ONE STEP FORWARD AND TWO BACK: MISSED OPPORTUNITIES IN REFINING THE UNITED STATES MINIMUM CONTACTS TEST AND THE EUROPEAN UNION BRUSSELS I REGULATION

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I. INTRODUCTION

Jurisdictional regimes ought to have two principal goals: fairness and predictability. By fairness, I mean that the rules of judicial jurisdiction in a particular system should not tilt too heavily toward either plaintiffs or defendants. A rule that allowed plaintiffs an unlimited choice of forums without regard to the residence of either party or the location of the liability-creating events would be too generous to plaintiffs. At the other extreme, a rule that allowed plaintiffs access to only one remote and inhospitable forum regardless of party residence or events would go too far the other way. Between those poles lie a good number of basically fair regimes.

Potential litigants also ought to be able to predict, with reasonable certainty, what impact their conduct has on jurisdictional options. For instance, a foreign corporation that decides to make a significant sales effort in the United States or the European Union (E.U.) should be able to know (or at least get reasonably certain advice on) whether and to what extent those commercial activities expand the horizon of forum choices in suits against them. Coordination between major jurisdictional systems is desirable, but – in my view – subsidiary to the goals of fairness and predictability. Coordination – in the sense of having identical or at least similar rules across regimes – could help litigants predict their forum choices because the more other systems look like their own, the more likely their instincts will be borne out in actual practice. Moreover, coordination would likely increase the chances of having cross-border judgments recognized, thus decreasing the likelihood that litigant and judicial resources will be consumed for no practical purpose. But having perfectly coordinated, yet wildly unfair or unpredictable (for example, imagine both systems deciding that the forum would be determined by a role of dice), jurisdictional systems would purchase coordination at too high a price.

Given the fundamental nature of judicial jurisdiction and the frequency with which it is litigated, one might expect that in the well-developed legal systems of the United States and the European Union the basic premises of jurisdiction would be reasonably clear and basically fair with any unsettled questions lingering around the edges. Instead, matters are – to be polite – a bit of

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a mess.[1] The lack of predictability in the U.S. regime has long been a subject of litigant, judicial and academic consternation.[2] Also, as I argue below, it leans too far in favor of defendants. While the E.U.'s regime gets higher marks for predictability, its continued use of exorbitant jurisdictional bases against non-E.U. defendants is actually pulling it further from harmonization with the United States, and – at least regarding the continued use of exorbitant national rules – it leans too far in favor of plaintiffs.

The last few years have offered both the United States and the European Union opportunities to realign their jurisdictional regimes to make them both fairer, clearer, and – if not harmonized – at least closer together. Both legal regimes failed in the task. The United States Supreme Court, which has remained silent on the contours of its "minimum contacts" test for a quarter century, agreed in 2011 to hear two jurisdictional cases, both involving foreign, corporate defendants. In *J. McIntyre Machinery, Ltd. v. Nicastro*,[3] a scrap metal processing machine manufactured by an English corporation was placed into the U.S. market through an independent U.S. distributor, and ultimately, it was sold to the plaintiff's employer in New Jersey. There, the machine sliced off four fingers of one of the plaintiff's hands, allegedly as a result of a defect in the product. The plaintiff sued in state court in New Jersey. In a six to three decision, the Supreme Court held that the New Jersey state court lacked jurisdiction.[4] The Court, however, failed to produce a majority opinion, with the lead opinion garnering only four votes and the result depending on a two-vote opinion that concurred in the result, but not the reasoning of the lead opinion. Thus, the Court continued to remain hopelessly divided over the boundaries of so-called "stream of commerce"[5] jurisdiction.

The Supreme Court's other decision came in *Goodyear Dunlop Tires Operations v. Brown*,[6] in which two thirteen-year-old North Carolinian boys playing in a soccer tournament were killed in a bus accident in France. The alleged cause of the accident was the failure of a tire manufactured by the Turkish

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[1] A fate, according to at least one commentator, Canada has not escaped. *See* Tanya J. Monestier, *A "Real and Substantial" Mess: The Law of Jurisdiction in Canada*, 33 QUEEN'S L.J. 179 (2007).

[2] *See, e.g.*, Sarah R. Cebik, *"A Riddle Wrapped in a Mystery Inside an Enigma": General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 11 ("Without any predictability in the courts' behavior, it is impossible for a defendant to structure conduct so as to avoid or subject itself to general jurisdiction.").

[3] 131 S. Ct. 2780 (2011).

[4] *Id.* at 2785.

[5] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.").

[6] 131 S. Ct. 2846 (2011).

subsidiary of the U.S. tire giant Goodyear U.S.A. The boys' families brought suit in North Carolina state court attempting to base jurisdiction on the unrelated sale of several thousand tires annually by the subsidiary in the forum state.[7] The Supreme Court's unanimous decision rejecting jurisdiction was expected,[8] but the Court announced a new test for attempted exercises of jurisdiction based upon business contacts where the liability-creating events took place elsewhere. In these exercises of what the Supreme Court calls "general jurisdiction,"[9] the Court said that the defendant must be "essentially at home" in the forum.[10] Because the unrelated sales of a small percentage of the defendant's tires in the forum state did not render the subsidiary "at home," the attempted exercise of jurisdiction was unconstitutional.

The reaction of U.S. academic commentators to *J. McIntyre* has been almost universally negative.[11] As I discuss at more length below, the Supreme Court's confused pronouncements reflect the lack of any clear constitutional rationale for limiting the exercise of state-court jurisdiction.[12] *J. McIntyre* would

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[7] *Id.* at 2852.

[8] *See, e.g.*, Michael H. Hoffheimer, *General Personal Jurisdiction after Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 U. KAN. L. REV. 549, 550 (2012).

[9] *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414–15 (1984). The term was coined in a famous law review article. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

[10] *Goodyear*, 131 S. Ct. at 2851.

[11] *See, e.g.*, Patrick J. Borchers, J. McIntyre*,* Goodyear*, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245 (2011) (calling the *J. McIntyre* opinion "a disaster"); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction,* 16 LEWIS & CLARK L. REV. 867, 868 (2012) ("The academic community met the . . . decision with almost unanimous disapproval."); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341, 345 (2012) (noting that *J. McIntyre* opinions "exacerbated rather than ameliorated the doctrinal confusion"); Megan M. La Belle, *The Future Of Internet-Related Personal Jurisdiction After* Goodyear Dunlop Tires v. Brown *and* J. McIntyre v. Nicastro, 15 J. INTERNET L. 3, 8 (2012) ("As for *McIntyre*, the highly splintered opinion is so muddled and fact specific, that its application to other cases should be limited."); Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 301 (2012) (noting that *J. McIntyre* plurality opinion attempted to return to "long discredited" notions of sovereignty); Johnjerica Hodge, Note, *Minimum Contacts in the Global Economy: A Critical Guide to* J. McIntyre Machinery v. Nicastro, 64 ALA. L. REV. 417 (2012).

[12] *See* Borchers, *supra* note 11, at 1271 ("The theoretical confusion results . . . from the fact that the [Supreme] Court has no clear idea why it is involved in regulating state-court assertions of personal jurisdiction."); Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994) ("[Personal jurisdiction doctrine] is a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be

have made for a perfectly sensible exercise of jurisdiction given that the bulk of the relevant evidence was located in New Jersey and, ironically, the English defendant clearly would have been subject to jurisdiction were New Jersey part of the E.U. and not the United States.

The reaction to *Goodyear* has been more mixed, with the consensus probably best described as cautiously optimistic.[13] I, however, am less sanguine than most. I and at least one other commentator have suggested that in limiting exercises of jurisdiction, the Supreme Court is actually concerned about choice of law,[14] particularly given the strong tendency of U.S. courts to apply their own law in conflicts cases.[15] Because of the gaps in the exercise of what the United States calls "specific jurisdiction"[16] (the E.U.'s term is "special jurisdiction"[17]) – the *J. McIntyre* decision being a prominent example – arguably broader-than-desirable exercises of general jurisdiction have become a partial antidote.[18] If what the Court means by "essentially at home" is that the corporate defendant has its headquarters in the forum, U.S. plaintiffs could find themselves irrationally disadvantaged in pursuing cases against foreign corporate defendants.

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divined."); Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202 (2011) (noting that the Supreme Court has never set forth a coherent rationale as to why the Due Process Clause limits personal jurisdiction).

[13] *See, e.g.*, Effron, *supra* note 11, at 870 (proclaiming that *Goodyear* was "clearly reasoned"); Hoffheimer, *supra* note 8 (suggesting a reading of the *Goodyear* opinion that would create a middle path of reasonable predictability); James R. Pielemeier, Goodyear Dunlop*: A Welcome Refinement of the Language of General Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 969 (2012); Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 527 (2012) (claiming *Goodyear* was a "positive development"). However, all commentators, including the foregoing, note that *Goodyear* is susceptible of different readings. At one extreme, it might mean to limit courts to exercising general jurisdiction over corporations to the equivalent of their domicile, at the other it might simply be saying that the relatively insignificant unrelated sales in that case fall short of the line. *See, e.g.*, Borchers, *supra* note 11, at 1266–67; Danielle Tarin & Christopher Macchiaroli, *Refining the Due-Process Contours of General Jurisdiction over Foreign Corporations*, 11 J. INT'L BUS. & L. 49 (2012).

[14] Borchers, *supra* note 11, at 1269 ("[C]hoice of law sits in the corner of the Supreme Court's minimum contacts cases like the brooding and uninvited party guest."); Stewart Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1165–66 (2013).

[15] Patrick J. Borchers, *The Choice-of-Law Revolution, An Empirical Study*, 49 WASH. & LEE L. REV. 357, 377 (1992).

[16] Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8 (1984).

[17] Ronald Brand, *Jurisdictional Developments and the New Hague Judgments Project*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW – ESSAYS IN HONOUR OF HANS VAN LOON 89, 99 (Permanent Bureau of the Hague Conference on Private Int'l Law ed., 2013).

[18] Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 613, 680 (1988).

While U.S. jurisdiction over foreign defendants contracts irrationally, the E.U.'s Brussels regime retains at least one irrationally expansive feature. Other commentators and I have praised the Brussels regime for setting forth relatively clear and sensible rules,[19] although some European commentators suggest things look better from a distance than up close.[20] However, all incarnations of the Brussels regime – the Brussels Convention, the Brussels I Regulation, and now the Recast Brussels I Regulation – have contained a feature that U.S. commentators have criticized.[21] Nearly all of the E.U. countries are home to one or more exorbitant bases of jurisdiction. French law allows for jurisdiction based solely on the plaintiff's French nationality,[22] the Germanic tradition allows for *in personam* jurisdiction based on the presence of any property of the defendant in the forum,[23] and the common law countries allow for *in personam* jurisdiction over defendants who are served with process in the forum, no matter how fleeting or casual their presence in the forum might be.[24] In the Brussels regime, all of the Member States have agreed not to employ these rules against defendants domiciled in other Member States,[25] but continue to employ them against defendants domiciled elsewhere.[26] Worse yet, the Brussels regime has magnified the import of these rules by treating judgments founded on these exorbitant bases as E.U. judgments and thus enforceable in any E.U. country.[27] The principal effect of the Recast Brussels I Regulation[28] (which will go into effect in 2015) is

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[19] *See* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992); Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995).

[20] *See, e.g.*, C.G.J. Morse, International Shoe *v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 999 (1995).

[21] *See, e.g.*, Brand, *supra* note 17, at 97; Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 232 (2001). *But see* Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1212 (1984) ("[T]here is no indication in reported decisions to suggest that the Brussels Convention's jurisdictional discrimination has posed much of a practical problem.").

[22] Brand, *supra* note 17, at 97 (referring to Article 14 of the French Civil Code).

[23] *Id.* (referring to Article 23 of the German Code of Civil Procedure).

[24] Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Annex I, 2001 O.J. (L 12) 1, 4 (EC), *amended by* Commission Regulation 1496/2002, 2002 O.J. (L 225) 13 (EC) [hereinafter Brussels I Regulation]. The United States also continues to cling to this antiquated rule. *See* Burnham v. Superior Court, 495 U.S. 604 (1990).

[25] Brussels I Regulation, *supra* note 24, art. 3.

[26] Brand, *supra* note 17, at 97.

[27] Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 68 (1993).

[28] Council Regulation 1215/2012 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 [hereinafter Recast Brussels I Regulation].

to eliminate the "*exequatur*" requirement, which had become an encumbrance on the free movement of judgments within the E.U., by allowing nations to, in effect, allow some re-litigation of the merits by the recognizing court.[29] While this change is undoubtedly an improvement from an intra-E.U. perspective,[30] it ups the ante with regard to judgments against non-E.U. defendants, making judgments easier to enforce throughout the European Union. Unfortunately, early proposals that pushed the sensible and just "universality" principle, which would have provided that the same rules are applied whether the defendant was or was not an E.U. domiciliary, were rejected.[31]

Below I argue that the current state of affairs is neither sensible nor just. Unhappily, two of the world's most important jurisdictional regimes are drifting in opposite directions to the detriment of the fair and orderly administration of justice in civil matters.[32] In Part II, I review U.S. jurisdictional principles. I examine the Supreme Court's vacillating application of the minimum contacts test. I then argue that the two new opinions sow yet more confusion and that the *J. McIntyre* opinion, in particular, is likely to prove problematic in application. In Part III, I discuss European jurisdictional principles under the Brussels regime. I argue that while the Brussels regime is better than the United States' minimum contacts test from a predictability standpoint, the unfortunate decision to apply exorbitant national jurisdictional rules against non-E.U. defendants makes it too plaintiff-friendly in application. In Part IV, I note that while there are renewed calls for a broad jurisdictional convention that would include both the United States and the European Union, such efforts are likely to fail for the same reason as the earlier unsuccessful efforts, which is a reluctance of other nations to enforce U.S. tort judgments. I argue instead that the best course of action is for both the United States and the European Union to put their own houses in order, the former with federal legislation and the latter with further amendment of the Brussels I Regulation.

II. UNITED STATES JURISDICTIONAL PRINCIPLES

A. Development

The development of U.S. jurisdictional principles has been told and re-told hundreds of times in tedious detail,[33] and I will not add to it except to the

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[29] *See* Peter Hay, *Notes on the European Union's Brussels-I "Recast" Regulation: An American Perspective*, 2013 EUR. LEGAL F. 1.

[30] *Id.*

[31] *Id.* at 2.

[32] This is not to suggest that these are the only two jurisdictional regimes of interest.

[33] My own particularly tedious recital can be found at 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, 25–77 (1990).

extent necessary to understand the current quandary. In the United States, personal jurisdiction is an issue of constitutional law, because the Due Process Clause of the Fourteenth Amendment is thought to limit the reach of state courts, and the parallel clause in the Fifth Amendment is thought to do so for federal courts.[34] The linkage between jurisdiction and due process is usually believed to emanate from the venerable case of *Pennoyer v. Neff*.[35] It is debatable, however, whether the *Pennoyer* decision actually so held.[36] It is quite possible that *Pennoyer* simply held that due process principles give the judgment debtor a right to collaterally attack a judgment for lack of jurisdiction, without attempting to prescribe any particular territorial limit on the rendering court's jurisdiction.[37]

Be that as it may, by fairly early in the twentieth century the Supreme Court held that due process principles limited courts to what it understood to be the accepted common law bases of jurisdiction: consent, voluntary appearance, and in-hand service of the summons while the defendant was physically present in the forum.[38] Then-modern developments proved challenging for this framework. Two particularly common difficulties involved corporations and non-resident motorists. Corporations, as juridical but not natural persons, could not be subjected to jurisdiction by service in the forum, even if the service was on a corporate officer.[39] As a result, the Supreme Court invented the fiction that a corporation doing business in the forum had implicitly consented to jurisdiction there.[40] The same implied-consent fiction was dispatched to take care of the issue of non-resident motorists, who usually had returned to their home states by the time of litigation, making it difficult to serve them. The Supreme Court likewise held that their action of driving on the forum state's roads showed that they had implicitly consented to jurisdiction.[41]

Eventually, the Supreme Court sought to bring these fictions under a single conceptual roof, and thus, it held in the famous case of *International Shoe Co. v. Washington*[42] that defendants having "certain minimum contacts" with the forum could be subject to jurisdiction there as long as the exercise of jurisdiction did not offend "traditional notions of fair play and substantial justice."[43] If ever there were a rubbery ruler, this is it. However, at least the Court's focus on fairness seemed likely to produce better results, and the outcome of the *International Shoe* case itself was an encouraging start. There, the Court held that

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[34] PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 480 (5th ed. 2010).

[35] 95 U.S. 714, 733 (1878).

[36] Borchers, *supra* note 33, at 32–43.

[37] *Id*. at 43.

[38] *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189 (1915).

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

[40] *See, e.g.*, Lafayette Ins. Co. v. French, 59 U.S. 404 (1855).

[41] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927).

[42] 326 U.S. 310 (1945).

[43] *Id.* at 316 (internal quotations omitted).

a Missouri-based shoe company could be forced to defend itself in the state of Washington in a case involving its liability for unemployment taxes on the roughly dozen salesmen employed there.[44] Critical to the Court's rationale was that the corporation's activities in the forum state – the employment of the salesmen – were related to the substance of the suit.[45]

Jurisdiction based on contacts related to the suit came to be known as "specific jurisdiction,"[46] while jurisdiction based on unrelated contacts was dubbed "general jurisdiction."[47] In the years following *International Shoe*, the Supreme Court paid a great deal more attention to specific jurisdiction. In that category, the Court held that even a single, isolated contact could support jurisdiction if related to the suit,[48] as long as the defendant's contact was purposeful.[49] The Court, however, struggled mightily to delimit the boundaries of specific jurisdiction. A good deal of the difficulty stemmed from the Court's vacillating rationales for limiting jurisdiction. In some circumstances, the Court seemed to say that at least part of the rationale for limiting jurisdiction was a function of the limited sovereignty of states,[50] while at other times stating that the true rationale was to protect defendants from the undue burden of being forced to defend in a distant forum.[51]

The difficulty of applying the minimum contacts test became obvious in products liability cases. A common scenario is a consumer injured by a product alleged to have been defectively designed or manufactured in another state or country. The first time the Supreme Court faced such a case was in *World-Wide Volkswagen v. Woodson*.[52] In *World-Wide*, the Court held that the plaintiffs could not obtain jurisdiction over the seller and distributor of the car (both located in the Northeastern part of the United States), because it had been brought to the forum state of Oklahoma by the plaintiffs, not by any purposeful action by the defendants.[53] With a cryptic citation to a lower court decision, the Court suggested in dicta, however, that the result would have been different had the product arrived in the forum in the "stream of commerce."[54]

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44 *Id.* at 316–20.

45 *Id.* at 320.

46 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414–15 (1984).

47 *Id.*

48 *See* McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957) (noting that sale of single insurance policy in forum state sufficient contact for suit on the policy).

49 Hanson v. Denckla, 357 U.S. 235, 253 (1958).

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

51 Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1980).

52 444 U.S. at 286.

53 *Id.* at 297.

54 *Id.* at 297–98 (citing Gray v. Am. Radiator & Standard Sanitary Corp., 176 N.E. 2d 761 (Ill. 1961)).

World-Wide and the stream-of-commerce theory produced voluminous academic commentary,[55] but precious little clarity for confused lower courts.[56] The Supreme Court seemed ready to provide much-needed guidance when it accepted for review *Asahi Metal Industry Co. v. Superior Court*.[57] *Asahi* made for an interestingly marginal case of whether the product had reached the forum state of California in the stream of commerce. A Japanese valve manufacturer had sold valves to a Taiwanese manufacturer of motorcycle tire tubes; the valve had been used in the finished product, which was sold in California, where it allegedly failed causing injury to the plaintiffs.[58] Unlike the *World-Wide* plaintiffs, the *Asahi* plaintiffs had bought the product in the forum state. However, the valve was merely a component of the finished product, and California accounted for only about 1% of the valve manufacturer's total sales, though this amounted to over 100,000 valves.[59] The Supreme Court, however, provided little help to baffled lower courts and practicing attorneys. Four Justices concluded that the valve had reached California in the stream of commerce.[60] Four Justices concluded that it had not because there were no indicia of any special effort to serve the California market.[61] One Justice refused to commit to either position, but remarkably enough, all nine Justices agreed that jurisdiction was lacking because it would have been unreasonable on general grounds.[62] The Supreme Court reasoned that the valve manufacturer was especially burdened because it was a foreign party.[63] Moreover, the Californian plaintiffs had settled their suit, leaving only an ancillary contest between the Japanese and Taiwanese companies as to their respective obligations in the settlement.[64]

With the Supreme Court evenly divided on the two views of the stream of commerce (sometimes called the "resale" and the "resale plus" tests[65]), lower courts predictably were divided as to which test to follow. Courts in roughly equal proportions sided with each test, with a good number hedging their bets by

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55 *See, e.g.*, Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77 (analyzing extensively *World-Wide*); Louise Weinberg, Choice of Law and Minimal Scrutiny, 49 U. CHI. L. REV. 440 (1982) (addressing interaction of *World-Wide* and choice of law); Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 COLUM. L. REV. 506 (1984) (discussing implications of *World-Wide* for multi-defendant cases).

56 HAY, BORCHERS & SYMEONIDES, *supra* note 34, at 417–18.

57 480 U.S. 102 (1987).

58 *Id.* at 105–06.

59 *Id.* at 122 (Stevens, J., concurring in part and concurring in the judgment).

60 *Id.* at 111 (O'Connor, J., plurality opinion).

61 *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment).

62 *Asahi*, 480 U.S. at 113–16 (O'Connor, J., plurality opinion), 116–17 (Brennan, J.), 122 (Stevens, J.).

63 *Id.* at 114 (O'Connor, J., plurality opinion).

64 *Id.*

65 Borchers, *supra* note 11, at 1248.

attempting to rationalize their results under both tests.[66] Moreover, the generalized reasonableness test added yet another layer to the analysis. Until then, the Court implied that fairness was not the main determinant and going so far as to say in *World-Wide* that the lack of minimum contacts could defeat an attempted exercise of jurisdiction, even if the forum was the most fair and convenient for all concerned.[67]

Meanwhile, on the general jurisdiction side of the fence, there was less to untangle because the Supreme Court's interest in the subject was so slight. From 1945 to 2011, the Court issued only two opinions exploring the general jurisdiction side of the minimum contacts test.[68] In 1952, the Court decided *Perkins v. Benguet Consolidated Mining Co.*,[69] the only decision in which it has found contacts-based general jurisdiction. In *Perkins*, a shareholder brought an action against a Philippines-based mining company, claiming that the company had failed to pay dividends and issue stock to which the plaintiff was entitled.[70] The action was brought in an Ohio state court, but none of the allegedly wrongful activities were conducted in Ohio.[71] However, during the period of time in question, the company's president had relocated most of the corporate activities to his Ohio home, an action forced by the World War II conflict.[72] Based on what the Court described as the "realistic reasoning" required by the minimum contacts test, the Court found that the Ohio defendant's activities were "continuous and systematic" and thus allowed for jurisdiction.[73]

The sole counterpoint to *Perkins* was *Helicopteros Nacionales de Columbia, S.A. v. Hall*.[74] In *Helicopteros*, four U.S. citizens (though none were residents of the forum state of Texas) were killed in South America, allegedly as the result of the negligence of the South American helicopter transport company. The survivors brought state-court negligence actions. The plaintiffs – perhaps foolishly – conceded that none of the contacts were related to Texas.[75] The principal contact between the South American helicopter transport company and Texas was that the company had purchased about U.S. $4 million in helicopter parts from Texas-based Bell Helicopter.[76] The Supreme Court, by a vote of eight to one, concluded that these unrelated purchases were insufficient to establish

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66 HAY, BORCHERS & SYMEONIDES, *supra* note 34, at 419–20.

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

68 HAY, BORCHERS & SYMEONIDES, *supra* note 34, at 409.

69 342 U.S. 437 (1952).

70 *Id.* at 439.

71 *Id.*

72 *Id.* at 447.

73 *Id.* at 446.

74 U.S. 408 (1984).

75 The concession arguably was foolish because apparently one of the allegations was of pilot negligence, and at least some of the pilots had been trained in Texas. *Id.* at 411.

76 *Id.*

jurisdiction.[77] Thus, when the new cases reached the Supreme Court, it was not painting on a blank canvas.

B. The Two New Cases

The more difficult of the two new cases was *J. McIntyre*. In that case, the defendant was an English manufacturer of scrap metal recycling machines.[78] A significant market for the machines was the United States, and the defendant made every effort to avail itself of the U.S. market.[79] Understandably from the English defendant's standpoint, it showed little concern about where its machines were sold.[80] The plaintiff's employer, a New Jersey recycler, became acquainted with the machines at a booth display at a convention in Las Vegas, Nevada.[81] The employer placed an order through the defendant's independent – though similarly named – Ohio-based distributor.[82] The machine, which cost about U.S. $24,000, was delivered to the employer in New Jersey, where – allegedly as the result of a defect – it injured the plaintiff.[83]

The plaintiff brought his suit in the New Jersey state courts, and New Jersey's highest court, following the broader of the two stream-of-commerce theories, found that the New Jersey courts had jurisdiction.[84] By a vote of six to three, the Supreme Court reversed. However, as it had done in the *Asahi* case, the Court produced a badly splintered opinion. The lead opinion of Justice Anthony Kennedy garnered only four votes. He argued for a view of personal jurisdiction that had more in common with the "sovereignty" and "implied consent" rationales that dominated U.S. jurisdictional jurisprudence before the dawn of the "minimum contacts" era.[85] Justice Stephen Breyer's concurrence in the judgment was based on very narrow grounds. Essentially, Justice Breyer held only that a single sale could not constitute a "stream" of commerce.[86] Moreover, Justice Breyer hinted strongly that he would have viewed the case differently had it involved sales through a giant online retailer such as Amazon.com.[87] Justice Ruth Bader Ginsburg's dissent, which garnered three votes, would have found jurisdiction. She argued, with considerable force, that the English manufacturer viewed the

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77 *Id.* at 419.

78 Nicastro v. J. McIntyre Mach. Am., Ltd., 987 A.2d 575, 577, 201 N.J. 48, 53, (2010), *rev'd sub nom.* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).

79 *J. McIntyre*, 131 S. Ct. at 2794 (Ginsburg, J., dissenting).

80 *Id.* at 2801.

81 *Id.* at 2795.

82 *Id.* at 2796.

83 *Id.* at 2795, 2797.

84 *See* Nicastro v. J. McIntyre Mach. Am., Ltd., 987 A.2d 575, 201 N.J. 48 (2010).

85 *J. McIntyre*, 131 S. Ct. at 2787.

86 *Id.* at 2792 (Breyer, J., concurring in judgment).

87 *Id.* at 2793.

United States as a single market, so granting the defendant immunity because of a lack of focus on a particular state made little sense.[88] She also pointed to the irony that if New Jersey were part of the European Union instead of the United States, the defendant would have been subject to jurisdiction there based upon Article 5(3) of the Brussels I Regulation, which provides for jurisdiction where the "harmful event" takes place.[89]

It was a disappointing performance by the Supreme Court. As a matter of elementary fairness, it seems perverse to have deprived the plaintiff of his home forum. Realistically, the only available alternative forum would have been an English court. Even assuming that the plaintiff had the means to pursue his case abroad, the statute of limitations likely would have expired. Moreover, there is a bizarre inequity in allowing the English defendant to freely avail itself of the U.S. market, but not be subject to suits for injuries caused by its machines in that market. As Justice Ginsburg pointed out in her dissent, New Jersey leads the United States in scrap metal processing, so discovering that one of the defendant's machines had found its way into New Jersey could hardly be counted as a surprise.[90]

Unlike *J. McIntyre,* which was a close case given the long-simmering split of authority in stream-of-commerce cases, the result in *Goodyear* was not a surprise. The North Carolina Court of Appeals' decision[91] was confusing. The lower court mixed the stream-of-commerce test with the requirement that general jurisdiction be based on continuous and systematic contacts, indicating that it did not fully comprehend the distinction between general jurisdiction and specific jurisdiction.[92] This left the Supreme Court with a large target, and it seemed unlikely that the Court had agreed to hear the case simply to affirm the result, but to clarify the reasoning.

In unanimously reversing the lower court's finding of jurisdiction, the Supreme Court reasoned by analogy: the unrelated sales of the subsidiaries' tires in the forum state were much more like the unrelated purchases found insufficient for jurisdiction in *Helicopteros* than the relocation of the corporate headquarters in *Perkins*.[93] The more interesting part of the *Goodyear* decision is the Court's newly announced "essentially at home"[94] test.[95] If the Court means to limit general jurisdiction over corporations to situations like those in *Perkins*, in which the corporation's headquarters are in the forum, then this would considerably restrict the scope of personal jurisdiction, at least as applied by many lower U.S.

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88 *Id.* at 2794 (Ginsburg, J., dissenting).

89 *Id.* at 2803.

90 *J. McIntyre*, 131 S. Ct. at 2795.

91 *See* Brown v. Meter, 199 N.C. App. 50, 681 S.E.2d 382 (2009), *rev'd sub nom.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

92 *Goodyear*, 131 S. Ct. at 2855.

93 *Id.* at 2856.

94 *Id.* at 2851.

95 *See* Stein, *supra* note 13 (discussing the "essentially at home" test).

courts.[96] Indeed, the Supreme Court's analogy of a corporate home to a defendant's domicile invites this reading.[97] If it means something broader than a singular home equivalent to domicile, the question of where the line is drawn becomes of critical importance. For example, the plaintiffs also named the parent company Goodyear U.S.A. as a defendant.[98] The parent corporation did not challenge the jurisdiction in the North Carolina courts,[99] apparently because it has several large manufacturing plants there. With the benefit of hindsight, that might have been a foolish decision by the parent corporation. A reasonable argument might be made that even a substantial physical presence in the forum does not render it "at home" there.[100]

The *Goodyear* opinion also left at least one long thread dangling. Belatedly, the plaintiffs argued that the Goodyear corporations should be considered a unitary enterprise for jurisdictional purposes.[101] From the standpoint of the plaintiffs, this would have placed them in a much better position because the parent's contacts would be imputed to the subsidiaries and vice versa. The Supreme Court, however, held that the plaintiffs were tardy in raising this issue, and thus refused to consider it.[102]

The Supreme Court has already agreed to review a case in which the lower court allowed the parent corporation and subsidiary corporation to be treated as a single entity.[103] In *Bauman v. DaimlerChrysler Corp.,*[104] the U.S. Court of Appeals for the Ninth Circuit held that a giant German automobile corporation and its U.S. subsidiary could be treated as one entity for jurisdictional purposes. The lower court narrowly denied a motion to have the decision reheard by a larger panel of judges.[105] The Supreme Court has agreed to hear the case.[106] Presumably the Court will issue its opinion in early 2014.

It is unlikely that the Ninth Circuit's decision will stand.[107] The assertion of jurisdiction in that case was twice removed from the ordinary case. The case was brought by Argentinian plaintiffs based on the activities in Argentina of a subsidiary of the German company.[108] However, the jurisdictional hook was not

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96 HAY, BORCHERS & SYMEONIDES, *supra* note 34, at 408–13.

97 Brand, *supra* note 17, at 94.

98 *Goodyear*, 131 S. Ct. at 2852.

99 *Id.*

100 Borchers, *supra* note 11, at 1266–67 (suggesting contrarily that *Goodyear* should not be read to limit contacts-based general jurisdiction to the corporate headquarters).

101 *Goodyear*, 131 S. Ct. at 2857.

102 *Id.*

103 *See infra* note 105.

104 644 F.3d 909 (9th Cir. 2011).

105 *See* Bauman v. DaimlerChrysler Corp., 676 F.3d 774 (9th Cir. 2011) (denying rehearing).

106 *See* DaimlerChrysler AG v. Bauman, 133 S. Ct. 1995 (2013) (granting cert.).

107 In fact, it did not stand. *See infra* note 117.

108 *Bauman*, 676 F.3d at 775.

the German parent's contacts with the United States, but rather contacts of an entirely separate U.S. subsidiary.[109] The Ninth Circuit imputed the contacts on what it termed an "agency" test, though it is quite debatable whether the U.S. subsidiary could be considered the agent of the German parent in any legal sense of the word.[110] Moreover, a majority of U.S. lower courts do not allow the contacts of related corporate entities to be imputed to each other based solely on the basis of an agency relationship; they require that the corporations be so closely linked as to be the "alter ego" of each other.[111] In general, this requires that the two entities ignore the corporate formalities that would keep them separate entities, and there is no suggestion of any such corporate formalities being ignored by the defendants in the Ninth Circuit case.[112]

The interesting question thus is not whether the plaintiffs will lose, but how they will lose.[113] One route that the Supreme Court might well draw on is an old line of cases that seems to say that imputation of jurisdictional relationships depends on whether the corporations are truly separate.[114] Another possibility is that the Court will ignore the parties' stipulation that the U.S. subsidiary was subject to general personal jurisdiction in the forum state of California and hold that it is not "at home" there.[115] A third is that because the claims of the Argentinian plaintiffs were based on the United States' Alien Tort Statute, which the Supreme Court recently ruled does not have any extraterritorial effect, there is no point in reaching the jurisdictional issue because the plaintiffs do not have a claim under U.S. law.[116] As the Ninth Circuit judges who voted to rehear the case noted, the circuit court's ruling potentially presents difficulties in the conduct of foreign relations because of the expansive view of jurisdiction taken by the Ninth Circuit.[117]

All of this leaves, at best, a murky picture in the United States regarding jurisdiction over foreign defendants. In *J. McIntyre*, the Supreme Court refused to allow jurisdiction in a case in which the plaintiff clearly should have been allowed

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[109] *Id.*

[110] *Id.* at 777.

[111] *Id.* at 776.

[112] *Id*.

[113] The plaintiffs did indeed lose. *See infra* note 117.

[114] *See* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925); *see also* HAY, BORCHERS & SYMEONIDES, *supra* note 34, at 515–17 (discussing the jurisdictional consequences of having related corporations in the forum).

[115] *Bauman*, 676 F.3d at 775.

[116] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (finding that Alien Tort Statute does not govern foreign conduct).

[117] *Bauman*, 676 F.3d at 777–78. After the symposium paper on which this article is based, and shortly before it went to press, the Supreme Court did indeed reverse the Ninth Circuit on the ground that even if the contacts of the subsidiaries were imputed to the parent corporation, the parent corporation lacked the requisite contacts to be "at home" in the forum state of California. *See* Daimler AG v. Bauman**,** 134 S. Ct. 746, 760 (2014).

to proceed. No rational argument could be made that allowing jurisdiction over the English defendant would have threatened international order, given the substantial benefits it was gaining from the U.S. market, or that it would not have been subject to jurisdiction under its own jurisdictional regime. *Goodyear*'s apparent contraction of general jurisdiction is not by itself problematic. But coupled with the deficient reach of specific jurisdiction, the risk of arbitrarily denying to plaintiffs a U.S. forum is considerable. Finally, as the Ninth Circuit's adventuresome assertion of jurisdiction shows, lower courts will not always be easy to rein in, particularly if the Supreme Court decides to take another multi-decade break from deciding personal jurisdiction cases.

Decisional predictability and fairness remain elusive under the minimum contacts regime. The Supreme Court made a modest advance toward predictability by announcing a test of sorts for the contacts necessary for general jurisdiction. Whatever modest gains might have been made on that front were thoroughly overshadowed by the muddled picture with regard to specific jurisdiction. Under U.S. law, if the Court fails to generate a majority opinion, the opinion that upholds the result on the narrowest grounds possible is the controlling one.[118] This means that Justice Breyer's two-vote concurrence is the controlling *J. McIntyre* opinion, even though it garnered the fewest votes.[119]

The problem is that Justice Breyer's opinion is so narrow that it leaves lower courts with very little to follow. Essentially he held that a single drop (even a U.S. $24,000 drop) cannot fill a streambed of commerce. However, Justice Breyer's opinion gives precious few clues—other than the tantalizing reference to Amazon.com[120] as to how much more is needed. Moreover, from the standpoint of elementary fairness, *J. McIntyre* is a disaster. As I have noted elsewhere, it is bad enough to tell plaintiffs in such cases that their suit cannot be brought in the most sensible forum, but worse yet to deliver the news only after the plaintiff has climbed four rungs of the appellate ladder having prevailed below.[121] Indeed, what happened to Mr. Nicastro – the *J. McIntyre* plaintiff – was the legal equivalent of being hit by lightning from a blue sky. After he prevailed before the New Jersey Supreme Court, he and his lawyers had every reason to be confident that they would be able to proceed to the merits of their suit. Instead, the Supreme Court reached down and reviewed a minimum contacts case for the first time in nearly a quarter century, all to tell him he could not bring his suit in the state where most of the evidence was located and in which the allegedly defective machine was foreseeably purchased to the economic benefit of the defendant. It was a very shabby performance indeed, but unfortunately the European performance was no better.

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[118] *See, e.g.*, Smith v. Univ. of Wash., 233 F.3d 1188, 1199 (9th Cir. 2000) (quoting Marks v. United States, 430 U.S. 188, 193 (1977)).

[119] *See, e.g.*, Ainsworth v. Moffett Eng'g, Ltd., 716 F.3d 174, 178 (5th Cir. 2013).

[120] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2793 (2011).

[121] Borchers, *supra* note 33, at 102.

III. EUROPEAN UNION JURISDICTIONAL PRINCIPLE

Jurisdictional principles in the E.U. have been fairly stable for several decades now. European nations have long been home to some famously exorbitant jurisdictional rules, which were counteracted by narrow rules of judgment recognition.[122] The E.U. nations (shortly thereafter joined by other European nations under the Lugano Convention[123]) struck a fairly sensible deal when they drafted the Brussels Convention.[124] In exchange for relinquishing their exorbitant jurisdictional rules – French "nationality" jurisdiction, German "assets" jurisdiction, and the United Kingdom's (U.K.) transient service rule being among the most prominent[125] – in favor of considerably narrower jurisdictional rules, they agreed to a relatively automatic recognition of each other's judgments, somewhat akin to the United States' rule of full faith and credit to judgments of other U.S. tribunals.

The general approach of the Brussels Convention, and its successors the Brussels I Regulation and the yet-to-enter-into-force Recast Brussels I Regulation, has been to allow jurisdiction at the defendant's domicile.[126] This is the Brussels regime's version of general jurisdiction. The Brussels instruments also have some provisions that U.S. lawyers would call specific jurisdiction and are known in the Brussels regime as special jurisdiction. For example, Article 5(3) on tort jurisdiction has survived with only minor modifications, and it provides that the plaintiff can have tort jurisdiction where the "harmful event" took place.[127] This has led to some marginal questions of interpretation. In a case involving water pollution of the Rhine River, it was held to allow jurisdiction both where effluent was put into the river and where its harmful effects were felt.[128] In a case involving multi-jurisdictional libel, that article was interpreted to allow the plaintiff to sue in any nation in which the offending publication was circulated, but that the plaintiff's damages would be limited to the proportion of reputational injury in the forum, unless the plaintiff went to the defendant's home nation to sue, in which case the full measure of damages could be recovered.[129] As noted above, this provision would provide a sensible and clear answer to a case such as

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[122] *See, e.g.*, Schibsby v. Westenholz, [1870] 6 L.R.Q.B. 155 (Eng.) (refusing to recognize a judgment founded on French "nationality" jurisdiction).

[123] Nathan M. Crystal & Francesca Giannoni-Crysta, *Enforceability of Forum Selection Clauses: A "Gallant Knight" Still Seeking Eldorado*, 8 S.C. J. INT'L L. & BUS. 203, 225 n.117 (2012) (discussing various iterations of the Lugano Convention).

[124] *See, e.g.*, Borchers, *supra* note 19, at 143–46.

[125] *See supra* notes 22–24 and accompanying text.

[126] Hay, *supra* note 29, at 4.

[127] *See* Recast Brussels I Regulation, *supra* note 28, art. 6(2).

[128] *See* Case 21/76, Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d' Alsace S.A., 1976 E.C.R. 1735.

[129] *See* Case C-68/93, Shevill v. Presse Alliance SA, 1995 E.C.R. I-415.

J. McIntyre by allowing suit in the injured plaintiff's home state.[130]

From a non-E.U. standpoint, the Recast Brussels I Regulation is a disappointment because it does nothing to curtail the use of exorbitant national bases of jurisdiction against non-E.U. defendants, including obviously United States and Canadian defendants. The E.U. Commission's proposed recast would have adopted the so-called "universality" approach, which would have forbidden the use of exorbitant national bases of jurisdiction against non-E.U. defendants,[131] except that it would have given E.U. courts "jurisdiction by necessity" in cases in which the non-E.U. forums were not realistic options.[132]

It is not surprising, but still somewhat disappointing, that the Recast Brussels I Regulation eschewed that approach in favor of retaining national rules of jurisdiction against outsiders.[133] A more modest, but still welcome change would have been to have at least limited the use of exorbitant national rules of jurisdiction against weaker parties that the Brussels regime generally protects—consumers, insurance policyholders, and employees. However, no such provision appears in the Regulation.[134]

Oddly, the press release issued with the Recast Brussels I Regulation causes one to wonder whether the European Parliament understood what it enacted. The official press release claims: "The recast regulation will provide that no national rules of jurisdiction may be applied any longer by member states in relation to consumers and employees domiciled outside the EU."[135] In fact, the Recast Brussels I Regulation does no such thing.[136] The only change it makes in this regard is to slightly broaden the jurisdictional reach allowed when E.U. consumers and employees are plaintiffs.[137]

The Recast Brussels I Regulation's real achievement is the abolition of the *exequatur* requirement for the recognition of other Member State judgments.[138] While this is a desirable change from an intra-E.U. perspective, it makes the discriminatory effect of the Brussels regime against non-E.U. defendants even more acute. A United States or Canadian defendant being sued in an E.U. court invoking an exorbitant jurisdictional basis could have, at one time, simply ignored the proceeding as long as the defendant did not have any assets in the forum nation, because other nations would likely have refused to recognize

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130 *See supra* note 83 and accompanying text.

131 Hay, *supra* note 29, at 2.

132 *Id.*

133 *Id.*

134 *See* Recast Brussels I Regulation, *supra* note 28.

135 Press Release, European Union, Recast of the Brussels I Regulation: Towards Easier and Faster Circulation of Judgments in Civil and Commercial Matters Within the EU, European Council PRES/12/483 (Dec. 6, 2012), *available at* http://europa.eu/rapid/press-release_PRES-12-483_en.htm.

136 Hay, *supra* note 29, at 5.

137 *Id.* at 4–5.

138 *Id.* at 6.

such a judgment. However, a similarly situated defendant no longer has that luxury unless the defendant does not have any assets in the E.U. because such judgments now circulate even more freely among the Member States.[139]

IV. THE WAY FORWARD AND A CONCLUSION

In 1992, at the behest of the United States, the Hague Conference on Private International Law began discussion of a potentially broad judgments convention that would include the United States, Canada, the E.U. states, and perhaps much of the rest of the world.[140] While there was much discussion of whether the convention would be "mixed"[141] or a "double,"[142] the thrust was to attempt to arrive at some common jurisdictional bases and rules that would guarantee judgment recognition. This quite broad effort ended with a modest convention covering only choice-of-court clauses.[143] Even that convention has yet to go into effect because it has been ratified by only one nation.[144]

There are now renewed calls and preparatory steps for a broad convention, such as the one originally envisioned.[145] At least one commentator – Professor Ronald Brand, who was part of the U.S. delegation at the last effort – aptly summarizes some of the likely difficulties. As he notes, the United States and European Union, while having perhaps moved closer together on general jurisdiction, are moving further apart on specific jurisdiction.[146] If differing

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[139] *Id.* at 5–8.

[140] *See infra* notes 145–48 and accompanying text.

[141] Meaning that it would have both permitted and prohibited bases of jurisdiction, but perhaps a considerable "grey zone" where national rules of jurisdiction could still apply, though recognition by other signatory states would not be guaranteed. *See, e.g.*, Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 201 (2001).

[142] A double convention is one where the jurisdictional bases and the rules of recognition are co-extensive, leaving no "grey zone" as in a mixed convention. The Brussels Convention is often held out as an example of a double convention, though in some respects it does not strictly meet that standard. *See* Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17, 20 (1998).

[143] Brand, *supra* note 17, at 92–93.

[144] The only nation to ratify it is Mexico. The United States has signed the Convention, but has not ratified it. If a second nation ratifies it, the convention will go into effect as between those two nations. *See Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last updated Nov. 19, 2010).

[145] Brand, *supra* note 17, at 90.

[146] *Id.* at 99.

specific/special bases of jurisdiction were the sole obstacles, they probably could be overcome. However, the likely sticking point will be the relative size of U.S. tort judgments compared with the rest of the world. United States courts are loved by tort plaintiffs and loathed by defendants because their judgments are often several times the size of those in other rich nations.[147] It seems virtually certain that any convention involving the United States would be acceptable to other nations only if it comes equipped with a provision that allows a recognizing court to revisit the size of the damage awarded.[148] However, even the late insertion of such a provision in an attempted bilateral convention in the late 1970's between the United States and the U.K. could not save that effort.[149] Given that the United States and the U.K. share the common law tradition, the failure of this effort even with a provision allowing re-examination of damages provides a cautionary tale. Moreover, U.S. courts are generally liberal in recognizing judgments from the courts of other nations, which gives other nations a diminished incentive to negotiate.[150]

Ultimately, as I argued above, jurisdictional regimes ought to aim for reasonable predictability and fairness. Potential litigants should be able to predict with a reasonable degree of certainty whether their activities will allow for suit in a particular forum. The United States' minimum contacts regime fairs poorly on that score, though it arguably made a slight bit of progress with the "essentially at home" test for general jurisdiction. The Brussels regime does better on that front, though it is not perfect. On the fairness front, the minimum contacts regime leans too far toward protecting defendants, particularly the continued denial to plaintiffs in products liability suits of the benefit of the forum state where the injury occurred, particularly for cases in which the placement of the product in the forum state was utterly predictable. The Brussels regime is perhaps too plaintiff friendly, particularly in its continued allowance of the use of exorbitant national rules. Coordination between regimes is desirable because it helps predictability, though it is less important than the other two considerations. Potential litigants are likely to think that the jurisdictional rules of other systems will resemble their own, and are thus likely to order their conduct, to some extent, based on that instinct. Indeed, one of the things that makes *J. McIntyre* so galling from a fairness perspective is that the English defendant would have been subject to suit in the plaintiff's home forum under the defendant's own jurisdictional regime.[151]

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[147] Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751, 807–10 (2003) (noting, among other things, that "American tort judgments, especially for personal injury, have a well-deserved reputation for being high").

[148] Russell J. Weintraub, *How Substantial is our Need for a Judgments-Recognition Convention and What Should We Bargain Away to get it?*, 24 BROOK. J. INT'L L. 167, 203–04 (1998).

[149] *Id.* at 204.

[150] Burbank, *supra* note 21, at 232.

[151] *See* Recast Brussels I Regulation, *supra* note 28, art. 6(2).

A more realistic step might be for the United States and the European Union to put their respective houses in order. Federal legislation might well be able to overcome the *J. McIntyre* decision. Because that case was filed in state court, the Due Process Clause of the Fourteenth Amendment governed. The Due Process Clause of the Fifth Amendment, however, would apply to federal legislation. There is strong lower court authority that under the Fifth Amendment, the standard is minimum contacts with the United States as a whole, rather than with the particular forum state.[152] Indeed, the *J. McIntyre* plurality opinion suggested as much.[153] Had the standard been minimum contacts with the United States as a whole, it seems virtually certain that there would have been jurisdiction given the direct efforts of the English manufacturer to serve the U.S. market. However, whether such legislation is feasible in today's highly partisan atmosphere in the United States is at best unclear.

Although the Brussels regime maintained its discrimination against outsiders in this round, perhaps the condition is not permanent. It is somewhat encouraging that the universality principle was raised and seriously discussed, if not ultimately adopted. Perhaps some future iteration will adopt the universality stance, at least for the weaker parties that the Brussels regime protects in other contexts.

The ultimate goal, however, of predictable, fair, and coordinated jurisdictional and recognition rules is far off. The relative success of the New York Convention regarding arbitral awards[154] may partially explain why so much commercial dispute resolution occurs in arbitral forums. Perhaps transnational litigation will one day have a breakthrough of this magnitude.

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[152] HAY, BORCHERS & SYMEONIDES, *supra* note 34, at 482–84. There have been bills introduced in Congress that would do essentially this in products liability cases. *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 9 (1999). The plurality opinion in *J. McIntyre* seemed to acknowledge this possibility as well. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011).

[153] *See J. McIntyre*, 131 S. Ct. at 2789–90.

[154] *See* Crystal, *supra* note 123, at 243 n.212 (citing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3).