Territorial Jurisdiction in Cyberspace

By Howard J. Grooters[1]

Trouble in Cyber-Paradise:

A well-known American internet portal, in the course of doing business in the United States, makes web pages in cyberspace[2] available to its members[3] for the purpose of

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[2] Also commonly known as "The Internet" or "The 'Net." The "World Wide Web," or simply the "Web," is but one facet of cyberspace, albeit the most popular. The internet, in simple terms, is a decentralized, vast network of interconnected networks of computers that may be accessed by anyone possessing the requisite technology: essentially a computer terminal and the means of tapping into the existing global internet communications infrastructure. The term "Cyberspace" is widely credited to have been coined by Science Fiction author William Gibson in his 1984 novel Neuromancer.

> "Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts . . . A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the nonspace of the mind, clusters and constellations of data. Like city lights, receding . . ."

WILLIAM GIBSON, NEUROMANCER 112 (1984).
[3] "Membership" with a web-site operator doing business in cyberspace is a very loose term, defined as needed, but generally requires the individual or legal entity seeking membership to provide demographic information through a registration process, such as name, address, and other data. Credit card transactions with the operator verify, at a minimum, the identity of the issuee of the card and billing address. In the absence of such direct transactions, however, given the predominant advertising based business model on the web, few web-sites make any attempt at either identity or location verification, and fewer still are capable of it. For the Yahoo! Auctions registration requirements, *see generally* (visited Mar. 29, 2002) <http://user.auctions.shopping.yahoo.com/show/signup?aID=-56895936&bid=yes&cc=us&lg=us>.

announcing and describing merchandise for sale, which other members can then browse on its web site. The internet portal then facilitates transactions between members by conducting simultaneous electronic auctions of the merchandise offered. The auctions are fashioned in such a way as to create legally binding contracts between sellers and high bidders, and at the conclusion of each auction the web portal places the two parties in contact with each other, who then execute the transaction directly. This web portal, one of the major transnational corporate presences in cyberspace, receives a "listing fee"[4] for its facilitation.

A number of the web portal's members place World War II era Nazi war memorabilia up for sale on the web-site on an ongoing basis.[5] Any implicit message or ideology drawn from the display and sale of such material is presumptively protected speech in the United States under the First Amendment to the US Constitution. In France, however, there is no absolute right of free speech equivalent to the First Amendment, and France has well defined anti-hate-speech laws[6] that prohibit the display of symbols of ideologies such as Nazism. Two French Anti-Hate groups[7] file suit against the American web portal in French court,[8] alleging that because the web pages promoting the offensive material can be viewed in

[4] The listing fee is a formulary commission structure, but is paid regardless of whether the item actually sells. *See*, (visited Mar. 29, 2002) <http://help.yahoo.com/help/us/auct/afee/afee-02.html>.

[5] For an example, *see* (visited Mar. 29, 2002) <http://www.legalis.net/cgi-iddn/french/affichejnet.cgi?droite=illustration/yahoo_auctions.htm>.

[6] CODE PENAL [C. PEN.] Art. R. 645-1 (Fr.) establishes criminal penalties for the offense of "[t]he wearing or the exhibition of uniforms, insignia, or emblems reminiscent of organizations or persons responsible for crimes against humanity." (Author's translation.) The penalties include fines, confiscation of the offensive articles, and the imposition of community service.

[7] La Ligue Contre le Racisme et l'Antisémitisme – LICRA [League Against Racism and Anti-Semitism] and L'Association Union des Etudiants Juif de France [French Jewish Students' Union].

[8] Le Tribunal de Grande Instance de Paris [T.G.I. Paris].

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France, the American company is in violation of French law.[9] Does the Paris court have jurisdiction to hear the complaint? Should it? If it does assert jurisdiction, how might a court enforce an ensuing judgment against an entity outside France's territorial borders?

If the Paris court issues an injunction ordering the American company to take all necessary steps to prevent the offensive web-pages from being viewed in France, subject to a cumulative fine (it did issue just such an order,)[10] does an American court have jurisdiction to hear a complaint seeking to block the Paris court's order on the basis that it violates the American company's and its members' free speech rights under the US Constitution? Should it?

If the American court asserts jurisdiction (it did)[11] and blocks the order of the Paris court (it did,)[12] should the Paris court seek to enforce its judgement anyway, through the provision of fines for non-compliance with the order, against any of the American company's assets that happen to be within their reach? More generally, at what point in a conflict spanning two or more sovereigns should the courts of one sovereign practice comity and respect the judgement of the courts of another? And at the broadest level, how might rules of jurisdiction be reformulated and harmonized to prevent jurisdictional conflicts such as this from arising in the first place?

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[9] *See* La Ligue Contre le Racisme et l'Antisémitisme – LICRA, et al c. Yahoo!, T.G.I. Paris, Ordonnance de Référé du 20 nov. 2000 (visited Mar. 29, 2002) <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>.

[10] Id. at 20-21, incorporating by reference La Ligue Contre le Racisme et l'Antisémitisme – LICRA, et al c. Yahoo!, T.G.I. Paris, Ordonnance de Référé du 22 mai 2000.

[11] Yahoo! v. La Ligue Contre le Racisme et l'Antisémitisme, et al, 145 F. Supp. 2d 1168 (N.D.Cal. 2001) (ruling against defendant's motion to dismiss for lack of jurisdiction).

[12] Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Antisémitisme, et al, 169 F.Supp.2d 1181 (N.D.Cal. 2001) (ruling in favor of summary judgement for plaintiff).

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These sort of questions have existed since the very beginning of cross border trade, simmering away on a back burner to one degree or another, but have very recently become dramatically more urgent reaching the proverbial boiling point on the relative high-heat burner of cyberspace.

The scenario just presented, a real one to which this paper shall return, demonstrates a number of key points that become self-evident

1. Cyberspace is inherently global, requiring a global point of view. It is simultaneously nowhere and everywhere, and those participating in it have little, if any, control over where it will pop into existence.

2. Jurisdiction matters. In addition to the familiar arguments revolving around fairness in terms of notice and convenience to the party sued, in practice it is often partially or wholly determinative of choice of law and therefore outcome.

3. If you are an operator in cyberspace, you are presently liable to be dragged into court anywhere in the world at any time – if for no other reason than to contest jurisdiction or face default. This is because territorial jurisdiction in matters of the non-territorially constrained realm of cyberspace is both highly uncertain and often existing simultaneously across many far-flung fora.

While the real life scenario, as described, is more than just a little interesting in considering the state of jurisdiction doctrine at the start of the Twenty-First Century, consider the following two hypothetical variations on the basic fact pattern:

1. Rather than a large, well financed corporate behemoth of the internet business sector, facilitating

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the transactions of others, and that purposefully engages itself in a myriad of unrelated international business transactions, instead the offensive web-site is operated by a small, and otherwise local antique dealer in the Willamette Valley of Oregon, as the seller in the transactions, on a computer in the back room of the business.

2. Rather than Nazi memorabilia, the subject matter of the web site is an internet securities offering by a legitimate securities issuer, whose internet offering is in compliance with US securities regulations, but is not in compliance with some pertinent law of the offended sovereign state.

Does either variation change any of the answers? Should they? One could easily spin numerous other hypothetical variations to wash out the moral, cultural, and power dynamics of the parties to the controversy, but these two suffice to demonstrate the point.

Historical overview: Part I

A brief review of the historical development of territorial jurisdiction to adjudicate in the United States will facilitate the discussion that follows. This overview does not purport to present a comprehensive history, but rather seeks to trace the development of the current doctrinal limitations on territorial jurisdiction to adjudicate in the US: namely, the requirements that the action be categorized, analyzed for the existence of territorial power under the power test, and subjected to due process scrutiny under the unreasonableness test.[13]

[13] This paper adopts the convention of naming the test as one of unreasonableness as regards the fairness component of US territorial jurisdiction doctrine, so as to reflect that while the burden to show the

Actor forum rei sequitur, or "the plaintiff follows the defendant's forum," was the classical jurisdictional doctrine imported into America from England during the colonial period.[14] The doctrine had its roots as a Justinian maxim in Roman law, which England had adapted and incorporated into the theory that sovereignty rested on the consent of the governed.[15] Thus, jurisdiction came to require the consent of the defendant. The early British requirement of express consent was, as one might imagine, met through coercion of the defendant by the plaintiff, yet coercion ultimately gave way to the more civilized doctrine of implied consent through physical presence[16] – the seed of the modern idea of physical power to adjudicate over the person.

At the birth of the industrial revolution, some American jurists were casting their nets farther afield in the development of jurisdictional doctrine. The theory of exclusive, territorially based jurisdiction appears as early as 1684 with the work of the Dutch Jurist Ulric Huber.[17] Huber wrote in the historical

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existence of power for jurisdiction falls on the plaintiff to the action, the burden of showing that the exercise of that power would be unreasonable falls on the defendant. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985).

[14] ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 150 (1993).

[15] KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 6, 13 (1999).

[16] *Id.* at 6.

[17] Ulric Huber (1636-1694), *De Conflictu Legum Diversarum in Diversis Imperiis* [Of the Conflict of Diverse Laws in Diverse Governments], *Praelectionum Juris Civilis Tomi Tres*, (Leipzig) (2nd ed. 1707) (1684), translated in Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 Ill. L. Rev. 375, 403 (1919). ("(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond. (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof. (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects").

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context of a relatively new confederation of states,[18] the seven northern provinces of the Low Countries,[19] which renounced their allegiance to the Spanish Crown, becoming the Republic of the United Provinces, also know as the United Netherlands.[20] Huber's writings had a natural appeal to an early American jurist at a time when territorial tensions among the several states encouraged the adoption and development of a theory of exclusive jurisdictional power based on territory.[21] One hundred fifty years after its genesis, the theory made its 1834 appearance in Justice Joseph Story's celebrated treatise, COMMENTARIES ON THE CONFLICT OF LAWS.[22]

Fairly early, the need became apparent for power to be categorized into what the power was directed upon, even though all actions ultimately affect a person's interests: As early as 17th Century colonial America, power concepts led to the invention of jurisdiction by attachment, or *quasi in rem*,[23] in

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[18] Union of Utrecht, Jan. 24, 1579. *See* TEXTS CONCERNING THE REVOLT OF THE NETHERLANDS 30-9 (Ernst H. Kossman & Albert F. Mellink eds., 1974).

[19] The French name for the Netherlands is still "*Pays-Bas*," literally, the Low Countries.

[20] PIETER GEYL, THE REVOLT OF THE NETHERLANDS 170-72, 183-84 (1958).

[21] CLERMONT, *Supra* note 14, at 6.

[22] JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS xiii, 19, 21 (1834). ("[E]very nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect, and bind directly all property, whether real or personal, within its territory; and all persons who are resident within it, whether natural born subjects or aliens. . . . [N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects, or others"). Regarding Story's treatise, Professeur Armand Lainé wrote, "we find there, concerning the French system, the most accentuated distance, and for the Dutch system the quickest sympathy. More than that, Story's doctrine reproduces that of the Dutchman Huber exactly; of this, it is but a paraphrase." Armand Lainé, *De l'Application des Lois Étrangères en France et en Belgique*, 23 Journal du Droit International Privé, 1896, at 481, 486.

[23] References to *quasi in rem*, throughout this article, refer to what is sometimes termed "sub-type two," also known as attachment, where the

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response to the demands of politically powerful creditors seeking a better collection tool in the aftermath of the depression of 1640 than personal jurisdiction then afforded.[24] Such is the conceptual baggage of the concept of power that attachment jurisdiction remains with us three hundred and sixty years later even though the subsequent expansion of personal jurisdiction has largely overcome the problems that led to this development.[25] In the context of limitations on power, Justice McLean, in the 1850 case of *Boswell's Lessee v. Otis*, wrote that "[j]urisdiction is acquired in one of two modes: first as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the later case, . . . [i]t must be substantially a proceeding *in rem*."[26] Thus, we have jurisdiction over persons (*in personam*) and jurisdiction over things (*in rem*). Of course, *in rem* ordinarily requires a nexus, i.e., that the property under power be the subject matter of the controversy. *Quasi in rem* did away with the nexus requirement, so that it is sufficient that the property be that of the defendant, but no longer necessary that it be the subject matter of the controversy. Necessarily, from a conceptual point of view, when the court proceeds *in rem*, it assumes power over the thing, or *res*, not the person, and "the defendant is not personally bound by the judgment beyond the property in question."[27]

In the 1877 case *Pennoyer v. Neff*, Justice Field further noted that power over the *res* is good because "[t]he law assumes that property is always in the possession of its

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plaintiff seeks to apply the defendant's property to the economic satisfaction of the unrelated claim. Such references, generally do not encompass "sub-type one," where the plaintiff seeks to establish a preexisting interest in the *res* as against the defendant's interest, as in actions to quiet title, foreclose a mortgage, etc. *See also*, CLERMONT, *supra* note 14, at 9.

[24] CLERMONT, *supra* note 14, at 11.

[25] *Id.*

[26] Boswell's Lessee v. Otis, et al., 50 US 336, 348 (1850).

[27] *Id.*

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owner."[28] This is a prime example of the sort of legal fiction that binds the power theory together. This decision precisely memorialized the doctrine of exclusive territorial jurisdiction by applying to the sovereign states the "principles of public law," one of which is "that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and by corollary, "no state can exercise direct jurisdiction and authority over persons or property without its territory."[29] One hundred and twenty-four years later, we still live with the last viable holding of the *Pennoyer* decision: the second prong of the necessity and sufficiency of physical presence for the exercise of personal jurisdiction – i.e., that physical presence of the defendant is always sufficient for the exercise of personal jurisdiction over her.

The power theory of exclusive territorial jurisdiction made sense in the compact, agrarian economies of both Seventeenth Century Holland and early Nineteenth Century America, and it generally resulted in "correct" outcomes, while minimizing interstate judicial conflict. The corollary, stated above, is most important because the power theory is, in the application, fundamentally one of limitations between sovereigns, explaining when and why a court, as in *Pennoyer*, should not adjudicate in light of those considerations. Moreover, those considerations primarily are infused with the mutual interests of sovereigns and politically powerful entities, rather than issues of fairness as to the parties. That is, the true underlying rationale was always the desirable allotment of authority among the courts of competing sovereigns.[30] However, while power explained jurisdiction relatively well prior to industrialization, it inevitably became less and less effective at jurisdictional explanation as industry and technology developed and the territorial relationship between parties in a transaction become less and less important.

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[28] Pennoyer v. Neff, 95 U.S. 714, 727(1877).
[29] *Id.* at 722.
[30] CLERMONT, *supra* note 14, at 7.

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Development of Unreasonableness as an Erosion of Power:

The manifestations of the inherent conceptual problems with the doctrine of power as the basis for jurisdiction are at a minimum when transactions between persons are, either wholly or substantially, localized geographically. As parties to transactions become geographically dispersed, power becomes less reasonable as a rationale for the exercise of jurisdiction. This is because power never adequately explained why, with a geographically complex cause of action, jurisdiction should be exercised in one forum rather than another. Recall that power ultimately developed out of the Justinian maxim *actor forum rei sequitur*, which was essentially an expression of the spirit of fairness at a time when Roman law enjoyed unlimited sovereign power.[31] As a determinative doctrine, though, the evolved, modern power theory never encompassed the assurance of fairness in an environment of mutually powerful and competing sovereigns. Such an assertion, of course, suggests that it was not a reasonable rationale in the first place, but merely a doctrine of convenience that fit the times. As the times have diverged from those of the source of the doctrine, it has become increasingly necessary to balance a test for unreasonableness against the unbridled expression of power. Thus, a line of cases developing an unreasonableness test as against the unfair exercise of territorial power was inevitable. Furthermore, the American courts began addressing the "why" of power in addition to the "what," leading to the development of doctrinal bases of jurisdiction that provided the theoretical explanation for the existence of the power in each category: The bases of personal jurisdiction, for example, are now physical presence, domicile, consent, and forum-directed acts.[32] The result is that

[31] *Id.* at 6.
[32] *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)

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the territorial power theory has undermined itself: jurisdictional exclusivity as an absolute doctrine having gone the way of the Dodo.[33]

In *Mitchell v. Neff*,[34] the non-resident Neff, not readily available for personal service, was given constructive service via local publication.[35] The Oregon court commenced an *ex parte* proceeding *in personam* against Neff, and entered default judgement against him in favor of Mitchell.[36] When Neff later purchased land in Oregon, it was seized and sold to Pennoyer in satisfaction of the judgement.[37] The result was *Pennoyer v. Neff*, and a decision that should not have been difficult. To proceed *ex parte in personam*, after all, is a logical oxymoron that cries out for a balancing test for unreasonableness. Although he could have easily avoided the constitutional issue, J. Field, for his own private reasons, was evidently not satisfied with the wholly adequate territorial power argument to justify the holding. Instead, Field took the opportunity to make constitutional law and to write one for the casebooks. Deep in the opinion, he went the extra step of looking to the then recently ratified Fourteenth Amendment to the U.S. Constitution as the underlying basis for the power test as articulated, to find that such a proceeding "to determine the personal rights and obligations of parties over whom that court has no jurisdiction do[es] not constitute due process of law."[38]

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[33] For example, a corporation incorporated in Delaware, with its home offices in Oregon, doing regular and systematic business in Washington involving contracts with a non-exclusive forum selection clause in California (say, because California law particularly favors an argument they anticipate they would make under some foreseeable circumstance), could find itself amenable to suit in all four states. This is a far cry from Huber's theory of exclusive territorial jurisdiction from which all this doctrine evolved.

[34] Pennoyer v. Neff, 95 U.S. 714, 716 (discussing the written stipulation of the parties in the case's ancestry).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 733.

Field's opinion marked the genesis of the view of jurisdiction as a constitutional doctrine, and due process under the Fourteenth Amendment has been eroding power ever since. A good example is found in Justice Oliver Wendell Holmes' 1917 opinion in *McDonald v. Mabee*.[39] Here, the principle that "service by publication dos not warrant a personal judgment against a non-resident" is extended into the realm of the resident, Mabee, who has departed, intending never to return (with dicta further suggesting that the same principle should apply to absent parties more generally).[40] J. Holmes acknowledged bluntly that "[t]he foundation of jurisdiction is physical power...," and in the context of the due process tempered power theory, explained why, where the defendant had left the state, intending never to return, and the only service of process was by local publication, the Texas courts had no basis for jurisdiction *in personam*.[41]

The full development of an unreasonableness test woven out of the cloth of due process came in the 1945 case of *International Shoe v. Washington*.[42] Therein, Chief Justice Stone, in rejecting "simply mechanical or quantitative" criteria in determining the boundary line of jurisdiction to adjudicate the rights and responsibilities of a non-resident corporation doing business in the state, and he held that "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[43] The opinion goes on to rule that "the activities . . . were systematic and continuous . . . in the course of which appellant received the benefits and protection of the laws of the state, ... The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish

[39] *McDonald v. Mabee*, 243 U.S. 90 (1917).
[40] *Id.* at 92.
[41] *Id.* at 91.
[42] *International Shoe v. Washington*, 326 U.S. 310, 319 (1945).
[43] *Id.*

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sufficient contacts or ties with the . . . forum to make it reasonable and just, . . . to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say . . . the present suit . . . involves an unreasonable or undue procedure."[44] The lesson was that jurisdictional analysis must henceforth consider the question of unreasonableness before allowing power to be exercised, and that the crucial element in that analysis must specifically be the relation of the cause of action to the defendant's activity within the forum. Another effect, given the "mechanical or quantitative" language, was to ensure the ensuing tradition of *ad hoc* fact-based analysis of jurisdictional questions as a common-law doctrine that has inevitably led to a state of jurisdictional uncertainty and lack of predictability in geographically complex controversies. However, C.J. Stone failed to explain why only such an *ad hoc* judicial analysis could implement the constitutional protections of the Fourteenth Amendment.

In 1958, the Court in *Hanson v. Denckla* elaborated on the minimum-contacts idea by declaring that "there be some act by which the defendant purposefully avails itself of the privileges of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[45] *Shaffer v. Heitner*, in considering a case of jurisdiction *quasi in rem* in 1977, extended the minimum-contacts analysis, and the application of the unreasonableness test, from jurisdiction *in personam* to all categories of jurisdiction to adjudicate.[46]

A sort of culmination to this jurisdictional morass came in 1980 with *World-Wide Volkswagen Corp. v. Woodson*, in which Justice White opined that the Due Process Clause, "acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgement."[47] In so opining, he ruled that where the plaintiff

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[44] *Id.* at 320

[45] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

[46] *Shaffer v. Heitner*, 433 U.S. 186 (1977).

[47] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

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had purchased an automobile in one state, and was involved in a collision in a second, in which the harm was allegedly enhanced by a defect in the automobile, the state where the collision occurred had no jurisdiction over the auto dealer and distributor, who were located in the first state and did no business in the second. Ignoring the strong arguments in the dissenting opinions regarding the reasonable expectation that an automobile would likely be driven out of the state,[48] the broader flaw in restricting the unreasonableness analysis to the interests of the defendant, and by implication the development of an *ad hoc* mode of analysis, becomes relatively clear.

In the first instance, the Court has created a situation, and the potential for a virtually limitless number like it, where the plaintiff can seek full justice only by litigating the same cause of action twice. Surely, the local defendant driver of the other automobile involved in the collision is not amenable to suit in the forum of the first state. However, the specter of double litigation, and its impact on the interests of the plaintiff, do not factor into the Court's due process analysis as the Court has formulated it through *International Shoe*[49] and its progeny. In the second instance, the Court has created a situation, and the potential again for many more like it, where the relevant litigation must be conducted in a forum in which neither the evidence nor the witnesses are located. Such physical distancing of jurisdiction from the tools of litigation also does not factor into the Court's conception of a doctrine of fairness. One cannot know for certain, but had the Court adopted a mode of analysis that examined the interests of both the plaintiff and the defendant, as well as the forum, in its application of an unreasonableness test, it is likely that this case would have come out the other way. One also cannot know for certain when, or with what case or fact pattern, the Court may decide to alter its method of *ad hoc* analysis.

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[48] *Id.* at 313-17 (Marshall, J., and Blackmun, J., dissenting); *Id.* at 317-19 (Blackmun J., dissenting); *Id.* at 319 (Brennan, J., dissenting).

[49] *International Shoe v. Washington*, 326 U.S. 310, 319 (1945).

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The Problem With Territoriality—Cyberspace Ignores Geographic Boundaries:

Although computers connected to the internet exist physically in a geographically unique location, cyberspace itself is conceptually difficult in geographic terms. There really is no "there" there in cyberspace, but mere geographic probabilities, or uncertainty. For one thing, Internet communications are packetized. Like a Star Trek transporter for electronic communications, the Internet splits up a whole communication into small parts, called packets, each of which can follow a different route to the destination, where they are reassembled. Not only can one not know if an e-mail from Eugene, Oregon to New York, NY, will follow a route through Texas or Montana, one also cannot know if it will follow uniquely one route, another, or both. One or more packets from the same e-mail could even follow an international route through Montreal, Quebec, or theoretically even through London, England. Along the way, the communication passes through computer hardware, established by a person or entity for that purpose, at each relay point.

More importantly, in the generalized situation, one cannot even know with certainty the geographic location of the computer at the other end of the communication. Internet domain names, components of the addresses of cyberspace, are not tied to geography the way postal addresses are. Nor are they tied to nation states. The common belief that the dot-com (.com) domain is just for the US is patently false. A dot-com address can be located anywhere, within the US or without. Even where the location of a person or business entity is known, the location of the server that individual or business uses to interact with cyberspace is not. Therefore, the electronic product one requests or purchases from a business with offices in one location may be served up by a computer in yet another unrelated and undisclosed location. Further, a transactional

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party may be influenced by any of a number of motivations to disclose a false location if queried. In addition, many fixed e-mail addresses are fully portable throughout the developed world, or that portion of it with Internet access, so that the e-mail (or electronically transmissible purchased product) a person sent to another whom she thought was in New York may actually be received by her in Paris, France.

The foregoing facts create a situation with three consequences. 1. The degree to which it may be assumed that there is knowledge of where the other party in a transaction is located is increasingly diminished as cyberspace becomes ubiquitous. 2. At the same time, the importance of geography as a determinative factor in the decision process of whether to enter a transaction becomes correspondingly less important in virtually every context other that that of jurisdictional amenability to suit. The result is that the typical transaction is becoming increasingly more geographically diverse and complex. Furthermore, the trend is not going away, but is accelerating, even in the aftermath of the 2000 dot-com meltdown. 3. Finally, and most significantly, the geographic reach, or breadth of market access, of parties with relatively weak economic resources has dramatically expanded without a corresponding decrease in the relative economic burdens of amenability to suit in geographically far-flung fora.

The importance of this third point warrants elaboration: Sellers, as we have seen in *International Shoe*[50] and its progeny, may be subject to suit in far-flung fora in which their multi-state activities satisfy the minimum-contacts analysis. In the bricks-and-mortar world, such far-flung business activity generally necessitates a relatively high level of capitalization, reducing the relative economic burden of litigation in such places. Where the unreasonableness test does not defeat jurisdiction in the plaintiff's home forum, it is a self-evidently correct forum when a consumer transaction is in controversy, with an

[50] *Id.*

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attendant imbalance in economic resources and burdens – i.e., when it may be economically unfeasible for the plaintiff to sue in a distant defendant's home forum. As the size and capitalization of a given business' operations become smaller, there is generally a corresponding diminution in that business' access to distant markets. At the extreme end of this business scale is the small, sole proprietorship, whose economic resources and burdens may be equivalent to, or even less favorable than, those of its individual customers. However, consumer transactions of the small business/customer variety were historically localized geographically, so that amenability to suit remained local for both parties, with similar economic burdens spread across similar economic resources.

Cyberspace fundamentally alters this dynamic. For the first time in the history of commerce, a minimally capitalized small business can simultaneously sell and deliver its electronic goods or services to its physical neighbors next door and to its cyber neighbors halfway round the world with equal ease and cost of execution, both of which may be minimal. Ultimately, this new dynamic will create many more causes of action that are economically unfeasible both for the plaintiff to pursue in the defendant's home jurisdiction and for the defendant to resist in the plaintiff's home jurisdiction.

Courts of law, on the other hand, remain as fixed geographically as they ever were. A plaintiff with a cause of action chooses the court in which to bring the action, and that court must make a determination of whether it can, should, and therefore will hear the case. The courts' migration to cyberspace presumably may be safely tucked away far enough into the future as to be disregarded in the present analysis.[51] Thus, as the typical action becomes increasingly geographically complex, we should expect two results. First, courts, with their territorial jurisdiction to adjudicate, will increasingly need to pause to consider at length the jurisdictional questions,

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[51] *But see infra* note 52 (discussing courtroom video experiments).

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consuming valuable time, effort, and resources of the courts and the parties that could be put to better use resolving the controversies giving rise to the actions. Second, plaintiff's will frequently file in the wrong jurisdiction because of increasing jurisdictional uncertainty, and find themselves in fora that will not entertain the merits of their cases, requiring refilings elsewhere and their starting over from scratch or causing other problems.[52]

One possibility in addressing the issue of cyberspace jurisdiction is to channel appropriate litigation into a federal "cyber-circuit," thereby eliminating the jurisdictional questions. Without going into excessive detail, this paper will briefly lay out the several reasons for rejecting such a focused approach.

Siting: A federal cyber-circuit would still have to be geographically sited somewhere even though its *raison d'être* is not. However, in one sense, the difficulty with cyberspace is not so much that it is nowhere, as that it is everywhere. Consequently, some parties in controversies destined for the cyber-court would be nearby, a relative convenience, while others would be far away, a relative inconvenience. Since the situs of this court would be well known, its existence would at least bring some much-needed certainty to the issue of jurisdiction in cyber-litigation, but at the cost of pure arbitrariness in the relative convenience and burden to each party. This would likely lead to undesirable consequences. For example, business-siting decisions would logically be affected. The presence of a cyber-court siting in New York City, for example, might have the unintended consequence of shifting cyber-business out of the "silicon valley" of California into the "silicon alley" of New York.

Venue: A slightly more creative solution to the arbitrary burdens of siting is to provide that cyber-court proceedings can go forward in any existing federal district court. The idea would be to disperse a cyber-circuit throughout the space of

[52] For example, a statute of limitations may expire.

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federal district courts, much the way cyberspace is dispersed throughout the physical space of geography, emerging where its use is required. There would not even need to be a "cyber-circuit," except conceptually – it would just amount to a federalization, presumably under the power of the commerce clause, of certain claims relating to activities in cyberspace. Unfortunately, this solution would simply recreate the problem in different clothing. The battle over jurisdiction would effectively be shifted to one of venue. It is apparent that the cyber-circuit idea really does not address the basic jurisdictional problem, which is one of needed certainty and predictability.

International Considerations: The cyber-circuit concept fails to take account of the inherently international nature of cyberspace, treating it as a US phenomenon. It would do nothing to resolve cyber-jurisdictional issues in international litigation. And, in one sense, the biggest hurdle for jurisdictional issues in cyber-litigation is the international element, particularly in combination with the geographic uncertainty of opposite parties in transactions, the distances involved in international litigation, and the relatively greater differences in law among the other nation states connected to cyberspace than among the several states of the US.

Choice of law: Choice of law would remain an issue, and a cyber-court would, more often than not, find itself applying the law of a state other than that in which it is sited.

Although some courts have experimented with the use of video and telecommunications equipment as a potential electronic judicial bridge between two or more geographic spaces, the results of the experiments have been rather underwhelming.[53] It may well be that courts will eventually

[53] A number of jurisdictions that experimented with such technology ultimately discontinued their use of it because of excessive time consumption and expense. See, for example, the discussion of the future evolution of jurisdictional principles in Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 DUKE L. J. 1147, 1188-95 (1978) (citing *Man Preferred*

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move into cyberspace, but that is a highly problematic path to a solution for jurisdictional uncertainty at present. For one thing, the courts' use of various supplementary devices, such as electronic equipment, has traditionally been a matter for local rule making. Such rule-making produces the antithesis of uniformity, and the subject matter would likely not lend itself well to general regulation. There is also a funding issue. And, once again, the international reality of cyberspace demands international adoption of a single solution to our common jurisdictional problems.

In the final analysis, we may be best advised to acknowledge that jurisdictional perfection, which the power theory strives mightily to achieve, is unachievable in a complex global society interconnected by cyberspace. Acknowledging the impossibility of creating a perfect system would mean abandoning the attempt to create it. There is a very good reason for considering exactly that: It would allow us to shift our focus onto achieving certainty and predictability through sub-constitutional regulation of jurisdiction, a highly desirable outcome. Furthermore, while there would remain room for differing commentators to find a few arguably "wrong" jurisdictional outcomes from such a standardized system, these would be relatively unimportant in light of a) the improved judicial efficiencies, b) the "wrong" occurring at a non-substantive stage of the proceeding – that is, not in the adjudication on the merits, and c) the jurisdictional outcome would be readily foreseeable by the "wronged" party. In the end, the welfare of the community as a whole would be improved through savings of time, effort, and resources on the

Over Machines, Courtroom Videotape Experiments Discontinued, 31 Bar Briefs 8 (1976)). This is not to suggest that telecommunications technology won't play an important role in the courts of the future. *Cf. id.* (citing *Court Hears Via D.C.-N.Y. Television Link*, Washington Post, Oct. 17, 1975, § A, at 9, col. 3; *TV Phone to Link Lawyers in City to Judges in Capital*, N.Y. Times, Oct. 8, 1975, at 1, col. 7). Ultimately, however, the use of such technology in courtrooms does not address the broader issue of jurisdictional uncertainty, which encompasses much more than mere transportation issues.

part of everyone involved in the litigation process, and greater certainty and predictability for businesses, which need to know where they will be amenable to suit in order to make rational, informed business decisions.

Sub-Constitutional Regulation of Jurisdiction—Constitutional Considerations:

A sub-constitutional scheme of regulation of jurisdiction ideally should encompass all litigation giving rise to competing claims of jurisdiction, interstate and international. That is, it should cover cyber transactions and non-cyber transactions alike. Real predictability can only be achieved through uniformity and standardization. Jurisdiction over cyberspace, after all, is but a subset of jurisdiction at large. Any scheme narrowly tailored to cyber-causes of action alone would be subject to many failings, not the least of which would result from the increasing mix of more traditional bricks-and-mortar business with cyber-business. A narrowly tailored approach would invite the mere replacement of the jurisdiction question with a dispute over whether the transaction involved was a cyber-transaction, and therefore subject to the narrow regulation. A broad, universal scheme of jurisdiction would avoid such a pitfall. Furthermore, since other jurisdictional issues of predictability and fairness needing redress exist outside of the realm of cyberspace,[54] synergy can be created by addressing multiple problems with one, more or less universal, solution.

Perhaps the first question is this: Can jurisdiction be regulated? All states have long-arm statutes, of course, so the immediate answer is "Yes." Most such statutes, however, do little if anything to reduce litigation of the jurisdictional question. Some states, California for instance, simply make

[54] This paper discusses this issue more fully in its international context.

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reference to constitutional limits.[55] Others, such as New York, delineate causes where jurisdiction arises, but in a way that invites judicial interpretation.[56] By either incorporating constitutional limitations by reference, or drafting statutory clauses that require active judicial intervention, legislatures have thus far relied on the Constitution and the courts to supply the law of territorial jurisdiction to adjudicate. It need not be that way. The better question is this: How can jurisdiction be efficiently regulated?

A sub-constitutional regulatory scheme would not have to be excessively radical, and would still at least be subject to Fifth Amendment due process concerns.[57] It would not eliminate all jurisdictional litigation. Forum shopping, after all, is as old as the availability of multiple fora. The goal is to avoid frequent challenges to jurisdiction, so legislation should seek to limit the choices of jurisdiction, consistent with basic principles of fairness – quite the opposite effect of the judicial development of the bases of jurisdiction under the power theory. But where basic fairness principles dictate otherwise, an alternative forum should be available. Moreover, jurisdictional rules should seek to distribute the work in an appropriate way, delineating the authority of the states through legislation, thereby replacing the judicial power test, while leaving the appropriate role of preventing the states from overstepping the

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[55] "A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10.

[56] N.Y. C.P.L.R. §302(a) (McKinney 2001).

[57] There is a good argument that congressionally legislated, nationwide jurisdictional rules covering all state and federal courts would be subject to due process analysis under the Fifth Amendment only, and not under the Fourteenth Amendment. Theoretically, this would give Congress a relatively clean slate free of constitutional precedent, as due process jurisdictional restrictions have been imposed on the states under the authority of the Due Process Clause of the Fourteenth Amendment; the equivalent clause under the Fifth Amendment is widely viewed to be less restrictive. See, Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community*, 40 Am. J. Comp. L. 121, 155 (1992).

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statutory and constitutional boundaries to the courts, through the application of a reasonableness test informed by the appropriate Due Process Clause. Any properly devised scheme, to avoid tempting the courts to continue resorting to the power analysis, should avoid a doctrine of individualized fact-based decision-making in favor of a strict rules-based approach.

This is really the crux of the matter, and it bears repeating. It is essential that any scheme adopt the predictability of a determinative rules-based approach and resist the uncertainty of *ad hoc* fact-specific analysis.

The next question is this: Does Congress have constitutional authority to regulate interstate jurisdiction among state courts? The answer to this is almost surely "Yes," primarily based on Congress's power under the Commerce, Full Faith and Credit, and Due Process Clauses.[58] Furthermore, the Supreme Court has already evinced a willingness to defer to state legislatures that enact "particularized" and "specialized" jurisdictional legislation.[59] It might be presumed that the Court would also defer to Congress, given its consistent view, in equal protection jurisprudence, that Congress has a positive discretionary role in implementing the Fourteenth Amendment.[60] Additionally, in light of the Court's relatively

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[58] CLERMONT, *supra* note 14, at 41.

[59] *See Kulko v. Superior Court*, 436 U.S. 84, 98 (1978), *Shaffer v. Heitner*, 433 U.S. 186, 214 (1977), *Hanson v. Denckla*, 357 U.S. 235, 252-53 (1958), *McGee v. International Life Insurance Co.*, 355 U.S. 220, 221, 224 (1957).

[60] "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Note that this portion of the holding addresses the Fourteenth Amendment as a whole, not just the Equal Protection Clause, which was specifically at issue in this case. This is directly at odds with the earlier language rejecting "mechanical or quantitative" criteria in determining whether the guarantees of the Due Process Clause are satisfied in the *International Shoe* opinion – i.e. it directly contradicts International Shoe's implied holding that correct implementation of the Due Process Clause must be judicially determined. Thus, it appears that Justice Brennan's opinion in *Katzenbach* overturns this element of C.J.

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recent willingness to allow consumers to contract away their right to a minimum-contacts forum through the use of forum-selection clauses,[61] it is questionable to what degree the Court is presently committed to the concept that jurisdiction is a constitutional matter.

The proverbial million-dollar question, perhaps, is this: Would Congress act? A scheme for legislative reform of the rules governing territorial jurisdiction to adjudicate can be great in theory, but useless in practice if Congress will not enact the enabling legislation. Fortunately, it appears quite likely that Congress will, in the relatively near future, perhaps the next two to ten years, consider legislation to adopt a Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters, which is currently under negotiation at the Hague Conference on Private International Law (Hague Conference).[62] "The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law."[63] The logical extension of this international effort,

Stone's opinion in *International Shoe*, and thereby opens up jurisdictional rulemaking to Congress, regardless of whether or not it remains viewed as a constitutional doctrine. Even with the refinements of *Boerne v. Flores*, which holds a general rule that due process legislation must be remedial in nature to be found constitutional, there is ample precedent support the Court's willingness to defer to legislatures on the issue of jurisdiction doctrine, even at the state level. *See Burnham v. Superior Court of California*, 521 U.S. 507 (1997) (relying explicitly on lack of any legislation in any state abandoning "tag" jurisdiction as partial basis for finding it constitutional under the Due Process Clause.)

[61] *See Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

[62] Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999 as amended, at (vistited Mar. 29, 2002) <http://www.hcch.net/e/conventions/draft36e.html>. The Convention is presently in a working draft status. It has not yet been put forward for ratification and there are no current signatory countries. [Hereinafter Hague Convention.]

[63] Hague Conference on Private International Law Statute art. 1 (1955), *opened for signature*, Oct. 9, 1951, 15 U.S.T. 2228 (1955). *See* (visited Mar. 29, 2002) <http://www.hcch.net/index.html> for general information on the

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inspired by the goal of unifying the rules of private international law, is to bootstrap a standardized, rules-based regulatory scheme of interstate jurisdiction onto a treaty adopting international rules of jurisdiction. It makes good sense to consider adopting the particular rules negotiated for this international treaty into national law as well, thereby achieving greater standardization, for three reasons. First, the Hague Convention, as adopted in the US, will have to pass the same constitutional due process scrutiny as interstate jurisdictional legislation.[64] Second, it is likely that the Hague Convention will closely resemble the Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters,[65] already in place in the European Economic Community,[66] and as such adopt the earlier Convention's clear, rules-based approach. Finally, these reasons combined with a higher level of standardization will result in the greatest predictability and certainty of jurisdictional amenity to suit.

Hague Conference.

[64] *See* Stanley E. Cox, *Why Properly Construed Due Process Limits On Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177 (1998).

[65] European Economic Community Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 27 September 1968, among the 25 March 1957 Treaty of Rome Members, Belgium, France, Federal Republic of Germany, Italy, Luxembourg, and the Netherlands, amended by the Luxembourg Convention for the Accession to the 1968 Convention of Denmark, the Republic of Ireland, and the United Kingdom, 9 October 1978, the Convention on the Accession of the Hellenic Republic to the Convention and to the Protocol on its Interpretation by the Court of Justice, 25 Oct. 1982, and the Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention and to the Protocol on its Interpretation by the Court of Justice, 26 May 1989, 1989 O.J. (L 285) 1 reprinted in 29 I.L.M. 1413 (1990). [Hereinafter Brussels Convention.]

[66] Hereinafter EEC.

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Historical Overview: Part II

A brief interlude reviewing the historical development of jurisdiction in Europe will elucidate the discussion to come.

Continental Europe followed a somewhat different jurisdictional evolutionary path than did the United States.[67] The Dutchman Huber, "in the estimation of continental jurists . . . [did] not occupy such a prominent position" as in England and the US, but was "considered one of the lesser writers on the subject."[68] The concept of territorial power never really took hold on the Continent. Without the power concept, certain exorbitant bases of jurisdiction, such as the United State's attachment jurisdiction, never developed. Nevertheless, parochialism was particularly unbridled without the restraint implicit in the concept of territorial power, and led to other, startling (to Americans at least) exorbitant jurisdictional excesses.

Napoleon, in 1804, for example, wrote articles 14 and 15 of the French civil code, and jurisdiction in France came to rest on the basis of citizenship alone.[69] In Napoleon's time, *le*

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[67] Regarding the publication of Justice Story's COMMENTARIES ON THE CONFLICT OF LAWS, Professeur Lainé observed: "Such marked the point of departure of private international law in England. Ever since, it has developed in a continuous evolution that continues still to this day." Armand Lainé, *De l'Application des Lois Étrangères en France et en Belgique*, 23 Journal du Droit International Privé, 1896, at 487 (author's translation). Note that Professeur Lainé occasionally interchanges the terms for 'England' and 'America' in a way that does not make sense in terms of nationality, such as referring to J. Story and the law of 'England' in the same thought. In the context of a comparative discussion of common law countries and civil law countries, however, it is correct in the sense that he is occasionally using the label 'English' to denote a broader application to the common law tradition, which existed only in English speaking countries (or those whose legal systems developed while subject to the British Crown).

[68] Lorenzen, *supra* note 16, at 375.

[69] *See* C. CIV. art. 14, 15 (Fr.). Article 14 establishes jurisdiction for French plaintiffs to sue in French courts, even for causes of action arising from transactions with foreigners in a foreign country. Article 15 requires suit

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citoyen, conceptually, was closer to our modern ideas of domicile than to today's concept of citizenship,[70] and where that basis applied, one could always sue in a French court. The Napoleonic articles are still in force outside the Brussels Convention signatory countries. This leads to the striking result, for example, that a Frenchman who, while vacationing in the United States, is involved in an automobile collision with an American in Oregon, can find jurisdiction to sue the American in the courts back home in France. The other nation states of Europe developed their own bases for exorbitant jurisdiction.[71] Possibly the most celebrated case of exorbitant jurisdiction in Europe was an Austrian court's proceeding *in absentia* in a paternity suit against the French skier Jean-Claude Killy. In this case, personal jurisdiction was based on the seizure of the defendant's undergarment, which he had left behind in an Austrian hotel room.[72] Insofar as Killy's alleged acts while in

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against a French defendant be pursued in a French court to be recognized, even when the cause of action occurs in a foreign country with a foreign plaintiff. Curiously, there is no provision for pure international jurisdiction in the citizenship context. Thus, there is no express jurisdiction under the French civil code for a non-French plaintiff to sue a non-French defendant in the French courts, even when the cause of action and all events related to it arise in France. An interesting argument for such French jurisdiction for an American in France with such a cause of action against, say, a Canadian, would be the principle of reciprocity embodied in Article 11, and the existence of jurisdiction in the American courts, based on power, for a French citizen whose cause of action arises in the US. Article 14 is drafted permissively. It does not prohibit the French from suing on a foreign cause of action in the foreign court. Article 11 grants the same civil rights to a foreigner in France as the French citizen would have in that foreigner's country of citizenship.

[70] Professeur Horatia Muir-Watt, le Faculté du Droit, Université de Paris I Panthéon-Sorbonne, personal communication. *See also*, Theodore Baty, The Interconnection of Nationality and Domicile, 13 ILL L. REV. 363 (1919).

[71] *See* C. CIV. art. 15 & 638 (Belg.); C. CIV. ART. 246(2), (3) (Den.) Denmark, art. 246(2), (3); art. 23 ZPO (F.R.G.); art. 126(3), 127 Rv. (Neth.).

[72] So *cause célèbre*, in fact, that it inspired the following verse penned by David D. Siegel:

Why the gasping? Why so waxen?
What's the matter, Anglo-Saxon?
Don't you like our theoretical advance?
Don't you find cerebral pleasure
In the comprehensive measure
Of the things our law can do with someone's pants?

If our courts in sober session
Happen into the possession
Of a pair of drawers whose occupant fled fast,
We indulge the helpful fiction
That we've also jurisdiction
Over him whose fleeting form they covered last.

It is really a refinement
That we discharge this assignment
Only after he who owns the shorts has gone.
We would deem it much to bold of
Any sheriff to take hold of
Someone's garment while the poor chap has it on.

Take advantage of this power.
Should your marriage, say, go sour,
You could sue your wife in any land you please:
In advance, while things are peaceful,
Just come tour with a valise full
Of her petticoats and female B.V.D.'s.

But we warn you, common lawyer,
You will find here no enjoyer
Of poor puns which cast aspersions on our Bar.
Don't come tongue-in-cheek observing
That you find our law unnerving
Or that "seizing briefs is stretching things too far."

If you're threatened by our action
You may find some satisfaction
In advice we urge that tourists keep in mind:
No amusement will you lack here;
Just be sure that when you pack here
You have not left any underwear behind.

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Austria gave rise to and were directly related to the paternity suit,[73] the Austrian court might have exercised jurisdiction inoffensively (under current American standards) on the basis of the contacts. But in the US, where such exorbitant bases of jurisdiction are not allowed, the existence of an inoffensive and permissible basis of jurisdiction that overlaps an offensive and impermissible one does not justify treating the impermissible one as if it were good.[74]

The problem with exorbitant bases of jurisdiction is that they are the Rodney Dangerfields of jurisdiction doctrine – they get no respect. Getting a judgment on an exorbitant basis is one thing, but enforcement of a judgment so obtained is another matter. If the target has assets in the forum state, enforcement is straightforward. However, most courts have been unwilling to honor or enforce judgments obtained under another forum's exorbitant jurisdiction, and suit on such a judgment will fail. Here in the U.S., a judgment obtained in France by the hypothetical vacationing Frenchman would be ruled void under basic concepts of fairness and due process.

After World War II, convergence of European law was seen as a necessity to prevent war from becoming a continuous occurrence throughout Europe.[75] The Council of Europe, a

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David D. Siegel, *Pack Up Your Troubles – Carefully*, N. Y. L. J., March 19, 1968, at 4.

[73] Alas, the puns are not mine, but the work of Cox, *supra* note 63, at 1184 n. 28.

[74] Shaffer v. Heitner, 433 U.S. 186, 208-09 (1977) (applying this principle to *quasi in rem* jurisdiction).

[75] This is readily deduced from language of European treaties of the time. *See*, Statute of the Council of Europe, 5 May 1949, (visited Mar. 29, 2002) <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm> (preamble states tits members are "[c]onvinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation;...") [hereinafter COE Statute]; Treaty of Paris, 18 April 1951, reprinted in RUDDEN & WYATT, BASIC COMMUNITY LAWS 3 (1980), Preamble, (preamble also states that its signatory members view the issue while "[c]onsidering that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it,..."); Treaty

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policy advisory body, was formed in 1949 with an original membership of ten countries.[76] The European Economic Community, a legal, economic entity created by the Treaty of Rome, followed in 1957.[77] On the theory that if you federalize the wallet, the heart will follow, six countries[78] became signatories to the Treaty of Rome, and members of the fledgling EEC, whose broad goals were free trade, a common customs union, a common market, and an economic community with common policies.

Achieving these goals was frustrated by the frequent unenforceability of judgments emanating from the courts of the same foreign states whose markets the EEC was striving to open and unify. The EEC addressed this problem in sweeping fashion in 1968 with the signing of the Brussels Convention.

The Brussels Convention and the U.S. Initiated Hague Conference Proposal:

The principal aim of the Brussels Convention[79] was assured and automatic mutual enforcement of judgments within the treaty zone. It is often referred to as *la convention double*, because the only way to reach agreement on automatic recognition of judgments emanating from other member states was to reach agreement also on when other member states could

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Establishing the European Economic Community, Rome, 25 March 1957, 298 U.N.T.S. 11, reprinted in RUDDEN & WYATT, BASIC COMMUNITY LAWS 20 (1980) (preamble states that its members are "[a]nxious to strengthen the unity of their economies and to ensure their harmonious development ...") [hereinafter EEC Treaty].

[76] *See Id.* at note 74, COE (the Council as of March 29, 2002, numbers 41 member states; it can not make law directly).

[77] *See Id.* at RUDDEN & WYATT 20.

[78] *See Id.*, EEC Treaty (Belgium, France, Federal Republic of Germany, Italy, Luxembourg, and The Netherlands; there are 15 member states today).

[79] Brussels Convention, 27 Sept., 1968, (visited Mar. 29, 002)<http://www.curia.eu.int/common/recdoc/convention/-en/c-textes/brux-idx.htm>.

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entertain an action that would require their enforcement. Thus, uniform rules of jurisdiction were included in this double convention. In some respects, the provision for automatic recognition of judgments operates like a Full Faith and Credit Clause, while the uniform rules of jurisdiction operate like the guarantees of the Due Process Clause. The fundamental differences stemmed from the clean slate the drafters of the Convention wrote upon and their approach to their task from the perspective of the civil law tradition. That is, they were unencumbered by American judicial notions of territorial power. The result was a clean, rules-based approach to jurisdictional issues that makes their outcome highly predictable, with only minor skirmishing having occurred at the borders.[80]

Far from foreign, the general provisions elucidate the Roman doctrine of that old Justinian maxim, *actor forum rei sequitur*.[81] The Convention next declares exorbitant bases of jurisdiction inapplicable within the zone of the Convention.[82] The general rule is then made subject to special rules of

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[80] As an example, one such skirmish occurred over the tort provisions of Art. 5(3), as to what is meant by the phrase "the place where the harmful event occurred." The European courts have given rulings that support an effects doctrine, so, for example, where river pollution from upstream in France led to a harmful effect downstream in the Netherlands, the harmed party was able to maintain suit in the Netherlands. Case No. 21/76, Handelswerkerig G.J. Bier B.V. v. Mines de Potasse D'Alsace S.A, Case No. 21/76, 1976 E.C.R. 1735. A case like *World Wide Volkswagen*, 444 U.S. 286 (1980), has never been decided in this context, and the issue would hinge on the interpretation of the phrase. In any event, *World Wide Volkswagen*, had it involved an auto purchased in England, and an accident in France while its passengers were on the way to Italy, rather than involving New York, Oklahoma, and Arizona respectively, would have come out the other way on the principle of allowing joinder of all defendants in a forum in which any one defendant is domiciled. *See* source cited *supra* note 94.

[81] *See* source cited *supra* 64 at Title II, Section 1, art. 2 ("subject to the provisions of this convention, persons domiciled in a Contracting State shall . . . be sued in the courts of that State").

[82] *Id.* at art. 3.

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jurisdiction allowing suit in other than the defendant's forum. For example, in contract, jurisdiction may be had in the place where performance was to occur,[83] and in tort, in the place where the harmful event occurred.[84]

More foreign in concept to American observers are special jurisdictional provisions for certain classes of disadvantaged plaintiffs. In particular, insurance policy-holders and consumers bound by consumer contracts are presumed to have unequal bargaining power and resources for recourse; both are given jurisdiction in either the domicile of the defendant or the place where they themselves are domiciled.[85]

It is this sort of provision that constitutional jurisdictionalists are often most philosophically, and adamantly opposed to, citing the risk of abuses of defendants' due process rights.[86] That sort of analysis fails to consider the interests of all parties, give recognition to the undeniable fact of inferior bargaining power and resources among certain classes of parties, or acknowledge that uncertainty and unpredictability fail to serve defendants' interests. What's more, in the international context, the very same exorbitant bases of jurisdiction the Brussels Convention eliminated among the treaty countries are specifically identified as the risks defendants face were the US to adopt such a convention and take jurisdiction out of the constitutional realm into sub-constitutional regulation.[87] That, frankly, is a disingenuous argument. As it stands today, US defendants are subject to these exorbitant bases of foreign jurisdiction. Were the US to

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[83] *Id.* at art. 5(1).

[84] *Id.* at art. 5(3).

[85] *Id.* at Section 3, art. 8(1), (2) in the case of insurance; *id.* Section 4, Art. 14 in the case of consumer contracts (defined in Art. 13 as "a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession").

[86] *See* Cox, *supra* note 63; *See also* Russell J. Weintraub, *Negotiating the Tort Long-Arm Provisions of the Judgments Convention*, 61 ALB. L. REV. 1269 (1998).

[87] *Cox*, *supra* note 63, at 1181-86.

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adopt the treaty, as it appears likely to emerge from the Hague Conference, that would no longer be the case.[88] Even further, constitutional jurisdictionalists join reformers alike in condemning the really bad Supreme Court decisions in the body of case law, such as *World-Wide Volkswagen*[89] and the denial of "jurisdiction where there is blood on the ground,"[90] and *Burnham v. Superior Court*[91] and the approval of tag jurisdiction.[92] Having acknowledged the dysfunctional state of the common law constitutional jurisdiction doctrine, though, there is little put forward by way of a solution except a sort of blind faith that in the end, the Court will finally get it right.[93]

The US is, of course, traditionally a common law country. It has also become increasingly codified over the years, especially through the later half of the twentieth century. To say that it remains purely a common law country would be slightly naive. However, old traditions die hard, and a philosophical attachment to the common law may provide some motivation to protect it from further erosion by code. The Supreme Court remains the final arbiter of the Constitution, of course. Professor Cox is fully correct in the assertion that constitutional rights must trump contrary treaty provisions.[94] To that end, the Court will always retain a role of enforcement of constitutional protections, against their infringement in the implementation of the treaty power, as well as the law making power, of the other branches of government. Where I disagree, is with an analysis that concludes that only the judiciary is equipped to determine constitutional limits with regard to jurisdiction, and by implied corollary that a legislated rules-

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[88] *See* source cited *supra* note 61, at art. 18(2).
[89] 444 U.S. 286, 294 (1980).
[90] Cox, *supra* note 63, at 1179.
[91] 495 US 604 (1989) (personal jurisdiction based on physical presence constitutional where defendant's presence was solely transient in nature).
[92] Cox, *supra* note 63, at 1179.
[93] *Id.* at 1191 ("I certainly am not a fan . . . These cases seem to be bad law, which I would gladly welcome the Court to overturn.")
[94] *Id.* at 1177-78.

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based approach such as that embodied in the Brussels Convention, or the Hague Convention Proposal, or as I propose here for interstate jurisdiction, would de facto be such a contrary approach.[95] Constitutional protections do not hinge on the choice of whether to approach a problem with common law principles or with code. Numerous civil law based democracies are quite successful in protecting the interests of their communities in the ways those communities want to be protected. The most effective approach to the art of the soluble is the flexibility to consider and apply different approaches when the current method proves or becomes ineffective in the face of changing circumstances. The US has both common law and statutory law in its toolkit, and it should use all the available tools.

Yet another factor in adopting rules such as those in the proposed draft of the Hague Convention is what the US would be giving up. In exchange for concessions from other signatories protecting US defendants against their traditional exorbitant jurisdictional bases, the US would have to give up its exorbitant bases of jurisdiction as against those nation states' defendants. As a model for simultaneous jurisdictional reform at home, it would mean abandoning certain unjustified bases for asserting general jurisdiction entirely. This would mean abandoning attachment jurisdiction, transient or "tag" jurisdiction, and "doing business" as a basis for general jurisdiction, as well as abandoning the doctrine of *forum non conveniens*, and the fall of the last standing prong of *Pennoyer*.[96] The Hague Convention focuses appropriate

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[95] *Id.* at 1178 (arguing "that the judiciary is peculiarly empowered to protect against . . . unreasonable assertions of personal jurisdiction").

[96] *Pennoyer v. Neff*, 95 U.S. 714 (1877). The last leg being the implied doctrine that physical presence is always a sufficient condition for the exercise of personal jurisdiction – the source of tag jurisdiction. Art. 3(1) of the Hague Conference draft proposal provides for jurisdiction in the defendant's forum, defining it as the "State where that defendant is habitually resident." *See* source cited *supra* note 61. The position of the US delegation is that the term "habitually resident," while well defined with

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jurisdiction on specific jurisdictional bases in a rules-based approach, as does the Brussels convention, and provides adequate jurisdictional reach without resorting to general jurisdiction on but extremely thin contacts.

It would be a mistake though to equate the negotiations at The Hague as a wholesale adoption of the terms of the Brussels Convention. A primary difference is that it is a mixed convention rather than a pure double convention. The Brussels Convention requires a forum to assume jurisdiction over a list of required bases. Any basis not on the list is prohibited. Other forums in the treaty zone are required to enforce a judgement when the jurisdiction is assumed on a required basis. The current draft of the Hague Conference looks different. There is a list of required bases, but a limited form of *forum non conveniens* would allow that court to suspend, though not refuse, the assumption of jurisdiction, if another more appropriate court exists in a forum that would have jurisdiction under the treaty.[97] If that second court refused to exercise its jurisdiction, though, the first court to hear the matter would be required to proceed on the merits.[98] When jurisdiction rests on a required basis, other treaty courts would be required to enforce the resulting judgement. There is also a list of bases of jurisdiction in which courts would be prohibited from assuming jurisdiction.[99] But departing from the Brussels Convention is

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additional parameters in the case of corporate entities, needs further enhancement in the case of natural persons. The intent is evident, though, to eliminate the sufficiency of mere presence. By analogy, it looks a lot like domicile. The corporate enhancements, articulated in Article 3(2) of The Hague Convention, are "a) where it has its statutory seat, b) under whose law it was incorporated or formed, c) where it has its central administration, or d) where it has its principal place of business." *See* source cited *supra* note 58. Thus, where a defendant is present in the plaintiff's forum, but domiciled in another, and where the plaintiff's forum does not have jurisdiction from some other provision of the treaty, the defendant should not be amenable to suit in that forum.

[97] *See* source cited *supra* note 61, at art. 22.

[98] *Id.*

[99] *See id.*, at art. 18.

that anything not on one of the two lists would fall into a middle gray zone of permitted bases, where a court would be permitted to assume jurisdiction based on the national law of that forum.[100] The provision for permitted bases, as well as the limited *forum non conveniens*, leaves a gray zone of jurisdictional uncertainty, but addresses some of the concerns surrounding the integration of mandatory assumption of jurisdiction into the US traditions of judicial discretion, as well as providing a possible means for working around insurmountable incompatibilities in the laws of the Convention member states.

The details of The Hague proposal will likely shift in considerable ways by the time the current draft becomes a proposal sent to the legislatures and parliaments of the participating nations, so a detailed analysis of the current draft would be beyond the scope or purpose of this paper. Indeed, one issue the delegations to the conference are currently considering, and one that must be resolved, is the issue of cyberspace and e-commerce.

It is safe to say, however, that it will resemble the Brussels Convention in significant ways, insofar as it will be a strict rules based approach to specific jurisdiction while moving away from general jurisdiction that is based on thin contacts. The Hague proposal will contain some significant compromises designed to conform to U.S. Constitutional requirements and assuage the political fears of those who see in such treaties a partial loss of sovereignty.[101]

My purpose here is to argue for a more sweeping,

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[100] *See id.*, at art. 17.

[101] Such a view is, in the final analysis, merely isolationist, and reflects a view that sovereign self-assurance comes only through conflict, never in cooperation. The fact is we live in a world of ever increasing economic transnationalism and globalism. Acknowledging that, and working within those parameters to enhance judicial and jurisdictional efficiency and certainty does not equate to a loss of sovereignty, and should not diminish traditional sovereign powers, but enhance sovereign viability through enhanced economic strength through cooperation.

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universal harmonization of rules of jurisdiction by proposing that when the Hague Conference comes to the US Senate for ratification, which many have argued it surely must in one form or another,[102] that Congress pick up the ball and run with it, extending the rules for international harmonization to federal and interstate jurisdiction as well. Such a national/international harmonization of US jurisdiction doctrine makes more and more sense as we become economically enmeshed deeper and deeper into cyberspace.

Cyber-Paradise Revisited:

The Yahoo! cases described in the introductory paragraphs to this article present a particularly difficult quandary.[103] More than a mere jurisdictional dispute, they appear to pit the Holy Grail of the US Constitution, the First Amendment protection of freedom of expression, against a restriction of hate-speech considered to be equally worthy in Europe, a continent which experienced first hand mass crimes against humanity in its recent past. Andrew Strauss notes that, in a case pitting the First Amendment against an anti-hate-speech prosecution, "[u]nder the American dualist approach to the relationship between domestic and international law, the constitutional standards would prevail in US Courts."[104] That

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[102] CLERMONT, *supra* note 14, at 103 (noting the untenable position the US is currently in as an outsider to the Brussels Convention is a strong impetus to negotiate a treaty – e.g., an American judgment against the Frenchman based on our exorbitant jurisdiction would not be enforceable anywhere in Europe, but the Frenchman's similar judgment against the American based on French exorbitant jurisdiction would be enforceable against the American's assets in any of the Brussels Convention member states, such as England, Germany, Denmark, and so on).

[103] *See* discussion *supra* Historical Overview: Part I.

[104] Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the US Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1265 (1998).

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should certainly be the case were the US asked to participate in such a prosecution. However, it was Yahoo! that sought the American jurisdiction, not the French groups seeking to keep the hate-speech out of France. It would be stretching the State Action Doctrine to the breaking point to presume that the jurisdictional hearing in *Yahoo! II*[105] was sufficient to invoke it. Instead, the district court found jurisdiction based on forum directed contacts in the prior French case, *Yahoo! I*.[106] This rationale is deeply flawed. The French groups' use of the mail and process service functions was solely as required to legally address Yahoo!'s actions directed toward France. Were Yahoo! directing those contacts – the offending speech – only at France, and nowhere else, this court's analysis would have to reach the same result, that US jurisdiction existed, thus likely invoking the state action doctrine and First Amendment protection. This is a nonsensical result, as it imposes US law on any foreign nation that does business with US corporations.

How might this case come out under the proposed Hague Convention? Well, it might not apply, of course, which is the principal reason this case is so problematic. Not only is it problematic now, but the Convention might not resolve anything in a case like this. That is because it is not technically a case in private international law. Although the plaintiffs in the French case were private parties, they were sued under provisions of the French Penal Code for a criminal offense. It is not at all clear whether this case would be bound by the terms of either the proposed Hague Convention, or, were the US a signatory, the Brussels Convention.[107]

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[105] La Ligue Contre le Racisme et l'Antisémitisme – LICRA, et al c. Yahoo!, T.G.I. Paris, Ordonnance de Référé du 20 Nov. 2000 (visited Mar. 29, 2002) <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>.

[106] Yahoo! v. La Ligue Contre le Racisme et l'Antisémitisme, et al, 145 F. Supp. 2d 1168, 1176-78 (N.D.Cal. 2001) (finding that the execution of service of process in the US through the US Marshal and the utilization of the US Mail for cease and desist letters were sufficient to invoke the Purposeful Availment Doctrine and find specific jurisdiction).

[107] Both conventions address their substantive scope in their first article, and

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Even were it not technically bound under the Convention, though, it is similar enough to a comparable private matter that comity might cause the courts to follow the Convention rules. Were a talented and persuasive litigator able to convince the courts that it is really a private matter in penal clothing, rather than the other way around, one could be reasonably certain that jurisdiction would be found where the harmful effect was felt, in France. In effect, Yahoo! would find itself bound by the order of the Paris court without the recourse available to it to have the order blocked in the ninth circuit district court.

But what of the first hypothetical variation to the case? What if, instead of the Internet titan Yahoo!, it was a small business person without the economic ability to resist the action in France? The outcome under the present draft of the Convention would be the same. Precisely this sort of small business e-commerce situation has acted as a new complexity and delay in the negotiations, and has sent ripples through the Brussels Convention as well, because of both Conventions' special treatment of disadvantaged plaintiffs. The two scenarios should not necessarily have the same result since they are not the same in terms of relative fairness and convenience to the defendant. It is apparent that some variation is needed along one of several approaches:

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contain a specific list of what the convention shall not apply to. Neither makes any direct reference to criminal proceedings, presumably because they are conventions expressly concerning "civil and commercial matters." The application to a case like Yahoo! I would hinge on interpretations of terms. *See See* La Ligue Contre le Racisme et l'Antisémitisme – LICRA, et al c. Yahoo!, T.G.I. Paris, Ordonnance de Référé du 20 nov. 2000 (visited Mar. 29, 2002) <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>. It is a case against a corporation, involving an injunction against an activity and economic penalties with no incarceration, litigated by private parties. It looks and smells like a civil matter in every regard except the statutory basis in the penal code. In theory, you could have the identical situation under a strict statutory tort and it would clearly fall under the authority of either Convention.

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1. Some form of reciprocal special treatment of disadvantaged defendants. The problem with this approach, generally, is that it might lead to controversies where there is no appropriate forum.

2. Exclude e-commerce from the provisions of the Convention. The problem with this approach is obvious.[108]

3. Informed consent in transactions, where operators would opt out if they do not wish to be amenable to suit in the other party's jurisdiction. The problem here lies in the geographic uncertainty of cyberspace.

4. Some form of alternative dispute resolution. The problem here is that this approach delves beyond the question of mere jurisdiction into the question of what forms are appropriate for resolution of conflict, thereby presenting an additional complexity for negotiations, as well as the possibility that adoption of a new jurisdiction regime might be much more difficult.

The delegations have discussed the e-commerce issue, particularly in regard to the third and fourth approaches.[109] While it has raised a new issue, that issue is not insurmountable. The likely result will add some complexity to the rules and burdens to cyberspace operators, and might look something like

[108] The rapid increase in the importance of e-commerce would render such a Convention a rapidly diminishing treaty that would not resolve a large portion of the problem it was tasked to address.

[109] Hague Conference on Private International Law, Preliminary Document No 12, August 2000, for the attention of the Nineteenth Sess., June 2001 (visited Mar. 29, 2002) <ftp://hcch.net/doc/jdgmpd12.doc>.

this: In the case of the hypothetical Oregon antique dealer, a requirement to query those requesting access to the e-commerce site for their location. There would still be special treatment for disadvantaged plaintiffs. Assuming the other party is such a disadvantaged entity, say a consumer, the Oregon dealer would have to decline to do business with that person to avoid amenability to suit in that person's jurisdiction. If the other party gives a false location so as to secure a transaction, that person would lose their status as a disadvantaged plaintiff for purposes of that transaction.[110] As a solution, it amounts to consent to jurisdiction as a requirement of doing business. From one point of view, this is far from ideal, as it would likely inhibit activity by small businesses on the web, and make those businesses less competitive and less viable. On the other hand, no better solution is eminently forthcoming, though some form of alternative dispute resolution remains a possibility,[111] and as a solution, it puts these businesses in a better position than many of them are in now – one of jurisdictional certainty, and with the ability to limit one's amenability to suit to predetermined jurisdictions.

And what of the second hypothetical variation to the case? What if instead of an Internet portal auctioning Nazi memorabilia it were an Internet based securities offering? Should another nation's laws be allowed to define terms under which securities might be offered if they are to be offered through cyberspace? Does this variation really change anything from the present situation? In fact, this variation looks quite different from the others. Securities offerings, after all, are highly regulated activities in the United States, and are not likely to present the sort of conflict as that presented in the Yahoo! cases. This is because securities dealers, issuers, and

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[110] *Id.*

[111] In the context of revisions to the Brussels Convention, "the European Parliament was emphatic that there must be no change in the rules of consumer protection except for the purpose of providing alternative methods of dispute resolution, including alternative on-line methods." *Id.* at 8.

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underwriters already qualify each purchaser in accordance with applicable securities laws in a way wholly absent in the Yahoo! auction transactions. Nevertheless, in the physical world where securities offerings are made available to individuals and entities who are lawfully qualified to receive them, and the objective of securities laws is to protect the investing public against fraud and inadequate disclosure,[112] regulation has not kept up with the internationalization of the securities markets. In this respect, cyberspace presents some different considerations than does the physical world and has been addressed effectively with the Wit Capital No Action Letter,[113] which describes procedures for isolating specific web pages of an offering so as to effectively restrict certain components of an offer to sell securities in accordance with all applicable securities laws to only those qualified to lawfully purchase them, and similarly only to those located where the offering is available and in compliance with local securities laws.[114]

Thus, it is evident that jurisdiction over conflicts arising out of securities offerings in cyberspace would be subject to the terms of the proposed Hague Convention, but it appears quite unlikely that a conflict such as the Yahoo! cases would arise – assuming an otherwise legitimate offering executed in compliance with the existing laws to which such an offering outside of cyberspace, and under the current jurisdiction regime, would already be subject. That is, the Convention rules would

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[112] 15 U.S.C. 77c-g, j (delivery, sale, or offer to sell securities through interstate commerce unlawful without filing of registration statement and full disclosure via a prospectus); 15 U.S.C. 77q (use of fraudulent means unlawful in the sale of, or offer to sell, securities); 15 U.S.C. 78m (requiring periodic reporting and disclosures); 17 C.F.R. 240.10b-5 (employment of manipulative and deceptive devices unlawful in the sale or purchase of securities). See generally, Securities Act of 1933, 15 U.S.C. §77a, et seq.; Securities Exchange Act of 1934, 15 U.S.C. §78a, et seq.

[113] Wit Capital Corp., SEC No-Action Letter, [Transfer Binder 1999] Fed. Sec. L. Rep. (CCH) ¶ 77,577 at 78,911 (July 14, 1999).

[114] Id. at 3 (prospectus and prospectus link pages not accessible until completion of the registration page).

present no foreseeable additional burden, while bringing conflict arising from a legally flawed offering under the umbrella of greater jurisdictional certainty.

Conclusions:

Regardless of how the *Yahoo*! cases might have come out under the Hague Convention, they were decided without it. What happens next? An appeal is promised in the US 9th circuit. For the sake of argument, though, let's assume the district court decision will be upheld on appeal, as it likely will be, and the Supreme Court will refuse certiorari. The French groups have a French judgment, and Yahoo! has an American judgment. The two are mutually incompatible. As has been mentioned, Yahoo! is a transnational corporation, and carries on numerous activities throughout Europe. It surely has considerable assets there, whether in infrastructure or bank accounts. In the meantime, Yahoo! has been racking up 100,000 FrF per day in fines under *Yahoo! I*.[115] So the French plaintiffs will have to decide whether to petition the Paris court, and perhaps other courts in Europe, to go ahead and enforce the judgment. Then those courts will have to weigh the 6issues and decide whether to reap the fruits of contested, exorbitant jurisdiction. Given recent European boldness toward the US, particularly in matters related to significant US corporations,[116] one might reasonably expect the Paris court to begin seizing assets the morning after the Supreme Court refuses to hear the case.

The goal of this paper has been to present a persuasive

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[115] Approximately $14,000 per day. *See* La Ligue Contre le Racisme et l'Antisémitisme – LICRA, et al c. Yahoo!, T.G.I. Paris, Ordonnance de Référé du 20 Nov. 2000 (visited Mar. 29, 2002) <http://www.juriscom.net/txt/-jurisfr/cti/tgiparis20001120.pdf>.

[116] As an example, the change in posture is evidenced by Europe's passing on the corporate merger of Boeing and McDonnell Douglas, contrasted with Europe's fairly bold block of the merger of General Electric and Honeywell.

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argument for jointly harmonizing the rules of interstate and international jurisdiction through sub-constitutional Congressional regulation. This paper has argued for the need for such harmonization through the example of jurisdictional problems associated with the rise of cyberspace in daily transactions. This paper developed the efficacy of the rules-based approach after demonstrating problems with the fact-specific approach. This paper then presented the ongoing negotiations for the proposed Hague Conference as a vehicle for overall reform of the transnational jurisdictional system. This paper's purpose has not been so much to argue for any particular set of rules, per se, so much as a rules-based approach based on both fairness to all the parties and the need to allocate authority among competing sovereigns. The Hague proposal is not perfect in form, nor would it be perfect in function, but it would represent a significant improvement in jurisdictional certainty and predictability compared to the present judicial *ad-hoc* approach. Neither has this paper proposed eliminating the judiciary from the implementation of jurisdictional doctrine entirely. Rather, this paper envisions a balanced system, where authority is Congressionally regulated, and the courts remain the ultimate arbiters of the fairness of that authority as it is exercised. Extending the internationally negotiated rules of the Hague proposal is the pragmatic approach to reform on the interstate level, as getting Congress to act on interstate regulation of jurisdiction by itself would be extremely difficult at best, while encouraging a Congress already considering international reform to broaden that reform to encompass interstate reform as well, is a much more realistic goal.

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