be attacked in a court of a different sovereignty.

Pope was founded on a state statute, as were similar decisions of other state high courts, all of whom paid little or no heed to the Due Process Clause or the general law. The reason for this is straightforward. As state courts, they were duty-bound to interpret state law and saw no constitutional impediment to enforcing their laws. While those state courts surely applied general law in tort and contract law where there were few statutes, the age of statutes was coming to state-court jurisdiction. As jurisdictional statutes, they had to be

317. *Id.*

318. *Id.* at 922.

319. *Id.*

320. *Id.* at 920–21.

321. *See, e.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397, 402–04, 408 (1930) (discussing how a Mexican state’s law must be applied involving a boat accident in Mexico where the only connection to the forum state of Texas was plaintiff’s residence).

interpreted to the letter. It was a matter of state law over which the Supreme Court had no say unless the Court were to declare casual corporate tag jurisdiction unconstitutional, which it finally did in 1915—thirty-seven years after *Pennoyer*.

Pope and its downfall make Justice Gorsuch’s point that constitutionalized personal-jurisdiction law has worked to the advantage of corporate defendants. While *Ford* handed corporate defendants a rare defeat in the Supreme Court, the minimum-contacts test has worked to protect corporate defendants even at the expense of giving an individual plaintiff any realistic access to justice. *International Shoe* is routinely hailed as the great liberator of state-court jurisdiction from the formalisms of the *Pennoyer* era,³²² but close inspection reveals a much more complicated picture than the conventional wisdom paints.

We are perhaps on the edge of a paradigm shift. Multiple Justices are questioning the stability of the foundations of modern jurisdictional law, and with good reason. Current law is entirely ahistorical and unsatisfactory in practice. Burying the minimum-contacts test need not usher in an era of unregulated state-court jurisdiction. Procedural due process holds out the possibility of a stable jurisdictional regime with greater predictability and fairer results.

322. See Sachs, *Pennoyer*, *supra* note 3, at 1251 (noting that “*Pennoyer* has a bad rap”).