

Pennoyer Was Right

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Pennoyer v. Neff has a bad rap. As an original matter, Pennoyer is legally correct. Compared to current doctrine, it offers a more coherent and attractive way to think about personal jurisdiction and interstate relations generally.

To wit: The Constitution imposes no direct limits on personal jurisdiction. Jurisdiction isn't a matter of federal law, but of general law—that unwritten law, including much of the English common law and the customary law of nations, that formed the basis of the American legal system. Founding-era states were free to override that law and to exercise more expansive jurisdiction. But if they did, their judgments wouldn't be recognized elsewhere, in other states or in federal courts—any more than if they'd tried to redraw their borders.

As Pennoyer saw, the Fourteenth Amendment changed things by enabling direct federal review of state judgments, rather than making parties wait to challenge them at the recognition stage. It created a federal question of what had been a general one: whether a judgment was issued with jurisdiction, full stop, such that the deprivation of property or liberty it ordered would be done with due process of law.

Reviving Pennoyer would make modern doctrine make more sense. As general-law principles, not constitutional decrees, jurisdictional doctrines could be adjusted by international treaty—or overridden through Congress's enumerated powers. The Due Process Clause gives these rules teeth without determining their content, leaving space for federal rules to govern our federal system.

In the meantime, courts facing jurisdictional questions should avoid pitched battles between “sovereignty” and “liberty,” looking instead to current

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conventions of general and international law. Pennoyer's reasoning can be right without International Shoe's outcome being wrong; international law and American practice might just be different now than they were in 1878 or 1945.

But if not, at least we'll be looking in the right place. General law may not be much, but it's something: the conventional settlement of the problems of political authority at the root of any theory of personal jurisdiction. Recovering those conventions is not only useful for its own sake, but a step toward appreciating our deep dependence on shared traditions of general law.

INTRODUCTION.....	1251
I. THE MODEL OF SOVEREIGN BORDERS	1255
A. Sovereign Borders and Constitutional Text.....	1256
B. Sovereign Borders and Modern Doctrine	1257
C. Sovereign Borders and General Law	1260
1. <i>General Law at the Founding</i>	1262
2. <i>General Law and Border Disputes</i>	1265
3. <i>General Law Today</i>	1268
II. PERSONAL JURISDICTION BEFORE <i>PENNOYER</i>	1269
A. Foreign Judgments.....	1270
B. Jurisdiction in State Court.....	1273
C. Jurisdiction in Federal Court.....	1278
1. <i>General Principles</i>	1279
2. <i>Full Faith and Credit</i>	1280
3. <i>Federal-Question Review</i>	1282
D. Departures from General Law	1284
III. WHAT <i>PENNOYER</i> GOT RIGHT	1287
A. <i>Pennoyer</i> Without the Fourteenth Amendment	1289
1. <i>Jurisdiction over Persons</i>	1290
2. <i>Jurisdiction over Property</i>	1291
3. <i>State Jurisdiction in Federal Court</i>	1293
B. The Fourteenth Amendment in Federal Court	1297
1. <i>Due Process and Jurisdiction</i>	1298
a. <i>Jurisdiction, Personal and Subject-Matter</i>	1299
b. <i>Contemporary Readings</i>	1300
c. <i>Jurisdiction Under State Law</i>	1301
2. <i>Pennoyer's Puzzles, Explained</i>	1302
a. <i>Timing</i>	1302
b. <i>Interests</i>	1303
c. <i>Waiver</i>	1305
d. <i>Arbitrariness</i>	1306
C. The Fourteenth Amendment in State Court	1306
1. <i>Due Process and Appellate Review</i>	1306
2. <i>Appellate Review and Judicial Deference</i>	1307

3. <i>Judicial Deference in State Court</i>	1309
a. <i>Reception</i>	1309
b. <i>Resistance and Reconciliation</i>	1311
IV. FROM <i>PENNOYER</i> TO THE PRESENT DAY	1313
A. The Decline of General Law	1315
B. Implications for Congress	1316
C. Implications for Courts	1318
1. <i>Easy Answers</i>	1319
2. <i>Harder Questions</i>	1321
3. <i>Refocusing on Sovereignty</i>	1323
CONCLUSION	1326

Introduction

This Article addresses the “central mystery”¹ of *Pennoyer v. Neff*²: what does due process have to do with jurisdiction?³

Pennoyer is mysterious in more than one way. How do Fourteenth Amendment protections against the power of any state allocate power among particular states? Why would a guarantee of “liberty interest[s]”⁴ act “as an instrument of interstate federalism”⁵ Is it even worth having a “liberty” to be sued in California but not in Oregon?

As it happens, these questions were answered in *Pennoyer*, more or less correctly. And those answers may help us solve other legal puzzles—of procedure, of interstate relations, and of the nature of our federal system.

Today, *Pennoyer* has a bad rap. Every fall, it frustrates a new generation of law students, who revile it almost as much as their professors do. At best, it’s seen as a relic, long ago cast aside by *International Shoe v. Washington*.⁶ At worst, it’s dismissed as a nineteenth-century dogma or a *Lochner*⁷-era power grab. To its critics, *Pennoyer* is “unsupported,”⁸ “unsound,”⁹ or “dead

1. Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 38 (1990).

2. 95 U.S. 714 (1878).

3. See generally Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071 (1994) (suggesting that the answer is very little).

4. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

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

6. 326 U.S. 310 (1945).

7. See generally *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state labor laws under the Fourteenth Amendment).

8. Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1125 (1981).

9. Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 76 (1984).

wrong”;¹⁰ an “err[or]”¹¹ and a “misinterpretation”;¹² “anachronistic,” “spurious,” “shallowly reasoned and conceptually confused”;¹³ a decision that “arouses dismay and even despair.”¹⁴

That derision is a mistake. As an original matter, *Pennoyer* is legally correct. While its language may seem archaic, its reasoning shouldn’t. Compared to current doctrine, it offers a more coherent and attractive way to think about personal jurisdiction and about interstate relations generally.

To understand why, though, we first have to abandon what many see as the main holding of *Pennoyer*: that the Fourteenth Amendment’s Due Process Clause—“nor shall any State deprive any person of life, liberty, or property, without due process of law”¹⁵—imposes rules for personal jurisdiction. In fact, the Constitution imposes *no* direct limits on personal jurisdiction *at all*. Personal jurisdiction isn’t a matter of constitutional law, or even of federal law. Instead, it’s a matter of general law—that unwritten law, including much of the English common law and the customary law of nations, that formed the basis of the American legal system and that continues to govern unusual corners of the system today.¹⁶

As general law, jurisdiction is something on which different court systems can disagree, in much the same way that dictionary editors might disagree on questions of conventional usage. The Constitution takes no position on these disagreements; it takes the generally accepted practices as it finds them. It regulates personal jurisdiction not through *rules* but through *institutions*—declining to provide specific answers in favor of creating a neutral forum in which to ask the questions. Because that forum is federal, not state, it can disregard local views that appear to conflict with the general rule. And because the rule is general, not constitutional, Congress might potentially displace it by statute—providing federal rules to govern a federal system.

The Founding-era picture was as follows. In the time of the special appearance, personal jurisdiction mattered mostly for *recognition*. Instead of sending an attorney to a distant court, the best way to dispute jurisdiction was

10. Adrian M. Tocklin, *Pennoyer v. Neff: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75, 137 (1997).

11. Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 501 (1981) [hereinafter Whitten, *Part One*].

12. Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 840 (1981) [hereinafter Whitten, *Part Two*].

13. Conison, *supra* note 3, at 1076.

14. Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 271.

15. U.S. CONST. amend. XIV, § 1.

16. See generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

often to take a default and live to fight enforcement another day. A sovereign might claim exorbitant jurisdiction in its own courts, executing judgments on whatever property it could find. But when the winner tried to enforce the judgment elsewhere, the “foreign” judgment would be held to international standards—which were part of the law of nations, which was part of the general law.

For this purpose, other American states were just as “foreign” as distant countries. The Full Faith and Credit Clause,¹⁷ together with its implementing statute (the 1790 Act),¹⁸ didn’t alter the law of jurisdiction, which each state court could still enforce. Even the federal courts held states at a certain arm’s length, giving no more weight to laws asserting jurisdiction beyond state borders than to laws purporting to redraw those borders themselves. Before *Pennoyer*, though, these federal views held no special weight; the general law they applied wasn’t federal law, and conflicting state judgments couldn’t be appealed to federal court.

The Fourteenth Amendment remade this picture simply by changing the route for appeal. A judgment without jurisdiction was void; its execution took away property (or, less commonly, liberty) without due process of law. That turned the presence or absence of jurisdiction, full stop, into a matter of constitutional concern. Whether a state court *had* jurisdiction would be answered by other rules; in particular, by general law, of which the Supreme Court on writ of error could take its own view. So instead of waiting for collateral attack, defendants could now raise personal jurisdiction directly—and expect state courts to conform to the federal view of things, on pain of being reversed. Over time, the need for collateral attack faded away, as did the memory of the doctrine’s general-law roots. Personal jurisdiction became a subcategory of due process, a matter of “traditional notions of fair play and substantial justice”¹⁹ and a field of endless dispute.

Different commentators have all seen different pieces of this puzzle,²⁰ but no one seems to have fully assembled it, or to have explained why

17. U.S. CONST. art. IV, § 1.

18. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2012)).

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

20. See, e.g., Borchers, *supra* note 1, at 24, 88 (arguing that “due process” historically “did not connote any limitation on personal jurisdiction” and calling on the Court to “get out of the business of regulating personal jurisdiction”); Conison, *supra* note 3, at 1076 (arguing, on similar historical grounds, for excising due process from the law of jurisdiction); John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591, 595 (1995) (criticizing Borchers’s historical account and arguing that due process does impose territorial jurisdictional constraints); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 7 (2006) (arguing that “sovereignty principles,” and not due process, “are what limit a court’s jurisdiction” over foreign defendants); Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 499–500 (1987) [hereinafter Perdue, *Scandal*] (recounting the history of *Pennoyer*, and describing its reliance

Pennoyer's solution was the logical response to the questions it faced. The traditional summary of *Pennoyer*, that the Fourteenth Amendment simply included rules of personal jurisdiction as “part of the constitutional mandate,”²¹ is widely (and correctly) viewed as ahistorical.²² In its place has emerged a wilderness of theories—that personal jurisdiction is really governed by substantive due process,²³ or individual fairness,²⁴ or the Full Faith and Credit Clause,²⁵ or Lockean notions of consent,²⁶ or federal common law.²⁷ Those who emphasize *Pennoyer*'s dependence on general law generally see this as a strike *against* the doctrine, a reason to “decouple the personal jurisdiction analysis from the Constitution altogether.”²⁸

Yet reviving *Pennoyer* does more than correct the historical record. It also serves a pressing modern need. If anything is as unpopular among procedure scholars as *Pennoyer*, it's the Supreme Court's decisions since

on due process as “startling”); Wendy Collins Perdue, *What's “Sovereignty” Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 731–32 (2012) [hereinafter Perdue, *Sovereignty*] (presenting a more sophisticated theory of *Pennoyer*, under which due process acts as a “hook” to raise other challenges in state and federal court); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 415 (1995) (arguing that international law, of its own force, constrains domestic jurisdictional law); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 852 (1989) (portraying the law of personal jurisdiction as federal common law); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 264 (2004) (same); Whitten, *Part One*, *supra* note 11, at 501 (arguing that *Pennoyer*'s approach to due process was a “doctrinal error”).

21. Oakley, *supra* note 20, at 685.

22. See, e.g., Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 704 (1983); Redish, *supra* note 8, at 1120–21; Whitten, *Part Two*, *supra* note 12, at 818.

23. See, e.g., Jacob Kreutzer, *Incorporating Personal Jurisdiction*, 119 PENN ST. L. REV. 211 (2014); see also Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEXAS L. REV. 689, 694 (1987) (describing “a due process right not to be subjected to unjustified assertions of state court jurisdiction”); cf. Perdue, *Scandal*, *supra* note 20, at 508–09 (“Just as in Field's time, personal jurisdiction continues to be treated as a substantive due process right.”).

24. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (describing limits on personal jurisdiction as “a function of the individual liberty interest preserved by the Due Process Clause”); Abrams & Dimond, *supra* note 9, at 75–76; John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1029 (1983); Redish, *supra* note 8, at 1114; Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 487 (1984).

25. See Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 796 (1955); see also Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 564–70 (1991) (suggesting such an approach).

26. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–81 (2011) (plurality opinion). See generally Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257 (1990).

27. See generally Trangsrud, *supra* note 20; Weinstein, *supra* note 20.

28. Parrish, *supra* note 20, at 56; accord Borchers, *supra* note 1, at 105; Conison, *supra* note 3, at 1205. But see Perdue, *Sovereignty*, *supra* note 20, at 743 (suggesting a “doctrinal ‘reset’”).

Pennoyer.²⁹ The pitched battles of modern jurisdiction doctrine—between “sovereignty” and “liberty,” between “traditional notions” and “substantial justice”—haven’t been solved by staring harder at the words “due process of law.” Returning to jurisdiction’s general- and international-law origins might help. Precisely because jurisdiction is a topic in general law, and is only enforced through the vehicle of due process, its substance isn’t fixed in constitutional amber. If the rules need improving, Congress has power to improve them.

In the meantime, courts needn’t be left adrift. *Pennoyer*’s reasoning can be right without *International Shoe*’s outcome necessarily being wrong. International law might just be different now than it was in 1878, or even in 1945; so might the general law of which it’s a part. But either way, we’ll be looking in the right place. Courts don’t need to plumb the depths of due process or solve all of political philosophy to discern the rules that are currently in general application. General law may not be popular at the moment, but it offers something important: a conventional settlement of the problems of political authority that personal jurisdiction so obviously raises.

The idea of general law, and our sense of its place in our federal system, has fallen somewhat out of fashion since *Erie Railroad Co. v. Tompkins*.³⁰ So this Article begins with an extended illustration, focused on the law of state borders, of why the Constitution might have left important topics to be regulated in this way. It then describes how the same model illuminates the law of personal jurisdiction, resolving many of the confusions that followed *Pennoyer*. Finally, the Article suggests some implications of *Pennoyer*’s view for the present day, and in particular for the powers of Congress over personal jurisdiction.

Coming to a right understanding of *Pennoyer* tells us about much more than jurisdiction. It shows that, even in the post-*Erie* landscape, there’s still a vital role for general law. In the field of interstate relations, *Erie* doesn’t always demand deferring to state courts on the scope of their own authority. And if it did, so what? In this field, as in so many, the rejection of *Erie* is the beginning of wisdom.

I. The Model of Sovereign Borders

A century after *Pennoyer*, it may seem hard to believe that the Constitution left personal jurisdiction open, establishing a union of states without limiting the reach of their courts. Nearly eighty years after *Erie*, it may seem even stranger that the topic might have been left to general law—

29. See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 5 (2010) (offering a parade of pejoratives that scholars have used to describe current doctrine); Weinstein, *supra* note 20, at 171 (“[T]he one point of consensus is that Supreme Court personal jurisdiction doctrine is deeply confused.”).

30. 304 U.S. 64 (1938).

that “fallacy,”³¹ that “illusion,”³² that “brooding omnipresence in the sky.”³³ Yet the Constitution did just this on a much more fundamental topic: the law governing state borders. Jurisdictional rules might effectively limit state authority, but borders *are* limits on state authority; they represent *the* basic constraint on state governments that have different powers on different sides of the line.

Like personal jurisdiction, the law of sovereign borders restricts state authority without obvious warrant in the text. Thinking carefully about borders helps us see why the Constitution might fail to discuss fundamental features of our system; why it leaves those features as matters of general law; and why it regulates them, if at all, through the creation of federal institutions.

A. *Sovereign Borders and Constitutional Text*

The Constitution tells us that states *have* borders: they’re entities that “Places” can be “in,”³⁴ “where . . . Crimes” can be “committed within,”³⁵ “from which” criminals can “flee,”³⁶ and so on.³⁷ But it doesn’t tell us where those borders are, or even how to find them.

This could be a real problem for a federal union. Like foreign nations, states that agree on their borders can settle them by compact, albeit with Congress’s consent.³⁸ But also like foreign nations, states that disagree might come to blows, the way Ohio and the Michigan Territory fought the 1830s “Toledo War.”³⁹ (The Constitution forbids states to “engage in War,” but not if they’re “actually invaded”⁴⁰—such as if another state’s militia shows up on their land.)

In practice, American courts use an extensive set of rules to settle border disputes without bloodshed. For instance, if two states border on a river, their borders will shift along with slow, accretive changes in the river’s course, while “a sudden shoreline change known as avulsion . . . has no effect on boundary.”⁴¹ Usually the border doesn’t lie in the exact middle of the river, but “along the main downstream navigational channel, or thalweg,” which

31. *Id.* at 79.

32. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

33. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

34. U.S. CONST. art. III, § 2, cl. 3.

35. *Id.*

36. *Id.* art. IV, § 2, cl. 2.

37. See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 315–20 (1992) (describing the constitutional commitment to territorial states).

38. U.S. CONST. art. I, § 10, cl. 3.

39. See generally Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241, 264–65 (2014) (describing the Toledo border dispute).

40. U.S. CONST. art. I, § 10, cl. 3.

41. *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (internal quotation marks omitted).

each state can access; and should the channel shift around an island, a boundary “on one side of the island remains there, even though the main downstream navigational channel” is now on “the island’s other side.”⁴²

Where do these rules come from? Not from Congress, which hasn’t legislated on the topic (and maybe couldn’t).⁴³ Nor from interstate compacts, nor old treaties, nor the Constitution itself—which doesn’t talk about *any* of this, and explicitly brackets the subject.⁴⁴ Accretion and avulsion are nowhere in the text; general principles of “Our Federalism,”⁴⁵ like the states being “coequal sovereigns,”⁴⁶ won’t get us anything as specific as the thalweg rule.⁴⁷

Unfortunately, the one thing the Constitution does for state border disputes is guarantee that we’ll have to decide them. Article III authorizes federal jurisdiction over controversies likely to involve state borders—such as those “between two or more States,” “between Citizens of different States,” or “between Citizens of the same State claiming Lands under Grants of different States.”⁴⁸ But it doesn’t tell the federal courts what to do when such cases arise. So the Constitution is almost maximally unhelpful: it ensures that federal courts will hear questions that it takes great care not to answer.

B. Sovereign Borders and Modern Doctrine

Why would the Constitution have done this? From a modern perspective, it’s hard to say. As Justices Brandeis and Holmes told us, “[t]here is no federal general common law,”⁴⁹ no “brooding omnipresence in the sky.”⁵⁰ So, “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State,” whether “declared by its Legislature in a statute or by its highest court in a decision.”⁵¹ This produces a certain “layer-cake” picture of law, with the Constitution and federal law at the top, and state law (written and unwritten) at the bottom. (See Figure 1.) When the federal sources are silent, the

42. *Louisiana v. Mississippi*, 516 U.S. 22, 25 (1995).

43. See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1828–29 (2012) (suggesting that it couldn’t).

44. U.S. CONST. art. IV, § 3, cl. 2 (“[N]othing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

45. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

46. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1325 (1996) (“Because states are coequal sovereigns under the Constitution, neither party to an interstate dispute has legislative power to prescribe rules of decision binding upon the other.” (footnote omitted)).

47. See Sachs, *supra* note 43, at 1837.

48. U.S. CONST. art. III, § 2, cl. 1.

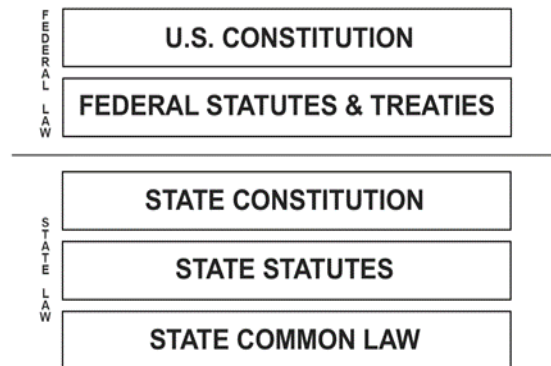
49. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (Brandeis, J., plurality opinion).

50. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

51. *Erie*, 304 U.S. at 78.

Supreme Court has told us, “state law must govern because there can *be* no other law.”⁵²

Figure 1: The Modern “Layer-Cake” View of Law



That picture doesn’t really work for state borders. If the good people of Michigan amend their constitution to announce that they’ve always owned Toledo, we wouldn’t take their word for it—though nothing in the Constitution’s text obviously stands in their way. (A ban on annexing new territory still assumes some law to determine the *old* territory.) The same would be true if they only voted to repeal the island exception to the thalweg rule. Many scholars might agree that “the Constitution implicitly strips the states of lawmaking power over this sort of question,”⁵³ but it’s not clear what part of the Constitution is doing this—or why the Constitution is involved at all. China and Japan have no constitution binding them together, but if they somehow submitted their territorial disputes to an American court, we’d have just as much reason to discount a Japanese statute as we would one from Michigan.

What is more, border questions necessarily involve more than one state. Federal courts regard as “rules of decision” the “laws of the several states . . . in cases where they apply”;⁵⁴ but the Rules of Decision Act doesn’t tell us where state laws apply, or *whose* laws apply where. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*,⁵⁵ the Court held that *Erie*’s prohibition “against such independent determinations by the federal courts[] extends to the field of conflict of laws,” so that federal courts should apply the “conflict of laws

52. *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965) (emphasis added).

53. Nelson, *supra* note 16, at 508.

54. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2012)).

55. 313 U.S. 487 (1941).

rules prevailing in the states in which they sit.”⁵⁶ At the same time, the Court has given states broad license to favor their own law whenever their interests are at stake.⁵⁷ So, in a border conflict between Michigan and Ohio, the modern doctrine in theory turns the interstate dispute into a race to the courthouse, with each federal court equally obliged to favor the state in which it sits.

This is absurd, of course, which is why the Court has never taken all its pronouncements in *Erie* or *Klaxon* at face value. Necessity being the mother of invention, the Court famously declared on the day it decided *Erie* that interstate disputes raise questions “of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.”⁵⁸ The same now goes for other areas of law—including “the rights and obligations of the United States,” “international disputes,” “admiralty cases,”⁵⁹ and perhaps questions of customary international law.⁶⁰ (See Figure 2.)

In these areas, the federal courts “have assumed the power to formulate and announce rules of federal law generally.”⁶¹ Like Acts of Congress, such rules preempt state law,⁶² provide federal-question jurisdiction,⁶³ and can be deliberately chosen to achieve policy goals.⁶⁴ That’s a neat trick, especially under a Constitution that vests “[a]ll legislative Powers herein granted . . . in a Congress of the United States.”⁶⁵ It’s even more impressive given that modern concepts of federal common law were apparently absent for nearly a

56. *Id.* at 494, 496.

57. *See* Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985) (letting a state choose its own law whenever it has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair” (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981))).

58. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

59. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

60. *Compare, e.g.,* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816, 821 (1997) [hereinafter Bradley & Goldsmith, *Critique*] (critiquing the “modern position” that customary international law “has the status of federal common law”), with Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825–27 (1998) (defending the view that “international law, as applied in the United States, must be federal law”), and Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, Commentary, 111 HARV. L. REV. 2260, 2260 (1998) (responding to Koh). *See generally* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365 (2002) (suggesting a return to earlier views of general law).

61. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 892 (1986).

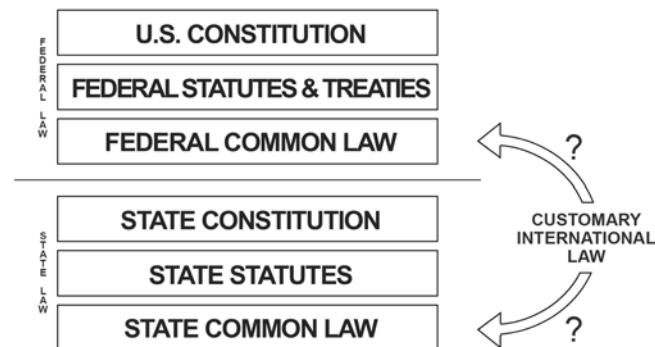
62. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

63. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972); *accord Hinderlider*, 304 U.S. at 110.

64. *See, e.g., Boyle*, 487 U.S. at 513 (adopting a test for federal-contractor liability based on what does and “does not seem to [the Court] sound policy”).

65. U.S. CONST. art. I, § 1.

Figure 2: The Modern View, Including Federal Common Law and Customary International Law



century after the Founding.⁶⁶ (How did anyone know where the states' borders were, before the Supreme Court realized it could tell them?) So while the emergence of federal common law may have solved some of *Erie*'s problems, it did so only at the cost of persistent doubts.⁶⁷

C. *Sovereign Borders and General Law*

There is, of course, another way to look at things—a “way of looking at law” that *Erie* and its progeny purported to “overrule[.]”⁶⁸ The Constitution may have left state borders to be governed by general law instead.

To modern lawyers, claims about general law might sound like so much make-believe. As Holmes and Brandeis saw it, a law “outside of any particular State,” subsisting “without some definite authority behind it,” was simply a “fallacy.”⁶⁹ Law is only the command of a sovereign, and no one commanded the general law—except for the courts, which can issue new commands with every new ruling.

66. See, e.g., Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1274 (1985) (“[N]othing like the theory of jurisdiction just articulated was generally accepted until far into the nineteenth century.”).

67. Compare Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761 (1989) (criticizing federal common law as illegitimate), with Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303 (1992) (defending its legitimacy), and Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015) (defending its legitimacy when it most resembles the preexisting general law).

68. *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945).

69. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (Brandeis, J.) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting)).

This “command theory” has less influence today, and for good reason. We routinely follow rules of English grammar and spelling that nobody ever laid down, rules we accept and use by practice and custom. It’d be “merely dogmatic,” to borrow H.L.A. Hart’s phrase, to say that nothing can be a rule of grammar “unless and until it has been *ordered* by someone to be so.”⁷⁰ Grammar rules might vary across societies, but they’re hardly a “fallacy” or a “brooding omnipresence.” In the same way, per Brian Simpson, we might see the common-law rules “as similar to grammarian’s rules, which both describe linguistic practices and attempt to systematize and order them.”⁷¹ The customary practices—on accretion and avulsion, inheritance by half-siblings,⁷² and so on—are passed on to new generations of lawyers, much the way grammar rules persist over time. As Hart says, a legal system might then give force to these “customs of certain defined sorts,” with courts applying them “as they apply statute, as something which is already law and because it is law.”⁷³

In such a system, the courts’ role might be to find the law, rather than to make it⁷⁴—to identify the recognized legal practice the way dictionary authors identify proper usage, or the way fashion magazines report what’s “in” this season.⁷⁵ Courts in different jurisdictions can all draw on these practices and customs at the same time, just as school boards in different states can draw on a common linguistic tradition. Various parts of a practice might be contested, and the courts’ act of describing a practice might lead that practice to change, the way fashion magazines sometimes set the fashion. But the practice itself and what any particular authority says about it are still two different things.

As strange as this might seem to modern ears, it may be a better way of explaining legal practice at the Founding, as well as many aspects of legal practice today. The place of general law was controversial from the start (though less so, as Stewart Jay describes, before the Alien and Sedition Acts made the issue politically radioactive),⁷⁶ so what follows is necessarily summary in nature. But without a full-blown historical account, we can still

70. H.L.A. HART, *THE CONCEPT OF LAW* 46–47 (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012).

71. A.W.B. SIMPSON, *The Common Law and Legal Theory*, in *LEGAL THEORY AND LEGAL HISTORY* 359, 376 (1987).

72. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *70–71 (describing a rule against half-brothers’ inheritance as “a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and the law”).

73. HART, *supra* note 70, at 46.

74. Stephen E. Sachs, *Finding Law* (Mar. 29, 2017) (unpublished manuscript) (on file with author).

75. I owe the fashion example to James Stern.

76. See generally Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985); Jay, *supra* note 66.

sketch out a plausible outline of the argument—and of why leaving interstate relations up to general law might have made a good deal of sense.

I. General Law at the Founding.—After independence, many states enacted reception provisions to declare which portions of British law still remained in effect.⁷⁷ What’s less clear is whether they had to. The Revolution wasn’t a Year Zero: it severed certain links to Great Britain without wiping the legal slate clean. Americans who were legally married on July 3, 1776, were still married the next day; so too people who owned houses, or owed debts, or so on. As Chief Justice Marshall put it:

This common law has been adopted by the legislature of Virginia. Had it not been adopted, I should have thought it in force. When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those relations. In breaking our political connection with the parent state, we did not break our connection with each other. It remained subsequent to the ancient rules, until those rules should be changed by the competent authority.⁷⁸

As Judge William Fletcher and Caleb Nelson recount, these “ancient rules” were seen in the early Republic as part of an existing tradition, rather than as a plaything of the courts.⁷⁹ Standing outside any one judicial system, the tradition was available to multiple states at once; and two courts could disagree about the tradition without either being obliged to take the other’s view.⁸⁰ In practice, judges had good reason to seek consistency, and federal courts often set the tone for the rest.⁸¹ They deferred to state courts on “local” questions about state statutes or property rules, questions that usually came up only in that state’s courts⁸²—just as federal courts today will defer to the

77. See, e.g., N.Y. CONST. of 1777, art. XXXV (adopting “such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law” on April 19, 1775, “subject to such alterations and provisions as the legislature” shall make); Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 797–800 (1951) (describing the process of reception).

78. *Livingston v. Jefferson*, 15 F. Cas. 660, 665 (Marshall, Circuit Justice, C.C.D. Va. 1811) (No. 8411).

79. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514–15 (1984); Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 929–49 (2013).

80. See Nelson, *supra* note 79, at 929 & n.29 (citing *Stalker v. McDonald*, 6 Hill 93 (N.Y. 1843) (rejecting the Supreme Court’s rule in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842))).

81. See, e.g., Fletcher, *supra* note 79, at 1538–54 (describing the evolution of the law of marine insurance).

82. See *Pollard v. Dwight*, 8 U.S. (4 Cranch) 421, 429 (1808) (Marshall, C.J.) (“In deciding on so much of this objection as depends on the laws of Connecticut, this court would certainly be guided by the construction given by that state to its own statute”); see also *Swift v. Tyson*, 41

Sixth Circuit on issues of Michigan law.⁸³ But by and large, every court was to apply the general law by its own best lights.⁸⁴

The general law was also available to the United States as a whole. There was no “common law of America,” in the sense of a full body of unwritten rules that preempted contrary state law.⁸⁵ Yet federal courts did apply general rules that were said to underlie the law of the thirteen states—what Marshall called “those general principles and those general usages which are to be found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state.”⁸⁶ These included the systems of “Law and Equity,”⁸⁷ together with “the practice of the courts of King’s Bench and Chancery in England,” which the early Supreme Court saw as “affording outlines for the practice of this court.”⁸⁸ They included the law of nations⁸⁹—both public and private international law, including the law of admiralty,⁹⁰ the general commercial law,⁹¹ and the principles of conflict of laws.⁹² And they included innumerable other rules, great and small, which federal courts could apply in appropriate cases.⁹³

U.S. (16 Pet.) 1, 18 (1842) (referring to “the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character”).

83. *MacGregor v. State Mut. Life Assurance Co.*, 315 U.S. 280, 281 (1942) (per curiam); *accord* *Rutherford v. Columbia Gas*, 575 F.3d 616, 627 (6th Cir. 2009) (Clay, J., concurring in part and dissenting in part).

84. *See* Nelson, *supra* note 79, at 944–49 (observing that, until a consensus across jurisdictions emerged, state courts were likely to exercise independent judgment about the content of general law).

85. *See* Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *reprinted in* Jay, *supra* note 66, app. A, at 1326–27 (disparaging such an idea).

86. *United States v. Burr*, 25 F. Cas. 187, 188 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694); *accord* *United States v. Burr*, 25 F. Cas. 55, 159 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,693) (referring to England as “that country whose language is our language, and whose laws form the substratum of our laws”).

87. U.S. CONST. art. III, § 2, cl. 1.

88. Rule, 2 U.S. (2 Dall.) 411, 413–14 (1792) (emphasis omitted).

89. 4 BLACKSTONE, *supra* note 72, at *67 (“[I]n England . . . the law of nations (wherever any question arises which is properly the object of [its] jurisdiction) is here adopted in [its] full extent by the common law, and is held to be a part of the law of the land.”); Bradley & Goldsmith, *Critique*, *supra* note 60, at 820, 824; Young, *supra* note 60, at 467.

90. *See* GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 1–16, at 45 (2d ed. 1975) (describing admiralty law as “probably seem[ing] ‘self-evident’” to the founders and as “need[ing] no express or implied legislative action on the part of any one nation to make it valid” in that nation’s courts); Whitten, *Part One*, *supra* note 11, at 592 & n.414; *cf.* *Luke v. Lyde* (1759) 97 Eng. Rep. 614, 617 (K.B.) (Mansfield, C.J.) (“[T]he maritime law is not the law of a particular country, but the general law of nations . . .”).

91. *See* Fletcher, *supra* note 79, at 1517.

92. *See, e.g.,* Conison, *supra* note 3, at 1103.

93. *See, e.g.,* *United States v. Burr*, 25 F. Cas. 187, 188, 191 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694) (applying the general law of evidence and of bail).

Rules like these were particularly important to a fledgling government with few statutes of its own. Rather than reinvent the wheel on each topic, the federal system could apply existing standards whenever its own law was silent.⁹⁴ When the Seventh Amendment incorporated “the rules of the common law”;⁹⁵ when the All Writs Act referred to “all other writs not specially provided for by statute, which may be . . . agreeable to the principles and usages of law”;⁹⁶ and when the Rules of Decision Act referred to state laws and “cases where they apply,”⁹⁷ these weren’t empty gestures; people knew what they were referring to. Indeed, the European Union did much the same thing after it was formed, and for much the same reasons: its courts now identify “general principles of EU law,” “unwritten rules of law which a judge of the [European Court of Justice] has to find and apply, but not create,” in order to “fill what would otherwise be gaps in EU law.”⁹⁸

In the early United States, general law filled the gaps in a very particular way. It was available for use by federal courts without really being “federal law.” It was law *for* the United States, but not “Law[] of the United States,”⁹⁹ of the kind that supported federal-question jurisdiction.¹⁰⁰ And it was law of the land but not “*supreme* Law of the Land,” of the kind that would override contrary law in the states.¹⁰¹ By legislation or by local usage, a state could alter the general rules on any topic under its control.¹⁰² But as the Supreme

94. *Cf.* Nelson, *supra* note 16, at 505 (arguing that “our federal system all but requires continuing recourse to rules of general law”).

95. U.S. CONST. amend. VII.

96. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (codified as amended at 28 U.S.C. § 1651 (2012)).

97. *Id.* § 34, 1 Stat. at 92.

98. ALINA KACZOROWSKA, EUROPEAN UNION LAW 115 (3d ed. 2013); *cf.* Consolidated Versions of the Treaty on the Functioning of the European Union art. 340, Oct. 26, 2012, 2012 O.J. (C 326) 47, 193 (adopting “the general principles common to the laws of the Member States” to govern certain liabilities of the EU itself).

99. U.S. CONST. art. III, § 2, cl. 1 (emphasis added); *id.* art. VI, cl. 2 (emphasis added); *see* Fletcher, *supra* note 79, at 1575.

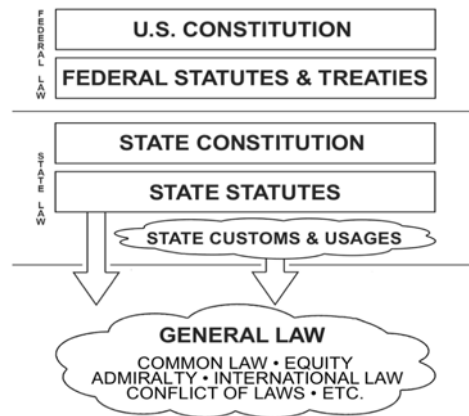
100. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545–46 (1828) (“A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. . . . [T]he law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.”); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 325 (1818) (finding “no law of the United States, which interferes with, or touches, the question of damages,” as it was “a question depending altogether upon the common law”); *cf.* N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286–87 (1876) (finding “no jurisdiction” to review a judgment involving “the law of nations” and “principles of general law alone”); RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 46 (1977) (distinguishing “‘jurisdiction of’ and ‘jurisdiction from’ the common law”).

101. U.S. CONST. art. VI, cl. 2 (emphasis added); *see* Bradley & Goldsmith, *Critique*, *supra* note 60, at 823 (observing that prior to *Erie*, “federal court interpretations of general common law were not binding on the states, and a case arising under general common law did not by that fact alone establish federal question jurisdiction”); Fletcher, *supra* note 79, at 1521–27.

102. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842); Fletcher, *supra* note 79, at 1532; Nelson, *supra* note 79, at 927. *But see* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal*

Court later put it, when a state couldn't alter the prior law (or simply chose not to), a legal question would be "determinable only by the general principles of that law."¹⁰³ (See Figure 3.)

Figure 3: The General-Law View. (General law might be received by statute or by usage.)



2. *General Law and Border Disputes.*—Assembling the pieces, we can now see how sovereign borders could rest on general law. The Constitution didn't *need* to say anything about sovereign borders, because the topic was already covered. The text just left the general law as it stood, while creating new institutions to enforce it. If a dispute arose in state court, in a case that couldn't be removed, then maybe it'd be decided under state-made rules. But in the cases that mattered—diversity, land grants, suits between states—there could be original jurisdiction in the federal courts, which would look past state land grabs and apply the general law for themselves.

This is largely how the Court understood things in *Rhode Island v. Massachusetts*,¹⁰⁴ decided in 1838. By providing jurisdiction but not the rule of decision, the Constitution necessarily "gives power to decide according to the appropriate law of the case."¹⁰⁵ What counts as the appropriate law, absent further direction, is a question for general conflicts principles: it "depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them."¹⁰⁶ These might include, in turn,

Court, 54 WM. & MARY L. REV. 655, 659 (2013) (noting that federal courts over time exercised more authority than *Swift* would have allowed); Clark, *supra* note 46, at 1290 (same).

103. *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 378 (1893); see Nelson, *supra* note 79, at 927.

104. 37 U.S. (12 Pet.) 657 (1838).

105. *Id.* at 737.

106. *Id.*

“the law of nations,”¹⁰⁷ “the law of prescription,”¹⁰⁸ and—for a bill filed “on the equity side of the Court”—“the principles and usages of a court of equity.”¹⁰⁹ In other words, general law provides both the conflicts rule and, potentially, the rule of decision.

The Court also explained why it wouldn’t treat the states’ own territorial claims as determinative. While the states started off with their own territories upon independence,¹¹⁰ they joined a “firm league of friendship” in the Articles of Confederation¹¹¹—which, by “a settled principle of the law of nations,” would bar them from taking each other’s territory so long as the alliance lasted.¹¹² When their alliance ended with ratification in 1788, each state “surrendered the right to judge of her own boundary” by “submitt[ing] the power of deciding a controversy concerning it to this Court.”¹¹³ By so doing, under those settled principles, each state “has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.”¹¹⁴ A state couldn’t assert power to declare its own sovereign borders and at the same time ask another sovereign’s court to declare them instead. (That’s also why China or Japan, which aren’t bound by the Constitution, can’t declare victory by statute in someone else’s court.) In other words, the general law, and not any rule imposed by the Constitution, told the Court which other sources of law to trust.

The point can be put more broadly. When a federal court hears a case, it needs to know what law to use and where any state laws “apply.” That question can’t be settled by state laws, as we don’t know yet if they apply or not. Without federal conflicts law on point, federal courts before *Klaxon* would fall back on the general law of conflicts, independently of whatever the state’s conflicts principles might be. (In fact, this might have been the *point* of diversity jurisdiction, which *Klaxon* accidentally vitiated.)¹¹⁵

107. *Id.* at 748.

108. *Id.* at 749.

109. *Id.* at 732.

110. *Id.* at 748; accord *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 398 (1852) (“It is well known to all of us, when the colonies dissolved their connection with the mother country by the Declaration of Independence, that it was understood by all of them, that each did so, with the limits which belonged to it as a colony.”).

111. ARTICLES OF CONFEDERATION of 1781, art. III.

112. *Rhode Island*, 37 U.S. (12 Pet.) at 748.

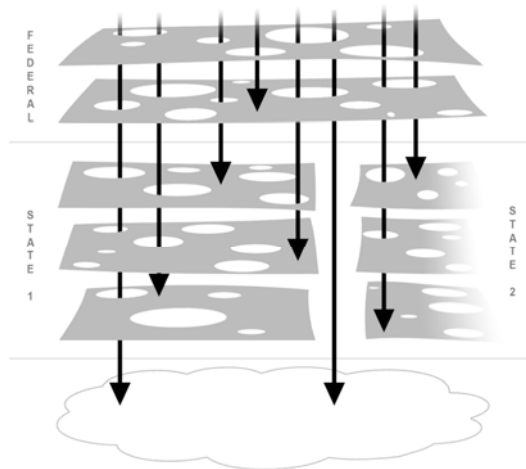
113. *Id.*

114. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821) (cited in *Rhode Island*, 37 U.S. (12 Pet.) at 748).

115. See, e.g., Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496 (1928); Laycock, *supra* note 37, at 282; Nelson, *supra* note 16, at 567; accord *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 359 (1827) (Johnson, J.) (stating that the establishment of federal courts was intended “to obviate that *conflictus legum*, which has employed the pens of *Huberus* and various others, and which any one who studies the subject will plainly perceive, it is infinitely more easy to prevent than to adjust”).

So the general law helped specify the domain in which a state could legislate—“could,” in the sense that its legislation would be *listened to*. Any rule a state adopted within its area of competence (torts, contracts, property, etc.) would be a rule of decision for the federal courts. But if the state legislated outside its competence (as judged by federal conflicts statutes, or, in their absence, by general law), or if the state had adopted no rule of local law on point, the federal courts would look elsewhere. In contrast to the modern layer-cake approach, a better model for these overlapping rules might be a stack of Swiss cheese, with different issues falling through the holes of one type of law to be answered by another—and sometimes slipping all the way through, falling outside the laws of any one state to be caught at the bottom by general law. (See Figure 4.)

Figure 4: Different Legal Questions Answered at Different Levels



As the Court later held, the right answer to these questions of general law will sometimes depend on who’s answering them. Questions of international law aren’t federal questions, so they “must be determined in the first instance by the court, state or national, in which the suit is brought.”¹¹⁶ In the absence of truly federal rules, a state court would take its own view of the general doctrine, and it might be bound to follow its own state’s statutes in preference thereto.¹¹⁷ (Even if general conflicts principles point elsewhere, the state legislature could always insist.) But a federal court could take its own view, both of the conflicts questions and of the substance, considering

116. *Huntington v. Attrill*, 146 U.S. 657, 683 (1892).

117. *See supra* note 102 and accompanying text.

each of these issues as among “those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions.”¹¹⁸

So it made sense for the Constitution to regulate sovereign borders by *providing a forum* instead of *providing rules*. Codifying the international law of sovereign borders is hard; establishing some courts to apply it is easy. If border questions would usually wind up in federal court, they’d be decided in a (presumably) neutral forum, under a (presumably) neutral view of the law.¹¹⁹ The Constitution doesn’t have to “partake of the prolixity of a legal code”;¹²⁰ it can prevent the states from stacking the deck in their own favor without adopting any specific rules.

3. *General Law Today*.—Surprisingly, eighty years after *Erie*, the Court still adheres to something very like these doctrines. Though federal courts claim the power to create new rules, they rarely do.¹²¹ Instead, given the Constitution’s silence, courts tend to assume that the law of interstate relations is whatever it *was* at some prior date. As Justice Breyer once wrote, “silence is not ambiguity; silence means that ordinary background law applies.”¹²²

In recent border cases, the Court has looked to the “traditional common-law rule governing avulsive littoral changes,”¹²³ as well as “the received rule of law of nations on this point, as laid down by all the writers of authority, including Sir William Blackstone.”¹²⁴ In other words, when it comes to borders, federal common law isn’t all that “federal”; the Court uses the same rules that foreign nations do. So do the states, applying these rules to private landholdings and political subdivisions.¹²⁵ When the Court declares, as late as 1990, that the “[g]eneral rules concerning the formation of riparian land are well developed and are simply expressed and well accepted,”¹²⁶ it’s invoking a “common legal object that’s part of a common legal tradition”—not just one among hundreds of distinct bodies of law whose rules just happen to coincide.¹²⁷

118. *Huntington*, 146 U.S. at 683.

119. See Bradley & Goldsmith, *Critique*, *supra* note 60, at 826 (noting that the Constitution, through Article III’s heads of jurisdiction, had “enabled Congress to ensure uniform federal interpretations” of customary international law in the cases in which it typically arose, without adopting any rules in particular).

120. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

121. See Nelson, *supra* note 16, at 508 (“Instead of fashioning a brand new code of interstate relations, the Court has relied heavily upon preexisting bodies of general law.”).

122. *New Jersey v. New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring).

123. *Id.* at 784 (majority opinion).

124. *Id.* (citations and internal quotation marks omitted).

125. See, e.g., *Dye v. Anderson Tully Co.*, 385 S.W.3d 342, 346 (Ark. Ct. App. 2011) (applying the thalweg rule to the boundary between two counties).

126. *Georgia v. South Carolina*, 497 U.S. 376, 403 (1990).

127. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1137 (2017).

As Nelson demonstrates, this persistence of general law is quite widespread. It shows up in any number of fields—federal contracting, bankruptcy fraud, vicarious liability, criminal defenses—in which federal law presupposes legal rules that it doesn't supply.¹²⁸ “Rather than tracking the local law of any single state, . . . these federal rules reflect state law *in general*; what matters is how *most* states do things, not whatever the policymakers in one particular state have said.”¹²⁹

This participation in broadly shared practice is more than a convenient choice. There's an element here of *opinio juris*, a sense of legal obligation. The Court's claim to make rules of federal common law doesn't mean that it can “make up any rules it likes.”¹³⁰ Redrawing (or “reinterpreting”) all the states as isosceles triangles wouldn't just be a terrible policy choice; it'd seem beyond the scope of a judge's authority, something our system hasn't entrusted judges to do. Even partisans of federal common law share an intuition against altering “the historic boundaries of the states”¹³¹—though the source of that intuition is a little unclear. But the better understanding might be that the Constitution simply left certain areas of law intact, and that modern courts have some obligation to do the same.

II. Personal Jurisdiction Before *Pennoyer*

The Constitution treated personal jurisdiction in much the same way as sovereign borders. That shouldn't surprise us: both topics are about the range of state authority, over territory as well as people. If we have rules about where to locate state lines, then we also might have rules about what those state lines *mean*—about what state officials can actually do, either behind those lines or beyond them.

“Can,” of course, is a relative term. Michigan “can” pass a statute claiming universal jurisdiction, just like it can claim ownership of Toledo. The question is whether anyone else will listen.¹³² As Shakespeare put it:

Glendower: I can call spirits from the vasty deep.

Hotspur: Why, so can I, or so can any man; But will they come when you do call for them?¹³³

128. Nelson, *supra* note 16, at 504, 524 & n.114.

129. *Id.* at 503–04.

130. *Id.* at 508.

131. Field, *supra* note 61, at 891 n.34.

132. *See* Conison, *supra* note 3, at 1108 (“Ultimately, whether a court ‘could’ or ‘could not’ legitimately exercise jurisdiction in the international sense was a matter of how other states would treat the resulting judgment.”).

133. *Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865, 879 (D.C. Cir. 2010) (Williams, J., concurring in part and dissenting in part) (quoting WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 3, sc. 1).

This was the crucial question before *Pennoyer*, when personal jurisdiction was typically a problem in recognition. Foreign countries' judgments were obviously free of any limits in the U.S. Constitution. The question for American courts was whether those judgments would be recognized and enforced. A judgment with jurisdiction, one that complied with the international rules (or, more precisely, with the American understandings of those rules), was valid and could be recognized. A judgment without jurisdiction was void. The foreign court's subject-matter jurisdiction might be primarily regulated by its own law, but its jurisdiction over the parties was not. Early American courts applied what they saw as rules of general and international law to determine whether foreign judgments deserved any respect.

By and large, the same regime was in place for courts at home. States that wanted to exercise broad jurisdiction would do so, and would execute judgments within their borders on as much of the defendant's property as they could find. These state judgments, unlike foreign ones, could claim the benefit of the Full Faith and Credit Clause and the 1790 Act. But these provisions were read to leave the law of personal jurisdiction alone. So when American courts were presented with the judgment of another tribunal, whether from Michigan or Mexico, they used the same approach to determining personal jurisdiction. The judgment was the product of a separate sovereign, which was expected to comply with international rules.

The Constitution's role here was largely indirect—letting defendants remove their cases into federal court or challenge enforcement through diversity suits. But because jurisdictional standards were general law, federal and state courts weren't bound by each other's decisions, and federal courts could take their own view of whether the standards were satisfied. Congress might have chosen to alter this regime, but it didn't. As a result, the same considerations that applied to international judgments were commonly applied to American judgments as well.

A. *Foreign Judgments*

In one sense, personal jurisdiction is always a matter of domestic law: whether a court will hear a case depends in the first instance on its own rules. In the widely cited 1808 case of *Buchanan v. Rucker*,¹³⁴ a creditor brought an action in King's Bench based on a judgment “of the island Court in Tobago.”¹³⁵ Process had been served by “nailing up” the summons “at the Court-House door,” though the defendant “never appeared to have been within the limits of the island, . . . nor to have been in any other way subject to the jurisdiction of the Court at the time.”¹³⁶ This practice was said to be

134. (1808) 103 Eng. Rep. 546; 9 East. 192 (K.B.) (per curiam).

135. *Id.* at 546, 9 East. at 192.

136. *Id.*, 9 East. at 192–93.

entirely lawful by Tobago's standards; it "was warranted by a law of the island, and was commonly practised there."¹³⁷ Justice Johnson noted in 1827 that "[t]he Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market place, at the shore of Leith, and the civil law process by proclamation, or *viis et modis*, is not much better."¹³⁸ Even today, French courts claim jurisdiction over suits by French plaintiffs against defendants encountered abroad.¹³⁹ States might find it politic to limit their claims to authority, but they also might not.

Yet these assertions of exorbitant jurisdiction do have a weakness. If a French court summons you to appear, you don't have to comply, unless you happen to visit or have assets in France. If you do, international law might respect French authority over your person or property within their borders, so their initially excessive claim to jurisdiction won't matter. But if you don't want to respond, just take a default, and make sure not to vacation in France. (Or, for that matter, any other country bound to respect French judgments.)¹⁴⁰

The real problem comes later. In the early Republic, jurisdiction was frequently raised at the recognition stage, for procedural as well as substantive reasons. Procedurally, before the advent of liberal pleading standards, it was risky for a defendant with a half-decent jurisdictional objection to respond to the summons. Arguing the merits could be taken as consenting to the court's authority.¹⁴¹ The alternative was to give up on the merits, by entering a special appearance or by defaulting and contesting enforcement elsewhere.¹⁴² Substantively, it was often better for defendants to litigate jurisdiction in some other forum nearer to home. For example, in *Buchanan*, the British court refused to recognize the foreign judgment—not only by construing Tobago's law more narrowly, but also by rejecting its

137. *Id.*, 9 East. at 193.

138. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 366 (1827) (Johnson, J.).

139. Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 388 & n.56 (1995) (citing CODE CIVIL [C. CIV.][CIVIL CODE] art. 14).

140. *See, e.g.*, Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1 (providing for recognition of judgments within the European Union).

141. *See, e.g.*, *Pollard v. Dwight*, 8 U.S. (4 Cranch) 421, 428–29 (1808) (Marshall, C.J.) (portraying defendants who argued the merits as having "placed themselves precisely in the situation in which they would have stood, had process been served upon them," and so having "consequently waived all objections to the non-service of process"); *accord* *Shields v. Thomas*, 59 U.S. (18 How.) 253, 259 (1855); *Mayhew v. Thatcher*, 19 U.S. (6 Wheat.) 129, 130 (1821); *cf.* FED. R. CIV. P. 12(b) ("No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion."); *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871, 874 (3d Cir. 1944) ("Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances.").

142. *See, e.g.*, *Orange Theatre Corp.*, 139 F.2d at 874.

international force.¹⁴³ Even if Tobago's law had made the judgment valid, asked Lord Ellenborough, "how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?"¹⁴⁴

Early American courts adopted a similar approach—insisting that foreign courts have power over the subject matter and the parties. This followed the "ubiquitous" rule in English law, inherited by the American legal system, that "proceedings without jurisdiction were *coram non judge*—that is, not before a judge."¹⁴⁵ Jurisdiction was the lawful power to decide the case, what distinguished a real judge from Judge Judy. Without it, "*non est iudex*," and it was no more necessary to obey the judgment than to obey "a mere stranger."¹⁴⁶ In domestic cases, a judgment of a court of competent jurisdiction was binding;¹⁴⁷ but a judgment without jurisdiction was void, a "nullity" subject to collateral attack¹⁴⁸ and which might even expose the officers who executed it to damages.¹⁴⁹ A foreign judgment might be scrutinized on the merits;¹⁵⁰ but a lack of jurisdiction would still turn it into "waste paper."¹⁵¹ As Chief Justice Marshall wrote in 1808, a document "professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to

143. *Buchanan v. Rucker* (1808) 103 Eng. Rep. 546, 547; 9 East. 192, 194 (K.B.) (per curiam).

144. *Id.*

145. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1828 (2008); see also Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 164 (1977) [hereinafter *Filling the Void*] ("For over three centuries it has been black-letter law that the judgment of a court without jurisdiction over the subject matter of the action before it is null and void in its entirety." (footnote omitted)).

146. *Case of the Marshalsea* (1612) 77 Eng. Rep. 1027, 1039; 10 Co. Rep. 68b, 76b (K.B.).

147. *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 186 (1809) (Marshall, C.J.) ("The judgment [given by the New Jersey Court of Common Pleas] was erroneous, but it is a judgment, and, until reversed, cannot be disregarded.").

148. *Id.* at 184–85 (determining whether the judgment was an "absolute nullit[y], which may be totally disregarded" in a collateral proceeding). *But see* *Durfee v. Duke*, 375 U.S. 106 (1963) (restricting the use of collateral attack for lack of subject-matter jurisdiction, but with little warrant in pre-New Deal case law).

149. *Compare* *Elliott v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828) (noting that if a court should "act without authority, its judgments and orders are regarded as nullities," and "all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers"), *with* *Simms v. Slacum*, 7 U.S. (3 Cranch) 300, 306–07 (1806) (reasoning that "judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void," so that "[a] sheriff who levies an execution under a judgment fraudulently obtained, is not a trespasser").

150. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 102 (New York, O. Halsted 1827) (noting that a domestic court, before enforcing a foreign judgment, could "examine into the merits of such judgment"); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1214 (2009).

151. *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 450, 474–75 (1836).

take cognizance of the subject it had decided, could have no legal effect whatever.”¹⁵²

To be respected abroad, foreign judgments not only needed jurisdiction under their own law but also had to comply with international rules. The subject matters that a foreign court could hear—patent cases, say, or claims under \$75,000—might well be left to foreign law to decide.¹⁵³ But no court, Marshall wrote, could “exercise[] a jurisdiction which, according to the law of nations, its sovereign could not confer.”¹⁵⁴ And the law of nations *did* regulate jurisdiction over the parties. According to Marshall and Justice Story, whatever force a judgment might have “within the dominions of the prince from whom the authority is derived,”¹⁵⁵ or “upon the subjects of that particular nation,”¹⁵⁶ a judgment that exceeded international limits on personal jurisdiction would not be “regarded by foreign courts” as binding,¹⁵⁷ or given any effect “upon the rights or property of the subjects of other nations.”¹⁵⁸ Principles like these didn’t come from the Constitution, or from anywhere else in federal law. Instead, as James Kent put it, they were principles “of general jurisprudence founded on public convenience, and sanctioned by the usage and curtesy of nations.”¹⁵⁹

B. *Jurisdiction in State Court*

Early American states stood in much the same position as foreign nations. Upon independence they had claimed all the rights of “Free and Independent States,” having “full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”¹⁶⁰ These powers remained in place unless they were limited by the Articles of Confederation,¹⁶¹ or later on

152. *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 268–69 (1808) (Marshall, C.J.).

153. *See id.* at 276 (“Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected.”).

154. *Id.*; *see also* *Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) (“The jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power.”).

155. *Rose*, 8 U.S. (4 Cranch) at 276.

156. *Bradstreet v. Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 1793).

157. *Rose*, 8 U.S. (4 Cranch) at 276–77; *accord* *Bischoff v. Wethered*, 76 U.S. (9 Wall.) 812, 814 (1870) (finding that an improperly rendered English judgment was not valid in the United States); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 586, at 492 (Boston, Hilliard, Gray & Co. 1834) (finding it “indispensable to establish, that the court pronouncing judgment had a lawful jurisdiction over the cause, and the parties,” or else its decision would be “a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals”).

158. *Bradstreet*, 3 F. Cas. at 1187.

159. 2 KENT, *supra* note 150, at 102; *cf.* STORY, *supra* note 157, § 611, at 509–10 (describing the rules for recognition as among “the doctrines of the common law”).

160. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis omitted).

161. ARTICLES OF CONFEDERATION of 1781, art. II.

by the Constitution or by federal law¹⁶²—none of which addressed personal jurisdiction. So if a state wanted to claim exorbitant jurisdiction within its borders, it could; “for aught I know,” Justice Story wrote, “the local tribunals might give a binding efficacy to such judgments.”¹⁶³ Should a state authorize service against a nonresident’s “tenants, attornies, or agents,” or by attachment of “a debt, a glove, or a chip,” federal law would not interfere; “it is not for us to say, that such legislation may not be rightful, and bind [that state’s] courts.”¹⁶⁴ The states themselves didn’t perceive any such limits until the second half of the nineteenth century—at which point a few courts found limits in their own state constitutions, not in the federal one.¹⁶⁵

The ultimate constraint on state judgments was whether anyone else would listen to them. A judgment would be recognized elsewhere, Connecticut’s high court noted in 1814, only “if the defendants [had been] so within the jurisdiction of the court . . . that they [could] be *commanded* . . . to appear and answer.”¹⁶⁶ For a New Hampshire state court, a New Hampshire statute commanding an appearance was good enough. But a Massachusetts court would first apply conflicts principles to see if that statute really bound the defendant—or if New Hampshire had tried, as Marshall had put it, to “exercise[] a jurisdiction which . . . its sovereign could not confer.”¹⁶⁷ In applying those standards, states weren’t always consistent; they sometimes rejected judgments as illegitimate that they themselves would issue at home. (One Massachusetts judge in 1805 described it as “well known that many of the States, of which *this* is one, proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him,” but he still voted to deny enforcement of a New Hampshire judgment for precisely that failing.)¹⁶⁸

Even before the Constitution was ratified, states were already in the habit of reviewing each other’s jurisdiction. The Articles of Confederation provided that “[f]ull faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of

162. U.S. CONST. art. VI, cl. 2; *id.* amend. X.

163. *Picquet v. Swan*, 19 F. Cas. 609, 612 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134); *accord* *Dearing v. Bank of Charleston*, 5 Ga. 497, 515 (1848) (acknowledging that, if Georgia’s legislature authorized a broader-than-usual jurisdiction, “the local tribunals might give effect to it”).

164. *Picquet*, 19 F. Cas. at 614; *accord* *Morrison v. Underwood*, 59 Mass. (5 Cush.) 52, 54 (1849) (upholding personal jurisdiction, per a Massachusetts statute, at the previous residence of a defendant who “was not an inhabitant of the state, and was out of the commonwealth, at the time”).

165. *See, e.g.*, *Beard v. Beard*, 21 Ind. 321, 323–24 (1863); *Weil v. Lowenthal*, 10 Iowa 575, 578 (1860); *see also* *Oakley v. Aspinwall*, 4 N.Y. (4 Comst.) 513, 521–22 (1851) (raising the possibility in dicta); *Jarvis v. Barrett*, 14 Wis. 591, 592 (1861) (questioning the extent of the state legislature’s power over jurisdiction).

166. *Hart v. Granger*, 1 Conn. 153, 168–69 (1814); *see* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1573–74 (2002).

167. *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276 (1808) (Marshall, C.J.).

168. *Bartlet v. Knight*, 1 Mass. 401, 410 (1805) (opinion of Sedgwick, J.).

every other State.”¹⁶⁹ That obligation was more than a little vague; but courts generally agreed that, whatever it meant, it *didn't* oblige them to recognize judgments that violated general jurisdictional rules.¹⁷⁰ For example, a year after the Articles took effect, a South Carolina court required a showing of a “condemnation in a court of competent jurisdiction,” under “common law rules,” before it would recognize the judgment of a North Carolina admiralty court and give “due faith and credit to all its proceedings” under “[t]he act of confederation . . . and the law of nations.”¹⁷¹

The same thing happened in Connecticut and Pennsylvania. There, creditors who had won judgments by foreign attachment in Massachusetts—seizing a handkerchief or a blanket said to belong to the defendant—tried to get their judgments recognized abroad.¹⁷² The courts in both states refused, with Chief Justice McKean of Pennsylvania dryly congratulating the plaintiff on obtaining the blanket; “[i]f that is sufficient to satisfy [him], he has done well to secure himself.”¹⁷³ But the judgment itself could only be considered as “a proceeding *in rem*, and ought not certainly to be extended further than the property attached.”¹⁷⁴ The Articles didn't speak expressly to the issue of jurisdiction, and they “must not be construed to work such evident mischief and injustice, as are contained in the doctrine, urged for the Plaintiff.”¹⁷⁵ Likewise, the Connecticut court rejected the argument that the “pretended service of the writ”¹⁷⁶ at the defendant's home in Connecticut, together with the attachment of a handkerchief in Massachusetts, might suffice for jurisdiction under Massachusetts law.¹⁷⁷ Those acts couldn't give a Massachusetts court “legal jurisdiction of the cause”; the Articles only mandated respect for judgments “where both parties are within the jurisdiction of such courts at the time of commencing the suit, and are duly served with the process, and have or might have had a fair trial of the cause.”¹⁷⁸

Courts continued to reason this way after ratification. Judges today speak of the Full Faith and Credit Clause in almost mystical tones, as

169. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3.

170. See Sachs, *supra* note 150, at 1221–26 (describing areas of confusion and of agreement, both before and after the Articles).

171. Jenkins v. Putnam, 1 S.C.L. (1 Bay) 8, 10 (1784) (per curiam).

172. See generally Kibbe v. Kibbe, 1 Kirby 119 (Conn. Super. Ct. 1786); Phelps v. Holker, 1 U.S. (1 Dall.) 261 (Pa. 1788).

173. Phelps, 1 U.S. at 264 (opinion of McKean, C.J.).

174. *Id.*

175. *Id.*

176. Kibbe, 1 Kirby at 126.

177. *Id.* at 120–21, 125–26; accord Kilburn v. Woodworth, 5 Johns. 37, 38, 40–41 (N.Y. Sup. Ct. 1809) (per curiam) (rejecting the argument that the Massachusetts judgment should be recognized because “by the laws of *Massachusetts*, . . . the judgment was regular and valid, and would be so considered in *Massachusetts*”).

178. Kibbe, 1 Kirby at 126.

“alter[ing] the status of the several states” and “mak[ing] them integral parts of a single nation.”¹⁷⁹ But the Clause actually left the states as foreign to one another in important ways. The Constitution’s Clause largely resembled that of the Articles; it included “public Acts” along with “Records, and judicial Proceedings,” and it let Congress “prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”¹⁸⁰ Congress soon followed up with the 1790 Act, which specified the mode of authentication and added that “the said records and judicial proceedings” would have “such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.”¹⁸¹ Yet none of these changes were thought to displace the existing jurisdictional rules.

That became apparent in the course of a long debate in state courts over the 1790 Act. The Act left unclear whether the phrase “such faith or credit” addressed effect or authentication—whether it made sister-state judgments conclusive on the merits, or whether it made particular copies of the judgments, once introduced in court, conclusive evidence of the originals’ existence and contents. As I’ve described elsewhere,¹⁸² courts and commentators argued about this for decades, both before and after the Supreme Court endorsed the “effect” interpretation in *Mills v. Duryee*.¹⁸³

Mills probably got it wrong,¹⁸⁴ but for now it doesn’t matter. What does matter is something on which both sides of the debate agreed: that a state judgment could be challenged in other courts for violating general-law rules of personal jurisdiction. In a widely cited 1803 decision in New York, some justices opposed the “effect” reading precisely because it might give effect to whatever strange forms of jurisdiction states might exercise at home.¹⁸⁵ Supporters of the “effect” reading countered that the 1790 Act implicitly applied only to valid judgments that respected the prevailing rules.¹⁸⁶

The courts spoke rather vaguely about the exact source of these rules. What counsel in one 1809 case in New York called “the principles, of the

179. *V.L. v. E.L.*, 136 S. Ct. 1017, 1020 (2016) (quoting *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)).

180. U.S. CONST. art. IV, § 1.

181. Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (2012)).

182. Sachs, *supra* note 150, at 1233–78.

183. 11 U.S. (7 Cranch) 481, 484 (1813).

184. *See* Sachs, *supra* note 150, at 1233–40 (collecting evidence on the meaning of the 1790 Act); *id.* at 1259–62 (describing the *Mills* decision).

185. *See, e.g., Hitchcock v. Aicken*, 1 Cai. 460, 481 (N.Y. Sup. Ct. 1803) (opinion of Kent, J.); *id.* at 478 (opinion of Radcliff, J.); *accord Picket v. Johns*, 16 N.C. (1 Dev. Eq.) 123, 131 (1827) (opinion of Henderson, J.).

186. *See, e.g., Hitchcock*, 1 Cai. at 465–66 (opinion of Thompson, J.); *id.* at 473 (opinion of Livingston, J.); *accord Rogers v. Coleman*, 3 Ky. (Hard.) 413, 417 (1808); *Bissell v. Briggs*, 9 Mass. (9 Tyng) 462, 469 (1813) (Parsons, C.J.) (per curiam); *Picket*, 16 N.C. (1 Dev. Eq.) at 134 (Taylor, C.J., dissenting); *Curtis v. Martin*, 2 N.J.L. (1 Penning.) 399, 406 (1805) (Pennington, J.).

common law,”¹⁸⁷ the court referred to as “the first principles of justice,”¹⁸⁸ while a Kentucky court combined international-law rhetoric,¹⁸⁹ general-law reasoning,¹⁹⁰ and a concern that a contrary view would be “too rigid and unjust.”¹⁹¹

Yet one particularly influential explanation, advanced in the 1813 Massachusetts case of *Bissell v. Briggs*,¹⁹² was simply that the restrictions had existed in international law before the Constitution and that the 1790 Act had left them in place. Before the Articles of Confederation, “all the courts of the several provinces, colonies or states were, at common law, deemed to be foreign to each other, and judgments rendered by any one of them were considered by the others as foreign judgments.”¹⁹³ The Constitution and 1790 Act had altered the recognition process in various ways, but neither had the “intention of enlarging, restraining, or in any manner operating upon, the jurisdiction . . . of the courts of any of the *United States*,” which “remains as it was before.”¹⁹⁴ To receive any benefit from the “federal constitution,” then, “the court must have had jurisdiction, not only of the cause, but of the parties”¹⁹⁵—under rules that the Constitution didn’t supply. Should a state court “render judgment against a man not within the state, nor bound by its laws, nor amenable to the jurisdiction of its courts,” its jurisdiction “might be inquired into” in another tribunal, “and if a want of jurisdiction appeared, no credit would be given to the judgment.”¹⁹⁶

These views continued to dominate in state courts, and the Supreme Court took care to leave the jurisdictional issue open when it opted for the “effect” interpretation in *Mills*.¹⁹⁷ The Court reaffirmed *Mills* in *Hampton v. M’Connel*,¹⁹⁸ and the jurisdictional issue was understood to stay open

187. *Kilburn v. Woodworth*, 5 Johns. 37, 40 (N.Y. Sup. Ct. 1809) (argument of counsel).

188. *Id.* at 41 (majority opinion) (per curiam).

189. *Rogers*, 3 Ky. (Hard.) at 419.

190. *See id.* at 417 (“Jurisdiction of the courts, is spoken of, and a proper attention to that subject, will furnish an easy solution . . .”).

191. *Id.*

192. 9 Mass. (9 Tyng) 462 (1813) (per curiam).

193. *Id.* at 464–65 (Parsons, C.J.).

194. *Id.* at 467.

195. *Id.* at 468.

196. *Id.*

197. *See Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813) (noting pointedly that “the Defendant had full notice of the suit, for he was arrested and gave bail”); *see also id.* at 486–87 (Johnson, J., dissenting) (worrying that details of common-law pleading might lead to the enforcement of out-of-state judgments contrary to “eternal principles of justice which never ought to be dispensed with”).

198. 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.).

afterwards,¹⁹⁹ despite some indications to the contrary.²⁰⁰ By 1828, according to the highest court of Massachusetts, “almost every State court in the Union” had ruled on the subject, and their views were “unanimous” that “in all instances, the jurisdiction of the court rendering the judgment may be inquired into.”²⁰¹ The “principles of the common law” applicable “to judgments of the tribunals of foreign countries” were still just as applicable “to the judgments of the courts of the several States when sought to be enforced [abroad].”²⁰² Positions like these were repeatedly expressed by state courts.²⁰³

C. *Jurisdiction in Federal Court*

This account of state courts is largely consistent with the scholarly consensus. What’s less well known is the role of federal courts in this system—and that they, too, held the judgments of state courts at arm’s length.

In the early Republic, relatively few interesting personal jurisdiction questions arose in cases filed originally in federal court. Under the Judiciary Act of 1789, no one could be “arrested in one district for trial in another, in any civil action before a circuit or district court,” and a suit against a U.S. resident had to be heard in the district “whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.”²⁰⁴ In any suit that satisfied the statute, personal jurisdiction was already airtight.

199. *Id.* at 236 n.c (1818) (reporter’s footnote) (“[I]t may safely be affirmed, that the question is still open in this court whether . . . a plea to the jurisdiction of the court in which the judgment was obtained . . . might, in some cases, be pleaded . . . to avoid the judgment.”); *Gerault v. Anderson*, 1 Miss. (1 Walker) 30, 33 (1818) (noting contemporary agreement “that the jurisdiction of [another state’s] courts can be enquired into, in an action brought on a judgment”); *see also Aldrich v. Kinney*, 4 Conn. 380, 386 (1822) (holding that only judgments “as are duly rendered by a court of competent jurisdiction” need to be afforded full faith and credit); *Borden v. Fitch*, 15 Johns. 121, 144 (N.Y. Sup. Ct. 1818) (holding that a judgment rendered by another state is only “conclusive where the defendant was arrested, or had in some way appeared, and had an opportunity of defending the original suit”).

200. *See Lanning v. Shute*, 5 N.J.L. 778, 779–80 (1820) (“The question presented by these pleadings [attacking a New York judgment] has been considered and settled . . . in the Supreme Court of the *United States*, in the case of *Hampton v. M’Connell*. This last is conclusive . . . ; we have no further discretion upon it.”).

201. *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 244 (1828).

202. *Id.* at 238.

203. *See, e.g., Dearing v. Bank of Charleston*, 5 Ga. 497, 513 (1848) (“[T]he Constitution leaves this question where we find it—it is still a question of jurisdiction and State authority.”); *Starbuck v. Murray*, 5 Wend. 148, 158 (N.Y. Sup. Ct. 1830) (holding, as to jurisdiction, that “the judgment of a court of another state is in its effect like a foreign judgment”); *Steel v. Smith*, 7 Watts & Serg. 447, 451 (Pa. 1844) (“Such is the familiar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the revolution.”); *see also Sallee v. Hays*, 3 Mo. 116, 117–18 (1832) (reading *Mills* to permit a Missouri court to set aside a Kentucky judgment on jurisdictional grounds).

204. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

But federal courts did hear actions involving the recognition of other courts' judgments, giving them opportunities to comment on the general rules. Federal courts, like state courts, reviewed the judgments of other judicial systems much like those of foreign nations.²⁰⁵ As in the maritime insurance cases studied by Judge Fletcher, federal and state courts saw themselves as engaged in the same enterprise, with the U.S. Supreme Court as "*primus inter pares*" in determining questions of general law.²⁰⁶ The 1790 Act, which applied to "every court within the United States,"²⁰⁷ made it particularly urgent for federal courts to decide which judgments to enforce, but it left the law of jurisdiction as it stood. And by directing new cases into federal courts, the statute created new opportunities to assess the states' compliance with the general law.

1. General Principles.—The federal courts' approach flowed naturally from the ordinary procedure on collateral attack. Consider *Elliott v. Lessee of Peirsol*,²⁰⁸ which arose from a challenge in a federal court in Kentucky to a prior Kentucky judgment for lack of subject-matter jurisdiction. The Supreme Court affirmed the lower court's decision in 1828, noting that "the jurisdiction of *any* Court exercising authority over a subject, may be inquired into in *every* Court, when the proceedings of the former are relied on."²⁰⁹ With jurisdiction, the state court's judgment would normally be binding and conclusive; without jurisdiction, "its judgments and orders are regarded as nullities."²¹⁰ Even though the Kentucky state and federal courts were as closely related as courts from different systems could be, the Court saw no reason why the state courts' jurisdiction would be immune from scrutiny: "We know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other Courts, in this respect."²¹¹

A few years earlier, in *Flower v. Parker*,²¹² Justice Story had taken the same approach as to personal jurisdiction. A Massachusetts court gave judgment against a Louisiana resident after "trustee process" on locals who owed him money;²¹³ when the Louisianan later tried to recover from the locals in a Massachusetts federal court, the locals pled the state-court judgment in defense.²¹⁴ On circuit, Story noted that Massachusetts might have had in rem jurisdiction over the debts themselves (as in the later, more

205. For extended discussion of this issue, see *infra* text accompanying notes 319–46.

206. Fletcher, *supra* note 79, at 1575.

207. Act of May 26, 1790, ch. 11, 1 Stat. 122.

208. 26 U.S. (1 Pet.) 328 (1828).

209. *Id.* at 340–41 (emphasis added).

210. *Id.* at 340.

211. *Id.*

212. 9 F. Cas. 323 (Story, Circuit Justice, C.C.D. Mass. 1823) (No. 4891).

213. *Id.* at 323–24.

214. *Id.*

famous case of *Harris v. Balk*),²¹⁵ but the original creditor had bungled the state procedures.²¹⁶ More importantly, though the initial action had listed the Louisianan as a defendant, Story found that the judgment didn't actually bind him—based on the “universal” principle, “consonant with the general principles of justice, that the legislature of a state can bind no more than the persons and property within its territorial jurisdiction.”²¹⁷ Indeed, Story wrote, “[n]o legislature can compel any persons, beyond its own territory, to become parties to any suits instituted in its domestic tribunals.”²¹⁸ In other words, the federal circuit court reviewed a judgment from Massachusetts under the same general principles as one from anywhere else.

2. *Full Faith and Credit*.—Nothing in the Constitution or the 1790 Act required the courts to do otherwise. While some federal decisions on the “effect” controversy simply skipped over the jurisdictional issues,²¹⁹ one early case did not. In 1799, Justice Washington on circuit refused to treat a Maryland bankruptcy discharge as discharging the defendant's debt to a Virginia creditor.²²⁰ As the plaintiff hadn't been summoned to attend the proceeding, the discharge couldn't really “be considered as a judgment of a Maryland court, which can bind persons residing out of that state.”²²¹ Washington specifically compared the issue to that of recognition of a foreign judgment, noting that while admiralty decisions received a certain preference under the law of nations, “the justice of other decisions may be questioned, and if a law of a foreign country were to declare that a decision of causes, without notice, should bind everybody, no foreign country would observe it.”²²² The Full Faith and Credit Clause *might* have been read to require obedience to such a judgment, but it gave the duty of prescribing effect to Congress, and according to Justice Washington, nothing that Congress had written gave any effect to the discharge at issue.²²³

215. 198 U.S. 215 (1905).

216. See *Flower*, 9 F. Cas. at 325–26.

217. *Id.* at 324–25.

218. *Id.* at 324.

219. See, e.g., *Bastable v. Wilson*, 2 F. Cas. 1012, 1012 (C.C.D.C. 1803) (No. 1097) (per curiam) (refusing a plea of *nil debet* to an action of debt on a state judgment); *Armstrong v. Carson*, 1 F. Cas. 1140, 1140 (Wilson, Circuit Justice, C.C.D. Pa. 1794) (No. 543) (same).

220. *Banks v. Greenleaf*, 2 F. Cas. 756, 756, 758–59 (Washington, Circuit Justice, C.C.D. Va. 1799) (No. 959).

221. *Id.* at 758.

222. *Id.*

223. *Id.* at 759. *But see* *Green v. Sarmiento*, 10 F. Cas. 1117, 1119–20 (Washington, Circuit Justice, C.C.D. Pa. 1810) (No. 5760) (suggesting in dicta ten years later that the validity of a New York state judgment under the 1790 Act would turn only on New York law, without recognizing any tension with *Banks*, and noting only that cases where a judgment rendered “*ex parte*,” with “the defendant having had no opportunity to make his defense . . . might form an exception”); *Field v. Gibbs*, 9 F. Cas. 15, 16 (Washington, Circuit Justice, C.C.D.N.J. 1815) (No. 4766) (“[W]hat . . . is to be done, if the judgment has been obtained against a person, residing out of the state, who was never served with process, or even notified of the existence of the suit, in which it was rendered? I

After leaving the matter open for some decades, the Supreme Court appeared to endorse this view in 1839, when it noted in *M'Elmoyle v. Cohen*²²⁴ that federal courts presented with prior state-court judgments could “inquire” into “the right of the state itself to exercise authority over the persons or the subject matter.”²²⁵ Echoing the reasoning of *Bissell* (and of Justice Story’s then-recent treatise on the Constitution), the Court wrote that the Full Faith and Credit Clause “did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the state.”²²⁶

In 1851, the Court settled the issue in *D’Arcy v. Ketchum*,²²⁷ holding that neither the Clause nor the 1790 Act gave effect to judgments that lacked jurisdiction under international law. *D’Arcy* involved a New York judgment against several copartners based on the appearance of one of them, a procedure accepted in New York but not universally.²²⁸ The creditor tried to enforce the judgment in a federal court in Louisiana²²⁹—facing that court with “the question, whether the New York statute, and the judgment founded on it, bound a citizen of Louisiana not served with process.”²³⁰ On writ of error, the Court analyzed the question in terms familiar since *Bissell*: under “well-established rules of international law, regulating governments foreign to each other,” courts would “disregard a judgment merely against the person, where he has not been served with process nor had a day in court.”²³¹ Such a proceeding “is deemed an illegitimate assumption of power, and resisted as mere abuse.”²³² That was “the international law as it existed among the States in 1790,”²³³ and neither the Constitution nor the 1790 Act had “altered the rule,”²³⁴ Congress legislated “[s]ubject to this established principle,” and without any intent “to overthrow [it].”²³⁵ Even if New York’s statutory service provisions were valid in New York’s courts, they had no power to “bind the citizens of one State to the laws of another.”²³⁶ New York could say that its judgments were valid, but under ordinary conflicts principles, no

answer, that his remedy is the same, and no other, as would be open to him, if the suit had been brought in the state, where the judgment was rendered.” (footnote omitted)).

224. 38 U.S. (13 Pet.) 312 (1839).

225. *Id.* at 326–27.

226. *Id.* at 327 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1307, at 183 (Boston, Hilliard, Gray & Co. 1833)).

227. 52 U.S. (11 How.) 165 (1851).

228. *Id.* at 166–67, 174.

229. *Id.* at 167.

230. *Id.* at 174.

231. *Id.*

232. *Id.*

233. *Id.* at 176.

234. *Id.* at 174.

235. *Id.* at 176.

236. *Id.*

one else had to listen. New York's statutes simply couldn't settle the question when "neither the legislative jurisdiction [of New York], nor that of [its] courts of justice, had binding force."²³⁷

3. *Federal-Question Review.*—*D'Arcy* was purely a negative decision: it confirmed that courts were under no obligation to recognize a judgment that lacked international sanction. But it quickly gave rise to more affirmative holdings, as the federal courts were now clearly committed to international rules of jurisdiction. So when one state court denied recognition to the valid judgment of another—valid, that is, according to the federal view of things—the losing party could seek Supreme Court review under section 25 of the Judiciary Act, portraying the denial as contrary to a "title, right, privilege or exemption specially set up or claimed" under the 1790 Act.²³⁸

In this way, the 1790 Act served as an occasional "hook" for the Court to correct state-court errors on the general law of jurisdiction. In 1867, the Court held that it had federal-question jurisdiction to review a New York decision refusing to give effect to an Illinois judgment.²³⁹ Two New Yorkers claimed certain movable property located in Chicago; the property was attached and awarded to one of them in Illinois, but a New York court later denied Illinois's *in rem* jurisdiction, in light of an outstanding mortgage under New York law.²⁴⁰ The two states' substantive laws disagreed on whether the property had been liable to attachment, and the Supreme Court applied what it saw as the general conflicts rule—namely that the state where the property was located had had full power to attach and dispose of it.²⁴¹

This rule didn't come from any federal statute, of course, and questions of general law couldn't support federal jurisdiction on their own.²⁴² If the issue were merely one of New York law, or even of general conflicts or property law that New York had adopted as its own, then the Court would have had no grounds for federal-question review of the New York judgment²⁴³—any more than it could review ordinary errors in state property

237. *Id.*

238. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (codified as amended at 28 U.S.C. § 1738 (2012)); *accord Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 134 (1875) ("[W]hether the validity or due effect of a judgment of the State court, or that of a judgment of a United States court, is disallowed by a State court, the Constitution and laws furnish redress by a final appeal to this court."); *see also* *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 301–03 (1866) (holding that the 1790 Act rendered a Mississippi statute "unconstitutional and void as affecting the right of the plaintiff to enforce" a valid Kentucky judgment).

239. *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307, 314 (1867).

240. *Id.* at 311, 313.

241. *Green v. Van Buskirk*, 74 U.S. (7 Wall.) 139, 148–52 (1869).

242. *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 287 (1875).

243. *See* *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 325 (1818) (Story, J.) (refusing to examine a state court's award of damages because it was "a question depending altogether upon the common law," and not on a "law of the United States").

or contract cases as unconstitutional takings or impairments of contracts.²⁴⁴ The Court wouldn't invent federal issues by assuming that state courts had gotten their own law wrong.²⁴⁵

Today we might explain the Court's involvement by reference to modern concepts of federal common law.²⁴⁶ James Weinstein, for example, has argued specifically in these terms, contending that the 1790 Act implicitly authorized a federal common law that was “essentially homegrown” rather than “mindlessly adopted” from international standards.²⁴⁷ As Weinstein correctly notes, early courts often described the rules they applied as being good policy²⁴⁸—much as courts often do today. But it's hardly clear that these courts actually viewed their rules as purely “instrumental”²⁴⁹—or that their routine claims to be applying international standards,²⁵⁰ or at least *attempting* to apply them, were made in bad faith. Rather than reading the Act as implicitly authorizing something new, the simpler explanation—and the one more faithful to the sources' own self-understanding—may just be that the Act failed to override something old.

Instead, what made the 1790 Act special was that it rested a federal issue (such as whether an Illinois judgment had to be recognized by other courts) on a state judgment's *international* validity and, in turn, on the reach of the state court's jurisdiction under the preexisting international law.²⁵¹ This was a question of general law, and one which New York's laws couldn't override—at least not in a way that the courts of other sovereigns had to

244. See, e.g., *R.R. Co. v. Rock*, 71 U.S. (4 Wall.) 177, 181 (1866) (rejecting an argument that “every case of a contract held by the State court not to be binding, for any cause whatever, can be brought to this court for review”).

245. See *Miller v. Nicholls*, 17 U.S. (4 Wheat.) 311, 315 (1819) (Marshall, C.J.) (“No other question is presented, than the correctness of the decision of the State Court, according to the laws of Pennsylvania, and that is a question over which this Court can take no jurisdiction.”); see also *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 638 (1875) (declining to review the portion of a Tennessee judgment based on “general principles of equity jurisprudence” and “unaffected by anything found in the Constitution, laws, or treaties of the United States”); *Rector v. Ashley*, 73 U.S. (6 Wall.) 142, 147 (1867) (refusing to undertake the “useless labor” of reviewing a judgment sustainable on state-law grounds).

246. Cf. Allan Erbsen, *Erie's Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 626 (2013) (arguing that, “[a]fter *Erie*,” federal courts are limited in their ability to apply general law directly, but “may create federal common law that incorporates or chooses general law”).

247. Weinstein, *supra* note 20, at 193, 195.

248. See *id.* at 195–98 (providing examples of “early nineteenth-century judges,” both state and federal, who “candidly acknowledged the instrumental reasons” for limits on jurisdiction).

249. *Id.* at 195.

250. E.g., *Bryant v. Ela*, 1 Smith 396, 401 (N.H. 1815) (“The law of nations forms a part of the law of Vermont, and of this State, and of every independent State.”).

251. See *Green v. Van Buskirk*, 74 U.S. (7 Wall.) 139, 148–51 (1869); see also *Crapo v. Kelly*, 83 U.S. (16 Wall.) 610, 618–22 (1872) (exercising federal-question jurisdiction to decide, based on general conflicts principles, that a Massachusetts judgment was valid and so required recognition in New York); Whitten, *Part One*, *supra* note 11, at 587–89 (summarizing the effect of *Green* and *Crapo*).

respect. New York could say that an Illinois judgment was invalid, but that wouldn't make it so.

This interdependence of federal and general law was what separated the general law of jurisdiction from, say, the law of negotiable instruments applied in *Swift v. Tyson*²⁵²—or from any other field of general law from which the states could depart by legislation.²⁵³ To the extent that a federal question rested directly on the general law of jurisdiction, a federal court had to take its own view of the issue,²⁵⁴ rather than treating it as a question of state law on which a state court—or even a state statute—might have the last word.²⁵⁵ As one law review put it, “the question of jurisdiction being thus thrown open to inquiry, the courts are at liberty to govern their conduct upon the subject, by the principles of international law.”²⁵⁶

D. Departures from General Law

The Full Faith and Credit Clause, together with the 1790 Act, partly federalized the general law of personal jurisdiction. But they did so in a very particular way. Despite what some scholars have argued, *D'Arcy* didn't hold that the Act or Clause simply adopted the then-prevailing standards of jurisdiction, as if in invisible ink.²⁵⁷ Neither did they authorize new fields of federal common lawmaking. Instead, they merely obliged states to respect valid sister-state judgments, full stop. But when the question of validity came before a federal court, whether in its original jurisdiction or on Supreme Court review, that court would have to determine the question according to its own views of general law.²⁵⁸ As later courts recognized, *D'Arcy* simply applied a rule of international law, which it held that federal law had left alone.²⁵⁹ This left substantial flexibility, both for states and for Congress, to depart from the general standards.

252. 41 U.S. (16 Pet.) 1 (1842).

253. See *id.* at 18 (noting that “the Courts of New York do not found their decisions upon this point upon any local statute,” and suggesting that a federal court would be obliged to enforce that statute if they did).

254. Cf. *Huntington v. Attrill*, 146 U.S. 657, 683–84 (1892) (holding that if a state refuses to recognize what it sees as a penal judgment, the Court “must determine for itself whether the original cause of action is penal in the international sense”).

255. See *supra* note 102 and accompanying text.

256. Alexander Martin, *Actions Against Non-residents and Absentees*, 15 AM. L. REG. 1, 9 (1866).

257. See, e.g., Rheinstein, *supra* note 25, at 795–96 (taking the Clause, as construed by *D'Arcy*, to apply “to the judicial proceedings of such other State as under the Law of Nations has had jurisdiction to proceed judicially”). But see David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1589 (2009) (noting that the Clause itself—as opposed to the 1790 Act—wasn't understood to stipulate the effect of state acts or judgments until the decision in *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615 (1887)).

258. See *supra* subpart II(C).

259. See, e.g., *Hall v. Lanning*, 91 U.S. 160, 168–69 (1875) (describing *D'Arcy* as reading the 1790 Act to “prescribe only the effect of judgments” of courts that “had jurisdiction,” including “by

As general law, the rules of personal jurisdiction could be overridden by state law within a state's own courts. If a state wanted its courts to recognize the exorbitant decisions of some other tribunal (domestic or foreign), that was just fine. General law could be overridden by statute, and neither the Clause nor the Act forbade states to act against interest.²⁶⁰ Or if a state simply misunderstood the international rules, accepting more sister-state judgments as valid than it had to, that was fine, too.²⁶¹ And if a state wanted to ignore *D'Arcy* and serve process on copartners anyway, within its own courts, that was *also* fine. So long as it understood that other courts might not enforce its judgments, it would never have to worry about federal review. As one mid-nineteenth-century commentator wrote, “[i]t could hardly be shown that such a law was in violation of the Federal Constitution, and the courts would not be justified in declaring it void as opposed to natural justice or the principles of international law.”²⁶² The only rule binding the states was that, if a state or federal judgment *did* have jurisdiction, under its own law and under the international rules, it had to be given effect under the 1790 Act. If a state court failed in this, its decision could be taken up to the Supreme Court²⁶³—in which case the federal courts' view of the general law was the one that counted.

Yet general law could be overridden in federal courts too. Because the Full Faith and Credit Clause didn't really constitutionalize jurisdiction, it left it open for Congress—in the exercise of some enumerated power—to rewrite the rules. International standards of jurisdiction could be used to supplement and interpret federal statutes, as other international rules are today.²⁶⁴ But they could also be abrogated, both for federal and for state courts.

Congress's power was prominently examined in the 1828 case of *Picquet v. Swan*,²⁶⁵ in which Justice Story on circuit used the general law to

international law”); *Price v. Hickok*, 39 Vt. 292, 298, 301 (1866) (describing *D'Arcy*—under the wrong name but the correct page citation—as resting “upon general principles of international law existing between the several states of the Union”).

260. See *Bissell v. Briggs*, 9 Mass. (9 Tyng) 462, 466 (1813) (describing a 1795 Massachusetts statute that recognized judgments rendered in other states and adding that “we know of no provision in the federal constitution, or in any law of Congress passed in pursuance of it, prohibiting any state from giving to judgments recovered in any other state any effect it may think proper” so long as the state “does not derogate from the effect secured by the constitution, and the acts of congress passed under it”).

261. Cf. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585–86 (1990) (noting that before 1914, the Supreme Court lacked jurisdiction to review state decisions mistakenly *upholding* claims of federal right).

262. Martin, *supra* note 256, at 12.

263. See *supra* note 238 (discussing *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1875)).

264. See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating the canon that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); see also *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (invoking this canon).

265. 19 F. Cas. 609 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

resolve a potential conflict between two acts of Congress. The Process Act of 1792 told federal courts to use certain state modes of proceeding²⁶⁶—which included, in *Picquet*, a version of foreign attachment.²⁶⁷ Yet by the Judiciary Act of 1789, as noted above, a suit against a U.S. resident could only be brought in the district “whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.”²⁶⁸ Story reconciled the two by holding that plaintiffs could “use the appropriate state process” to reach defendants who already met the Judiciary Act’s terms—but that state laws could “confer no authority on this court to extend its jurisdiction over persons or property, whom it could not otherwise reach.”²⁶⁹

The Supreme Court endorsed the same solution a decade later,²⁷⁰ but what’s more important is Story’s reasoning. The reach of any court, whether state or federal, was presumed to be limited by “the general principles of law [that] must be presumed to apply to them all”—namely, that a court of a particular territory “is bounded in the exercise of its power by the limits of such territory.”²⁷¹ Because the Judiciary Act had created territorial districts, the territorial scope of a lower court’s powers would be determined by applying the ordinary rules of international law.²⁷²

Yet if the jurisdictional rules only had the status of general law, they could be overridden by statute. If Congress wanted to, it could tell the federal courts to send their process “into every state in the Union”²⁷³—a conclusion that the Supreme Court would later reach as well.²⁷⁴ Indeed, Story wrote, if Congress ordered that “a subject of England, or France, or Russia, . . . be summoned from the other end of the globe,”²⁷⁵ a federal court “would certainly be bound to follow it, and proceed upon the law.”²⁷⁶ Story expressed no sense of any constitutional limit on this power, in the Fifth Amendment’s Due Process Clause or anywhere else. All that mattered was whether the court had jurisdiction—and the only limits on its jurisdiction were those of general law, which federal statutes would always outrank. Such an exorbitant jurisdiction would, of course, “be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of

266. See generally Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275.

267. 19 F. Cas. at 609–10.

268. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

269. *Picquet*, 19 F. Cas. at 611.

270. See *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (concurring with *Picquet*’s substance and describing its reasoning “as having great force”).

271. *Picquet*, 19 F. Cas. at 611.

272. *Id.*

273. *Id.*

274. *Toland*, 37 U.S. at 328.

275. *Picquet*, 19 F. Cas. at 613.

276. *Id.* at 615.

nations”;²⁷⁷ so Story wouldn’t lightly “infer[]” so extraordinary a rule “from so general a legislation as congress has adopted.”²⁷⁸ But Story offered no reason to suppose that, if Congress *did* want to assert universal jurisdiction, there was anything in the Constitution to stop it.

Congress’s ability to revise the law of jurisdiction may also have extended into the state courts. Under the second sentence of the Full Faith and Credit Clause, Congress had power “by general Laws” to “prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”²⁷⁹ In a series of proposals in the early nineteenth century, congressional drafters repeatedly made the effect of a judgment in other states turn on the source of personal jurisdiction.²⁸⁰ One typical bill proposed in 1806 would have made state judgments conclusive “against any party thereto, who appeared, or was personally served with legal notice to appear”—but rebuttable on the merits if the defendant “neither appeared, nor was personally served with legal notice.”²⁸¹

If the Constitution itself had required personal service, or even just adherence to the international rules, these bills would have been unconstitutional: a judgment without jurisdiction was *void*, not merely rebuttable. But if the jurisdictional rules were general law, they could be abrogated by a properly enacted statute. Congress could use its power to “prescribe . . . the Effect”²⁸² of state judgments by determining which ones would be recognized in federal courts, whether or not they would be respected abroad. As it happens, none of these bills were ever enacted. But the fact that they were proposed, and that the objections to them typically weren’t phrased in constitutional terms, suggests that there was no firm consensus *against* their constitutionality—and that if Congress had tried to exercise its power, it might well have succeeded.²⁸³

III. What *Pennoyer* Got Right

At the Founding, personal jurisdiction was a topic in general law, focused on a state’s sovereign power over persons or property within its territory. Today, it’s a constitutional question rooted in due process. How

277. *Id.* at 611.

278. *Id.* at 615.

279. U.S. CONST. art. IV, § 1.

280. See Sachs, *supra* note 150, at 1254–57, 1262–66, 1267–74 (describing these proposals).

281. H.R. 46, 9th Cong., § 1 (1st Sess. 1806). For other proposals, see H.R. 17, 15th Cong. (1st Sess. 1817); H.R. 45, 13th Cong. (2d Sess. 1814); H.R. 20, 10th Cong. (2d Sess. 1808).

282. U.S. CONST. art. IV, § 1.

283. See Sachs, *supra* note 150, at 1270–74 (describing the debates over the 1817 proposal); see also *id.* at 1264–65 n.278 (“[T]he cases and bills discussed here show judgments rendered without personal service were thought to be potentially enforceable. . . . [T]here is no indication in the debates that such enforcement by a federal court would have violated due process.”).

did we get from there to here? And how could *Pennoyer* have lawfully brought about this change?

As it turns out, *Pennoyer* was a sensible, perhaps even natural consequence of combining existing jurisdictional doctrines with the newly enacted Fourteenth Amendment. *Pennoyer*'s application of traditional principles was more or less right, in both reasoning and result. More importantly, *Pennoyer* was right as to its most "novel," even "startling," contribution to American law: the identification of due process as a limit on state jurisdiction.²⁸⁴ On that question, *Pennoyer*'s approach was and is entirely defensible.

The starting point for *Pennoyer*'s holding was that state and federal courts could take different views of the general law. As other scholars have concluded,²⁸⁵ *Pennoyer* didn't try to "constitutionalize" jurisdiction, in the sense of elevating specific rules to constitutional status. To the Court, jurisdictional doctrine was just a branch of the ordinary general law, one on which federal and state courts could amicably disagree. What the Fourteenth Amendment changed wasn't the status of the law of jurisdiction, but the consequences of that disagreement.

The reason was that due process often depended on a court's jurisdiction, full stop. Due process is commonly thought to forbid deprivations of liberty or property without the lawful judgment of a properly authorized court.²⁸⁶ The insight underlying *Pennoyer* is that a court lacking in personal jurisdiction isn't properly authorized, so it can't issue a lawful judgment. Relying on the judgment to take property away from the defendant, limit his or her liberty, and so on, works a deprivation without due process.

As a result, even though it didn't speak to jurisdiction directly, the Fourteenth Amendment altered the prevailing jurisdictional rules by adjusting the mechanisms of appellate review. When determining the presence or absence of jurisdiction, courts of the United States would have to take an independent view of the general law, not bound by state statutes or by the decisions of state courts. Should a state disagree with the federal courts, its judgment might appear—in federal eyes—to lack jurisdiction under general law, and so to threaten a violation of due process. That meant the losing party could seek review in the Supreme Court, with the lack of Fourteenth Amendment due process providing the necessary federal question. And because the state courts knew all this in advance, they would have to adopt the federal view of things, to avoid any future reversals. In short, the Fourteenth Amendment effectively federalized the law of jurisdiction without anyone necessarily intending to. It created an obligation

284. Perdue, *Scandal*, *supra* note 20, at 499–500.

285. See Perdue, *Sovereignty*, *supra* note 20, at 732.

286. See *infra* section III(B)(1).

for state courts—one that hadn't existed before—to follow the federal courts' lead on questions of personal jurisdiction.

The goal of this analysis isn't to discover some gnostic “true meaning” of *Pennoyer*, much less to read the mind of Justice Field. Instead, the goal is to put forward a plausible reading of *Pennoyer*—and, most importantly, to show why this sympathetic reconstruction would have been legally correct.

A. *Pennoyer Without the Fourteenth Amendment*

To see what *Pennoyer* changed, it's important to start with what it took for granted. This subpart explores *Pennoyer* as if it were a pre-Fourteenth Amendment case, showing why it would have been correctly decided on existing legal grounds.

To start with, *Pennoyer* was a recognition case. It stemmed from a default judgment of an Oregon state court, in a lawsuit by John Mitchell against Marcus Neff for unpaid legal fees.²⁸⁷ Neff having moved to California, process was served by publication under Oregon statutes.²⁸⁸ A default judgment issued and was executed against Neff's land, which was eventually conveyed to Sylvester Pennoyer—against whom Neff, on returning, filed a diversity action in Oregon federal court.²⁸⁹ The trial court saw various defects in the publication process, but the Supreme Court held that all state-law requirements had been satisfied; the problem with the state judgment, if there was one, rested on “principle[s] of general, if not universal, law.”²⁹⁰

Just as other federal courts had done before, the Court in *Pennoyer* examined the Oregon judgment as the tribunal of a separate sovereign, subject to international standards. Except insofar as the states were “restrained and limited” by the Constitution, they still retained “the authority of independent States.”²⁹¹ This authority was determined by reference to “principles of public law”²⁹²—a reference, in contemporary legalese, to international law.²⁹³ And among those principles, the Court stated, was the rule that “no State can exercise direct jurisdiction and authority over persons or property without its territory,” such as by “extend[ing] its process beyond

287. The best treatment of the facts and personalities involved is generally acknowledged to be Perdue, *Scandal*, *supra* note 20.

288. See *Pennoyer v. Neff*, 95 U.S. 714, 716–17 (1878) (statement of the case); *id.* at 720 (opinion of the Court).

289. *Id.* at 715–16 (statement of the case).

290. *Id.* at 720–21 (opinion of the Court).

291. *Id.* at 722.

292. *Id.*

293. See Conison, *supra* note 3, at 1090; Drobak, *supra* note 24, at 1026 n.59; Weinstein, *supra* note 20, 180 n.45.

that territory so as to subject either persons or property to its decisions.”²⁹⁴ As the Court saw things, the Oregon judgment failed on both counts.

I. Jurisdiction over Persons.—According to *Pennoyer*, before it could determine a nonresident’s “personal rights and obligations” (including, say, the obligation to pay legal fees), a state needed jurisdiction over the person.²⁹⁵ This jurisdiction couldn’t be obtained by sending process “into another State, and summon[ing] parties there domiciled to leave its territory and respond to proceedings against them.”²⁹⁶ Nor would publishing the summons internally “create any greater obligation upon the non-resident to appear.”²⁹⁷

These conclusions were entirely orthodox. While *Pennoyer*’s views on personal service have had their share of historical criticism, other research has defended their general outlines.²⁹⁸ The standard nineteenth-century means of establishing in personam jurisdiction was to show the defendant’s subjection to the court, whether by voluntary appearance or by lawful service of a summons to appear.²⁹⁹ Mere notice to the defendant wasn’t enough.³⁰⁰ To make the defendant “bound to appear” as a matter of general principle,³⁰¹ states needed to accomplish an official legal act, which they only had power to do within their own territories.³⁰²

There were a few recognized exceptions to the rule, but not many. States were seen as having more freedom to create novel service methods for their

294. *Pennoyer*, 95 U.S. at 722.

295. *Id.* at 732.

296. *Id.* at 727.

297. *Id.*

298. Compare Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 YALE L.J. 289, 292 (1956) (arguing against a historical service requirement), and Hazard, *supra* note 14, at 271 (same), with Weinstein, *supra* note 20, at 189–90 (arguing that the service requirement was well-established historically), and Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 94 (1968) (“The common law courts neither exercised nor believed they could exercise jurisdiction in personal actions without either physical custody of the defendant or an appearance by him.”).

299. See, e.g., *Nations v. Johnson*, 65 U.S. (24 How.) 195, 205 (1860); *Harris v. Hardeman*, 55 U.S. (14 How.) 334, 339 (1852); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 623 (1838); *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 472 (1830); *Rogers v. Coleman*, 3 Ky. (Hard.) 413, 424–25 (1808); *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 241 (1828); *Borden v. Fitch*, 15 Johns. 121, 144 (N.Y. Sup. Ct. 1818); see also Levy, *supra* note 298, at 63 (describing the history of the summons).

300. See *Gerault v. Anderson*, 1 Miss. (1 Walker) 30, 34 (1818) (describing notice and authority as distinct requirements); *accord Ewer v. Coffin*, 55 Mass. (1 Cush.) 23, 28 (1848); *Colvin v. Reed*, 55 Pa. 375, 380 (1867); *Benton v. Burgot*, 10 Serg. & Rawle 240, 241 (Pa. 1823); STORY, *supra* note 157, § 546, at 457–58.

301. *Picquet v. Swan*, 19 F. Cas. 609, 612 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

302. See *Warren Mfg. Co. v. Etna Ins. Co.*, 29 F. Cas. 294, 298 (Thompson, Circuit Justice, C.C.D. Conn. 1837 [approximate date]) (No. 17,206) (holding that personal service beyond a state’s borders could have no legal effect); *accord Ewer*, 55 Mass. (1 Cush.) at 28; *Fenton v. Garlick*, 8 Johns. 194, 197 (N.Y. Sup. Ct. 1811); *Hitchcock v. Aicken*, 1 Cai. 460, 484 (N.Y. Sup. Ct. 1803) (opinion of Lewis, C.J.); *Price v. Hickok*, 39 Vt. 292, 296 (1866).

own citizens or residents, who had separate obligations to obey their own state's laws.³⁰³ There were special rules for cases involving marriage or divorce,³⁰⁴ as well as for corporate defendants.³⁰⁵ But these subject-specific additions didn't do much to change the general rule. By the mid-nineteenth century, one Massachusetts court had called the matter "now too well settled to admit of discussion," that if a defendant "is not served with process, and does not voluntarily appear and answer to the suit," any resulting judgment "cannot be enforced against him out of the local jurisdiction."³⁰⁶

2. *Jurisdiction over Property.*—The other route to defending the Oregon judgment was as a judgment in rem. Oregon unquestionably had power over Neff's land within its borders, and the Supreme Court agreed that it could use that land to satisfy claims against its owner.³⁰⁷ But as *Pennoyer* saw things, states could exercise in rem jurisdiction after service by publication only "where property is once brought under the control of the court by seizure or some equivalent act."³⁰⁸ Neff's property was first brought under the court's control as part of the process of execution, well after the judgment had issued.³⁰⁹ That meant the judgment, when it issued, wasn't really in rem at all, but just an ordinary judgment for money damages.

This analysis, too, was largely orthodox. No state, the Court had held in 1844, "can arrogate to itself the power of disposing of real estate without the forms of law"; it had to "obtain jurisdiction of the thing in a legal mode."³¹⁰ Attaching property would be taken, other cases said, "as constructive notice to the whole world"—but only "where the proceeding is

303. See *Welch v. Sykes*, 8 Ill. (3 Gilm.) 197, 201 (1846) (holding that a state's new mode of process can be "binding on its own citizens"); *Weaver v. Boggs*, 38 Md. 255, 261 (1873) (describing constructive service as "binding upon persons domiciled within the State where such law prevails," a rule "based upon international law"); see also *Dearing v. Bank of Charleston*, 5 Ga. 497, 510–11 (1848) (construing a statute regarding service to apply only to English subjects, as "the citizen of each independent State should be liable to, and be protected by, the laws of the State to which he owes allegiance"); *Sim v. Frank*, 25 Ill. 125, 127 (1860) (stating that a Pennsylvania statute allowing judgment without notice or appearance "can only be binding upon citizens of that State"); *Douglas v. Forrest* (1828) 130 Eng. Rep. 933, 940; 4 Bing. 686, 703 (C.P.) (permitting a judgment by foreign attachment when "the party owed allegiance to the country," by whose laws "his property was, at the time those judgments were given, protected"); *Martin*, *supra* note 256, at 7 (noting the commonly invoked "principle," of which he strongly disapproved, that "every citizen is amenable to the laws of his country wherever he may be").

304. See, e.g., *Colvin*, 55 Pa. at 378–83.

305. See, e.g., *Warren Mfg. Co.*, 29 F. Cas. at 299; *Moulin v. Trenton Mut. Life & Fire Ins. Co.*, 24 N.J.L. 222, 234 (1853).

306. *Phelps v. Brewer*, 63 Mass. (9 Cush.) 390, 395–96 (1852); accord *Sim*, 25 Ill. at 127; *Melhop v. Doane & Co.*, 31 Iowa 397, 406–07 (1871).

307. *Pennoyer v. Neff*, 95 U.S. 714, 723 (1878); see also *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 241 (1828) ("If the property of a citizen of another State, within its lawful jurisdiction, is condemned by lawful process there, the decree is final and conclusive.").

308. *Pennoyer*, 95 U.S. at 727.

309. *Id.* at 720.

310. *Shriver's Lessee v. Lynn*, 43 U.S. (2 How.) 43, 60 (1844).

strictly and properly in rem, and in which the thing condemned is first seized and taken into the custody of the court.”³¹¹ A state might skip attachment pursuant to statute when the case was “substantially, a proceeding *in rem*,” determining the ownership of specific property without leaving the defendant “personally bound.”³¹² But Mitchell’s judgment had let him execute against whatever property he could find—and a judgment in rem could not be used, per international standards, to establish that kind of personal debt.³¹³

To Justice Hunt, in dissent, the timing of attachment was “a matter not of constitutional power,” but only “of detail.”³¹⁴ If Oregon had full power over Neff’s land, why care about when the writ issued? Some cases (and state statutes) agreed with Hunt,³¹⁵ but other cases agreed with Justice Field,³¹⁶ who may have had the better of the argument. It was black-letter law that a judgment without jurisdiction was void, not merely voidable.³¹⁷ So the presence or absence of jurisdiction couldn’t depend, as Oregon law would have it, on property to be named later—“upon facts to be ascertained after [the court] has tried the cause and rendered the judgment.”³¹⁸ To Field,

311. *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 475 (1830) (quoting the decision below, of which the court “unanimously approve[d],” see *id.* at 470).

312. *Boswell’s Lessee v. Otis*, 50 U.S. (9 How.) 336, 348 (1850); see *Pennoyer*, 95 U.S. at 734 (categorizing actions “to partition real estate, foreclose a mortgage, or enforce a lien” as “substantially proceedings *in rem*”); cf. *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 317 (1870) (describing the statutory attachment of real or intangible property without a physical seizure).

313. See, e.g., *Green v. Van Buskirk*, 74 U.S. (7 Wall.) 139, 149 (1869) (describing a “manifest” distinction, “supported by authority,” between using foreign attachment proceedings to establish a claim against the debtor personally and merely to defend the seizure of the goods attached); *id.* at 148 (“Of course Green could not sue Bates on it, because the court had no jurisdiction of his person; nor could it operate on any other property belonging to Bates than that which was attached.”); accord *Boswell’s Lessee*, 50 U.S. (9 How.) at 348; *Picquet v. Swan*, 19 F. Cas. 609, 612 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134); *Dearing v. Bank of Charleston*, 5 Ga. 497, 513 (1848); *Bissell v. Briggs*, 9 Mass. (8 Tyng) 462, 469 (1813); *Borden v. Fitch*, 15 Johns. 121, 142 (N.Y. Sup. Ct. 1818).

314. *Pennoyer*, 95 U.S. at 738, 748 (Hunt, J., dissenting).

315. See *id.* at 738–40 (listing statutes); *Jarvis v. Barrett*, 14 Wis. 591, 594–95 (1861); see also *Tocklin*, *supra* note 10, at 132–34 (defending Hunt’s view).

316. See *Cooper*, 77 U.S. (10 Wall.) at 319 (“Without [seizing or attaching property] the court can proceed no further . . .”); *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1851) (describing certain judgments as “nullities,” because there was no “attachment or other proceeding against the land, until after the judgments”); *Boswell’s Lessee*, 50 U.S. at 348 (limiting the effect of in rem judgments to “property of the defendant, within the jurisdiction of the court”); see also *Oakley*, *supra* note 20, at 679–83 (defending at length the strength of authority on this point).

317. *Elliott v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340 (1828); *Filling the Void*, *supra* note 145, at 164.

318. *Pennoyer*, 95 U.S. at 728 (majority opinion). Compare *Borchers*, *supra* note 1, at 40 (arguing that *Pennoyer* was really a case about state law, as Justice Field “construed the Oregon Code to allow for personal jurisdiction . . . only in accordance with the territorial principles”), with *Pennoyer*, 95 U.S. at 720 (construing Oregon’s damage cap to limit recoveries against absent property owners “to the extent of such property” at the time of suit, but not as limiting courts’ jurisdiction “only [to] such property,” and thereby permitting ordinary money judgments “having no relation to the property” so long as they didn’t exceed the determined amount), and *id.* at 733

Mitchell's judgment didn't run against hypothetical property that Neff might have already sold off, or that he might never have owned at all; it ran against *Neff*, establishing a personal liability, and so was void in international eyes.

3. *State Jurisdiction in Federal Court.*—Hunt and Field's dispute over attachment brought forward a deeper tension in the case. The Court rejected Oregon's judgment based on international standards. But why did international standards matter? As Hunt argued, this case wasn't about "the faith and credit to be given in one State to a judgment recovered in another"; it was about "land lying in the same State" of Oregon.³¹⁹ So why would a federal court in Oregon come to a different answer than a state one?

Field asked the same question, but in the opposite direction. If Mitchell's judgment were really just "waste paper"³²⁰—if it were void *ab initio*, and not just voidable—why should it be valid in the state's eyes? As the Court wrote, "if the whole proceeding . . . is *coram non iudice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice—it is difficult to see how the judgment can legitimately have any force within the State."³²¹ Field praised cases from the few states that had begun to incorporate the general rules as part of their own law—and that maintained, "as it always ought to have been," that an exorbitant judgment "is not entitled to any respect in the State where rendered."³²² But why hadn't this happened in every state?

The answer, again, can be found in the special features of general law. On general-law questions, state and federal courts could agree to disagree. Neither of them controlled the other, and while there were advantages in uniformity, neither side had to blink first. The correct legal answer in any particular case would depend on the forum in which the case was brought.

This arrangement may seem bizarre to modern eyes, but it shouldn't. Even today, courts are sometimes obliged to render different judgments on identical questions of law. Suppose that a criminal defendant raises a good First Amendment defense that's nonetheless barred by circuit precedent. An appellate panel might then affirm the conviction, even while privately agreeing with the defendant. Should the case be reheard en banc, the same judges might vote to vacate the panel decision and reverse the judgment—even though the panel and the district court, by following circuit precedent, had done *exactly* what they were required to do. In one sense, the district court "got it wrong"; the First Amendment doesn't mean one thing at trial and another on appeal, or one thing before the panel and another en banc.

(disapproving "the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other States").

319. *Pennoyer*, 95 U.S. at 741 (Hunt, J., dissenting).

320. *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 475 (1836).

321. *Pennoyer*, 95 U.S. at 732 (majority opinion).

322. *Id.*

But in another sense, the district court “got it right”; it delivered the kind of decision that a court in its position was supposed to deliver. (And had it followed its best lights on the First Amendment question, circuit precedent be damned, it would have been acting contrary to its legal obligations, all things considered.)

Sometimes the law makes us take others’ views as authoritative, even if they’re potentially incorrect. The Oregon court had to pay attention to Oregon’s statutes, including statutes that overrode the general law and expanded the state’s legislative and judicial powers. But a federal court might not, if *its* reading of the general law put the outer limits of personal jurisdiction beyond Oregon’s power to legislate.

Pennoyer explained this disagreement between state and federal courts with an eye to the available means of review. Diverse parties could take their cases directly to federal court. But when a state court applied its own state’s statutes, there had been “no mode of directly reviewing such judgment or impeaching its validity within the State where rendered.”³²³ General-law cases didn’t create federal-question jurisdiction,³²⁴ and without federal law on point, there was no possibility of Supreme Court review. So the state judgment “could be called in question only when its enforcement was elsewhere attempted”;³²⁵ only a change in forum could produce a change in law.

Once the question did arise in a different court, though—as in Neff’s federal suit to recover his land—that court could give a different answer. “[T]he courts of the United States,” wrote Field, “are not required to give effect to judgments of this character when any right is claimed under them.”³²⁶ The U.S. courts were “not foreign tribunals,” but they were “tribunals of a different sovereignty, exercising a distinct and independent jurisdiction,” and only “bound to give to the judgments of the State courts . . . the same faith and credit which the courts of another State are bound to give to them.”³²⁷ In other words, a federal court wasn’t required to take a state’s jurisdictional statutes at their word—and it would give state judgments the recognition they were due, not as a matter of state law, but as a matter of *general law*.

Hunt’s argument does have some modern defenders. Patrick Borchers, for example, argues that the federal courts sitting in each state were bound to follow that state’s jurisdictional law, even as they might reject similar

323. *Id.*

324. *See supra* note 100 and accompanying text.

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

326. *Id.*

327. *Id.* at 732–33.

judgments from other states.³²⁸ Yet as Borchers notes,³²⁹ the 1790 Act applies to “every court within the United States”³³⁰—to federal courts as well as state ones. If the Act is generally limited to internationally valid judgments, as *D’Arcy* held,³³¹ it imposes no obligation on *any* federal court to respect a void judgment, whether in or out of the state that rendered it.³³²

Numerous statements by the Supreme Court suggested that federal courts, as courts of a separate sovereignty, were supposed to subject every other court system to the same degree of scrutiny. In *Elliott v. Lessee of Peirsol*, Attorney General Wirt had argued that the Circuit Court for the District of Kentucky “was not competent to inquire into the acts of the Court of the state of Kentucky,” by analogy to courts of the same system in Britain.³³³ As noted above, the Supreme Court specifically rejected that argument, stating that “[w]e know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other Courts, in this respect.”³³⁴ Likewise, in *M’Elmoyle v. Cohen*, the Court denied that the 1790 Act was “intended to exclude,” in “any Court in the United States,” defenses that “inquire into the jurisdiction of the Court in which the judgment was given,” regarding “the right of the state itself to exercise authority over the persons or the subject matter.”³³⁵ And in *Baldwin v. Hale*,³³⁶ the Court reasoned from the premise that state insolvency laws “have no extra-territorial operation,” and that a state court “sitting under them” can give no “[l]egal notice” creating an “obligation to appear,” to the conclusion that the court would have “no jurisdiction” that could bind any other tribunal³³⁷—and so a discharge from the Court of Insolvency in Massachusetts applied only in Massachusetts *state* courts, and not “in the courts of the United States, or of any other State.”³³⁸

This reasoning supports Justice Story’s decision in *Flower v. Parker*, when sitting on circuit in Massachusetts, to give the same scrutiny to a

328. Patrick J. Borchers, *Pennoyer’s Limited Legacy: A Reply to Professor Oakley*, 29 U.C. DAVIS L. REV. 115, 127 & n.61 (1995) [hereinafter Borchers, *Limited Legacy*]; Borchers, *supra* note 1, at 30–32, 36 n.115.

329. Borchers, *Limited Legacy*, *supra* note 328, at 127.

330. Act of May 26, 1790, ch. 11, 1 Stat. 122.

331. *See supra* note 229 and accompanying text.

332. *See* *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 302 (1866) (describing the 1790 Act as “applicable in all similar cases where it appears that the court had jurisdiction of the cause, and that the defendant was duly served with process, or appeared and made defence”).

333. 26 U.S. (1 Pet.) 328, 331 (1828) (argument of counsel) (“This is not done by the Courts of King’s Bench, of England, in reference to the proceedings of Ecclesiastical Courts, or Courts of Common Pleas.”).

334. *Id.* at 340 (majority opinion).

335. 38 U.S. (13 Pet.) 312, 326–27 (1839) (quoting *Hampton v. M’Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818)) (internal quotation marks omitted).

336. 68 U.S. (1 Wall.) 223 (1863).

337. *Id.* at 234.

338. *Id.* at 230; *see id.* at 224 (statement of the case).

Massachusetts state judgment as to judgments from out of state.³³⁹ It also supports Justice Field's conclusion prior to *Pennoyer*, addressing the issue on circuit in *Galpin v. Page*,³⁴⁰ that "[a]ll the circuit courts of the United States have the same relation to the state courts," and would "examine into [their] jurisdiction" to the same extent, no matter where they sit.³⁴¹ And, of course, the federal courts' taking an independent view of any conflicts questions was standard practice prior to *Klaxon*.³⁴²

At the same time, to my knowledge, there don't seem to have been any open statements of Hunt's view before Hunt's dissent. Judges sometimes paraphrased the language of the 1790 Act, stating blandly that state judgments would receive the same effect in federal court as in the court where they were rendered.³⁴³ But the 1790 Act required the same thing for every state judgment, local or distant—which is why *M'Elmoyle* emphasized that the Act didn't cover jurisdiction. Other courts regularly spoke of recognition in geographic terms; a given judgment might be enforceable within a state, but "a dead letter beyond the territory within which it was pronounced."³⁴⁴ But of course state courts faced these issues only with respect to the judgments of *other states*; and while federal courts used the same refrain, they didn't actually apply it as a rule. Borchers cites a number of in-state federal recognition cases applying state rules of jurisdiction, yet each of them had other legal reasons to do so³⁴⁵—and none suggested that federal courts

339. 9 F. Cas. 323, 324–25 (Story, Circuit Justice, C.C.D. Mass. 1823) (No. 4891).

340. 9 F. Cas. 1126 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 5206).

341. *Id.* at 1132.

342. *See supra* note 115 and accompanying text.

343. *See, e.g.*, *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466, 471 (1830). *But see id.* at 472, 474–75 (concluding that the state judgment rested on service that was improper even on state-law principles, rendering it unnecessary to discuss what would have happened if those principles had contradicted "the general law of the land").

344. *Hall v. Williams*, 23 Mass. (6 Pick.) 232, 246 (1828).

345. Some of these cases involved collateral attacks on the prior judgment's *subject-matter* jurisdiction, which of course would depend on state law. *See Elliott v. Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340–41 (1828) (inquiring into a Kentucky court's "authority over a subject," as "derived wholly, from the statute law of the state"); *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 185–86 (1809) (inspecting "the constitution and powers of the [New Jersey] court in which this judgment [of treason] was rendered," and looking to New Jersey statutes to determine that "[w]ith respect to treason, then, it is a court of general jurisdiction"). Some found state law consistent with international law, so compliance with state law became the only question worth answering. *See Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 317–19 (1870) (determining that procedures established by state statute were consistent with general requirements for in rem jurisdiction); *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 470–72 (1836) (describing the process required by statute as more exacting than under the "general principles of law, by which the validity of sales made under judicial process must be tested"). Some found that the plaintiff had failed to comply with state law, making it unnecessary to reach other issues. *See Galpin v. Page*, 85 U.S. (18 Wall.) 350, 372–73 (1874) (finding that "[t]he provisions mentioned were not strictly pursued," as state law required); *Boswell's Lessee v. Otis*, 50 U.S. (9 How.) 336, 350 (1850) (finding that "the requisites of the statute [had not] been complied with"). Some fell into *Pennoyer's* category of cases that were "substantially proceedings *in rem*," 95 U.S. 714, 727 (1878), in which compliance

were legally *bound* by the jurisdictional practices, no matter how exorbitant, of the state in which they sat.

The strongest argument for Hunt's view may be an argument from silence. Why didn't more out-of-state defendants challenge state judgments in this way? Why didn't they just default in the state court and then sue the winner right back in federal court—a strategy that might even survive modern limits on collateral attack?³⁴⁶ One answer, of course, is that some defendants did: this was essentially the strategy in *Flower*. Another answer is that most out-of-state defendants were probably happy to sit at home and wait for the plaintiff to try to collect. Suing abroad, even in federal court, meant the expense of distant litigation and the risk of a hostile jury; Flower brought his suit to recover money from his debtors, not just to challenge recognition in the abstract. And, in any case, the rarity of a litigation strategy doesn't always mean that the strategy was wrong. (To my knowledge, scholars have turned up no antebellum examples of Supreme Court review of a state's refusal to recognize a judgment under the 1790 Act—even though such challenges were legally available from the beginning.)³⁴⁷

Given the absence of more direct statements of Hunt's view, together with the presence of statements pointing the other way—as well as the actual application of federal scrutiny to in-state judgments in *Flower* and *Galpin*—the preponderance of the evidence seems to favor *Pennoyer*, and the rule that federal courts could take their own view of state jurisdiction.

B. *The Fourteenth Amendment in Federal Court*

Immediately after establishing that federal courts could make their own judgments, *Pennoyer* delivered its most famous sentence:

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights

with local statutes was all that was required. See *Sargeant v. State Bank of Ind.*, 53 U.S. (12 How.) 371, 383–87 (1851) (discussing the evidence admissible under state law in a collateral attack on a state court's order to convey land); *Steele's Lessee v. Spencer*, 26 U.S. (1 Pet.) 552, 559–60 (1828) (assessing the impact on third-party purchasers, under state law, of an injunction requiring the current owner to convey land). And some concerned substantive state-law issues that were only indirectly related to jurisdiction, such as the evidentiary sufficiency of the record of a previous judgment, see *Harvey v. Tyler*, 69 U.S. (2 Wall.) 328, 341–48 (1865), or the formalities for acknowledging a deed, see *Deery v. Cray*, 72 U.S. (5 Wall.) 795, 806–07 (1866) (looking to the decisions of the Supreme Court of Maryland when rejecting an argument that a deed was void because it did not show compliance with “the law of Maryland then in force concerning the privy examination of married women”).

346. See, e.g., *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982); cf. *Durfee v. Duke*, 375 U.S. 106, 115 (1963) (preventing relitigation of subject-matter jurisdiction once the issue has been “fully litigated and judicially determined”).

347. See *supra* text accompanying notes 238–56.

and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.³⁴⁸

This connection between jurisdictional standards and due process isn't obvious. Martin Redish, for example, has argued that there was no "historical link between due process and the concepts of federalism or interstate sovereignty," at least "prior to its unexplained creation in *Pennoyer v. Neff*."³⁴⁹ It's true that there's no direct link; the Due Process Clause isn't a federalism provision. But that doesn't mean there's no link at all. Read another way, *Pennoyer*'s invocation of due process makes perfect sense: a judgment without jurisdiction is void, and property or liberty taken under a void judgment is taken without due process of law.

The crucial point here is that due process doesn't require any particular technique of obtaining personal jurisdiction. It just requires *jurisdiction*, full stop. Jurisdiction is what makes the process *lawful*, what gives the court legal power to take away property or liberty. A judgment without jurisdiction is void, a piece of "waste paper."³⁵⁰ And taking away someone's property or liberty based on a piece of waste paper is, if *anything* is, a deprivation without due process of law.

1. Due Process and Jurisdiction.—Even those quite skeptical of *Pennoyer* might agree that due process sometimes requires a properly constituted court.³⁵¹ This is a familiar part of due process doctrine, particularly in cases about administrative tribunals and other entities at the edges of Article III.³⁵² And it's also a familiar part of ancient doctrine, dating at least from Bracton's principle that "no one shall be disseised of his free tenement without a judgment."³⁵³ From roughly the fourteenth century to

348. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

349. Redish, *supra* note 8, at 1120–21; accord Whitten, *Part Two*, *supra* note 12, at 818 (arguing that "the traditional territorial rules" weren't part of the original meaning of due process).

350. *Voorhees*, 35 U.S. (10 Pet.) at 475.

351. See, e.g., Hazard, *supra* note 14, at 270–71, 270 n.102 (criticizing the "logic and policy" of *Pennoyer*, but acknowledging that Justice Field's assertion linking "limitations on state-court jurisdiction" with due process "rested on better ground in the precedent than is sometimes assumed").

352. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985) (suggesting that, under certain circumstances, some "Article III review" may be "required by due process considerations"); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855) (associating due process with a "trial according to some settled course of judicial proceedings"); cf. *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is . . . because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process."); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 269 (1990) (describing "a fundamental congruence between the question whether the citizen has been afforded the judicial process that is 'due' and the question whether sufficient scope has been given to the 'judicial' power").

353. F.W. MAITLAND, *EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW* 316 & n.2 (A.H. Chaytor & W.J. Whittaker eds., 1910).

today, “due process” has “consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law,” a sense that continued to be relevant as the phrase crossed the Atlantic and found its way into the Constitution.³⁵⁴ This doesn’t have to be all that “due process” means, of course—not by half. But it is a core sense of the term. If the Supreme Court was right to say that “‘due process of law’ generally implies and includes actor, reus, iudex,”³⁵⁵ then it’s a real problem to find yourself *coram non iudice*.

a. Jurisdiction, Personal and Subject-Matter.—The vital clue to this theory of *Pennoyer*, as highlighted by Wendy Collins Perdue, is that the case refers equally to *subject-matter* as well as to personal jurisdiction.³⁵⁶ According to Field, whatever other difficulties attend the Fourteenth Amendment’s words, “there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.”³⁵⁷ For “such proceedings” to have “any validity” in establishing “the personal liability of the defendant,” they must be conducted by “a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit,” and the defendant “must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.”³⁵⁸

No one thinks that the Constitution includes any specific rules for the *subject-matter* jurisdiction of state courts. (Say, that a small-claims court can only hear cases up to \$10,000, and so on.) Subject-matter jurisdiction is typically state law, which the Due Process Clause takes as it finds—just as, for example, it looks to state-law definitions of property.³⁵⁹ But this suggests that due process might not specify any particular rules for *personal* jurisdiction of state courts, either. All that matters is that they *have* personal jurisdiction, in the eyes of the forum examining the judgment. And if that forum is federal, the standards for personal jurisdiction may be drawn from the federal courts’ view of the general law. In other words, due process isn’t a stand-in for a list of acceptable service methods; it’s a consequence of a

354. Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012).

355. *Murray’s Lessee*, 59 U.S. (18 How.) at 280 (emphasis omitted); cf. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND 39 (London, Societie of Stationers 1628) (describing “*Actor, Reus, and Iudex*” as requisite to a judgment).

356. Perdue, *Scandal*, *supra* note 20, at 505–06.

357. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

358. *Id.*

359. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

court's having subject-matter and personal jurisdiction, as defined by whatever *other* sources of law confer them.³⁶⁰

b. Contemporary Readings.—Reading *Pennoyer* as requiring jurisdiction, full stop, makes more sense than reading it to treat any particular service rules as written in stone. *Pennoyer* does cite a treatise by Thomas Cooley for the proposition that “due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.”³⁶¹ But Cooley’s treatise repeatedly stated that due process depended on *jurisdiction*, not just on particular requirements involving personal service.³⁶² And Cooley himself argued, soon after *Pennoyer*, that the range of state personal jurisdiction was partly defined by “an admitted principle in the law of nations,”³⁶³ not just by constitutional requirements. So it’s at least as plausible to read *Pennoyer*’s quote from Cooley as simply carrying through an incorporation by reference. Due process required various personal service rules, not as a (necessary) matter of definition, but as a (contingent) matter of implication—in light of the fundamental need for jurisdiction, full stop, as well as any particular legal standards for personal jurisdiction that happened to be in place.

Indeed, that’s how a number of the early decisions applying *Pennoyer* spoke about the matter. In 1889, the New Jersey Supreme Court noted that if a court “has no jurisdiction,” then “no part of such procedure would constitute due process of law”—in which case “the recent amendment to the federal constitution illegalizes the entire affair.”³⁶⁴ In 1897, the Ohio Supreme Court explained *Pennoyer*’s personal-service requirement as resting “on the ground that the proceedings of a court of justice to determine personal rights and obligations of one over whom *it has no jurisdiction* is not due process of law.”³⁶⁵ And in 1908, the Supreme Court itself identified two requirements of procedural due process: that the court “shall have jurisdiction” (for which it cited *Pennoyer*, among other cases), *and* that the parties be given “notice and opportunity for hearing.”³⁶⁶

360. See *Perdue, Scandal*, *supra* note 20, at 506; *Perdue, Sovereignty*, *supra* note 20, at 732.

361. *Pennoyer*, 95 U.S. at 734 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 405 (Boston, Little, Brown & Co. 1868)).

362. See COOLEY, *supra* note 361, at 358 (“If in these cases the court has jurisdiction, they proceed in accordance with the law of the land . . .”); *id.* at 397–98 (stating that “the question, what constitutes due process of law,” is “not so difficult” as to courts, for “[t]he proceedings in any court are void if it wants jurisdiction”—both subject-matter and personal—“of the case in which it has assumed to act”).

363. Thomas M. Cooley, *The Remedies for the Collection of Judgments Against Debtors Who Are Residents or Property Holders in Another State, or Within the British Dominions*, 31 AM. L. REG. (o.s.) 697, 700 (1883).

364. *Elasser v. Haines*, 18 A. 1095, 1097 (N.J. 1889).

365. *Kingsborough v. Tousley*, 47 N.E. 541, 543 (Ohio 1897) (emphasis added).

366. *Twining v. New Jersey*, 211 U.S. 78, 110–11 (1908).

c. Jurisdiction Under State Law.—This theory might seem to prove too much. If the key issue is jurisdiction, full stop, won't the Supreme Court be overwhelmed with garden-variety jurisdictional defects? Does *every* case in which a state court lacked jurisdiction, whether personal or subject-matter, really pose a due process problem too?

Only sort of. It *is* a problem for a defendant to be deprived of life, liberty, or property without due process of law. And if a state court actually lacks subject-matter jurisdiction, then its judgment doesn't provide due process. But that doesn't mean the case would—or should—be reviewed by the Supreme Court.

As noted above, every incorrect construction of state contract law is a potential Contracts Clause problem; every wrong decision about public property is a potential takings problem; and so on.³⁶⁷ Yet we don't expect the Supreme Court to hear all these cases. That's because these federal issues are premised on errors of state law, arising only on the assumption that the state courts got their own law wrong. The Supreme Court usually doesn't second-guess state courts in this way,³⁶⁸ unless it suspects some kind of “evasion” of a federal right.³⁶⁹ So long as the state decision “rests upon a fair or substantial basis,” it'll be taken as authoritative³⁷⁰—in which case the Court could only conclude that there was in fact no error, and so no failure of due process.

By contrast, *Pennoyer's* doctrines of personal jurisdiction weren't state law in this sense. They were pure questions of general law—which the federal courts could look to directly, both because Congress hadn't legislated on the topic and because, under the conflicts principles applicable in federal courts, no state could rewrite the jurisdictional rules on its own. So if a state supreme court wrongly upheld the trial court's jurisdiction—as a matter of general law, or even as a matter of state statute—the Supreme Court could still look past that court's decisions and come to its own view.

At the same time, this understanding doesn't open the door to full federal review of all state decisions involving general law. State courts have an obligation to faithfully apply their own state's law—not only local law, but also any general-law rules that the state incorporates by reference. On most topics (torts, contracts, etc.), the state is perfectly competent to depart from the general law by statute. And where it isn't, or where the state has chosen to leave the general law in place, not every state-court mistake in applying the general law will create a due process problem. A judgment with

367. See *supra* text accompanying note 244.

368. See *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825) (noting that, “in cases depending on the laws of a particular State,” the Court would uniformly “adopt the construction which the Courts of the State have given to those laws,” rather than suggest that other courts “had misunderstood their own statutes”).

369. *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930).

370. *Id.*

proper jurisdiction may be *erroneous* and liable to correction on appeal; but it isn't *void*, and its execution raises no due process problem. *Pennoyer* worked as it did only because both key elements were present: jurisdictional concerns that implicated due process, as well as general-law rules on which the federal courts were forced to reach their own conclusions.

This interpretation explains why the Court still sometimes looks past state assertions of *subject-matter* jurisdiction. For example, try as it might, a state court can't reassign title to land in another state,³⁷¹ nor bar a witness from testifying elsewhere³⁷²—even if the state declares itself competent to do so, and even if the parties have fully litigated the issue and lost before the state courts.³⁷³ In cases where the *whole state system* lacks authority to decide a particular matter,³⁷⁴ the Court will prevent the state court (in Chief Justice Marshall's words) from “exercis[ing] a jurisdiction which, according to the law of nations, its sovereign could not confer.”³⁷⁵ In these exceptional cases, in which the general law actually does place limits on subject-matter jurisdiction, the Court can and does take an independent view.

2. *Pennoyer's Puzzles, Explained.*—Understanding due process as requiring jurisdiction, full stop—and understanding jurisdiction as governed by general law—gives us an easy way to resolve a number of longstanding confusions about *Pennoyer*. Why did the connection between jurisdiction and due process only emerge with the Fourteenth Amendment, and not earlier? Why would a lawsuit infringe a liberty interest on one side of a state border, and not the other? How can personal jurisdiction be waivable, if it's a function of sovereign authority? And how do we reconcile grand theories of due process with the archaic exceptions and encrustations of the law of jurisdiction? Thinking of the problem in terms of general law may help solve all four.

a. Timing.—The Fifth Amendment's Due Process Clause has been with us from the beginning; so have many state equivalents. But only one state court explicitly held that its own due process clause limited jurisdiction, and that wasn't until halfway through the nineteenth century.³⁷⁶ Why didn't anyone draw this connection earlier?

371. *Fall v. Eastin*, 215 U.S. 1, 11–12 (1909).

372. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 239 (1998).

373. *Compare* *Durfee v. Duke*, 375 U.S. 106, 116 (1963) (barring collateral attack for lack of subject-matter jurisdiction when the issue had been “fully and fairly litigated”), *with id.* at 114 n.12 (recognizing exceptions when “the lack of jurisdiction over the subject matter was clear” or “the policy against the court's acting beyond its jurisdiction is strong” (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 451(2) (AM. LAW INST. Supp. 1948) (internal quotation marks omitted))).

374. *Cf. McDonald v. Or. R.R. & Navigation Co.*, 233 U.S. 665, 670 (1914) (suggesting that the Court could consider “contentions address[ed] . . . to the subject-matter of jurisdiction . . . in the sense of the fundamental absence of any and all right to take cognizance of the cause”).

375. *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276 (1808) (Marshall, C.J.).

376. *See* *Beard v. Beard*, 21 Ind. 321, 324, 328 (1863) (holding that the “due course of law” clause of the Indiana Constitution required personal service of process on nonresidents).

Pennoyer's theory offers a potential answer. Think of the state clauses. If due process just requires jurisdiction, full stop, and a state court thinks it has jurisdiction on state-law grounds, then there's no due process problem under the state constitution. (And if it *doesn't* have jurisdiction on state-law grounds, then it rules on those grounds, without reaching the state-constitutional question.) The same goes for sister-state recognition: sister states would deny recognition to an exorbitant judgment on general-law grounds long before it might pose a problem for their own due process clauses.

It's equally hard to imagine a case in which the issue could have arisen under the Fifth Amendment. The Judiciary Act of 1789 limited federal original jurisdiction to areas that were perfectly safe on general-law principles; anything unusual would lose on statutory grounds first. State assertions of jurisdiction couldn't violate the Fifth Amendment directly. And if some federal trial court had wrongly decided to recognize a state judgment that violated international standards, the Supreme Court would have reversed based on *those standards*, not based on the Fifth Amendment. Again, there'd never have been a reason to reach the constitutional ground.

b. Interests.—The Due Process Clause is concerned with “depriv[ations]” of “life, liberty, or property.”³⁷⁷ In modern personal jurisdiction cases, we normally identify the deprivation as the order to appear in some distant state, or perhaps the imposition of the judgment per se. Due process is said to “protect[] an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties, or relations.’”³⁷⁸ But why would these contacts or relations be relevant to a *liberty* interest? Individual rights are about the individual—and an individual defendant has no more liberty when bossed around by one state than by another.

In fact, the Court explained the problems with this modern view soon after *Pennoyer*. In *York v. Texas*,³⁷⁹ a state statute made any appearance in the Texas courts—even a limited one objecting to jurisdiction—equivalent to a general appearance that consented to jurisdiction.³⁸⁰ The defendant claimed that this procedure violated due process.³⁸¹ The Court agreed that it would be “more convenient” for the defendant to contest jurisdiction in the first suit, rather than defaulting and challenging recognition later.³⁸² But the state

377. U.S. CONST. amend. XIV, § 1.

378. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); see also Drobak, *supra* note 24, at 1046 (describing the view that “the defendant’s liberty” is “affected by his forced participation in a lawsuit,” the “time, effort, and cost” of which “intrude on a defendant’s personal life”).

379. 137 U.S. 15 (1890).

380. *Id.* at 19.

381. *Id.* at 19–20.

382. *Id.* at 21.

offered a variety of other remedies, too: if any property were to be seized, he could seek to enjoin the execution; or he could wait and sue for its return, with the invalid judgment giving the other side no defense.³⁸³

What made these remedies adequate was that they would prevent a “depriv[ation] . . . of liberty [and] property,”³⁸⁴ which is what the Due Process Clause was all about. According to the Court, “the mere entry of a judgment for money, which is void for want of proper service,” wasn’t the deprivation in question; it was a legal nullity, an empty breath.³⁸⁵ Only “when process is issued thereon or the judgment is sought to be enforced” would “liberty or property [be] in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the amendment is preserved, and there is no just cause of complaint.”³⁸⁶

York’s explanation makes much more sense than current doctrine. What the Constitution protects isn’t the defendant’s liberty to sit peacefully at home, or to exercise his arms by throwing a foreign summons (but not a local summons!) in the trash. Rather, the things protected are the things the judgment orders taken away: property, liberty, and so on. Any one of these might be taken away, but only with “due process of law”—including the judgment of a court of competent jurisdiction, and not just some piece of “waste paper.” The constitutional “depriv[ation]” is the execution, not the judgment.

That said, the judgment itself can still be challenged on due process grounds. Courts can’t lawfully issue judgments that are unlawful to execute: a defendant can ask the Supreme Court to declare a void judgment to be void precisely *because* it threatens an unlawful deprivation, contrary to rights set up under the Constitution. Suppose a state court issued a \$500 judgment out of the blue, against someone who hadn’t even been sued. The execution of that judgment would violate due process—an excellent reason for an appellate court to vacate the judgment ordering it, even before any money changes hands. (As one Louisiana court put it, “if any judgment based on such substituted service would be an absolute nullity, incapable of any effect whatever against the person or property of defendant, it would be mere folly to permit the ear of the Court to be vexed with such useless and inconsequential proceedings.”)³⁸⁷ But the judgment in *York* posed no such problem. If the trial court really had personal jurisdiction, then Texas’s lack of a special appearance procedure to raise the issue didn’t itself reflect an independent due process concern. But if jurisdiction really were absent, then

383. *Id.*

384. *Id.* at 20 (quoting U.S. CONST. amend. XIV, § 1).

385. *Id.*

386. *Id.*; accord *Kauffman v. Wootters*, 138 U.S. 285, 287 (1891).

387. *Laughlin v. La. & New Orleans Ice Co.*, 35 La. Ann. 1184, 1185 (1883).

any subsequent proceeding involving the judgment would have to recognize it as invalid—and a failure to do so would be reviewable in federal court.

Indeed, the same would be true in a recognition case in *state* court. Suppose that Mitchell had carried his Oregon default judgment into California, filing a state-court action to enforce the judgment and serving Neff in person. The California court might reject the prior judgment on general-law grounds. But if it didn't, without the Fourteenth Amendment, there was nothing Neff could do; it would just be an ordinary error by a California court on a question of general law. With the Amendment in place, though, the new judgment involves a due process problem: the California court, no less than the Oregon one, would be threatening to take away Neff's property based on a piece of waste paper.³⁸⁸ (That said, because the California court really would have had personal jurisdiction over Neff, *its* judgment would be merely erroneous, not void; and if Neff failed to seek Supreme Court review, he couldn't collaterally attack the California judgment in some third proceeding.)³⁸⁹

c. Waiver.—Unlike subject-matter jurisdiction, personal jurisdiction is waivable. Yet if jurisdiction really reflects limits on state authority, how can an individual choose to waive it? How could a private person “change the powers of sovereignty”?³⁹⁰

The general-law approach obviates this concern. Whether an issue is waivable depends on the particular legal standard involved, not on the abstract category to which it belongs.³⁹¹ As the law currently stands, parties can't confer subject-matter jurisdiction on a federal court; but Congress could still structure its jurisdictional statutes to create some opportunities for waiver. Suppose Congress amended the diversity statute to state that “the required amount-in-controversy is usually \$75,000, but anything over \$20,000 is fine unless the defendant timely objects.” That's neither incoherent, nor unconstitutional, nor legally impossible: it just sets a different

388. See *Scott v. McNeal*, 154 U.S. 34, 50 (1894) (agreeing that a state can't declare “a judicial determination . . . made in [a party's] absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property,” as that would “deprive him of property without any process of law whatever” (quoting *Lavin v. Emigrant Indus. Sav. Bank*, 1 F. 641, 662 (C.C.S.D.N.Y. 1880))); *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878) (stating that “to hold a defendant bound by such a judgment is contrary to the first principles of justice”).

389. See RESTATEMENT (FIRST) OF JUDGMENTS § 13 & cmt.c (AM. LAW INST. 1942) (noting that the “second judgment, although not void and not open to collateral attack,” is still “subject to reversal in the Supreme Court . . . on the ground that the rendition of the second judgment, as well as the rendition of the first judgment, is in violation of the Fourteenth Amendment to the Constitution of the United States”).

390. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

391. See Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL'Y 1, 7 (2014) (explaining that courts recognize venue waivers not “because contract law somehow trumps procedure, or because the parties are somehow entitled to override whatever the law actually requires,” but because “our procedural law just happens to recognize a role for private understandings when allowing rights to be waived”).

kind of rule. So whether personal jurisdiction is waivable depends on whether the general law says it is. If so, there's no mystery to be explained.

(Separately, personal jurisdiction might be inherently "waivable" to the extent that the doctrine involves the court's power to force an appearance.³⁹² A defendant outside the court's reach can always appear anyway—in which case the doctrinal requirements would be *satisfied*, not ignored.)

d. Arbitrariness.—One occasionally embarrassing feature of personal jurisdiction involves what one scholar calls the "special jurisdictional rules" that apply in particular areas, such as "divorce, real property, and penal law."³⁹³ These rules leave the doctrine "marbled with elements that, if explicable in due process terms at all, can only be so explained with a great deal of effort."³⁹⁴ It's an impossible task to assemble a clean, theoretically coherent approach to due process that *also* predicts all these doctrinal hangers-on. (Out of the crooked timber of jurisdictional doctrine, no straight thing was ever made.)

Fortunately, a conventional standard of general law doesn't have to follow from any grand theory—whether of consent, sovereignty, fairness, or anything else. Customary standards are customary, which means that they can be just as strange as the societies that produced them. So it's not surprising to see various old doctrines crawl out of the woodwork now and then, even if they detract from the coherence of the system as a whole.

C. *The Fourteenth Amendment in State Court*

As discussed so far, *Pennoyer's* reasoning rested on two pillars. Due process requires that state courts have jurisdiction, full stop, which federal courts will assess based on their own view of the general law. The third pillar, the one that held up the whole, was the system of appellate review. With the Fourteenth Amendment in place, a state judgment that violated general standards would also be held to violate due process, providing for federal-question jurisdiction and a route to Supreme Court review.

This meant that state courts, if they wanted to avoid reversal, needed to change their jurisdictional practices. Instead of taking their own view of the general law (let alone abrogating it by statute), states now had to hew to the Supreme Court's view of things—including its view of the reach of state law.

1. Due Process and Appellate Review.—As noted above, before the Fourteenth Amendment, there was no direct federal review of state courts' personal jurisdiction. Questions of general law weren't federal questions;³⁹⁵ all the parties could do was to wait for the recognition stage, in which a new

392. See Nelson, *supra* note 166, at 1568–74.

393. Weinstein, *supra* note 20, at 222–23 (footnotes omitted).

394. *Id.* at 249.

395. See *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1875).

lawsuit might qualify for diversity jurisdiction or raise a question under the 1790 Act.

After the Fourteenth Amendment, though, a case in state court could be taken to the Supreme Court, on a claim that the underlying judgment lacked personal jurisdiction and so threatened a deprivation without due process. The specific standards to be applied were still drawn from general law; jurisdiction hadn't become a federal question in *that* sense.³⁹⁶ But federal law required compliance with those standards, whatever they were—and a state decision that failed to comply with them would be “against the title, right, privilege or exemption specially set up or claimed” under federal law.³⁹⁷ (Consider, as above, how the 1790 Act was read to require recognition of valid state judgments; the Supreme Court might review a state's failure on this ground, even though the substantive standards of validity weren't themselves federal law.)³⁹⁸ As the Court described it in 1899, “[t]he Federal question with which we are now concerned is whether the [state] court obtained jurisdiction to render judgment in the case against the [defendant] so that to enforce it would not be taking the property of the [defendant] without due process of law.”³⁹⁹ Or to put it another way, due process functioned as a “hook” to get a general-law case into federal court.⁴⁰⁰

The most important feature of *Pennoyer*'s “hook” wasn't just the new route to federal review. It was the effect of that review—whether for legal reasons or just *in terrorem*—on decisions in the state courts. The standards for jurisdiction weren't constitutional: they didn't stem from the Due Process Clause. But once state courts realized that their own views of general law might be reversed as erroneous, they started to adopt the federal ones instead.

2. *Appellate Review and Judicial Deference.*—Even before the federal judiciary declared itself “supreme in the exposition of the law of the Constitution,”⁴⁰¹ state courts regularly looked to Supreme Court decisions in the interest of not being reversed. On a question within the Court's appellate jurisdiction, one Massachusetts court wrote in 1822, “that court has the final

396. See Whitten, *Part Two*, *supra* note 12, at 820 (considering and dismissing the possibility that traditional territorial rules of personal jurisdiction “are *incorporated* in the meaning of due process”).

397. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

398. See *supra* section II(C)(3).

399. *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 609 (1899); see also *Nat'l Exch. Bank of Tiffin v. Wiley*, 195 U.S. 257, 261–62 (1904) (considering only “the part of the defense which distinctly raises a Federal question,” namely that the Ohio court's judgment was rendered “entirely without authority or jurisdiction,” and so “could not be upheld consistently with the Fourteenth Amendment of the Constitution of the United States”).

400. *Perdue, Sovereignty*, *supra* note 20, at 731; accord *Oakley*, *supra* note 20, at 625–26; *Trangsrud*, *supra* note 20, at 879; cf. *Kreutzer*, *supra* note 23, at 221 (accusing *Pennoyer* of “pretend[ing]” to treat the Due Process Clause as such a hook, when the Court was actually transforming the substantive law of jurisdiction).

401. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

and conclusive authority; so that their decision must be taken to be the law of the land.”⁴⁰² Maybe it’d be otherwise, a later court reasoned, if the Court were “restrained by the smallness of the sum in controversy”; but if “the case itself . . . may be carried to that court by writ of error,” then the “law, thus settled, is binding upon this Court.”⁴⁰³

This reasoning is highly practical: there’s no point in a court issuing a ruling that it knows will be reversed. It also helps make sense of the lines of judicial authority. In the days of *Swift v. Tyson*, it wasn’t always obvious which courts would defer to which others on which issues; appellate review provided one easy test. Just as district courts today will “follow the holdings of the Federal Circuit in cases falling within [that Circuit’s] appellate jurisdiction,”⁴⁰⁴ and will follow the holdings of their own geographic circuit courts otherwise, state courts would apply the Supreme Court’s views in any case subject to that Court’s review. This understanding followed from a simple “postulate,” namely “that one rule must prevail in the court of original jurisdiction and in the court of last resort”⁴⁰⁵—a postulate that works just as well regardless of what kind of law is involved.

This is exactly how some contemporaries regarded *Pennoyer*. Consider the evidence of Volume 59 of the Tennessee reports, printed in 1878. After reporting the five-year-old case of *Barrett v. Oppenheimer*,⁴⁰⁶ which refused to enforce a sister-state judgment founded on improper service,⁴⁰⁷ the reporter included a long footnote summarizing what was then the Supreme Court’s very recent decision in *Pennoyer*.⁴⁰⁸ It described *Pennoyer* as holding that judgments in violation of the traditional rules “were void, upon general principles,” and *also* under the Fourteenth Amendment’s Due Process Clause.⁴⁰⁹ In particular, it addressed the question of how state courts should respond. Noting that *Pennoyer* let other states provide their own statutory methods of service on their own citizens, it invoked a line of case law about the methods of ascertaining those other states’ laws, arguing that state courts should choose such methods “by the same rule which is to determine the appellate court on a writ of error”—namely that of the Supreme Court,

402. *Commonwealth v. Green*, 17 Mass. (16 Tyng) 515, 546 (1822).

403. *Braynard v. Marshall*, 25 Mass. (8 Pick.) 194, 196–97 (1829). On the dispute over whether the amount-in-controversy requirement added to section 22 of the Judiciary Act carried over to section 25, see *Buel v. Van Ness*, 21 U.S. (8 Wheat.) 312, 322–23 (1823), and Kevin C. Walsh, *In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions*, 90 NOTRE DAME L. REV. 1867, 1888–91 (2015).

404. *Rates Tech. Inc. v. Speakeasy, Inc.*, 685 F.3d 163, 174 n.9 (2d Cir. 2012).

405. *Hanley v. Donoghue*, 116 U.S. 1, 6 (1885).

406. 59 Tenn. (12 Heisk.) 298 (1873).

407. *Id.* at 304.

408. *Id.* at 304 n.*.

409. *Id.* at 304–05 n.*.

“where the case is *ultimately* cognizable.”⁴¹⁰ In other words, courts should adopt *Pennoyer*’s view of the “general principles” not solely on its own merits, but also to avoid inconsistency with the ultimate court of review.

3. *Judicial Deference in State Court*.—This institutional account of the duty to follow *Pennoyer* may help explain its uneven reception in state courts. Some state courts took to it immediately, while others resisted for decades. If *Pennoyer* were just a straightforward analysis of the Fourteenth Amendment, that division would have been very odd. But because *Pennoyer* in fact had a number of important moving parts, it’s easy to see why some state courts might have understood or accepted them sooner than others.

a. *Reception*.—Some state courts quickly saw *Pennoyer* as affecting their approach to the general law. Indeed, one of the earliest state decisions described the situation in almost precisely these terms.

In *Belcher v. Chambers*,⁴¹¹ a nonresident of California had been served by publication under California law.⁴¹² He then mounted a collateral attack on the default judgment by challenging its execution in state court.⁴¹³ Under prior California decisions, the court would have upheld the judgment, presuming that the defendant had somehow received adequate service.⁴¹⁴ And if this were merely a matter of state law, like interpreting a state statute, the federal courts might do the same—trusting the state courts to understand their own law.

But state courts’ jurisdiction was no longer just a matter of state law. As Justice Field had previously ruled on circuit, presumptions affecting jurisdiction were matters of general law—and if a federal court ever got hold of the case, it would take a different view of the general law and make the opposite presumption.⁴¹⁵ With the Fourteenth Amendment in place, the federal courts *would* get hold of the case, because they could use due process to “re-examine every judgment of this Court” involving personal jurisdiction.⁴¹⁶ So to avoid unnecessary reversal, the opinion reasoned, California’s courts should follow their “practice” of always “adopt[ing] that view of a legal question which has been taken by the Supreme Court,” whenever “the question involved” might arrive there by writ of error.⁴¹⁷

Viewed with modern eyes, the opinion in *Belcher* is most surprising for what it *didn’t* say: that the Fourteenth Amendment actually imposes any

410. *Id.* at 306 n.* (citing *Baxley v. Linah*, 16 Pa. 241 (1851)); *see also Hanley*, 116 U.S. at 5–7 (correcting errors in that line of case law but endorsing its underlying premise).

411. 53 Cal. 635 (1879).

412. *Id.* at 636 (statement of the case).

413. *Id.*

414. *Id.* at 640 (majority opinion).

415. *Id.* (citing *Galpin v. Page*, 9 F. Cas. 1126, 1131 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 5206)).

416. *Id.* at 643.

417. *Id.* at 642–43.

substantive restrictions on state-court jurisdiction. We're used to the idea of following federal courts for federal law, state courts for state law, and so on. But the court bypassed substantive questions like that for purely institutional ones: what legal issues were involved, who would get to decide them, and how they would make their decisions. Or, as it helpfully summarized:

- (1) A writ of error will issue from the Supreme Court
- (2) In such proceeding, the Supreme Court . . . will not follow the rule of the Supreme Court of California . . . , but will declare the law as announced in *Galpin v. Page* and *Pennoyer v. Neff*.
- (3) To accord with the decisions of the Supreme Court of the United States, the judgment . . . in the present action must be held to be null and void.
- (4) When our judgment must depend upon a question which may be reexamined by the Supreme Court . . . , we will follow the rule of law laid down by that Court.⁴¹⁸

Again, the court wasn't following the Supreme Court's reading of *federal law*; *Galpin* was a pre-Fourteenth Amendment case. It was following the Supreme Court's lead on a question of general law—and none too willingly at that. Several other state courts did the same.⁴¹⁹

Commentators noticed the same thing. In the 1881 edition of his treatise on judgments,⁴²⁰ A.C. Freeman described *Pennoyer* in what might seem a very curious way. He didn't say that *Pennoyer* altered any actual jurisdictional rules. Rather, he described the consequence of *Pennoyer*'s reading of the Fourteenth Amendment (assuming that it would stick) as being that “all questions regarding the [personal] jurisdiction of courts . . . must ultimately be determined in the national courts, *or at least according to the principles there recognized and applied*”—so that the “wide dissimilarity” in state rules “must ultimately disappear.”⁴²¹ If one thinks that the Fourteenth Amendment constitutionalized personal service, that's a strange way of

418. *Id.* at 643.

419. See *Eliot v. M'Cormick*, 10 N.E. 705, 710 (Mass. 1887) (noting that, “[a]s the question before us depends upon the construction of a provision of the federal constitution”—the standard for Supreme Court review under section 25 of the Judiciary Act—“our decision, if against the exemption or privilege claimed under that provision, would be subject to be re-examined by the [Supreme Court] upon a writ of error”); *Elmendorf v. Elmendorf*, 44 A. 164, 165 (N.J. Ch. 1899) (“[I]nasmuch as the decisions of the United States supreme court control state courts as to [the Fourteenth Amendment's] construction and application, a judgment within the terms of the amendment as so construed is no longer valid within the state”); *Kingsborough v. Tousley*, 47 N.E. 541, 543 (Ohio 1897) (“Whether the enforcement of such a judgment . . . violates the constitutional provisions referred to, is a federal question, with respect to which the state courts are necessarily controlled by the decisions of the national supreme court.”).

420. 1 A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS (S.F., A.L. Bancroft & Co. 3d. ed. 1881).

421. *Id.* § 561, at 591 (emphasis added).

saying it.⁴²² But it's a relatively straightforward way of saying that the Amendment made the need for jurisdiction into a federal question, which the Court would answer based on its own view of the general law—or, as another scholar put it, that the Amendment “impose[d] upon the state courts a duty to conform their decisions to what the Supreme Court regards as correct principles of the conflict of laws.”⁴²³

b. Resistance and Reconciliation.—The reception of *Pennoyer* wasn't entirely smooth. A number of state courts, particularly in New York and North Carolina, obstinately rejected *Pennoyer*'s due process language—holding that they could do what they wished within their own states,⁴²⁴ until the Court finally reversed them in 1915.⁴²⁵ Some interpret this response, and the Supreme Court's equivocal rhetoric in subsequent cases, as reflecting persistent uncertainty about *Pennoyer*'s commitment to independent review in federal courts.⁴²⁶ But the odds seem low that the Supreme Court would flip-flop so many times in succession, without even commenting on the change in doctrine. A better explanation may just be that the states were able to get away with resisting dicta, and various procedural constraints delayed the point at which *Pennoyer*'s dicta crystallized into holding.

First, and most simply, *Pennoyer*'s discussion of the Due Process Clause really was dicta. The problem wasn't that Mitchell's original judgment predated the Fourteenth Amendment, as is often thought; the problem was that the case arose from Neff's *federal* suit to undo the sale, filed in the Circuit Court for the District of Oregon.⁴²⁷ That federal court couldn't violate the Fourteenth Amendment if it wanted to—and it applied the same general standard of review to the Oregon judgment as it would have applied to a judgment from Ontario, even though Ontario isn't subject to the Fourteenth Amendment either. In other words, *Pennoyer* would have reached the same

422. Cf. Borchers, *Limited Legacy*, *supra* note 328, at 159–60 (highlighting Freeman's treatise as evidence of uncertainty regarding *Pennoyer*'s holding).

423. E. Merrick Dodd, Jr., *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 533 (1926) (emphasis added); see also *id.* at 533–34 (“Since the Federal Constitution is silent as to the requirements for jurisdiction, the Supreme Court has been obliged to seek for these elsewhere, and it has sought for and found them in principles of conflict of laws.”).

424. See, e.g., *Menefee v. Riverside & Dan River Cotton Mills*, 76 S.E. 741, 743 (N.C. 1912) (disagreeing with the Supreme Court as to the validity of service on a corporate representative); see also *Pope v. Terre Haute Car & Mfg. Co.*, 87 N.Y. 137, 140 (1881) (same); cf. *Grant v. Cananea Consol. Copper Co.*, 82 N.E. 191, 192–93 (N.Y. 1907) (acknowledging that “in so far as the service of process is concerned, the decisions of our own court are not in entire accord with those of the Supreme Court of the United States”).

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

426. See, e.g., Borchers, *supra* note 1, at 43–51 (canvassing the period's case law and arguing that “*Pennoyer* left the matter of whether there was a general constitutional limitation on the reach of state courts in splendid ambiguity”).

427. See *Pennoyer v. Neff*, 95 U.S. 714, 715 (1878) (statement of the case); Perdue, *Scandal*, *supra* note 20, at 500 n.142.

outcome with or without the Amendment in place, which is enough to make dicta of its discussion of due process. We might understand Field's interest in including the discussion nonetheless; the logic here is complicated enough to warrant signaling it to other courts up front, rather than waiting for some enterprising attorney to build the whole Rube Goldberg machine from scratch. But the fact that the discussion was dicta also limited its immediate impact on state courts.

Second, there were sound procedural reasons for the Supreme Court not to mention due process in every case. In cases arising from federal trial courts, the Fourteenth Amendment wasn't an issue,⁴²⁸ so the Court often discussed jurisdictional issues without mentioning the Amendment,⁴²⁹ or without taking any position on whether state judgments could now be "directly questioned, and their enforcement in the State resisted."⁴³⁰ The same was sometimes true when it reviewed state courts' failure to give Full Faith and Credit effect to another state's judgment, which again required no consideration of the Fourteenth Amendment.⁴³¹ By contrast, when the Court reviewed state courts directly, it made no secret of the constitutional standard that applied.⁴³² It's unclear why more litigants didn't press the issue earlier,

428. See U.S. CONST. amend. XIV, § 1 (discussing what "[n]o State shall" do) (emphasis added).

429. See, e.g., *Wilson v. Seligman*, 144 U.S. 41, 44 (1892) (discussing *Pennoyer's* principles but not the Fourteenth Amendment); *accord* *Arndt v. Griggs*, 134 U.S. 316, 320, 326 (1890); *Freeman v. Alderson*, 119 U.S. 185, 187–88 (1886); *Brooklyn v. Ins. Co.*, 99 U.S. 362, 370 (1879).

430. *Pennoyer*, 95 U.S. at 733; see, e.g., *Cooper v. Newell*, 173 U.S. 555, 567 (1899) (citing *Pennoyer's* discussion of the rules for federal courts, and leaving aside whether a state judgment "was entitled to any force in the State in which it was rendered"); *Goldey v. Morning News*, 156 U.S. 518, 521 (1895) ("Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."); *Hart v. Sansom*, 110 U.S. 151, 155 (1884) ("The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes."); *Ins. Co. v. Bangs*, 103 U.S. 435, 439 (1881) (Field, J.) (noting that "the State law cannot determine for the Federal courts what shall be deemed sufficient service of process," though that "[i]t may be otherwise in the State courts"); see also *St. Clair v. Cox*, 106 U.S. 350, 353 (1882) (describing the issue in *Pennoyer* as how "State courts [might] acquire jurisdiction to render a personal judgment against non-residents which would be received as evidence in the Federal courts" (emphasis added)); cf. *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 410–11 (1903) (relying on *Goldey*).

431. See *Haddock v. Haddock*, 201 U.S. 562, 605 (1905) (holding that New York had no obligation to recognize a divorce decree, but "[w]ithout questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue"); *accord* *Grover & Baker Sewing Mach. Co. v. Radcliffe*, 137 U.S. 287, 299 (1890). But see *Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough*, 204 U.S. 8, 15 (1907) (noting, in an interstate recognition case, that "no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law").

432. E.g., *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 610 (1899) ("[T]he question for us to decide is whether [there] was a sufficient service to give jurisdiction to the [state] court over this corporation. If it were, there was due process of law . . ."); cf. *Dewey v. Des Moines*, 173 U.S. 193, 202–03 (1899) (determining a state's jurisdiction to tax by analogy to *Pennoyer's* principles,

making use of the Court's then-mandatory jurisdiction to resolve the ongoing split,⁴³³ but the same could be said of other topics on which the law was far more settled.⁴³⁴ When the issue did come up, at least, the Court didn't forget what *Pennoyer* had said a few years earlier; it simply wasn't necessary to every decision.

Third, while there was some resistance in the states, many courts did reconsider their prior decisions over time.⁴³⁵ Some applied the general-law standards as a matter of their own normal procedure;⁴³⁶ some repeated older language about judgments being received differently in and out of the state;⁴³⁷ but many recognized that *Pennoyer* had fundamentally changed the process of review, even before the Court confirmed it in 1915.⁴³⁸ "Formerly," the Supreme Court of New Jersey wrote in 1889, judgments pursuant to state statutes were "sometimes held to be enforceable in such state," though the court had lacked personal jurisdiction "according to the general principles of law and justice," and though the judgments "would not be recognized extraterritorially. But now, by force of the addition to the federal constitution just adverted to, such judgment would be of no legal avail either at home or abroad."⁴³⁹ Field couldn't have put it better.

IV. From *Pennoyer* to the Present Day

When the Fourteenth Amendment was adopted, jurisdiction was governed by a complex interplay of general law, constitutional rules, and

and holding that a tax without proper jurisdiction "would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution").

433. See Circuit Court of Appeals Act of 1891 (Evarts Act), ch. 517, § 6, 26 Stat. 826, 828 (codified as amended in scattered sections of 28 U.S.C.) (establishing—for the first time—discretionary Supreme Court certiorari review of certain federal judgments); see also Act of Feb. 13, 1925 (The Judges' Bill), ch. 229, § 1, sec. 237(b), 43 Stat. 936, 937 (codified as amended in scattered sections of 28 U.S.C.) (extending that discretion to many cases from state courts).

434. See *supra* note 347 and accompanying text.

435. See, e.g., *Kemper-Thomas Paper Co. v. Shyer*, 67 S.W. 856, 860 (Tenn. 1902) ("Since the deliverance of [*Pennoyer*] some of the states that had previously announced the distinction there reprehended and repudiated, have . . . overruled their former decisions to the contrary and adopted a rule in harmony with it.").

436. E.g., *Amsbaugh v. Exch. Bank of Maquoketa*, 5 P. 384, 386 (Kan. 1885).

437. See, e.g., *Pickett v. Ferguson*, 45 Ark. 177, 192 (1885) ("Now, as Ferguson was neither personally summoned, nor voluntarily appeared in the Tennessee suit, and was not even a citizen of that state, no court sitting there could render any judgment against him which would be recognized elsewhere as of any validity. Such a judgment is treated in other jurisdictions as a mere nullity.").

438. See *De La Montanya v. De La Montanya*, 44 P. 345, 347–48 (Cal. 1896) (taking *Pennoyer*'s rule as "based upon a proposition of international law," which now affected "the validity of [a] judgment within the state where rendered"); *id.* at 350 (McFarland, J., dissenting) (describing the invalidity of a judgment "even in the state where it was rendered" as "the main proposition decided by" the case, and one "which may, perhaps, be styled 'modern'"); accord *Denny v. Ashley*, 20 P. 331, 332 (Colo. 1889); *Bickerdike v. Allen*, 41 N.E. 740, 742 (Ill. 1895); *Wilson v. Am. Palace Car Co. of N.J.*, 55 A. 997, 998–99 (N.J. 1903).

439. *Elasser v. Haines*, 18 A. 1095, 1097 (N.J. 1889).

federal review. It's not surprising that these subtleties were lost over time. Today, personal jurisdiction is a topic in due process, with the Supreme Court regularly divining specific doctrines from a famously obscure text. Those who find this practice legally arbitrary or otherwise unsatisfying might wish to look to an earlier model.

This Article defends *Pennoyer* on original grounds. Based on American law as it stood at the Founding, and as it's been lawfully modified since, the reasoning of *Pennoyer* was and is legally correct.⁴⁴⁰ For some people, that's defense enough. But even those who reject originalism as a general approach might still hesitate to enforce "constitutional" restrictions with no better source than the pen of Chief Justice Stone. After all, the current panoply of due process restrictions on state jurisdiction is widely disliked.⁴⁴¹ So if personal jurisdiction doctrine is of the Court's own invention, and if it can't claim roots in an actual Fourteenth Amendment that was actually enacted, what is it good for? Why not do something else—or let democratically elected legislators, whether in the states or in Congress, choose a different path?

Indeed, the one clear result of returning to *Pennoyer*'s model would be a substantial increase in the power of Congress over state jurisdiction. Because due process requires jurisdiction, full stop, and because this federal question is answered in the last instance by a federal court, what matters is the federal view of who has authority over what. To the extent that Congress has enumerated power to determine the federal view, the Due Process Clauses won't stand in the way.

Before Congress acts, of course, courts will still need to decide personal jurisdiction cases. In the meantime, returning to the original law of personal jurisdiction might make less difference in practice than in theory. The practices that constitute general and international law can change over time. It might be that today's law of jurisdiction, even when reconstructed along these lines, would look more like *International Shoe* than like *Pennoyer*. Or maybe not. There are different ways of understanding the process of common-law change, and these in turn would have different implications for the unwritten requirements enforced by federal courts. Odds are, though, that the result would be more determinate, more sensible, and in any case more legally sound than the doctrines we've got now.

440. See generally Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) (describing this approach to constitutional law).

441. See Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1304–05 (2014) (“The one thing jurisdiction scholars agree on is the sad state of personal jurisdiction law.”).

A. *The Decline of General Law*

Pennoyer was partly a victim of its own success. Its reasoning was based on the process of *recognition*. Before *Pennoyer*, whatever jurisdiction a state asserted in its own courts could only be challenged in some other forum. But once parties could raise their due process challenges in the *rendering* court, fewer cases had to wait for the recognition stage—and with the issue already litigated in one court, it couldn't be relitigated in another.⁴⁴²

That procedural change obscured a broad swath of substantive law—such as the distinct roles of the 1790 Act and the Full Faith and Credit Clause, or the differences between Supreme Court and state-court review. By the time of *Hess v. Pawloski*,⁴⁴³ the Court no longer relied on what Perdue calls the “awkward formulation” of whether “Massachusetts lacked legitimate authority [under other doctrines] and, as a result, enforcement of any subsequent judgment would have violated the Due Process Clause.”⁴⁴⁴ Instead, the Court understandably described the issue as “whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment.”⁴⁴⁵ In other words, the Court spoke in shorthand—and soon judges began to treat the shorthand as if it were substance.⁴⁴⁶ Rather than look to sources beyond the constitutional text, courts assumed that the Due Process Clause told them everything they needed to know. Treating jurisdiction as a subfield of constitutional due process also made life easier for judges after *Erie* and *Klaxon*; jurisdiction was too important to be left up to state courts, but it didn't have to be maintained as a prominent example of general law.

As a topic in due process, and not general law, jurisdiction was highly susceptible to other trends in due process jurisprudence. From the idea that “[t]he state is free to regulate the procedure of its courts . . . , unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,”⁴⁴⁷ it's but a short step to the “traditional notions of fair play and substantial justice”⁴⁴⁸ so central to *International Shoe*⁴⁴⁹—and from there to our current menagerie of

442. See generally *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).

443. 274 U.S. 352 (1927).

444. Perdue, *Sovereignty*, *supra* note 20, at 733.

445. *Hess*, 274 U.S. at 355.

446. See Brief of Professor Stephen E. Sachs as *Amicus Curiae* in Support of Petitioner at 28, *BNSF Ry. Co. v. Tyrrell*, No. 16-405 (U.S. cert. granted Jan. 13, 2017).

447. *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (internal quotation marks omitted).

448. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

449. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken*, 311 U.S. at 463).

“minimum contacts,” “purposeful availment,” five-factor reasonableness, and so on.⁴⁵⁰

But the details of the doctrine only mask deep divisions on the foundations. Every Justice now on the Court might speak the same language of specific and general jurisdiction, but there’s no consensus on the animating principles behind these categories—leading to wild swings in doctrine over the past few years.⁴⁵¹ Once we start searching for substantive criteria in the Due Process Clause, we’re bound to come up short—for only on the most heroic readings of the Clause is there anything in it for us to work with. (“Turn it over, and turn it over, for all is therein. . . .”)⁴⁵² Without firm ground to build on, the Court seems to lurch from theory to theory as the mood strikes—citing convenience,⁴⁵³ fairness,⁴⁵⁴ federalism,⁴⁵⁵ liberty,⁴⁵⁶ tradition,⁴⁵⁷ consent,⁴⁵⁸ or all of the above.

B. *Implications for Congress*

By treating the Due Process Clause as a font of substantive rules, the Court has seized control of the law of jurisdiction without any idea of what to do with it. This is perhaps the exact opposite of the earlier, general-law model—on which courts were expected to leave the law in place, applying shared unwritten principles until the *legislature* said otherwise. Were we to restore the original approach to jurisdiction, the most significant change wouldn’t be any particular substantive rule, but a reallocation of authority: between the courts and Congress, and between states and the federal government.

Today we place federal courts in charge of articulating limits on state ones. That makes it very hard to regulate fast-moving fields such as the Internet; legislatures can respond to new facts and make sensible-but-undertheorized compromises without having to justify everything they do as

450. Erbsen, *supra* note 29, at 3 (bemoaning the “catchphrases and buzzwords” that dominate jurisdiction doctrine).

451. *See, e.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–61, 762 n.20 (2014) (Ginsburg, J.) (unexpectedly elevating the phrase “at home,” introduced without fanfare three years earlier in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), into the primary test for general jurisdiction); *see also id.* at 773 (Sotomayor, J., concurring in judgment) (noting the novelty of the Court’s rule).

452. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 903 (2009) (Scalia, J., dissenting) (quoting 8 THE BABYLONIAN TALMUD: SEDER NEZIKIN, Aboth 76–77 (I. Epstein ed. & trans., 1935)).

453. *See McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957).

454. *See Shaffer v. Heitner*, 433 U.S. 186, 206, 212 (1977).

455. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293–94 (1980).

456. *See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

457. *See Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (Scalia, J., plurality opinion).

458. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–81 (2011) (Kennedy, J., plurality opinion).

having been dictated by the Fourteenth Amendment. While that Amendment gives Congress an enforcement power,⁴⁵⁹ under current doctrine there's not much Congress could do to vary (and, in particular, to weaken) the obligations the courts have imposed. Even if we negotiated a broad multilateral treaty coordinating jurisdiction across nations, we still might be unable to sign it, should any of its terms be thought to depart from the Court's current take on due process.⁴⁶⁰

Under *Pennoyer*, though—putting concerns about notice to one side⁴⁶¹—the Fourteenth Amendment only requires jurisdiction, full stop. When state judgments are challenged in federal courts, those courts will use any relevant sources of law to see if jurisdiction was present or absent. The Constitution doesn't *limit* those sources to general law. It just so happens that, at the time of *Pennoyer*, the courts didn't have anything else to work with. But they could use other sources of law too, if we only had some way to provide them.

As it turns out, we do. The Full Faith and Credit Clause lets Congress “prescribe . . . the Effect” of “the public Acts, Records, and judicial Proceedings” of the several states.⁴⁶² As noted above, early Congresses repeatedly considered proposals to vary a judgment's effect based on the source of its jurisdiction.⁴⁶³ If Congress were to tighten the reins on state courts, declaring that a judgment based on a certain kind of service should have no effect in any other forum, then a federal court considering that judgment would have to conclude that it indeed had no effect, whatever the general law might say. And if the judgment were legally ineffective, its use against an individual's liberty or property would violate due process.

Alternatively, if Congress wanted to expand the reach of state courts, it could pass a statute defining additional grounds on which to recognize a state judgment as valid. Because statutes outrank general law—and because federal statutes, if constitutional, are *supreme* law—the federal courts would necessarily give such a judgment its full effect. The same thing could happen through a self-executing treaty, made by the President with the Senate's consent. (Or, perhaps, an interstate compact made with Congress's consent,⁴⁶⁴ which commanded each state's citizens to attend the other's courts.) In this way, a judgment that might be questionable under general law can be declared valid by statute or treaty, whether in a state's own courts or in the federal courts. And if the judgment itself is legally valid, then

459. U.S. CONST. amend. XIV, § 5.

460. See Stanley E. Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L. REV. 1177, 1186 (1998) (discussing whether “properly construed due process limits can be trumped by reasonably negotiated treaties”).

461. See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950).

462. U.S. CONST. art. IV, § 1.

463. See *supra* notes 279–85 and accompanying text.

464. See U.S. CONST. art. I, § 10, cl. 3.

there'd be no particular reason to suspect that the deprivations it orders would violate due process: such deprivations would only occur, as far as any federal court could tell, pursuant to the judgment of a court of competent jurisdiction.

In other words, though constitutional due process is still involved, the federal government has essentially free rein to set jurisdictional doctrine for the states. The Fourteenth Amendment still plays a crucial role; without it, there'd be no way to challenge an exorbitant judgment in the rendering court, whatever Congress might say about recognition in any other forum. But the Due Process Clause gives teeth to Congress's pronouncements, entitling defendants to challenge jurisdiction without waiting for the recognition stage.

Congress also has free rein to regulate jurisdiction in the federal system. The Supreme Court has suggested that the Fifth Amendment might limit federal courts in much the same way that the Fourteenth Amendment limits state courts.⁴⁶⁵ But as *Pennoyer* saw things, that may not be right. Again, all that due process requires is jurisdiction, full stop. Under the Tribunals Clause⁴⁶⁶ or the Necessary and Proper Clause,⁴⁶⁷ Congress might confer personal jurisdiction on lower federal courts in an enormous range of cases—summoning “a subject of England, or France, or Russia . . . from the other end of the globe to obey our process.”⁴⁶⁸ That might annoy our friends abroad, but it'd be fully effective at home, overriding any general-law rules to the contrary. In so doing, it'd also eliminate any potential Fifth Amendment objections: the court would have had jurisdiction according to federal law, and the judgment of a competent court is a paradigmatic example of due process.⁴⁶⁹ The scope of federal power abroad, like the scope of state power at home, would be decided by our elected representatives—and not divined, or perhaps manufactured, from an unyielding Due Process Clause.

C. *Implications for Courts*

Waiting for statutes can take quite a while. To date, Congress has regulated state-court jurisdiction in only a handful of cases.⁴⁷⁰ Perhaps it'd act more quickly if its authority were widely acknowledged; but the courts

465. See *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (leaving as an open question whether “a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant’s contacts with the Nation as a whole”).

466. U.S. CONST. art. I, § 8, cl. 9.

467. *Id.* cl. 18.

468. *Picquet v. Swan*, 19 F. Cas. 609, 613 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

469. See Wendy Perdue, *Aliens, the Internet, and “Purposeful Availment”: A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U.L. REV. 455, 471 (2004) (“[O]ne might reasonably conclude that with respect to the questions of allocation of sovereign authority between the United States and other nations, the Constitution does not constrain at all.”).

470. See, e.g., 28 U.S.C. §§ 1738A–1738B (2012) (child custody and child support determinations).

have to decide cases in the meantime. So if we wished, for whatever reason, to leave the wilderness of modern due process and to return to the original model of personal jurisdiction, what would the courts do differently?

In some areas, the answers are easy. Courts would continue to scrutinize state judgments under the Due Process Clause—this time for compliance with the general law, not as it stood in 1878, but as it stands today. The goal is identifying existing standards, not building rationalist castles in the air. Courts might also look to international practice for these standards, but only to the extent that it still coheres with American practice.

The harder questions involve identifying those practices, especially after many decades in which practice abroad has become less uniform and judges have muddied the record at home. How can we tell what the existing practice is, if the courts have for many decades been doing something else? How is it even possible for “the existing practice” to be something other than what’s currently done? As it turns out, these practices can exist at more than one level, and many jurisdictional practices are still recognized as shared. Despite decades of neglect, general law may still have something to offer us.

And when the answers do remain vague, a renewed focus on general law may also help clarify which considerations have greatest weight. If jurisdiction’s substantive standards were emanations of the Due Process Clause, it might make sense to focus on the “liberty” of the defendant. But once attention moves to general law, it becomes easier to see why sovereignty—a concept found nowhere in the Clause’s text—might be jurisdiction’s definitive concern.

1. Easy Answers.—Rejecting the modern due process theory doesn’t mean that courts should “abandon” the enforcement of jurisdictional rules;⁴⁷¹ nor should they “stop supervising jurisdiction under the Due Process Clause.”⁴⁷² Due process really does require lawful jurisdiction, so federal courts should still take a hard look at state-court judgments, even without any legislative guidance.

At the same time, returning to a general-law model wouldn’t mean simply resetting the clock to 1878. General law is customary law, and custom can change over time—even due to actions that once violated the custom. (Think of spelling or grammar rules, which routinely evolve due to routine violations.) Should today’s generally accepted standards of jurisdiction look more like *International Shoe* than *Pennoyer*,⁴⁷³ it wouldn’t matter if these customs had changed partly due to judicial influences, which themselves resulted from mistakes about the Due Process Clause. Alternatively, it’s

471. Borchers, *supra* note 1, at 20.

472. Conison, *supra* note 3, at 1205.

473. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (AM. LAW INST. 1987) (describing a highly flexible regime of jurisdiction to adjudicate).

possible that the general rules of *Pennoyer*'s day might still be in force today; but that requires further argument.

What courts *would* give up would be the general approach of *International Shoe* and its progeny, of requiring each remaining "traditional practice" to conform to a court's "[f]reeform notions of fundamental fairness."⁴⁷⁴ Such practices may seem out of keeping with the times. But when it comes to general law, the fact that "so it was laid down in the time of Henry IV"⁴⁷⁵ is an *excellent* reason for courts to continue to apply the longstanding rule, letting Congress decide whether and when to change it. In that respect, *Burnham v. Superior Court*⁴⁷⁶ is an easy case, notwithstanding its widespread disapproval among academics.⁴⁷⁷ Tag jurisdiction would be permissible as "the practice of, not only a substantial number of the States, but as far as we are aware *all* the States and the Federal Government."⁴⁷⁸

Likewise, the insistence in *Shaffer v. Heitner*⁴⁷⁹ that existing rules of in rem jurisdiction pass "the same test of 'fair play and substantial justice,'"⁴⁸⁰ or the more recent insistence in some courts that "older precedent" on corporate consent give way to new theories of general jurisdiction,⁴⁸¹ would both be out of place. Again, it might turn out that either of these requirements just happens to conform to the modern practice. But that, too, requires further argument.

At the same time, courts should be careful about treating any international practice as the currently accepted one, no matter how many familiar American precedents it disrupts.⁴⁸² As under *Swift*, widely shared rules are sometimes displaced by local customs,⁴⁸³ much the way that American English diverges from that spoken elsewhere; it was clear even in Story's day that the common law could develop its own conflicts principles

474. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (Kennedy, J., plurality opinion).

475. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

476. 495 U.S. 604 (1990).

477. See, e.g., Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on Burnham v. Superior Court of California*, 1990 U. ILL. L. REV. 593.

478. *Burnham*, 495 U.S. at 615 (Scalia, J., plurality opinion).

479. 433 U.S. 186 (1977).

480. *Id.* at 207.

481. *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145 (Del. 2016) (applying Daimler AG v. Bauman, 134 S. Ct. 746 (2014)); see also *id.* at 145 n.19 (citing similar decisions).

482. See, e.g., Perdue, *supra* note 469, at 462 (arguing that American notions of "purposeful availment" are "noticeably absent" abroad, where "effects or harm within the country is generally sufficient"); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 612 (1991) (arguing that tag jurisdiction "is contrary to the consensus of civilized nations and . . . may violate international law").

483. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842) (noting that, in any particular jurisdiction, a "local usage" might displace general principles of law).

as distinct from international norms.⁴⁸⁴ If American practice has knowingly departed from international custom (say, by treating in-state service as sufficient), then in case of such a conflict, the American practice would control.

2. *Harder Questions.*—The more difficult problems for courts involve areas where the shared system of rules has broken down over time. International practice, for example, is less clear than it used to be. Some authorities argue that there *is* no international law of jurisdiction—that the opprobrium directed at well-known examples of exorbitant jurisdiction, such as jurisdiction based on the plaintiff’s nationality, is nowadays a matter only of international comity and no longer one of international law.⁴⁸⁵ Should this prove correct, though, the distinction between law and comity might turn out not to be as pressing as it seems—so long as there’s substantial agreement on which exercises of jurisdiction are truly exorbitant.⁴⁸⁶ If a federal court would hold a given foreign judgment invalid, as too jurisdictionally fishy for international comity to save, then the same judgment would be properly held invalid if it were issued by a state court instead. All that matters is whether the relevant standards are well-defined enough to be applied by courts; if so, then the state courts can still be required (through the “hook” of due process and appellate review) to adhere to the federal courts’ view of things.

On the domestic side, absent legislative intervention, the crucial question is determining what counts as American practice. One approach might look to Nelson’s account of general law—as based on “how *most* states do things,” and not “whatever the policymakers in one particular state have said.”⁴⁸⁷ In that case, the minimum-contacts test, the purposeful-availment rule, and so on might all continue uninterrupted, as reflections of an American practice that acknowledges but still departs from international rules.

But another approach looks to a different kind of American practice—to our practice of attributing certain rules to the general common law of

484. See STORY, *supra* note 157, § 241, at 201 (describing the difference of opinion between “foreign jurists” and “the common law” on capacity to contract).

485. See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, reporters’ note 1 (Tentative Draft No. 2, 2016) (“With the exception of sovereign immunity, . . . modern customary international law generally does not impose limits on jurisdiction to adjudicate.”); see also William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2123 (2015) (“[N]o customary international law rule prohibiting the exercise of [exorbitant] jurisdictional bases has emerged.”). But see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 2, ch. 2, intro. note (AM. L. INST. 1987) (“The exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement.”).

486. See Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 473, 475 (2006) (suggesting that “the world’s different bases of exorbitant jurisdiction are, in essence, not as different as they appear”).

487. Nelson, *supra* note 16, at 503–04.

jurisdiction, bypassing those rules we attribute to the Due Process Clause instead. This approach treats jurisdiction much the way the Multistate Bar Exam treats criminal law:⁴⁸⁸ it identifies the rules we conventionally preface with “at common law . . .,” such as that burglary must be of a dwelling house⁴⁸⁹ or that voluntary intoxication is no defense.⁴⁹⁰ In this sense, we can all agree on what the shared common-law rule *is*—the one that *would* obtain absent legislative or judicial intervention—even though we also know that it may no longer be what’s regularly done.

These rules, too, can change over time. The common law of intoxication was different at the end of the nineteenth century than at the beginning,⁴⁹¹ just as the common law of contract was different under Mansfield than it had been under Holt.⁴⁹² But these were changes internal to the common law, not separate impositions by statute. As the Supreme Court envisioned it in *United States v. Chambers*,⁴⁹³ the prevailing rule of common law is something distinct from a restatement of the prevailing statute law—especially when the governing statutes “themselves recognize the principle which would obtain in their absence.”⁴⁹⁴ (In the same way, it’d be error to take the *customary* practice of European states to be whatever European Union members have agreed to by treaty and legislation.)⁴⁹⁵

This approach wouldn’t be without its critics. Maybe we can’t say what jurisdiction would be like without *International Shoe*, because we can’t even imagine the legal contours of that world. Unlike statutes modifying the common law of burglary, court decisions construing (or misconstruing) the Due Process Clause aren’t conscious stand-ins for a specific alternative that might be revived at any moment. Maybe the general-law practice has long since broken up, and *International Shoe* is all we have.

On the other hand, maybe the best way to describe the Court’s twentieth-century case law really is as the imposition of separate standards on *Pennoyer*-era practices, rather than the growth and development of that particular customary tradition into something new. Or some of each; maybe a few of the early post-*Pennoyer* cases were still toiling in the fields of the

488. See Daniel J. Solove, *The Multistate Bar Exam as a Theory of Law*, 104 MICH. L. REV. 1403, 1406 n.10 (2006) (commenting on the fact that the Multistate Bar Exam employs “archaic common law definitions of crimes” that have long since been “supplanted with statutory law”).

489. Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1009 (1951).

490. See *Montana v. Egelhoff*, 518 U.S. 37, 44–45 (1996) (Scalia, J., plurality opinion) (describing early common-law beliefs about voluntary intoxication).

491. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1048–49 (1944).

492. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 350–51 (4th ed. 2002).

493. 291 U.S. 217 (1934).

494. *Id.* at 226; cf. Baude & Sachs, *supra* note 127, at 1108–09 (discussing *Chambers*).

495. Cf. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 909 (2011) (Ginsburg, J., dissenting) (comparing the American law of personal jurisdiction to the European Court of Justice’s interpretation of particular EU regulations).

general-law tradition, while later cases superadded distinct standards of due process. If so, then perhaps the removal of these separate standards might leave the early twentieth-century service rules—with their unfashionable emphasis on presence, citizenship, and consent—as the last standing default.

Developing a full theory of common-law change—and successfully applying it to the twentieth-century history of personal jurisdiction—is somewhat beyond this Article’s scope. But even a partial theory, to be developed further in future work, can still make a real difference. Understanding jurisdiction as general law would have a real impact over and above any revisions it makes to specific doctrines. The judge’s task wouldn’t be to find the best theory of due process, to reconcile ancient traditions with fundamental fairness, and so on, but to issue the ruling most consistent with our existing practices. That may be more of a change of tone and emphasis than a change in substance, at least at first. But it could have substantial effect on the development of the doctrine over time—making it both more predictable and more determinate, in the long run, than the Court’s continuing efforts to rationalize the law.

3. *Refocusing on Sovereignty*.—Reviving *Pennoyer* offers no guarantee of doctrinal certainty. The general law of jurisdiction is only as determinate as it is;⁴⁹⁶ and neither the general law, nor the customary international law that it incorporates, has any great reputation for clarity. But these bodies of law do have one extremely important feature: a sensible connection to the allocation of sovereign power.

Under *Pennoyer*, due process requires jurisdiction, full stop, with the actual jurisdictional standards supplied by other sources of law. This fact helps us resolve the oft-repeated conflict of “sovereignty” and “liberty” that’s long occupied the courts.⁴⁹⁷ Due process requires a lawful judgment *before* liberty or property is taken, and our notions of sovereignty are necessarily connected to our convictions about which judgments are lawful.

Indeed, it’s hard to see how the field could be about anything else.⁴⁹⁸ Personal jurisdiction doctrines are “inescapably political”;⁴⁹⁹ they regulate the exercise of power by some people over others. Jurisdiction isn’t about *where* litigation takes place—and it hasn’t been since at least 1794, when the Supreme Court barred a French consul from hearing admiralty claims on U.S.

496. See generally Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014) (cautioning against views of law as inherently rule-like).

497. Compare, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880–81 (2011) (Kennedy, J., plurality opinion), with *id.* at 899–900 (Ginsburg, J., dissenting).

498. See generally Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769 (2015) (arguing for such a reorientation).

499. Stein, *supra* note 23, at 692.

soil.⁵⁰⁰ If geographic convenience were all we cared about, we could have had the consul hear claims in people's living rooms.⁵⁰¹

Instead, jurisdiction is about *who* gets to decide.⁵⁰² It's about choosing the group of people who get to choose the judges, to write the rules of procedure and evidence, to supply the jury—that is, to dispose of “all [the defendants'] worldly goods,”⁵⁰³ and often their liberty to boot. In particular, because jurisdiction includes the power to come to the *wrong* judgment,⁵⁰⁴ it's about choosing the people who have power to make the *wrong* choices on all these counts and who have the right to see their choices enforced anyway.

Perhaps because the right answers are so hard to find, and the temptation to throw in the towel so great, jurisdiction scholars sometimes downplay the importance of their subject—suggesting, for instance, that the only really meaningful aspect of personal jurisdiction is its effect on choice of law.⁵⁰⁵ But there'd be no point in getting excited over procedural issues—over the election of judges,⁵⁰⁶ over pleading standards,⁵⁰⁷ over the scope of class actions,⁵⁰⁸ over the treatment of sexual assault victims on the witness stand,⁵⁰⁹ and so on—if our political process had no effect on the answers, and if anyone could just as easily sue or be sued in some other forum with any or none of these rules.

Each of these topics involves the exercise of political power over defendants, because the defendant doesn't choose the forum. Courts sometimes explain this exercise through a framework of consent or voluntary submission;⁵¹⁰ but that's merely *tacit* consent, a well-known “quagmire” of

500. *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6, 16 (1794).

501. Sachs, *supra* note 441, at 1311.

502. *See id.* at 1303 (identifying the crucial questions regarding personal jurisdiction as ones about “not *where*, but *who*”); *see also* Erbsen, *supra* note 498, at 772 (“[M]odern personal jurisdiction doctrine conflates two distinct questions: (1) where may litigation occur, and (2) which governments may authorize litigation.”).

503. *Burnham v. Superior Court*, 495 U.S. 604, 623 (1990) (Scalia, J., plurality opinion).

504. *See* Baude, *supra* note 145, at 1831 (“[J]udgments closed disputes even when they were wrong, but only when there was jurisdiction. . . . The lawfulness of judicial action in a given case depended on the authority of the judge, not the reasons for judgment.”).

505. *See, e.g.*, Drobak, *supra* note 24, at 1058 (stressing that personal jurisdiction requirements function as a limit on choice of law); Redish, *supra* note 8, at 1139 (suggesting that jurisdictional limits are the results of states' desires to achieve their policy goals by having their substantive law control the outcomes of cases).

506. *See* Sandra Day O'Connor, Opinion, *Take Justice Off the Ballot*, N.Y. TIMES (May 22, 2010), <http://www.nytimes.com/2010/05/23/opinion/23oconnor.html> [<https://perma.cc/BR7T-PT5D>] (arguing that the direct election of state court judges should be replaced with a “merit selection system”).

507. *See generally* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

508. *See generally* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

509. *See* FED. R. EVID. 412.

510. *See* *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) (Kennedy, J., plurality opinion) (“A person may submit to a State's authority in a number of ways.”).

political theory.⁵¹¹ What exactly does a British metal-shearer manufacturer have to do to become subject to the will of the American people, or to those of New Jersey in particular? As Perdue writes, “[t]he problem of political legitimacy has troubled philosophers for centuries,”⁵¹² and it’s unlikely that any convincing theory will finally be developed in the U.S. Reports, between the first Monday in October and the last day of June.⁵¹³

This is where the general law of jurisdiction can help. For a workable jurisdictional doctrine, we don’t need a philosophically correct theory of political obligation—any more than we need actually correct policy in any other area of the law. The law usually serves as a means of conventional settlement, something “on which society (mostly) agrees and which allow[s] us (mostly) to get along.”⁵¹⁴ With regard to political authority, some of our conventional settlement is found in international law, the amorphous body of customs and practices that allocate authority among sovereign nations; within the United States, much of the rest is found in general-law principles. To the extent that there *are* any shared rules about judicial jurisdiction—and this is not to assume that there will be any, or any at the level of specificity we need—the principles of general and international law seem like good places to start.

After all, everyone believes in *some* limits on a state’s territorial authority. Jurisdiction to execute a judgment usually ends at the border; one state shouldn’t send its judicial marshals to seize persons or property within the territory of another. Yet sovereign borders, too, are a form of conventional settlement of questions of political authority. They serve as arbitrary dividing lines, and they only work to the extent that people agree on them. Where people disagree, borders cease to be useful—say, in the East China Sea.⁵¹⁵ But where borders do work, they help answer what might otherwise be theoretically insoluble questions: which groups of people should rule over which other groups, which decisions should be made in Washington or in Mexico City, and so on. Courts could always try to think up better answers, like colonial administrators offhandedly redrawing maps, but there are also plenty of reasons why they shouldn’t. Finding the current conventional answers is not only easier than finding true ones—it may also be more suitable for a judge’s role.

511. Perdue, *supra* note 25, at 537.

512. *Id.* at 546.

513. See Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 308 (1987) (“United States Reports is hardly an adequate forum for philosophical debate.”).

514. See Baude & Sachs, *supra* note 127, at 1096; see also *id.* at 1096–07 (“We don’t have an inherent ‘just is’ law of narcotics, either, but judges don’t handle drug cases by making their own first-order normative decisions.”).

515. See generally MARK E. MANYIN, CONG. RESEARCH SERV., THE SENKAKUS (DIAOYU/DIAOYUTAI) DISPUTE: U.S. TREATY OBLIGATIONS (2016), <http://www.fas.org/sgp/crs/row/R42761.pdf> [<https://perma.cc/CUN6-9LBG>] (describing the dispute between Japan and China regarding islands in the East China Sea and the United States’ role therein).

Conclusion

That *Pennoyer* got it right is more than a historical debating point. The American law of personal jurisdiction is an intellectual shambles. If there's a half-coherent alternative, defensible on original grounds, that should be seen as good news. If this alternative is moderately helpful in achieving other goals, like modernizing jurisdictional doctrine by statute, so much the better.

That alternative, it turns out, is the much-mocked notion of general law, together with the long-despised decision in *Pennoyer*. Other scholars have discussed jurisdiction with general law before, but they've generally thought that it proved *Pennoyer* wrong.⁵¹⁶ In fact, recovering the model of general law is crucial to understanding why *Pennoyer* got things right.

More importantly, recovering this model points the way to other areas of the law we might better understand, once we let the scales of *Erie* and *Klaxon* fall from our eyes. To some scholars, because jurisdiction is “part of the law of conflicts, *Erie* and *Klaxon* undermined the case for continued federal court supervision” of the subject.⁵¹⁷ The same argument would ring hollow as applied to state borders, where federal supervision seems vital to the constitutional plan. One person's *modus ponens* being another's *reductio*, we might with equal justice say that the case for federal supervision of state personal jurisdiction has undermined the case for *Erie* and *Klaxon*.

Erie's reasoning depends crucially on the impossibility—the “fallacy”—of general law.⁵¹⁸ Yet general law is not only possible, but indispensable. State-court jurisdiction is just one topic, and far from the only one, as to which our Constitution was designed in light of general law. Many areas that are crucial to a federal system go unaddressed in our constitutional text: choice of law, jurisdiction to tax, extraterritoriality, interstate and international relations, and so on. That may or may not have been a deliberate choice, but it also wasn't really an oversight. These areas weren't left to “majestic generalities”⁵¹⁹ or to arbitrary gaps, but to an already-functioning

516. See, e.g., Borchers, *supra* note 1, at 20, 22–24 (arguing that the Court should “abandon the notion that state court personal jurisdiction is a matter of constitutional law” and attributing the “constitutionalization of American personal jurisdiction” to *Pennoyer* and its progeny). See generally Conison, *supra* note 3, at 1135–39 (characterizing *Pennoyer* as unjustifiedly breaking with a prior tradition).

517. Conison, *supra* note 3, at 1183.

518. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938); see Michael Steven Green, *Erie's Suppressed Premise*, 95 MINN. L. REV. 1111, 1119 (2011); Sachs, *supra* note 74 (manuscript at 47) (arguing that the “whole logic” of *Erie* “unravels” once one recognizes that a state court could decide cases by finding general law instead of making state law).

519. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (Jackson, J.).

system of law—the entire purpose of which is to lie in reserve, answering questions that other sources of law have left open.

After so many years under *Erie*, it takes a great effort just to understand how our own legal system was supposed to work. Recovering the general law of jurisdiction might be a good first step.