

Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?

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I. INTRODUCTION

It is a privilege to comment on the paper of Robert Casad, who probably has done more than any other American to reveal the mysteries of jurisdiction to those who must understand that complicated body of law or suffer its consequences.¹ Professor Casad's capacity to explain complicated doctrine to Americans made him the logical choice to do the same in this international gathering. He has performed the work with clarity and grace, covering a great deal of territory and, as well, charting a course for the future.

Of course, that leaves little room for commentary, at least if the commentator is not bent on pressing pet theories or fighting old battles. I will try to resist those urges and to view Professor Casad's paper as an opportunity for comparative reflection in both the retrospective and prospective dimensions that occupy his attention. My thinking on these matters has been shaped by teaching and writing on issues of international civil litigation in United States courts,² and

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1. See Robert C. Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century, Forum Conveniens and Forum Non Conveniens*, 7 TUL. J. INT'L & COMP. L. 91 (1999); ROBERT C. CASAD, *JURISDICTION IN CIVIL ACTIONS* (2d ed. 1991).

2. See, e.g., Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103 (Summer 1994).

by my participation in a study group formed to advise the United States delegation to the Hague Conference on Private International Law in connection with the current project to fashion a treaty on the recognition and enforcement of judgments.³ That project contemplates a product that will at least be a “convention double,” prescribing rules for the recognition and enforcement of judgments as well as both required and prohibited grounds for the assertion of jurisdiction to adjudicate.⁴ It may also contain a third category of jurisdictional grounds that are neither required nor prohibited and thus become a “convention mixte.”⁵

II. JURISDICTION TO ADJUDICATE IN HISTORICAL AND COMPARATIVE CONTEXT

A. *The Relationship Between State and Federal Law*

It probably bears more emphasis than Professor Casad's paper provides that the primary source of authority for jurisdiction to adjudicate in state courts, which conduct the vast majority of judicial business in the United States, is state law. This is a point easily forgotten by Americans, and I assume that it may not be noticed by those from other countries. It is easily forgotten here because law school courses tend to focus, as Professor Casad's paper focuses, on federal constitutional limitations on the exercise of state court jurisdiction.⁶ Such emphasis could be explained as a concession to the shortness of life, since in one sense federal limitations impart uniformity to the area and make it possible, in that sense, to speak of the “American law of jurisdiction to adjudicate.”⁷ For many years, and perhaps still today, it could also be explained in part by the utility function of law professors:⁸ the desire of most of us to teach at least

3. See CATHERINE KESSEDJIAN, SYNTHESIS OF THE WORK OF THE SPECIAL COMMISSION OF MARCH 1998 ON INTERNATIONAL JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, PRELIMINARY DOCUMENT NO. 9 (1998) [hereinafter PRELIMINARY DOCUMENT NO. 9]; CATHERINE KESSEDJIAN, SYNTHESIS OF THE WORK OF THE SPECIAL COMMISSION OF JUNE 1997 ON INTERNATIONAL JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, PRELIMINARY DOCUMENT NO. 8 (1997) [hereinafter PRELIMINARY DOCUMENT NO. 8].

4. See PRELIMINARY DOCUMENT NO. 8, *supra* note 3, at 11-12.

5. See *id.*; see also Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 272, 282-84 (Summer 1994).

6. See, e.g., RICHARD H. FIELD et. al., CIVIL PROCEDURE 923-1083 (7th ed. 1997).

7. Such emphasis is also consistent with the use of a federal model in the basic course in Civil Procedure, particularly given the choice made to borrow jurisdictional standards in most federal civil litigation from state law. See Fed. R. Civ. P. 4(k)(1)(A).

8. See RICHARD A. POSNER, OVERCOMING LAW 109-44 (1995).

some constitutional law.⁹ In any event, it can be justified on more practical grounds, to the extent that, explicitly or in fact, states have tied their jurisdictional law to developing federal constitutional standards.¹⁰

The tendency to elide state law and federal constitutional law concerning jurisdiction to adjudicate—what I will call linkage—is not without costs, domestically and internationally. Domestically, it may encourage a race to the bottom, as state lawmakers consider either the interests of their residents or the interests of their lawyers in securing access to a local forum and do not want either to suffer competitive disadvantage.¹¹ When this happens, state law suffers.

Thinking about the matter in this way brings into view a second potential cost of linkage, which is opposed to the first and has broader jurisprudential roots and implications. Due process has both procedural and substantive dimensions. Both of them implicate the proper role of the judiciary in constraining state (and federal) law, and it is not easy to locate the law of personal jurisdiction exclusively in either.¹² During the procedural “due process explosion”¹³ of the 1970s, many Americans came to think and talk about due process as marking not “the least possible good”¹⁴ one could say about a law, but rather that which should be afforded as a normative matter. When this happens, both state law and federal constitutional law may suffer.¹⁵

Whether or not it is helpful to think about developments in constitutional law affecting personal jurisdiction in terms of the

9. See *id.* at 87.

10. See Casad, *supra* note 1, at 104; see also *Burnham v. Superior Court*, 495 U.S. 604, 639 n.14 (1990) (Brennan, J., concurring in judgment).

11. “States have little incentive to limit rules such as transient jurisdiction that make it easier for their own citizens to sue out-of-state defendants.” *Burnham*, 495 U.S. at 639 n.14 (Brennan, J., concurring in judgment) (emphasis in original).

12. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which involved personal jurisdiction, may have initiated the modern debate on the Supreme Court about the proper role of the judiciary in interpreting the constitutional command. See *id.* at 323-26 (separate opinion of Black, J.). That debate, which is more famously associated with issues like abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), continued in connection with procedural due process, see *Goldberg v. Kelly*, 397 U.S. 254, 272-279 (1970) (Black, J., dissenting), as it did in the jurisdictional context. See *Burnham*, 495 U.S. at 622-27 (opinion of Scalia, J.); *id.* at 633-37 (opinion of Brennan, J.). In addition, the Court in *International Shoe* drew on procedural due process cases. See *infra* text accompanying note 30.

13. Henry J. Friendly, “Some Kind of Hearing,” 123 U. PA. L. REV. 1267, 1268 (1975).

14. “To say that a law does not violate the due process clause is to say the least possible good about it.” Elliott E. Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 25 (1971).

15. Cf. William B. Fisch & Richard S. Kay, *The Constitutionalization of Law in the United States*, 46 AM. J. COMP. L. 437, 456-62 (1998) (discussing remedies and “judicialization”); *infra* text accompanying note 42 (linkage hinders comparative perspective).

procedural due process revolution, that revolution is long over,¹⁶ and the third and most obvious cost of linkage has been incurred. Both the changing contours of due process and its fact dependency have exacerbated the uncertainty of state jurisdictional standards founded in federal constitutional limitations.¹⁷

Internationally, this American phenomenon of linkage might have augured significant advantages, if it had yielded a relatively determinate "American law." Instead, however, it has imposed substantial costs as a result both of the uncertainty of jurisdictional standards tied to changing (but ever fact-dependent) constitutional norms and of the inevitably exorbitant¹⁸ appearance of jurisdictional law that started as a floor and became a bed.

The same phenomenon may be in part responsible for difficulties Americans have experienced in attempting to explain American law to their colleagues abroad, including at The Hague. This is not to say that, for instance, Europeans would accept all of the jurisdictional bases set forth in a typical state long-arm statute of the elaborating type (that is, one that does not simply refer to and incorporate federal constitutional standards).¹⁹ Starting at that level, however, not only would be sounder as a jurisprudential matter, but would also provide more hope of shared understanding than starting and ending with the opinions of the Supreme Court of the United States.²⁰

Proceeding as I suggest might be misleading if anyone believed as a result that the chosen "American" model was typical. That would be a risk if the comparative project were descriptive. It should not be a risk in a project whose aim is a treaty, such as the current project at The Hague. Indeed, the perspective taken here could be of value not only in educating our colleagues abroad about American law but also in educating ourselves.

In the process of reaching compromises with delegates from other countries, the American delegates would do well to remember that due process is a floor and, thus, that there is room to live above it.

16. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); see also Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

17. See Casad, *supra* note 1, at 7, 10.

18. For a discussion of exorbitant fora in connection with current deliberations at The Hague, see PRELIMINARY DOCUMENT NO. 8, *supra* note 3, at 59-63 and Annex VI.

19. See, e.g., UNIF. INTERSTATE AND INT'L PROC. ACT § 1.03, 13 U.L.A. 361-62 (1986) (personal jurisdiction based on conduct).

20. Cf. Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1575-76 (1992) (uniform state judgments recognition and enforcement legislation prompted by difficulties encountered in other countries accustomed to codified law).

They might also find it easier to accept that, when one views the United States as the relevant territory, there is no need to insist on the availability of every basis of jurisdiction to adjudicate found in the law of the fifty states and/or found not to violate due process, and conversely, no need to resist a single basis that might violate due process if asserted by a state court.²¹ If the time comes to consider whether to adopt compromises made at The Hague as federal law, the same perspective should ease the burdens of those concerned about either the legal or the political problems of federalism.²²

B. *Tag Jurisdiction*

Professor Casad's paper well describes both the historical importance of physical presence in the development of American ideas about jurisdiction to adjudicate and the current constitutional law regarding it.²³ International and comparative perspectives on that subject permit me to explore further the problems and opportunities afforded by the interplay of state and federal law. In addition, tag jurisdiction provides a test of the positive dimensions of Professor Casad's claims concerning the role of interest balancing in the application of constitutional norms.²⁴

1. International and Comparative Perspectives

In previous work I have noted the irony that, although the foundations of American constitutional law concerning personal jurisdiction were thought to lie in public international law, the cornerstone of the foundation, physical presence in the state at the time process is served, is no longer an acceptable basis for the assertion of personal jurisdiction internationally.²⁵ Moreover, although Professor Casad is correct to mention the division on the Supreme Court of the United States in the *Burnham* case,²⁶ we agree

21. Cf. FED. R. CIV. P. 4(k)(2) (authorizing exercise of jurisdiction consistent with the Constitution in federal question case where defendant is not subject to the jurisdiction of the courts of general jurisdiction of any state).

22. See Patrick J. Borchers, *Judgments Conventions and Minimum Contacts*, 61 ALB. L. REV. 1161, 1174-75 (1998). For an example of the use of federal legislative power to override state (personal and subject matter) jurisdictional law, see 28 U.S.C. §§ 1602-1611 (1994) (foreign sovereign immunity).

23. See Casad, *supra* note 1, at 98, 107.

24. See *id.* at 104.

25. See Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1468 n.66 (1991) (book review).

26. See *Burnham v. Superior Court*, 495 U.S. 604 (1990); see also Casad, *supra* note 1, at 103.

that the Court is unlikely to hold any assertion of tag jurisdiction unconstitutional, except perhaps if someone were dragged into a state in order to be served there.²⁷ *Burnham* is thus evidence of the limits of any due process revolution in standards for jurisdiction to adjudicate, were that needed, as it is evidence of the folly of tying state law to what the Constitution does not prohibit.

Here, however, the fault for the continuing use of a jurisdictional standard that the rest of the world regards as exorbitant cannot be laid to the phenomenon of linkage described above, because, as Justice Scalia reminded us, tag jurisdiction has a "pedigree."²⁸ Indeed, the linkage originally moved in the opposite direction—from state law to federal constitutional law²⁹—and it is precisely the territorial element of traditional American thinking about jurisdiction to adjudicate that always limited the potential of jurisprudence that is unconcerned with such matters. In *International Shoe*, the Court drew inspiration from the nascent jurisprudence of procedural due process,³⁰ but because of the substantive, that is to say territorial, aspect of jurisdiction to adjudicate in a federal system, that jurisprudence was never wholly adequate to the constitutional task.

If I am correct that neither state law nor federal constitutional law concerning tag jurisdiction is likely to change soon as a result of indigenous developments, the current project at The Hague can be seen as an opportunity to use international lawmaking to bring about change. Moreover, since, as Professor Casad suggests, we resist a separate procedural law for international cases,³¹ the changes effected first for international cases might then be adopted for domestic cases.

The major impediment to compromise on this question at The Hague—other than the traditional American attitude that the United

27. See *Burnham*, 495 U.S. at 628 (White, J., concurring in part and concurring in judgment).

28. *Id.* at 620 (opinion of Scalia, J.).

29. See James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 42-53 (1992).

30.

But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." See also *Milliken v. Meyer*, 311 U.S. 457, 463. See also *Holmes, J.*, in *McDonald v. Mabee*, 243 U.S. 90, 91.

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

31. See Casad, *supra* note 1, at 93; see also Burbank, *supra* note 25, at 1458-73; Burbank, *supra* note 2, at 118, 125-27; cf. Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4 (1995).

States should not have to change its law in any respect³²—is likely to arise from the recently discovered utility of tag jurisdiction in litigation against individuals who are alleged to have committed human rights violations.³³ However, there may be a solution at hand that would preserve the good while jettisoning the bad. Perhaps the convention could be framed so as to preserve the possibility of exercising jurisdiction to adjudicate, on bases not otherwise specified, in cases asserting violations of public international law—or, more narrowly, of universal human rights—when the ground of jurisdiction was itself consistent with public international law.³⁴

2. Interest Balancing and General Jurisdiction: The Value of Comparative Perspectives

Burnham may demonstrate the limits of the due process revolution in more ways than one. For, as Professor Casad points out,³⁵ four Justices, led by Justice Brennan, expressed the view that tag jurisdiction was subject to analysis under the standards of *International Shoe*, and they concluded that those standards were met on the facts of the case.³⁶ Such reasoning appears to toll the thirteenth hour on the notion that what Professor Casad calls “interest balancing”³⁷ has much of a role to play in disciplining assertions of jurisdiction.

It is possible, however, that tag jurisdiction is now simply a constitutional anomaly, best understood historically by considering

32. See Burbank, *supra* note 2, at 127-39.

33. See *Kadic v. Karadzic*, 70 F.3d 232, 246-247 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); see also Harold Hongju Koh, *International Business Transactions in United States Courts*, in 261 RECUEIL DES COURS 13, 144-46 (1996).

[Tag jurisdiction] is indeed used in certain countries to prosecute a defendant, accused of a violation of human rights committed abroad, where the jurisdiction is based on the theory of “universal jurisdiction.” This theory has its origins in public international law. It allows for certain crimes (for example, genocide, crimes against humanity, war crimes) to be dealt with by the courts of any State willing to arrange such proceedings, being based on the idea that these crimes should not remain unpunished, while the country in which they were based does not prosecute the perpetrators and no international tribunal can become involved.

PRELIMINARY DOCUMENT NO. 9, *supra* note 3, at 30 n.53.

34. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) (Universal Jurisdiction to Define and Punish Certain Offenses); *id.* § 423 (Jurisdiction to Adjudicate in Enforcement of Universal and Other Non-Territorial Crimes); *id.* § 702 (Customary International Law of Human Rights).

35. See Casad, *supra* note 1, at 103.

36. See *Burnham v. Superior Court*, 495 U.S. 604, 628-40 (1990) (Brennan, J., concurring in judgment).

37. Casad, *supra* note 1, at 97.

the important role that it once played in mitigating the rigors of a territorial system highly protective of defendants when travel was difficult and expensive, and thus serving the interests of plaintiffs and states.³⁸ In that regard, tag jurisdiction is a species of general jurisdiction, and thus does not require any connection between the defendant's contacts in the state and the plaintiff's claims.³⁹

When one considers another basis of general jurisdiction, namely domicile/state of incorporation,⁴⁰ it is apparent that such bases are not immune to "interest balancing" as a means of justifying a contemporary conclusion that an assertion of jurisdiction is not fundamentally unfair. The states of the United States have a shared interest in providing at least one place where a person or corporation can be sued—a jurisdictional "headquarters"⁴¹—an interest that is shared by plaintiffs. In light of these interests, a person or corporation that has purposefully established such a relationship with a state cannot properly complain that an assertion of jurisdiction is so unfair as to be unconstitutional.

This suggests that another cost for federal constitutional law of the linkage we see today lies in the loss of comparative perspective that may occur when due process is formulated knowing that it will serve as the source of rules for state law. Otherwise, due process might serve "as an instrument of interstate federalism"⁴² by taking account dynamically of the adjudicatory jurisdictional landscape within the United States as a whole, adjusting the constitutional floor when new grounds became available that diminished the need for others and hence altered the balance of interests broadly viewed. That is one way to understand the Supreme Court's decision in *Shaffer v. Heitner*,⁴³ and understanding it that way makes *Burnham* no less difficult to reconcile.⁴⁴

38. See Weinstein, *supra* note 29, at 53-54. Note that similar reasoning can be used to justify the use of tag jurisdiction in exceptional cases even today. See Koh, *supra* note 33, at 145.

39. See *Burnham*, 495 U.S. at 607 (opinion of Scalia, J.) ("a suit unrelated to his activities in the State").

40. See, e.g., *Milliken v. Meyer*, 311 U.S. 457 (1940).

41. *Williamson v. Osenton*, 232 U.S. 619, 625 (1914) ("technically preeminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined"); see Arthur T. Von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1137, 1179 (1966).

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

43. 433 U.S. 186 (1977).

44.

Accordingly, in its day, and as part and parcel of an entire jurisdictional system, a rule that in-state service was sufficient may well have been "reasonable, in the context of

This way of looking at jurisdiction to adjudicate may also be helpful to our delegates at The Hague. It appears that delegates from other countries have had difficulty accepting the basis of asserting general jurisdiction to adjudicate that we call “doing business.”⁴⁵ It is probably too late in the day for an assertion of jurisdiction on this basis in a state where the defendant conducts substantial business systematically and continuously to be held unconstitutional.⁴⁶ Yet, the advent of aggressive forms of specific jurisdiction, coupled with the headquarters basis of general jurisdiction, should cause one who believes in interest balancing and in due process “as an instrument of interstate federalism”⁴⁷ in the sense used above, to pause over that question. So perhaps should its origins in a fiction that is tied to territorial notions of presence.⁴⁸ In any event, the domestic comparative approach should help American delegates not to insist on this ground internationally, at least if other bases brought into focus by that approach are essentially preserved. Surrender should be even easier if it is proposed to include more limited forms of “doing business” jurisdiction, such as those that favor consumers.⁴⁹

III. FORUM NON CONVENIENS

Professor Casad points out that “[c]ontinental European countries generally reject the doctrine of forum non conveniens.”⁵⁰ Their reaction is due in part to the theoretical difficulty he notes of a court that has competence or jurisdiction and is refusing to exercise

our federal system of government.” But now that the restrictive service of process requirement has been replaced with the more flexible “minimum contacts” test, the overbroad rule of sufficiency may no longer be fair and proper. More significantly, a due process standard that focuses on the historical existence of a single rule, isolated from the web of other rules in which it functioned is questionable, to say the least.

Weinstein, *supra* note 29, at 54 (footnotes omitted).

45. See PRELIMINARY DOCUMENT NO. 8, *supra* note 3, at 63; *id.* at Annex VI; PRELIMINARY DOCUMENT NO. 9, *supra* note 3, at 30.

46. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). *But see Burnham*, 495 U.S. at 610 n.1 (opinion of Scalia, J.) (suggesting that, as a constitutional matter, general jurisdiction on the basis of doing business may be restricted to corporations).

47. *Supra* text accompanying note 42.

48. “A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner as to warrant the inference that it is present there.” *Philadelphia & Reading Railway v. McKibbin*, 243 U.S. 264, 265 (1917); see also *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945).

49. See PRELIMINARY DOCUMENT NO. 8, *supra* note 3, at 41-43; see also PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRELIMINARY DRAFT OUT LINE TO ASSIST IN THE PREPARATION OF A CONVENTION ON INTERNATIONAL JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, INFORMATION DOCUMENT NO. 2, at 13 (Sept. 1998) (Article 7—Contracts with Consumers).

50. Casad, *supra* note 1, at 106 footnote omitted).

it.⁵¹ In part it is also due to another related theoretical difficulty, namely, doctrine that expressly vests enormous discretion in the court.⁵² A third basis for rejection, I suspect, is the lack of perceived need for such an equilibrating device in systems whose rules of jurisdiction to adjudicate are relatively determinate and also relatively conservative vis a vis defendants,⁵³ as are the rules in the Brussels⁵⁴ and Lugano⁵⁵ Conventions.

Although forum non conveniens can be traced back a long way in Scots law, it has a short history in American courts outside of admiralty and maritime cases.⁵⁶ Moreover, the jurisprudential puzzle that dismays our European colleagues is no less puzzling here, at least when one considers the federal courts. That may explain why, in rationalizing and limiting the power of the federal courts to dismiss cases by abstaining in favor of state courts in the *Quackenbush* case, the Supreme Court recognized, but did not seek to justify, forum non conveniens as discrete.⁵⁷ Of course, the discretionary nature of the doctrine is not otherwise problematic in most American courts, and there is widely recognized need for the relief it provides in states whose rules are neither determinate nor conservative.⁵⁸

Professor Casad identifies and explores a potential anomaly created by supposed convergence between the factors that a court considers in determining whether to dismiss under forum non conveniens and the factors "that must be examined under the *International Shoe* doctrine to see whether the court has jurisdiction."⁵⁹ He finds it "hard to visualize a case where the balance

51. See *id.*

52. See Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1299-1300 (1998); Wendy Kennett, *Forum Non Conveniens in Europe*, 54 CAMBRIDGE L.J. 552, 559-61 (1995); Burbank, *supra* note 25, at 1464-65.

53. See Zekoll, *supra* note 52, at 1297-1300.

54. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, as amended by 1990 O.J. (C 189) 1. For the subsequent history of the Brussels Convention, see von Mehren, *supra* note 5, at 275.

55. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319). See von Mehren, *supra* note 5, at 275-76.

56. See Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 795-812 (1985).

57. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721-23 (1996); Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 17 (1998).

58. See, e.g., Zekoll, *supra* note 52, at 1298-99.

59. Casad, *supra* note 1, at 105; see *Travelers Health Ass'n v. Virginia ex rel. State Corporation Commission*, 339 U.S. 643, 649 (1950) ("Such factors have been given great weight in applying the doctrine of forum non conveniens.").

of interests makes the forum fundamentally fair, but where the forum is seriously inconvenient and the balance is so strongly in favor of the defendant that the plaintiff's forum choice should be rejected."⁶⁰ He also seems to suggest that the anomaly does not arise very often, because "the doctrine of forum non conveniens is essentially limited to cases where the defendant's forum contacts are so substantial as to permit jurisdiction there for any cause of action, no matter where it arose,"⁶¹ in other words, cases involving general jurisdiction.

Assuming for purposes of discussion that the factors are the same, the supposed anomaly exists only if one thinks about "the *International Shoe* doctrine" as designed to determine "whether the court has jurisdiction" and thinks about interest balancing as designed to determine whether "the forum [is] fundamentally fair." It does not exist if one views the role of federal law as checking assertions of jurisdiction that are fundamentally unfair⁶² and recalls that the source of authority for the forum non conveniens doctrine applied in state courts is state law.⁶³

Even taking the view of *International Shoe* that Professor Casad adopts, the anomaly may not have been presented very often if the lower courts followed the lead of the Supreme Court. After the Court renewed its attention to the constitutional limitations on state court jurisdiction in 1977 and until recently, there was very little evidence of actual interest balancing in the decisions of the Supreme Court. Instead, the continuing influence of territoriality gave references to interests, as opposed to contacts, the quality of lip service.⁶⁴

It may be that Professor Casad is correct in his empirical assertion that forum non conveniens is "essentially limited to cases" of general jurisdiction.⁶⁵ But if, as he contends, interest balancing is or should be part of the constitutional analysis of general jurisdiction as it is of specific jurisdiction,⁶⁶ one would expect to encounter the same anomaly. This may suggest either that the supposed convergence of factors does not exist or that interest balancing has no role, or a different role, to play in connection with general jurisdiction. Both may be true.

60. See Casad, *supra* note 1, at 105.

61. *Id.*

62. See *supra* text accompanying notes 12-16.

63. See *American Dredging Co. v. Miller*, 510 U.S. 443 (1994) (admiralty).

64. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 213-16 (1977); *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

65. See Casad, *supra* note 1, at 105.

66. See *id.* at 105-06.

Although interest balancing is part of the contemporary American approach to both forum non conveniens and constitutional limitations on state court jurisdiction, it may be important to refine Professor Casad's assertion that the same factors are weighed in the balance. The forum non conveniens analysis is, or at least is supposed to be, far more particularistic in connection with both private interests and public interests,⁶⁷ and if it is not, it is probably a mask for choice of law.⁶⁸

I suggested above that, notwithstanding Justice Brennan's opinion in *Burnham*, interest balancing cannot save most assertions of tag jurisdiction,⁶⁹ but I argued that it could be used to justify domicile/place of incorporation.⁷⁰ The interest balancing I employed was, like the ground of jurisdiction, categorical. The other ground of general jurisdiction discussed above, doing business, occupies intermediate territory, which is to say that, even assuming substantial defendant activity that is systematic and continuous, it is not clearly immune to constitutional attack on the basis of categorical, *ex ante* interest balancing. If *ex post* the courts make no effort to consider interests other than those suggested by the defendant's activities in the forum, forum non conveniens serves as a critically important equilibrating device.

Given the theoretical problems that forum non conveniens poses for continental European systems, it is no surprise that the American delegates to The Hague have encountered resistance to the notion that the doctrine be a recognized feature of any treaty concluded.⁷¹ Certainly, the existence of those problems must mean that no signatory state should be required to apply the doctrine in its courts. Beyond that, it would seem advantageous to all signatory states that a convention which is likely to be more adventurous than the Brussels and Lugano Conventions accommodate such a safety valve in those states whose legal traditions permit it. I am assuming a requirement that there be an alternative forum available in another signatory state⁷² and that, as a result of its location in another signatory state, no inquiry concerning its adequacy would be permitted.⁷³ To the extent

67. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

68. See Stein, *supra* note 56, at 831-40.

69. See *supra* text accompanying notes 35-37.

70. See *supra* text accompanying notes 40-41.

71. See PRELIMINARY DOCUMENT NO. 9, *supra* note 3, at 42-44.

72. Compare Kennett's suggestion for a modified version of *forum non conveniens* under the Brussels Convention, whereby it "would not operate in cases where the plaintiff was domiciled in a Contracting State." Kennett, *supra* note 52, at 568-69.

73.

that even that departure from the model of a “convention double” proved controversial, the American delegates might have an easier time in negotiations if they were willing to accept in return the Brussels Convention approach to *lis pendens*.⁷⁴

IV. CONCLUSION

Professor Casad is correct that many courts, including the court that decided it, and many commentators, have misinterpreted *International Shoe*,⁷⁵ and his suggested analytical approach seems to me more faithful to that case and to due process jurisprudence than the bifurcated approach taken in both of the two main opinions in *Asahi Metal Industry Co. v. Superior Court*,⁷⁶ let alone the lip service given to interests (other than those suggested by the defendant’s contacts) in so many decisions before *Asahi*.⁷⁷

These comments reflect my sense that, both domestically and internationally, that may be the wrong project. Resting on a floor that moves, and consisting in many rooms of nothing but that floor, the American house of jurisdiction to adjudicate is not a place where any sensible person other than a lawyer (if that is not redundant) wants to live. It is time to renovate the rooms, and in doing so, we may profit greatly from the fact that some of the revised design may be required, and that all of it can be influenced, by a collaborative international architectural project.

The Brussels and Lugano Conventions do not permit the dismissal of actions on grounds of *forum non conveniens*. The Conventions thus mirror the prevailing opinion in most civil law nations that the plaintiff’s choice of a particular forum should not be disturbed as long as a jurisdictional rule permits this choice. This solution is seen as providing legal certainty and avoiding costly, and potentially offensive, litigation over the adequacy of the courts involved.

Zekoll, *supra* note 52, at 1297 (footnotes omitted).

74. In the event of duplicative litigation, Article 21 of the Brussels Convention, *supra* note 54, requires that “any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established,” and when it is established, “shall decline jurisdiction in favour of that court.” See PRELIMINARY DOCUMENT No. 9, *supra* note 3, at 44. On *lis pendens* in federal courts, see Burbank, *supra* note 57, at 14-17.

75. See Casad, *supra* note 1, at 107-08.

76. See *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-16 (1987); *id.* at 116-21 (Brennan, J., concurring in part and concurring in judgment); see also Casad, *supra* note 1, at 108-09.

77. See *supra* text accompanying note 64.