

**Jurisdiction and Non-Profit Organizations:  
Making Federalism Safe for the Independent Sector\***

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There is a new interest among states in regulating non-profits. Yet the jurisdictional rules governing these non-federal initiatives are currently muddled, and this muddle invites turf wars among states. The immediate result of such conflicts between different states' laws will be headaches for non-profits, as the *avaunt garde* states like New York and California impose regulatory requirements on charities that exceed other states' less ambitious regulations. But aside from vexing charities, these state clashes ultimately endanger the decentralized regulation of the charitable sector. Charities subject to multiple or conflicting state laws will predictably look to Congress for assistance. If charities ask for relief, they will probably receive it,<sup>1</sup> possibly in the form of a single national set of regulations for the governance of the non-profit sector. Ironically, the unfettered exertion of state power will threaten to eliminate state power altogether.

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<sup>1</sup>In June of 2004, the Senate Finance Committee held a roundtable on the transparency and accountability of charities, soliciting responses to a staff discussion paper proposing various reforms of federal tax policy and non-profit regulation. The staff paper is available at [http://www.independentsector.org/PDFs/discussion\\_draft.pdf](http://www.independentsector.org/PDFs/discussion_draft.pdf). The Senate Finance Committee also held hearings on the same topic with a view to enacting federal legislation. See Senate Finance Committee, "Charity Oversight and Reform: Keeping Bad Things from Happening to Good Charities," available at <http://www.finance.senate.gov/sitepages/hearing062204.htm>.

Federalism, in short, is at risk. This might not be such a bad thing if one believes that the regulation of charitable enterprises is a simple matter of requiring charities to adhere to the one best system. For those who are more skeptical about any single lawmaker's capacity to discover the one best way to regulate charities, the nationalization of non-profit law would be unfortunate. There is no quick fix to the problem of organizational corruption: Better, then, to let different states attempt different solutions. The federalization of for-profit corporate governance through the Sarbanes-Oxley Act<sup>2</sup> has not been uncontroversial, with some distinguished scholars attacking it as essentially useless for improving corporate governance.<sup>3</sup> Scholars of non-profit governance have similarly suggested that a single set of rules for large and small charities makes little sense.<sup>4</sup> In addition, the regulation of non-profits raises far more difficult issues of associational and expressive liberties than the regulation of for-profit enterprises. Why not, then, allow different states to tackle these problems in different ways, learning from each other's mistakes, each of which is likely to be more easily reversed and contained than any federal statute?

Such non-federal experiments, however, require strong jurisdictional limits. Those limits are now missing. In the four sections of this article, I will assess the prospects for the U.S. Supreme Court's supplying more robust constraints. In Part I, I will briefly describe two paradigmatic efforts by non-federal governments to

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<sup>2</sup> Pub. L. No. 107-204, 116 Stat. 745 (2002), codified at \_\_\_\_\_

<sup>3</sup> Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 *Yale L.J.* 1521 (2005) (critiquing recent federal regulation of corporate governance).

<sup>4</sup> Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 434-35 (2004).

regulate charitable governance (in California) and charitable solicitations (in Florida). In Part II, I will set forth some functional considerations that ought ideally to influence how jurisdiction to enforce such regulation should be defined. In Parts III and IV, I will provide a rough overview of the basic constitutional rules that constrain states' adjudicative and legislative jurisdiction respectively, explaining the ambiguities that afflict them and the respects in which the doctrines approximate the functional considerations outlined in Part II. I will close in Part IV by suggesting some ways in which the federal courts' more aggressive enforcement of more stringent jurisdictional rules could ultimately protect the federal system from turf wars that threaten to destroy it.

### **I. The Problem: Aggressive States and Unclear Jurisdictional Rules**

Before one canvasses the legal doctrines, it is helpful to have a rough sense of the problem. Consider two areas in which non-federal governments have flexed their regulatory muscles – the governance of non-profits and solicitation of donations by non-profits.

Inspired by the federal Sarbanes-Oxley Act, California has enacted the Non-Profit Integrity Act (“N-PIA”),<sup>5</sup> a law that imposes requirements on non-profit organizations' auditors and boards similar to those that the federal SOX imposes on for-profit corporations. The substantive provisions of the N-PIA are not extraordinarily controversial, at least as applied to larger charities<sup>6</sup>: A spate of

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<sup>5</sup> Calif. Gov't Code, §§12580-12599.7

<sup>6</sup> Most large charities – those with over \$40 million in annual expenses – already adhere to the audit committee standards of Sarbanes-Oxley. See Francie Ostrower & Marla J. Bobowick, *Nonprofit Governance and Sarbanes Oxley* in 2005 Urban Institute Nat'l Survey of Nonprofit Governance

corrupt or at least incompetent behavior by the officers or staff of some charities has led to suggestions for more independence of charities' auditors and audit committees from their officers.<sup>7</sup> N-PIA's requirements that the charities' auditing accountant maintain some independence from the charities' officers might seem like a perfectly sensible requirement to insure an independent audit.

N-PIA's aggressive choice-of-law clause, however, arguably encroaches on the jurisdiction of other states. That clause provides that N-PIA "applies to all charitable corporations, unincorporated associations, trustees, and other legal entities holding property for charitable purposes ... over which the state or the Attorney General has enforcement or supervisory power."<sup>8</sup> This provision could extend the N-PIA to any foreign charities that solicit contributions in California, because section 12582.1 of California's Government Code covers all "charitable corporations" that are "doing business or holding property in this State for [charitable] purposes." The California Attorney General's website asserts that the N-PIA applies to "all charities that solicit donations and conduct sales solicitations

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(2005), available at [http://www.urban.org/UploadedPDF/311363\\_nonprofit\\_governance.pdf](http://www.urban.org/UploadedPDF/311363_nonprofit_governance.pdf). 80% of smaller charities (with annual expenses of less than \$2 million) however, do not follow these structural recommendations. *Id.* at 2, 6.

<sup>7</sup>There is no shortage of scandals involving charities' misuse of funds. *See, e.g.*, Testimony of Confidential Witness "Car" before Senate Finance Committee, June 22, 2004, available at <http://www.finance.senate.gov/hearings/testimony/2004test/062204hctest.pdf> (Describing "fraud, deception, waste, and abuse" at Amerideam, Inc, a non-profit dedicated to assisting low- and moderate income households purchase homes); Letter from Senator Charles Grassley to Bonnie McIlveen-Hunter, chair, American Red Cross, December 29, 2005 available at <http://finance.senate.gov/press/Gpress/2005/prg122905.pdf> (Expressing concerns about possible misuse of Red Cross funds); R. Frammolino and J. Felch, *Getty Book Deal Led to Questions of Conflict: Ex-board Chairman Got Contract after Leaning on Munitz and Others for Pay and Perks*, Los Angeles Times, June 13, 2006 (describing possible self-dealing by head of J. Paul Getty Trust); Sewall Chan, *City Finds Widespread Fraud at a Bronx Charity* New York Times, October 6, 2006 (describing how top employees of a city-financed Bronx charity diverted hundreds of thousands of dollars for personal expenses).

<sup>8</sup> Calif. Gov't Code §12581.

in California, no matter where those organizations are domiciled.”<sup>9</sup> On this view, a charitable corporation incorporated under Massachusetts law that operates out of a Boston building and employs only residents of Massachusetts as officers and staff would have to amend its charter and bylaws to comply with N-PIA if its staff placed a phone call to a supporter in California soliciting a contribution. Some might say that this extension of California law constitutes an extra-territorial invasion of Massachusetts’ regulatory authority. But California might retort that Massachusetts is allowing unreliable charities to confuse its citizens.

N-PIA’s choice-of-law clause is not the only sign of increasing state assertiveness over charities. State and local governments are increasingly imposing draconian regulation of charitable solicitation in ways that encroach on sister states’ turf. Pinellas County, Florida, for instance, enacted an ordinance requiring any charitable organization soliciting contributions from county residents to register with the county government by providing information regarding (for instance) the familial relationships of the officers and directors of the charity, the cost and method of the solicitation efforts, and the plan for the distribution of the proceeds of the solicitation.<sup>10</sup> The ordinance in its original form applied to any charity that received donations from Pinellas County residents through the charity’s website, regardless of whether the charity was aware of the donor’s residence.<sup>11</sup> Pinellas County also imposed its onerous disclosure requirements on any consultant who

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<sup>9</sup> <http://www.ag.ca.gov/charities/faq.htm#no1> (Viewed on September 27, 2006).

<sup>10</sup> Pinellas County Ordinance No. 93- 106

<sup>11</sup> See Declaration of Lane Brooks, Public Citizen’s Director of Development & Marketing, filed in Public Citizen v Pinellas County, Civ Action No. 8:01-CV-943-T-23TGW (available at <http://www.citizen.org/documents/BrooksDeclaration.pdf>).

assisted a charity with a solicitation, even if the assistance consisted exclusively of general work on a mass mailing having no particular connection to Pinellas County such as crafting a letter or compiling a national mailing list, if some part of the mass mailing ended up in a Pinellas County resident's mailbox.

In response to litigation by a coalition of charities, the U.S. district court for Florida's middle district held that Pinellas County's regulation of out-of-state consultants violated the 14<sup>th</sup> Amendment,<sup>12</sup> because the consultants did not "purposefully aid the solicitation of funds from the citizens of Pinellas County, in particular as opposed to general solicitations conducted more or less nationally."<sup>13</sup> Under threat of further litigation, the County voluntarily rescinded its regulation of internet donations.<sup>14</sup>

But the argument for barring counties from exercising power over out-of-state consultants or charitable websites remains cloudy. Could the consultants be forced to register in Pinellas County if they had actually addressed an envelope to a Pinellas County resident? What if they designed a computer program to type up the addresses of every resident in the State of Florida? The nation? The world? Why must the consultant have Pinellas County on his or her mind "in particular"? And why did the county back off of its internet regulations? If a charity's representations on a website are viewable from the county, then how do they differ

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<sup>12</sup> *American Charities for Reasonable Fundraising Regulation v. Pinellas County*, 189 F.Supp.2d 1319 (M.D. Fla. 2001).

<sup>13</sup> *American Charities for Reasonable Fundraising Regulation*, 189 F.Supp.2d at 1329.

<sup>14</sup> The regulation of internet solicitations was contained in Pinellas County Code, §42-310, which was repealed on October 15<sup>th</sup> 2002. For the repeal, see Minutes of Pinellas County Comm'n, October 15<sup>th</sup>, Item #85, at p. 4488 (available at <http://www.pinellasclerk.org>).

from, say, images and words on a billboard or, for that matter, a piece of mass mail? If the latter are fair game, then why not the former?

As I shall explain below, constitutional doctrine does not currently provide a clear answer to these questions. Charities do not know when they can be haled into a foreign court based on their websites or mass mailings or other contacts with the foreign forum's jurisdiction. They also do not know whether foreign jurisdictions can regulate their corporate structure based on the charity's sending a letter into that jurisdiction or maintaining a website that could be viewed from the jurisdiction. These uncertainties threaten not only to perplex charities but also ultimately to undermine state law.

## **II. First Principles: The Problem of Jurisdiction in a Federal Regime**

Before describing the doctrines governing jurisdiction to adjudicate and legislate, it is useful to describe the problem that jurisdictional rules must solve. Otherwise, one might find oneself trying to apply a morass of vague rules without any sense of the goals that the system ought to pursue.

I suggest that the core task of jurisdiction in a federal regime is to solve what I call the dilemma of extra-territorial injury. To understand this dilemma, it is helpful to have an imaginary problem in mind. Therefore, imagine a hypothetical charitable foundation, the Adopt a Lizard Foundation ("ALF"), which is qualified under section 501(c)(3) of the IRC as a tax-exempt charity. ALF is organized under the laws of Michigan as a charitable trust and operates out of a small building located in Ann Arbor, Michigan. ALF is dedicated to the charitable purpose of

finding homes for abandoned lizards and other foundling reptiles. ALF also has hired a Michigan-based consultant, Guilt Trip Solicitations (“GTS”), to help ALF create brochures, mailing lists, and letters for fund-raising campaigns. GTS also has assisted ALF in designing a website describing ALF’s activities.

Suppose that a resident of New York stops by ALF’s building while visiting a friend who happens to be an ALF volunteer. The New Yorker idly picks up a brochure from a box at the front door marked with a sign that says “spread the word: take a brochure and pass it on!” When the New Yorker goes back to New York, he takes the brochure with him. Suppose that something in the brochure arguably offends New York law. Perhaps the brochure made representations about how much of its proceeds are spent on the care of lizards without disclosing that the chair of ALF’s board of trustees is also the herpetologist who is paid by ALF to provide such care. Someone in New York – perhaps the New York attorney general – files a lawsuit against ALF in New York superior court, alleging that the brochure’s representations about how it spends contributions constitutes a form of fraud, because ALF has not taken elementary precautions to eliminate conflicts of interest.

Does the U.S. Constitution permit either ALF or GTS to be haled into New York state or federal court on the basis of such contacts? And does the U.S. Constitution permit the New York court to apply New York law on the legal issues that arise in the dispute? These questions focus one’s attention on the dilemma of extra-territorial regulation. On one hand, one could argue that the New York court’s assertion of jurisdiction over, and enforcement of New York law against,

ALF would be a grotesque invasion of Michigan's right of self-government. ALF is, after all, a Michigan-based charity. The fact that some of its literature happened to drift into New York should not give New York extra-territorial power over a Michigan organization. If Michigan wants to give small charities like ALF freedom from elaborate regulatory requirements, then that is Michigan's prerogative in a federal system. New York cannot extend its laws and judicial jurisdiction into another state's territory. But, on the other hand, New Yorkers are affected by ALF's statements when those statements enter New York's territory. If those statements are fraudulent, then should New York be helpless against the fraud because they were made by an off-shore charity? May non-residents stand outside New York's borders and, without fear of New York's government, bombard New York's citizens with statements that are defamatory, fraudulent, or otherwise illegal? New York must have the power to protect itself from injuries within its territory even when those injuries have extra-territorial origins.

One can generalize from this example to describe the dilemma of extra-territorial injury as the result of two conflicting goals of any federal system: (a) Each state must have the power to protect itself from persons' actions that occur outside the state's territory and that nevertheless affect the state's residents but (b) each person is entitled to be governed primarily by their own state government and not by the "extra-territorial" laws of other states. It is impossible to vindicate one value without detracting from the other. Hence, the dilemma. If state governments could never regulate extra-territorial actions, then each government would be at the mercy of non-residents who deliberately inflicted polluted water,

defamatory news articles, defective products, deceptive advertisements, dangerous jobs, or other harmful items on the state's populace. But if governments could always regulate extra-territorial acts whenever those acts affected the government's territory, then states could generally regulate non-residents given that, as a practical matter, their activities generally are likely to have some more or less attenuated effect on other states.<sup>15</sup> Thus, non-residents would be subject to the power of a regime that they did not elect and could not otherwise control.

Whatever the details of laws or judicially crafted doctrines concerning jurisdiction might be, this dilemma of extra-territorial injury lies at their heart. Jurisdictional rules make no functional sense unless they strike some sensible balance between these two goals of protecting states and their residents from both extra-territorial legislation and the cross-border effects of private activity.

Note also that the dilemma can be expressed as either a clash between different states' "interests" in territorial self-government or between individuals' "rights" to being subject to lawful government. New York's extra-territorial regulation of a Michigan charity burdens Michigan's right to govern its own citizens but it also offends the charity's right to be subject only to governments possessing lawful authority. When courts emphasize states' interests, they typically invoke "structural" provisions of the Constitution such as Article IV, §1's Full Faith & Credit clause; when courts emphasize individuals' rights to be free from lawless power, they emphasize the "rights" provisions of the U.S. Constitution. But,

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<sup>15</sup> Indeed, the existence of such interstate effects is the basis for Congress' virtually plenary power to regulate every business within the United States, however insignificant, pursuant to Article I, §8's "commerce clause. See *Wickard v. Filburn*.

regardless of textual hook (all of which, in any case, are strictly speaking non-germane to the problem of extra-territoriality<sup>16</sup>), the underlying normative considerations are identical, as the Court has properly realized<sup>17</sup> (albeit to the objections – mistaken in my view – of some scholars<sup>18</sup>). The identity of the states' *legitimate* interests and individuals' *reasonable* expectations is only confused by invoking the idea that individuals are entitled to “notice” of the laws to which they are subject: If the laws emanate from lawful authorities, then individuals have such notice constructively. Thus, Due Process is entirely parasitic off of the idea of territorial sovereignty.<sup>19</sup>

One might be tempted to solve this dilemma in my hypothetical involving ALF by noting that ALF did not deliberately send the brochure to New York: the brochure was carried there by a New Yorker. One might also note that the cost to ALF of keeping its literature from slipping across state boundaries is very high, while the cost to New Yorkers of exercising care when picking up literature in

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<sup>16</sup> See *infra* Don Regan, *Siamese Essays*.

<sup>17</sup> For a succinct conflation of Due Process “fairness” concerns and concern with “structural” state interests, see *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality) (“for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”).

<sup>18</sup> Several commentators have complained that the Court's conflation of Full Faith and Credit with Due Process makes little logical sense, as the former protects states from the invasion of their interests by sister states, while the latter protects private organizations and individuals from having their legitimate expectations disrupted by enforcement of unforeseeable law. See, e.g., Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 Mich. L. Rev. 2448, 2506-07 (1999).

<sup>19</sup> This relationship between state interests and due process is helpfully outlined in A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 617, 645-46 (2006). For an earlier and equally cogent analysis of the relationship between due process and state sovereignty, see Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689, 711-14 (1987). As Professor Stein notes, the individual's power to waive jurisdictional limits in no way suggests that those limits are not defined by the sovereignty of the states. The right to be free from unlawful authority is an individual right, but it is defined by the rightful scope of state power.

other states is not so great: they should not assume, after all, that they will be protected by New York's laws when they travel outside of New York. Therefore, one could conclude that New York should not have jurisdiction over ALF based on such flimsy contacts. The result might be different, however, if the contents of the brochure were posted on ALF's website accessible to any New Yorker with a computer: then the costs to ALF of preventing the extra-territorial injury are diminished, while the burden on New Yorkers, surfing the web in their own home, is increased. And one might be even more willing to subject ALF to New York's jurisdiction if ALF sent letters to New York addresses.

If one takes this approach to the dilemma, then one is seeking a solution based on what I call "the cost of law avoidance." It is plausible to believe that a sensible system of jurisdiction should minimize the sum of two costs: (1) the non-resident's costs of taking actions to insure that the non-resident will not be dragged into the courts, or be subject to the laws, of a jurisdiction other than the one in which that non-resident resides and (2) the residents' costs of avoiding exposure to the products, communications, or other effects resulting from the actions of other states' residents. One might reasonably say that it makes no sense to require a person to take precautions to avoid affecting other jurisdictions if the costs of those precautions exceeds the costs that those extra-territorial effects that the person would impose on residents of other jurisdictions by failing to take such precautions.<sup>20</sup>

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<sup>20</sup> Defining jurisdiction by looking to the costs of law avoidance is similar, but not identical, to the theory of "comparative impairment." Comparative impairment requires the court to apply the law

As an illustration of this approach, consider another hypothetical. Suppose that ALF's website allows viewers to make contributions directly to ALF via the website, but only after the viewer signals that he accepts the terms of agreement for making a contribution. One of these terms is that disputes arising out of any contribution will be governed by Michigan law. The viewer clicks "I agree" and only then can make a contribution with his credit card. Suppose that the attorney general of New York argues that this "interactive" website subjects ALF to New York law and New York courts' jurisdiction. According to the New York Attorney General, if ALF wishes to avoid the jurisdiction and laws of New York, then ALF must eliminate the interactive features and create a purely "passive" informational website. In deciding whether to accept this proposed jurisdictional rule, a court that cared about the costs of law avoidance would ask whether it is more costly for ALF to forego an interactive website than it is for New Yorkers to read and understand a choice-of-law agreement.

I mention such a functional analysis to the dilemma of extra-territorial regulation not because the doctrine self-consciously follows such policy-oriented principles. As I shall explain below, judicial opinions addressing jurisdictional issues are unusually under-theorized, relying on conclusory assertions about "notice," "state interests," "reasonability," and the like to justify but rarely clarify

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of the jurisdiction that would be most impaired if it were not applied to the dispute. William Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 12-13, 17-20 (1963). By contrast, the minimization of the costs of law avoidance looks to the burden on private parties, not the impairment of laws. The premise of the costs-of-law avoidance theory is that a state should not apply its law to a non-resident, even when that person's actions affect the state's residents in ways that the state seeks to control, if those affected residents can easily take steps to avoid the costs inflicted by the non-resident's actions.

the jurisdictional rules that they announce. However, these considerations about the costs of law avoidance are inevitably implicated by any system of jurisdiction, whether courts know it or not. Therefore, it is useful to keep these costs of a jurisdictional system in mind as one canvasses the various doctrines, if only to have a tie-breaker when the doctrine grinds to a stalemate of confusion.

In what follows, I will provide a quick-and-dirty overview of the constitutional rules defining two sorts of jurisdiction, conventionally denoted “jurisdiction to adjudicate” and “jurisdiction to legislate.” The distinction is, in a strict sense, logically confused,<sup>21</sup> but it is important as a doctrinal matter, because the Court has prescribed much clearer constitutional limits on the reach of the state statutes defining state courts’ jurisdiction than it has imposed on the reach of other sorts of state statutes. Some commentators have even suggested that the Court ought to abandon its efforts to prescribe constitutional limits on state courts’ power to adjudicate disputes.<sup>22</sup>

I will, by contrast, suggest that these limits ought to be extended more generally: The Court ought to police jurisdiction to legislate just as aggressively as it now polices jurisdiction to adjudicate. This is not because the Due Process clause

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<sup>21</sup> All jurisdiction is “legislative,” in that the state legislation defines the jurisdiction of state courts such that constitutional limits on state courts are, in reality, limits on the power of the state legislature to project their courts’ power extra-territorially. Given that common-law courts have substantial powers to define primary norms of conduct, jurisdiction to adjudicate

<sup>22</sup> See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. Davis L. Rev. 19 (1990). Borchers notes that state the Due Process clause is not concerned with protection of state sovereignty. This is correct, but irrelevant: The principle barring extra-territorial regulation – including judicial regulation – does not depend on any specific clause of the Constitution but is implicit in the implicit structure of any federal regime. See Regan, *Siamese Essays*, *supra*. That the Court has chosen to house the principle in the Due process clause is perhaps unfortunate as a matter of judicial craftsmanship. But it is hard to see what practical importance this essentially aesthetic failing has.

or the Full Faith and Credit clause or any other clause of the U.S. Constitution contains a prohibition on extra-territorial legislation. They do not.<sup>23</sup> Rather, the need for such a limit is simply implicit in any federal system. Assuming that Congress will not deliver the necessary limit (an issue that I will briefly touch on below), it is high time for the Court to fill the breach.

### III. An Overview of Constitutional Limits on Jurisdiction to Adjudicate

Consider, first, the problem of state courts' jurisdiction to adjudicate disputes: On the basis of what sorts of contacts with a jurisdiction may a non-profit organization be haled into that jurisdiction's court? The Court gives two different sorts of answers, depending on whether jurisdiction is based characterized as "specific" or "general" jurisdiction.<sup>24</sup>

The test for specific jurisdiction applies when the litigation in question arises out of, or is related to, the defendant's contacts with the forum's territory that justify the forum's assertion of jurisdiction. As a paradigm of specific jurisdiction, consider a state's assertion of jurisdiction over an out-of-state firm to determine whether it owes taxes to pay for the unemployment insurance for which the firm's

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<sup>23</sup> The text of the Constitution does not expressly forbid extra-territorial legislation. As Don Regan observes, Article IV, section 1's full faith and credit clause certainly does not prohibit extra-territorial regulation. That clause requires New York to give full faith and credit to its sister state's judicial proceedings, record, and public acts. But Article IV does not prevent New York from enforcing its own law if such enforcement does not involve disregard of another state's law on the same issue. If North Carolina and Virginia lack any laws covering the issues addressed by New York's prohibitions, enforcement of New York law would not involve any lack of recognition of any state's "public acts." The problem, in other words, is not that New York is refusing to apply some other sovereign's law but rather that New York is enforcing its own law "extra-territorially." Donald Regan, *Siamese Essays: (1) CTS Corps v. Dynamics Corp of America and Dormant Commerce Clause Doctrine and (2) Extra-Territorial State Regulation*, 85 Mich. L. Rev. 1865, 1892-95 (1987)

<sup>24</sup> The Court did not coin these terms: Two law professors did. See Alfred von Mehren & David Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966). But the concepts have caught on and dominate the doctrine.

dozen employees in the forum state are eligible.<sup>25</sup> Because the jurisdiction being asserted is limited to adjudication of obligations that arise out of or are connected with employment within the state, the assertion of jurisdiction on the basis of such contacts is more acceptable than assertion of jurisdiction based on identical contacts for a more general purpose. For instance, an out-of-state insurance company can be haled into California state court to litigate eligibility of the insured under the policy, even though the out-of-state defendant's contacts with California consist of a single letter from the insurer to the insured containing an insurance contract.<sup>26</sup> But a Delaware trust company cannot be forced to litigate in Florida court the validity of a trust executed in Delaware for a Pennsylvania settlor, despite the trust company's extensive dealings with the settlor after she moved to Florida, because the litigation did not arise out of those Florida contacts.<sup>27</sup>

General jurisdiction, by contrast, exists when the defendant has some sort of connection to the forum that is (in the Court's phrase) so "systematic and continuous" that the forum is entitled to assert jurisdiction over the defendant even if the litigation does not arise out of the defendant's connections to the forum. The paradigm of general jurisdiction is a state court's jurisdiction over the forum state's own citizens<sup>28</sup> or, by logical extension, corporations that have their

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<sup>25</sup> *International Shoe v. Washington*, 326 U.S. 310 (1945).

<sup>26</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>27</sup> *Hanson v. Denckla*, 357 U.S. 235, 252 (1958) ("From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in *McGee*. But the record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in *McGee*").

<sup>28</sup> *Milliken v. Meyer*, 311 U.S. 457, 464 (1941)(permitting Wyoming court to exercise jurisdiction over Wyoming defendant in litigation concerning ownership of interests in Colorado mine, because

headquarters and principal place of business within the forum state.<sup>29</sup> Even if the litigation arises out of facts having nothing in particular to do with defendant's contacts with the forum state, if those contacts are so great that the defendant can be said to be permanently present within the forum state in a way analogous to domicile, then the forum can exercise jurisdiction over *any* litigation concerning that defendant.

This thumbnail sketch, although roughly accurate, obscures some important ambiguities in each category of jurisdiction to adjudicate. It turns out that both categories are more obscure, and potentially much broader, than the sketch above suggests.

A. *Specific Jurisdiction in more detail: Three Ambiguities*

To make sense of specific jurisdiction, one needs some account of why the relation between the litigation and the defendant's contacts should matter. Intuitively, this relation insures that the state's extra-territorial regulation is calibrated towards the costs imposed within the forum state by out-of-state actions.<sup>30</sup> As the defendants' actions outside the forum state impose a greater effect on that state, the forum state has a greater interest in controlling those

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“[t]he state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties” ).

<sup>29</sup> *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952)

<sup>30</sup> *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980) suggests such a comparison of costs when the Court declares that “[t]he concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”

activities, and the state's jurisdiction over those activities can grow in proportion to that interest.

But this justification for specific jurisdiction suggests the first basic ambiguity in the doctrine: How close must the relationship be between the theories of liability being litigated and the defendant's contacts with the forum state?

Professor Lea Brilmayer has argued that specific jurisdiction cannot exist unless the activities justifying jurisdiction are "substantively relevant" to the underlying claim for liability, a position that has won some but not universal support among lower courts.<sup>31</sup> The normative theory outlined in Part I above suggests that this position is correct: The assertion of power over the non-resident defendant, after all, can be justified as necessary protection from cross-border harms only if the defendant's contacts with the forum state are actually harmful. If the contacts are not even relevant to the proof of such harm, then it is difficult to know why they justify the forum's intervention. But the issue remains unresolved by the cases.

Viewing specific jurisdiction as an exercise of power justified by the forum state's need to protect states from non-resident's harmful contacts suggests a second ambiguity in the theory: Specific jurisdiction presupposes a multi-state doctrine of

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<sup>31</sup> Lea Brilmayer, *How Contacts Count: Due Process Limits on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 84-88. Professor Brilmayer's narrow definition of what it means for litigation to be related to defendant's contacts with the forum has been controversial. Compare Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988) with Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 Harv. L. Rev. 1465 (1980). For a summary of the lower court positions, see Flavio Rose, Comment, *Related Contacts and Personal Jurisdiction: The "But For" Test*, 82 Cal. L. Rev. 1545 (1994); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 Ind. L. Rev. 343 (2005). For an example of a decision adopting Professor Brilmayer's view, see *United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992) (quoting *Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986)) (bracketed material added by court) ("the defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case"). The circuits remain split over the issue. See Comment, *Related Contacts and Personal Jurisdiction: The 'But For' Test*, 82 Calif. L. Rev. 1545 (1994).

causation and injury – theory of “jurisdictional torts,” if you will – to define the precautions that non-residents must take to avoid being haled into a state’s courts.<sup>32</sup> After all, many private actions have cross-boundary effects, but, if states are to be preserved from the extra-territorial reach of their sister states, not all such effects can justify extension of a state’s laws to the action. Which effects, then, should justify extra-territorial regulation? All effects that are causally close to the defendant’s actions in another state? All foreseeable effects? Intended effects?

In *World-Wide Volkswagen*, the Court announced that the defendant was only subject to adjudicative jurisdiction of a state court if the defendant intended to create the effects in the forum state that are the basis for such jurisdiction. The plaintiffs in *World Wide Volkswagen* were New York residents who had purchased a car from a New York car dealer in New York and were later injured by a car crash in Oklahoma. They filed a lawsuit in Oklahoma state court against the manufacturer alleging defective design, joining the car dealership and the distributor as well (probably as an effort to destroy complete diversity and thereby keep the case from being removed to federal court). The dealer and distributor both moved to dismiss for lack of personal jurisdiction. Assuming that the dealer and distributor could be held responsible for selling a defectively designed car, there is no doubt that the litigation arose out of an effect in Oklahoma – the car crash – that was caused by the defendants. But the Court held that this

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<sup>32</sup> Such a theory, of course, raises the usual “bootstrap” problem in which the determination of jurisdiction in some sense presupposes liability on the merits. See 2 Robert C. Casad & William Richman, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* 12-13 (1998)

relationship between the defendants and the forum state was insufficient, because the defendants had not deliberately taken any steps to transport the car to Oklahoma: The dealer might foresee, but did not intend, to make this sort of contact with the forum.<sup>33</sup>

*World-Wide Volkswagen's* concept of “purposeful availment,” therefore, is closely connected to states’ interests in being free from other state’s extra-territorial assertions of jurisdiction. The concept is best understood not so much as an effort to protect defendants from litigation in unforeseen forums, as Professor Spencer suggests in a recent article,<sup>34</sup> but rather as an effort to protect states from the excessively long arms of other states’ courts.<sup>35</sup> The actor’s intent to affect a state has always been relevant to the concept of so-called “effects-based” jurisdiction,<sup>36</sup>

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<sup>33</sup> *World-Wide Volkswagen*, 444 U.S. at 295-96.

<sup>34</sup> It is mistaken to assert, as does Benjamin Spencer in a recent article, that “the intentionality of the defendant ... is not relevant to a state interest analysis.” Spencer’s error, understandable in light of the Court’s opaque reasoning, is to assume that the “purposeful availment” standard serves the function of protecting individual defendants from unforeseeable litigation rather than protecting each state from the encroaching jurisdiction of sister states. A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 617, 645-46 (2006). States have interests in insuring that their citizens are not regulated by other states unless such regulation is justified by the regulating state’s need to protect itself from the extra-territorial effects of that citizen’s actions. But, because all private action generates some cross-border effects, it is necessary to bar states from regulating non-residents on the basis of effects that bear only a remote or attenuated relationship to the non-resident’s actions. The requirement of “purposeful availment” is simply a way of defining the causal link between a private person’s action in one state and the effects generated by that action in another state. Some such standard, whether intentionality, negligence, or pure strict liability, is necessary if state assertion of jurisdiction regulation of non-residents on the basis of cross-border effects is to have any limit.

<sup>35</sup> *World-Wide Volkswagen* emphasizes that “[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States--a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.” *World-Wide Volkswagen* at 291.

<sup>36</sup> See, e.g., *Strassheim v. Daily*, 221 U.S. 280, 284 (1911) (“[a]cts done outside the jurisdiction, but intended to produce and producing detrimental effects within its, justify a state in punishing the cause of the harm”).

as a mechanism to tie the actor's out-of-state actions to the territory of the regulating state.<sup>37</sup>

*World-Wide Volkswagen*, however, pays little attention to the other half of the jurisdictional dilemma – protection of states from cross-border effects of private action. The Court could easily have adopted Europe's dominant rule under which defendants would be required to litigate in any jurisdiction where their goods caused an injury.<sup>38</sup> Why does an "intentionality standard" strike the right balance between protecting states from their sister states' extra-territorial laws and protecting states from non-resident's extra-territorial actions? Why not just a pure "causation" standard?

Although the Court's justification for the intentionality standard is cryptic, *World-Wide Volkswagen* hints at a vision of jurisdiction in which defendants should be able to "shop" among forums with the same freedom as plaintiffs. According to *World-Wide Volkswagen*, the Due Process clause requires that the defendant be able to avoid litigation in a forum by refraining from marketing goods in that forum's territory.<sup>39</sup> Thus, *World Wide Volkswagen* offers a vision of states' exchanging

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<sup>37</sup> See *supra* Don Regan, *Siamese Essays* at 1900.

<sup>38</sup> See, e.g., Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 5(3), 1972 O.J. (L 299) 32, reprinted in 29 I.L.M. 1413 (providing that jurisdiction exists "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred"). Article 10 of the Preliminary Draft of the Hague Conference on Private International Law provided that the injury's occurrence in the forum state would have to be "foreseeable," but, as numerous commentators have noted, foreseeability alone would not satisfy *World-Wide Volkswagen*. See Letter from Jeffrey D. Kovar to J.H.A. van Loon, Sec'y Gen'l, Hague Conf. on Private Int'l Law, February 22, 2000, at 7 (noting that foreseeability test in Article 10 might "not survive Supreme Court review"), available at <http://www.cptech.org/ecom/hague/kovar2loon22022000.pdf>; Patrick Borchers, *A Few little Issues for the Hague Judgments Negotiations*, 24 Brook. J. Int'l L. 157, 161-62 (1998).

<sup>39</sup> "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' *Hanson v. Denckla*, 357 U.S., at 253, it has clear notice that it is subject to suit there,

access to the state’s market in return for the right to adjudicate injuries caused by non-resident defendants’ products, a vision akin to Charles Tiebout’s spatial economies.<sup>40</sup> In this market for jurisdictions, states are constrained from imposing excessive liability by defendants’ threat to exit, while defendants are constrained from exit by their desire for access to the states’ market. If one were optimistic, one might hope that this market would produce an efficient equilibrium in which states would not extend their power to non-residents unless the costs imposed by non-residents on the state justified such an extension.

Whatever the justification for the “purposeful availment” theory, it has led to a lot of litigation on how specifically a defendant must target a state – with advertisements, websites, regular sales, etc. – to indicate a purpose to take advantage of the benefits and protections of the jurisdiction’s laws.<sup>41</sup> Jurisdiction tends to be easier when the defendant is alleged to have committed an intentional tort against a plaintiff suing in her own state of domicile, because the jurisdictional intent to target the jurisdiction is necessarily implied by the allegations in the

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and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.” *World-Wide Volkswagen*, at 297.

<sup>40</sup> Charles Tiebout, *A Pure Theory of Local Expenditures* sets forth an abstract model of local governments’ taxation and provision of local public goods in which private “citizen-consumers” reveal their preferences for taxes and services by migrating to the jurisdiction that offers their preferred mix.

<sup>41</sup> The cases are legion. For a sample of the myriad of problems that arise in torts and contracts, see Eugene F. Scoles, Peter Hay, Patrick J. Borchers, Symeon Symeonides, *Conflict of Laws* 360-423 (4<sup>th</sup> ed.2004).

complaint.<sup>42</sup> These uncertainties are endemic to an “intentionality” standard: they do not exist under the Brussels Convention’s ‘strict liability’ rule based on the location of the accident.

*World-Wide Volkswagen*’s “purposeful availment” theory has given rise to a third ambiguity in the doctrine: The precedents have yet to resolve whether a defendant’s intentional shipping of goods into the stream of interstate commerce suffices by itself to establish purposeful availment of any state in which they land. *World-Wide Volkswagen* contains dicta approving of such a theory.<sup>43</sup> But *World-Wide Volkswagen* also rests on the notion that a defendant must be able to avoid litigation in a state’s courts by severing connections to the state’s market. One might infer that it cannot be a condition for avoiding litigation in a state’s courts that one must withdraw from interstate commerce in every state altogether. Otherwise, each state could hold hostage the commerce of its neighbors as leverage to expand its own jurisdiction. The difficulty, however, is that certain forms of commercial activity do not easily permit the participant to withhold their products from one state unless they withhold them from every state. If Acme sells an automobile part to Lemon Auto Company, Acme has little control over where those components ultimately end up: They float down the proverbial stream of commerce, outside Acme’s power to insure that they do not enter a state with an

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<sup>42</sup> *Calder v. Jones*, 465 U.S. 783, 789 (1984) (holding that Florida writer and editor could be sued in California state court for article alleging defaming California resident because “their intentional and allegedly tortious actions were expressly aimed at California”).

<sup>43</sup> *World-Wide Volkswagen* at 297-98 (“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”).

hearty appetite for dragging unwilling non-residents litigants into its courts. If Acme's intent to take advantage of this stream of commerce suffices to subject it to jurisdiction in every state in which its products drift, then each state will be able to force Acme to drop out of interstate commerce altogether as the price for avoiding that state's jurisdiction. But this price is arguably too high, because it allows one state to hold Acme's commerce with other states hostage as the price for Acme's avoiding litigation in the first state's courts. The doctrine remains unclear about whether a defendant's specific intent to participate in the "stream of commerce" suffices to subject the defendant to specific jurisdiction in litigation arising out of the effects of the defendant's products. Four justices in *Asahi Metal* took the view that an intent to participate in the stream of commerce did not constitute sufficient purposeful availment, and the circuit courts are divided on the question.

In short, the concept of specific jurisdiction is obscure on (at least) three points: (1) The degree to which the defendant's contacts justifying jurisdiction must be related to the underlying litigation; (2) how specifically a defendant must have the purpose of targeting a specific state; and (3) the degree to which the defendant's intent to ship goods in interstate commerce suffices to subject that defendant to jurisdiction wherever those goods may happen to land.

**B.**     *General jurisdiction in more detail: Who is a member of a state's political community?*

General jurisdiction requires no connection between the underlying litigation and the forum state. The required connection is, instead, between the

defendant and the forum. In order for a court to exercise general jurisdiction over a defendant, the Court has declared unhelpfully that the defendant should have “continuous and systematic... contacts” with the forum state.<sup>44</sup> State legislatures have dutifully codified this standard in numerous long-arm statutes defining their court’s jurisdiction.<sup>45</sup> But repetition has not clarified the meaning or justification of the phrase.

As noted above, the paradigmatic basis for general jurisdiction over a natural individual is domicile. But the concept analogous to domicile for artificial persons such as corporations is obscure. If a corporation is incorporated or headquartered in a state, then it is likely amenable to jurisdiction in that state for unrelated claims.<sup>46</sup> But what if the corporation simply has a small office in the state that sells tickets or that employs a half-dozen salespeople?<sup>47</sup> Or what if the corporation simply sells a lot of stuff in the state?<sup>48</sup> Commentators note that physical presence in the state, not merely frequent sales of goods, is usually required for general

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<sup>44</sup> *International Shoe*, 345 U.S. at 317 (noting that “there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities”).

<sup>45</sup> See, e.g., Mich. Comp. L. section 600.711, which provides that “[t]he existence of any of the following relationships between a corporation and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise general personal jurisdiction over the corporation and to enable such courts to render personal judgments against the corporation. (1) Incorporation under the laws of this state. (2) Consent, to the extent authorized by the consent and subject to the limitations provided in MCL section 600.745. (3) The carrying on of a continuous and systematic part of its general business within the state.

<sup>46</sup> Lea Brilmayer *et al.*, *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 733 (1988).

<sup>47</sup> *Read v. American Airlines, Inc.*, 640 P.2d 912 (Mont. 1992) (ticket office sufficient for general jurisdiction over airlines); *St. Louis-San Francisco Ry. v. Gitchoff*, 68 Ill. 2d 38, 369 N.E.2d 52 (1977) (sales office with seven employees in the forum) . Compare *Philadelphia & Reading Railway Co v McKibbin*, 243 US 264, 268 (1917) (finding sales of tickets on foreign railways within country's jurisdiction insufficient to establish corporate “presence” in state).

<sup>48</sup> See, e.g., *Bearry v. Beech Aircraft*, 818 F.2d 370 (5<sup>th</sup> Cir. 1987) (sales of aircraft in state insufficient for general jurisdiction over unrelated plane crash).

jurisdiction.<sup>49</sup> But none of the decisions clarify why real estate and employees should matter more than millions of dollars in sales of goods. One suspects that, at the bottom of such distinctions is a self-defeating effort to locate the physical presence of an intangible person.

Is there a normative theory that might get us beyond such legal fictions? Professor Brilmayer has argued that general jurisdiction is justified by the notion that persons with close ties to a jurisdiction gain special privileges from membership – in particular, the right to vote – that justify reciprocal duties. Being members of the political community, they have constructively consented to that community’s exercise of power over them.<sup>50</sup> One might also attempt to understand general jurisdiction as simply a diluted form of specific jurisdiction, in which the need for the litigation to be related to the defendant’s contacts with the forum have been relaxed.<sup>51</sup> On this theory, a forum could assert jurisdiction over a corporation that sold automobiles in the forum state even if the underlying litigation did not arise out those automobiles, just so long as the litigation arose out of similar automobiles sold elsewhere.<sup>52</sup> The forum state would have an interest in exercising jurisdiction on the basis of the *risk* that the defendant’s contacts could result in an injury similar to the subject of litigation. Likewise, one could argue that *every* lawsuit against an organization is related to the decision-making personnel of the corporation, on a

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<sup>49</sup> See, e.g., Eugene Scoles, Peter Hay, Patrick Borchers, & Symeon Symeonides, Conflict of Laws §6.9, at 357-38 (4<sup>th</sup> ed. 2000).

<sup>50</sup> Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 Duke L.J. 1 (1991).

<sup>51</sup> Professor Twitchell suggests that many instances of ostensibly “general” jurisdiction are really instances of such ‘diluted’ specific jurisdiction. See Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 646-64 (1988).

<sup>52</sup> *Id.* at 660-662

sort of jurisdictional theory of *respondeat superior*. On this view, subjecting a corporation to jurisdiction at the location of its headquarters or corporate “seat” is simply a diluted form of specific jurisdiction.

None of these theories, however, explains the sort of general jurisdiction that is frequently asserted under state statutes authorizing state courts to hear any case of a corporation “doing business” within the state.<sup>53</sup> An organization is not a member of any political community because it happens to own a building and employ some workers within a state. The fact that its contacts are “systematic,” “continuous,” “sustained,” etc., simply seems question-begging: Why should permanence of contacts matter, if they have nothing to do with the injury being adjudicated? Starbucks undoubtedly has a permanent physical presence in every state. But is the presence of a Starbucks-owned coffee shop in Manhattan a good reason to give the New York state courts the power to hear a dispute about whether a shipper made a timely delivery of a shipload of coffee beans at the port of New Orleans? It is hard to imagine a functionally sensible justification for such an allocation of judicial responsibilities, which may be why European nations universally reject such a theory in favor of a “seat-of-the-corporation” concept.

The Court has never clarified the scope of general jurisdiction beyond its tag line requiring systematic and continuous contacts. Predictably there has been a flood of *ad hoc* decisions and little consensus among the states, beyond a general requirement of some permanent physical installation owned by the defendant.

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<sup>53</sup> See, e.g., *Lafer v. Ostrow*, 55 N.Y.2d 305, 434 N.E.2d 692, 449 N.Y.S.2d 456 (App. Ct. 1982) (Sustained and systematic activity in New York by foreign corporate sales agency in soliciting sales, delivering samples, and calling accounts, sufficient for jurisdiction).

### III. Overview of Constitutional Limits on Jurisdiction to Legislate: Two

#### Ambiguities

The federal constitutional doctrines governing jurisdiction to legislate are far less elaborate than those governing jurisdiction to adjudicate. With a few exceptions discussed below, the Court has enforced only the most minimal restraints on state courts' decisions to apply forum law to cases with only the most tenuous connections to the forum state.

To generalize crudely but with rough accuracy, the Court has placed two related limits on states' choice of law. First, the Court has held that the Full Faith & Credit clause of Article IV prohibits a forum from enforcing any state's "substantive" law unless that state either (1) had some interest in the case at the time that the underlying events giving rise to the litigation occurred<sup>54</sup> or (2) acquired such an interest after the underlying events occurred as a result of something other than the plaintiff's efforts to secure a favorable forum.<sup>55</sup> Second, the Court has held that the Due Process clause of the Fourteenth Amendment bars

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<sup>54</sup> See, e.g., *Alaska Packers Assn. v. Industrial Accident Comm'n*, 294 U.S. 532, 549 (1935) (forum State may apply its own workers compensation statute to the employment-related injuries of a worker hired in the State).

<sup>55</sup> So, for instance, the Court held that Minnesota had an interest in applying its law to benefit Mrs. Hague despite the fact that she was not a resident at the time of either her husband's accident or the purchase of insurance from Allstate, because she moved to Minnesota after the accident for reasons other than simply gaining the benefit of Minnesota law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 318-19 (1981)(plurality opinion). Justice Powell's dissent, however, argued that no post-occurrence change of residence could confer an interest on a forum state. *Id.* at 337. Justice Powell's position has the support of the weight of the authority. See Comment, *Legislative Jurisdiction, State Policies, and Post-Occurrence Contacts in Allstate v. Hague*, 81 Colum. L. Rev. 1134 (1981). *Phillips Petroleum v. Shutts*, 472 U.S. 797, 820 (1985), stated that "[e]ven if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance," citing *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936). But *Shutts* acknowledged that, in *Hague*, "the plaintiff's move to the forum was only relevant because it was unrelated and prior to the litigation." *Id.*

a forum from enforcing any state’s “substantive” law unless the parties to the dispute could have had some reasonable notice that such law could be applicable to the case at the time that the underlying events giving rise to the litigation occurred.<sup>56</sup>

The state’s interest required by Article IV can be based on either domicile of the party<sup>57</sup> or location of the injury,<sup>58</sup> just so long as some plausible story can be concocted for how, as a general matter, the forum law regulates the contact in question. The notice to the litigants of the applicable law required by the Due Process clause can be supplied by some specific connection between the dispute and the jurisdiction the law of which is being applied.<sup>59</sup> But such notice might also be supplied by the litigant’s consent to do business in the regulating state<sup>60</sup> or write

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<sup>56</sup> *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (Texas court may not enforce limitations period provided by Texas law, thereby contradicting the insurance policy’s one-year limitations period, because Texas lacks power to affect “the rights of parties beyond its border having no relation to anything done or to be done within them”).

<sup>57</sup> For instance, California was held to have an interest in insuring that a worker hired in California could recover compensation under California’s more generous compensation policies, even though the worker was injured in Alaska. *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 294 U.S. 532 (1935).

<sup>58</sup> For instance, the forum has an interest in applying its state’s common law policy of recovery to benefit a non-resident employee who was injured in the forum state, because such a policy could benefit medical creditors of injured workers like the employee, even though no such creditor existed in plaintiff’s actual case. *Carroll v. Lanza*, 349 U.S. 408, 413 (1955).

<sup>59</sup> In *Hague*, for instance, the plurality made much of the fact that the insured commuted to Minnesota regularly, apparently giving Allstate notice that Minnesota law might be applied to calculate auto insurance benefits. *Hague*, 449 U.S. at 640-42.

<sup>60</sup> In *Watson v. Employers Liability Assurance Corp.*, for instance, Justice Frankfurter concurred separately to argue that Louisiana could enforce its “direct action” statute against an out-of-state insurer reasoning that “Louisiana, free as it was to exclude the insurance company from coming into the State to do business, was empowered to condition the company’s entry by an undertaking to observe a public policy binding on all local insurance companies and strictly related to the protection of serious interests of its own citizens.” *Watson*, 348 U.S. 66, 74 (1955) (Frankfurter, J., concurring). *Hague*’s plurality opinion also rested on its decision on Allstate’s being registered to sell insurance in Minnesota, even though the policy in question had not been sold from any Minnesota office. *Hague*, 449 U.S. at 642-43.

insurance policies that insure movable assets or that do not contain in geographic limitation of liability.<sup>61</sup>

In short, the constitutional constraints on choice of law seem more apparent than real. The U.S. Supreme Court has struck down a state’s application of forum law under the full faith and credit clause only once in the last half-century, when it held that Kansas could not apply its royalty rules to determine amounts owed by a non-Kansas company to non-Kansas residents on leases of land located outside of Kansas.<sup>62</sup> *Shutts* is hardly a promising foundation for a robust constitutional limit on state choice of law, resting as it did on the self-conscious holding that there was zero connection between Kansas and the non-Kansas oil leases.

One might attempt to make search among the Court’s precedents for language pointing to some sensible normative theory – say, the principle calling for the minimization of the costs of law avoidance described in Part II. But this attempt would probably be vain. Since the 1940s, the Court has foresworn any effort to “balance” the relative interests of different states when determining whether a state is entitled to apply its laws to a dispute.<sup>63</sup> Instead, the Court simply asks whether a state has some interest in protecting either its territory or its citizens from some non-resident’s activity. Either a territorial or a domicile-based nexus with a dispute suffices,<sup>64</sup> and the Court makes no effort to determine which

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<sup>61</sup> *Clay v. Sun Ins. Co.*, 377 U.S. 179, 182 (1964).

<sup>62</sup> *Phillips Petroleum v. Shutts*, 472 U.S. 797, 820-23 (1985)

<sup>63</sup> *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 495-96 (2003) (noting that Court had “in the past, appraised and balanced state interests” but that “[t]his balancing approach quickly proved unsatisfactory”).

<sup>64</sup> *United States v. Richards*, 369 U.S. 1, 15 (1962) (“Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests

of the several interested states has the “greatest” interest or will be most impaired if its law is not enforced.

Such a theory of legislative jurisdiction is hopelessly vague. It is no good to base jurisdiction on “a significant contact or significant aggregation of contacts, creating state interests,”<sup>65</sup> unless one specifies what such contacts must signify and which state interests are legitimate. Could New York regulate a Michigan-based charity like ALF (discussed in Part II) on the basis of ALF’s officer’s vacations in the Adirondacks? Would such a visit “signify” a state interest? The difficulty, in particular, is that the Court has not clarified two aspects of legislative jurisdiction. First, the Court also has never expressly stated that the reach of states’ legislative jurisdiction over non-resident actors is limited by a requirement that non-resident actors purposefully avail themselves of the benefits and protections of state laws. Such an intention may be sufficient for legislation, but the Court has never declared it to be necessary. Second, the Court has never clarified the existence, scope, and purpose of general legislative jurisdiction: Sometimes, indeed, the Court invokes contacts unrelated to the purpose of state laws as justification for applying those state laws.<sup>66</sup> In this sense, the constitutional limits on jurisdiction to legislate have

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possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity. Thus, an Oklahoma state court would be free to apply either its own law, the law of the place where the negligence occurred, or the law of Missouri, the law of the place where the injury occurred, to an action brought in its courts and involving this factual situation.”

<sup>65</sup> *Hague*, 449 U.S. at 312-13.

<sup>66</sup> The fact that an insurance company is registered to do business in Minnesota, for instance, is hardly a reason for Minnesota to regulate contracts made by the insurer’s Wisconsin office. *Hague*, 447 U.S. at 337-38 (Powell, J., dissenting) (“The State does have a legitimate interest in regulating the practices of such an insurer. But this argument proves too much. The insurer here does business in all 50 States. The forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State”).

the appearance of being far more permissive than the analogous limits on jurisdiction to adjudicate.

It is a familiar paradox that the Court been more reluctant to limit legislative than adjudicative jurisdiction, despite the greater significance of the former for both individuals and states.<sup>67</sup> Part of the reason for the Court's leniency about the more important topic may be that the state courts have exercised enough self-restraint by refraining from applying their own jurisdiction's laws that the Court does not see a pressing reason to intervene more forcefully.<sup>68</sup> The Court may also be reluctant to constitutionalize any particular conflict of law theory, given scholars' and courts' disagreement over the subject and the Court's own initial *faux pas* in constitutionalizing some overly rigid conflicts of law doctrines prior to the New Deal.<sup>69</sup> Whatever the reason, however, there is a sense in the precedents that the

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<sup>67</sup> Martin, *Personal Jurisdiction and Choice of Law*, 78 Mich. L. Rev. 872, 879-80 (1980); Brilmayer *et al*, *A General Look at General Jurisdiction*, *supra* at 776-78; Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. Rev. 33, 90 (1978)

<sup>68</sup> There is ample evidence to contradict the widespread belief that state courts are biased in favor of forum law. *See, e.g.*, Simeon Symeonides, *Choice of Law for Products Liability: The 1990s and Beyond*, 78 Tul. L. Rev. 1247, 1318 (2003).

<sup>69</sup> On the Court's nervousness about constitutionalizing conflicts theories, see *Sun Oil v. Wortman*, 486 U.S. 717, 727-28 (1988) ("If we abandon the currently applied, traditional notions of [limitations periods], we would embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable"). The Court's *faux pas* is epitomized by *New York Life Insurance Co. v. Dodge*, 246 U.S. 357 (1918), in which the Court held that Due Process clause of the 14<sup>th</sup> Amendment required the law of the place of contracting (New York) be applied to a loan contract between a Missouri resident and a New York insurance company. The Court reasoned that applying Missouri law would deprive the New York insurer of "vested rights" that sprung up under New York law at the moment that the contract was accepted. Because the loan contract was secured by an insurance policy secured in Missouri that Missouri was admittedly entitled to regulate, there was an air of artificiality about the majority's choice-of-law rule that led Justice Brandeis to write a sweeping dissent. But justice Brandeis' own initial attempt to create a constitutionally required theory of conflicts was not notably more successful. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932) held that New Hampshire could not apply its pro-employee common law recovery rules to benefit a non-resident employee injured in New Hampshire but employed by a Vermont firm. The Court reasoned that the New Hampshire court had to extend full faith and credit to Vermont's workers compensation law, because that law would be fatally undermined if employers could not gain the benefit of immunity

Court is likely to uphold a court's application of a state's law to a dispute just so long as the events giving rise to the dispute involved either the state's territory or residents.

This sense must be incorrect, even though the Court has never corrected it. It cannot be that a mass of unrelated contacts between a non-resident and a state will allow the latter to regulate the former's purely out-of-state action. The absurdities of such a position are too apparent. New York, for instance, could hardly arrest Michigan children vacationing in New York for truancy on the ground that they did not attend a school that met New York's accreditation standards. New York could hardly prosecute a Michigan resident for smoking in a Michigan restaurant even if this smoking offended a visiting New Yorker and violated a New York law banning smoking in public accommodations. Such exercises of extra-territorial power are obviously unconstitutional even though New York asserts a genuine, heartfelt interest in better educated tourists in New York and cleaner air in Michigan and even though there are "substantial" territory- and domicile-based links between New York and the regulated Michiganders in either case. The "size" of the contacts are simply irrelevant: whether the vacation of those Michigan students lasts a week or a month, whether the Michigan restaurant has in its premises one New York tourist or a hundred who are irritated by second-hand smoke in Ann Arbor, we intuitively know that neither Michigander would fall within New York's regulatory jurisdiction. But the Court's Due Process and Full

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from tort lawsuits when they opted into Vermont's workers' compensation scheme. It is widely acknowledged that *Clapper's* specific holding was overruled *sub silencio* by *Carroll v. Lanza*.

Faith & Credit precedents have not supplied us with useful reasons that would explain our intuitions and help in harder cases.

Despite the silence of those Due Process and Article IV precedents, however, it is not difficult to see, in other doctrinal contexts, that the Court requires more than a certain quantity of “contacts” between a non-resident and a state to permit the latter to apply its laws to the former. Those contacts must signify that the non-resident has somehow acted within the state’s territory such that the burdens of state regulation are outweighed by the state’s need to protect itself from the effects of extra-territorial private activity. In *Edgar v. MITE*, for instance, the Court held that the dormant commerce clause doctrine barred Illinois from regulating stock transactions by corporations that were neither incorporated nor had their principal place of business within Illinois.<sup>70</sup> Although the Court invoked the notion that such a state law imposed an excessive burden on interstate commerce, the Court’s analysis was driven wholly by the concept of extra-territoriality: Illinois burdened interstate commerce because its laws regulated stock transactions between two non-residents of Illinois – non-resident corporations and non-resident shareholders. The Illinois statute applied to all corporations incorporated under the laws of other states if the corporation has its principal executive office in Illinois and had at least 10% of its stated capital and paid-in surplus represented in Illinois. According to the Court, the critical problem with this law is that it barred a foreign corporation “from making its offer and concluding interstate transactions not only with [the corporation’s] stockholders living in Illinois, but also with those living in other

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<sup>70</sup> 457 U.S. 624 (1982).

States and having no connection with Illinois.”<sup>71</sup> The Court rejected the idea that any state could enact a law that “has a sweeping extraterritorial effect,” because “[t]he Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.”<sup>72</sup> Although the Court invoked commerce clause doctrine, *Edgar* was based on considerations imported from the Court’s Due Process doctrine governing states’ jurisdiction to adjudicate: In *Edgar*’s words, “[t]he limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, 'any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.”<sup>73</sup>

*Edgar* is merely a plurality opinion. However, its essential holding is consistent with the Court’s other statements regarding extra-territorial jurisdiction over non-residents: states may not regulate such non-residents simply because they happen to have “contacts” with the regulating state.<sup>74</sup> Undoubtedly, the corporation being regulated in *Edgar* had contacts with Illinois: Its headquarters was in Illinois, as was much of its capital investment. But the regulation in question was not directed towards *these* contacts but rather to unrelated (or insufficiently related) out-of-state activity – namely, sales of stock certificates issued under Delaware law by non-Illinois shareholders to a non-Illinois purchaser. Had the

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<sup>71</sup> *Id.* at 642.

<sup>72</sup> *Id.* at 642-43.

<sup>73</sup> *Id.* at 642.

<sup>74</sup> *See, e.g., Bonaparte*

contacts with the regulating state been the right sort of contacts, properly related to the underlying transaction being regulated, then the Court would have upheld the regulation.<sup>75</sup>

One should not be distracted by the ostensible doctrinal context of *Edgar* to miss its central concern with precisely the same issue raised by the Court's Full Faith & Credit decisions. In both contexts, the Court is concerned with the extra-territorial jurisdiction of states. In both contexts, the Court limits such jurisdiction by requiring certain sorts of contacts between the party being regulated and the regulating state. *Edgar* simply makes clear what common sense would otherwise dictate in any case – that the regulation in question must be directed at the contacts that fall within the regulating state's territory. Otherwise the contacts are an empty pretext for regulation.

In short, it is almost a certainty that the Court will usually require that the effects (or “contacts”) justifying regulation be the target of such regulation. In this sense, legislative jurisdiction will generally be specific jurisdiction. (Whether there is also some sort of general regulatory jurisdiction remains an open question, although surely Professor Brilmayer is correct to note that such jurisdiction ought to be narrowly construed to apply only to unique affiliations<sup>76</sup>).

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<sup>75</sup> For instance, the Court later upheld Indiana's anti-takeover law that was limited to corporations incorporated under Illinois law. *CTS v. Dynamic Corporation*.

<sup>76</sup> Brilmayer *et al.*, *A General Look at General Jurisdiction supra*, at 776-79. Professor Brilmayer and her students interpret *Edgar* and *CTS* to allow general jurisdiction on the basis of unique affiliations. I am inclined to view the pair of cases as allowing specific jurisdiction on the basis of related affiliations, based on the admittedly formalist criterion that the rules governing stock transactions are related to the decision to incorporate within a specific state.

But the question remains open what sorts of contacts are proper subjects for specific legislative jurisdiction. Just those contacts intended by the regulated party? All contacts caused by the regulated party? Or some subset of either criteria? The Court could not enforce a general requirement that the regulated party specifically intend to target the regulating state without rendering unconstitutional the First Restatement's jurisdiction-selecting rules.<sup>77</sup> Given that the Court has refused to declare such tradition-sanctioned rules unconstitutional,<sup>78</sup> there will be no general requirement of purposeful availment for legislative jurisdiction. But such a requirement might be enforced whenever states base legislative jurisdiction on criteria other than the First Restatement. Thus, the nature of "significant contacts" justifying legislative jurisdiction remains ambiguous in much the same way as "minimum contacts" justifying specific jurisdiction to adjudicate.

#### **IV. Applying the Principles to Charities**

With these ambiguous principles in mind, how should a Court resolve the problems set forth in Parts I and II? Recall the two sorts of regulation being imposed on the charities by California and Pinellas County, Florida in Part I – regulation of the charities' decision-making structure a la Sarbanes-Oxley and requirements that charities register with the county in which their cybernetic or mass mail solicitations happen to land. Could either of these sorts of regulations be imposed based on the sorts of contacts that Michigan-based ALF has with New York, as described in Part II?

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<sup>77</sup> The *lex locus delicti* rule, for instance, permits legislative jurisdiction in the state of injury even when the defendant did not intend the injury to occur within that state.

<sup>78</sup> See, e.g., *Sun oil v. Wortman*, *supra*; *Burnham v. Superior Court*.

The answer, of course, is uncertain, because the doctrine is ambiguous. However, the best resolution of the ambiguities would suggest a narrow construction of states' jurisdiction and a negative answer to the question. But the explanation of this position requires a digression on how charities might be different from other private organizations and why these differences should lead to narrower rules for adjudicative and legislative jurisdiction.

A. *How are Charities Different? The Case Against Non-Unique General Jurisdiction*

First, consider three respects in which charities differ from other sorts of private organizations. The most obvious difference is that charities' stakeholders and officers cannot have any private interests in the financial expansion of the charitable enterprise. This obvious fact has two consequences. First, charities are distinctively dependent on the use of solidaristic or civic gratifications to raise capital: they must appeal to the potential donee's sense of the public interest (albeit tempered with offers of tee shirts and coffee mugs as well). Second, charities are uniquely dependent on public enforcement to insure that their officers comply with their fiduciary duties. There is no shareholder derivative suit available to enforce such duties on behalf of donors or other private interests, because donors and heirs of donors cannot have residual interests in the firm. Aside from their dependence on civic motivation, 501(c)(3) organizations are heavily regulated by the Internal Revenue Service, which enforces a series of rules barring officers from operating under conflicts of interest that rise to a private interest in the organization. Finally, both charitable solicitation and charities' decision-making structure are protected

(albeit in controversial and ill-defined ways) by First Amendment guarantees of expressive association.

I suggest that these characteristics counsel in favor of a narrow construction of states' adjudicative and legislative jurisdiction over non-resident charities. The reason is rooted in the criteria for sensible jurisdictional rules set forth in Part II. Recall that those criteria ask whether the non-resident party's costs of foregoing contacts with a state in order to avoid that state's laws exceed the costs to the state of having to endure those unregulated contacts. All of the characteristics of charities outlined above suggest that it is more costly for charities to endure grabby states than it is for states to endure under-regulated charities.

Consider, first, the problem of charities' constitutionally protected status. The costs of overlapping regulatory jurisdiction are high when the topic of regulation is charitable solicitation. The Court's First Amendment doctrine protects paid solicitors from certain bans on fee arrangements and certain types of disclosure requirements, while allowing states to impose other, more narrowly tailored regulations serving precisely the same end.<sup>79</sup> These doctrinal distinctions differ from much of First Amendment jurisprudence in that they use an "effects" rather than a "purpose-based" test for determining whether a regulation over-

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<sup>79</sup> States, for instance, may not prohibit paid solicitors from retaining a fixed percentage of donations as a fee, because such a prohibition might reduce the amount of charitable speech. Likewise, the state may not require solicitors to disclose their fee to potential donors. *Riley v. Federation for the Blind*, 487 U.S. 781, 793-95 (1988) However, the state *may* prohibit such solicitors from fraudulently misrepresenting the percentage of money that goes to charity, and they may force the charity to file detailed financial disclosure forms that the state makes available to the public. *Iid. At 800-01*. The basis for these fine distinctions is the Court's own determination that prophylactic rules barring certain compensation arrangements or requiring certain disclosures simply deters too much speech.

burdens protected speech.<sup>80</sup> If deterring “too much” speech, however, is the essence of the First Amendment violation, then overlapping grants of legislative jurisdiction to regulate solicitation can plainly have the prohibited effect. Pinellas County’s demand for elaborate information from solicitors imposes an enormous logistical burden on charities who may simply refuse to launch campaigns in the county rather than comply with the registration demands. Given that there are over 3,000 counties in the United States, the possibility of cumulative burdens loom large. The Court has rejected arguments rooted in the First Amendment for limiting jurisdiction to adjudicate defamation lawsuits.<sup>81</sup> But cumulative regulatory jurisdiction seems more burdensome than overlapping jurisdiction to adjudicate: The defendant who is subject to possible defamation lawsuits in multiple jurisdictions can invoke rules of claim and issue preclusion to reduce endless re-litigation, but it is not obvious how a non-profit organization can avoid expensive compliance with different jurisdictions’ registration requirements.

The dominant role of public authorities in enforcement of fiduciary obligations is a second reason to worry that overlapping regulatory jurisdiction will be especially costly. Unlike private corporations the fiduciary duties of which can be enforced through shareholders’ derivative lawsuits, charities lack stakeholders

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<sup>80</sup> See generally Jed Rubenfeld, *The First Amendment’s Purpose*, 53 Stan. L. Rev. 767 (2001); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996). Of course, it is standard fare for the Court to insist that even content-neutral regulation of speech must be narrowly tailored to accomplish a legitimate state objective. But the Court does not generally take this inquiry seriously

<sup>81</sup> *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

with such ready access to private litigation.<sup>82</sup> Litigation over charities' fiduciary duties, therefore, will tend to involve litigation by public authorities. To give different attorneys general the same power to enforce different regulations against the same non-profit organization is to invite regulatory chaos and an unseemly interjurisdictional tug-of-war between public authorities.<sup>83</sup>

On the other side of the ledger, the cost to states deprived of such jurisdiction are less severe. Charities are constrained by reputational concerns that play a smaller role in for-profit businesses. Moreover, the backdrop of IRS regulation places a floor on the degree to which a lax state can shelter fraudulent charities who would burden the rest of the nation with their corrupt blandishments. The IRS lacks personnel to enforce these requirements, but there is no reason in principle why the IRS could not recruit state agencies to assist in implementation of federal standards.<sup>84</sup>

How narrow must such jurisdiction be? It is best to work out the details of any jurisdictional rule in the context of specific cases. However, at the very least, it is reasonable to insist on strict limits on general regulatory jurisdiction, which presents the greatest risks of overlapping jurisdiction and conflicting regulatory

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<sup>82</sup>The beneficiaries of charities may have standing to sue to enforce an organization's charitable purpose, but the legal barriers to standing are formidable, given the judicial expectation that the attorneys general of the states have primary enforcement responsibility. For a survey and discussion of the cases, see Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 340-46 (2004);

<sup>83</sup>Such conflicts could, in theory, be resolved through the usual mechanism of removal of cases involving diverse parties to federal court and transfer to a single venue based on the decision of the panel on multi-district litigation. However, there has been a long-standing tradition of narrowly construing federal courts' statutory equitable powers over charitable trusts, *see, e.g., Fontain v. Ravenal*, 17 How. (58 U.S.) 369, 384 (1854) (disclaiming equitable powers to manage charitable bequest), and such a procedure is hardly a normal practice with charitable organizations.

<sup>84</sup>*Id.* at 426-27.

mandates.<sup>85</sup> As a modest proposal, the Court could prohibit states from exercising any sort of general jurisdiction over charitable organizations unless the organization bore a unique affiliation to the state such as incorporation or principal place of business. Otherwise, state authorities could be limited to enforcing laws the purpose of which is to control specific charitable assets or actions within the regulating jurisdiction.

Are such limitations consistent with the Court’s jurisdictional precedents? Here, the curse of the Court’s doctrinal vagueness is also blessing: Although notions like “significant contacts” and “substantial fairness” hardly provide clear guidance, they also do not foreclose sensible solutions. In order to stiffen the requirements for states’ exercising jurisdiction over charities, one might simply require that each of the ambiguities described above be resolved against jurisdiction for charitable organizations.

The Court’s own precedents, conflicting and nebulous as they are, supply justification for such a principle limiting jurisdiction to favor non-profits. In *Order of United Commercial Travelers v. Wolfe*,<sup>86</sup> the Court held that the laws governing an insurance contract issued by a fraternal society of traveling salesmen must be governed by the law of the fraternal society’s home state. In reaching this opinion,

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<sup>85</sup> As an example of an instance in which “greater uniformity of the states as to the principles governing the organization and operation of charities,” Fremont-Smith describes the simultaneous litigation by the respective state attorneys general against Banner Health Systems concerning Banner’s sale of hospitals in South Dakota, North Dakota, and New Mexico. *Id.* at 321-22. However, it is not obvious why any uniformity was necessary in the case: the attorneys general were each pursuing claims regarding different assets, arguing that the particular hospitals within their respective states were under a constructive trust and that, therefore, the proceeds could not be diverted from the purposes of that trust. There is nothing inconsistent about each state court reaching a different conclusion non the matter.

<sup>86</sup> 331 U.S. 586 (1947).

the Court emphasized that the bond between a fraternal organization and its members “differs from the ordinary contractual relationship between a policyholder and a separately owned corporate or 'stock' insurance company.”

According to the Court,

However, interwoven with their financial rights and obligations, they have other common interests incidental to their memberships, which give them a status toward one another that involves more mutuality of interest and more interdependence than arises from purely business and financial relationships. This creates – ‘The indivisible unity, between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, \* \* \*. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation.’<sup>87</sup>

Although the analogy between membership in a fraternal order and a marriage is a bit much, the reliance of the non-profit organization on appeals to the member’s civic sense is well-documented.<sup>88</sup> The critical premise of *Order of United*

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<sup>87</sup> *Wolfe*, 331 U.S. at 605-606.

<sup>88</sup> For an account, in particular, of how fraternal societies used civic motivations to preserve the insurance fund from fraudulent claims, see John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* chapter 3 (Cambridge: Harvard University Press, 2004).

*Commercial Travelers* is that the Court should construe the Constitution's Full Faith and Credit clause to confer special solicitude for the flourishing of such organizations above organizations based on "purely business and financial relationships." The Court justifies such a view of Full Faith and Credit by pointing to the motivations underlying non-commercial association – "more mutuality of interest and more interdependence" – suggesting that such organizations are simply more trustworthy than business associations and, therefore, pose less of a risk to the regulatory goals of states that would seek to extend their insurance regulations to such societies.

*Order of United Commercial Travelers* remains undisturbed as precedent: the decisions expanding legislative jurisdiction in the 1950s and 1960s expressly distinguished *OUCT* based on the distinction between for-profit and fraternal insurers. Although a leading conflicts-of-law treatise regards *OUCT*'s "continued validity" as "doubtful, given the Court's unwillingness to constitutionalize choice of law,"<sup>89</sup> this skepticism might be misplaced. Wholesale constitutionalization of any abstract theory of choice of law is certainly out of the question. But resolving a few doctrinal ambiguities against broad jurisdiction over a limited class of organizations might be more acceptable even to a cautious Court.

But to determine more precisely the consequences of the proposed narrow jurisdictional rule, it is helpful to take a brief look at two specific regulatory contexts – charities' internet solicitation and charities' internal organization.

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<sup>89</sup> Eugene Scoles *et al.*, *Conflict of Laws* §3.24, at 164, n.18 (4<sup>th</sup> ed. 2004).

B. *Jurisdiction to Adjudicate: Making Web-Based Solicitation Safe for Charities*

Recall ALF's problem described in Part II: the hypothetical Michigan-based charity maintained a website through which people in other states could make donations, and New York's attorney general sought to use this fact as a basis for dragging ALF into New York state court. Should state residents' accessing charitable websites have such a jurisdictional consequence for charities?

An enormous literature addresses this question not just for charitable websites but for any website.<sup>90</sup> The most persuasive position on the general issue of the internet and personal jurisdiction has been set forth by Professor Allan Stein,<sup>91</sup> who urges that the interactivity of the website – that is, the capacity of a viewer to make donations, or communicate, through the website – should be utterly irrelevant to jurisdiction. According to Professor Stein, the contrary view expressed in the widely followed decision of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*<sup>92</sup> is simply intellectually confused and practical harmful.

Accepting Professor Stein's general criticism of *Zippo*, one can still ask a narrower question: Should charitable websites receive special treatment when asking whether communications on the website should be the basis for jurisdiction? On this narrower question, I will suggest a position different from Professor Stein:

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<sup>90</sup> For samples of the literature, Note, *No Bad Puns: A Different Approach to the Problem of Personal Jurisdiction and the Internet*, 116 Harv. L. Rev. 1821 (2003). Symposium, *Personal Jurisdiction and the Internet*, 98 Nw. U. L. Rev. (2004); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199 (1998).

<sup>91</sup> Allan Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U.L.Rev. 411 (2004).

<sup>92</sup> 952 F.Supp. 1119 (W.D. Pa. 1997).

Even if the charity could feasibly screen out viewers from a particular state from accessing its website, the charity ought not to be amenable to jurisdiction in any state on the basis of a website unless the words on the website themselves constitute culpable behavior under state law.

First, consider (briefly, as Professor Stein has already done the work) the reasons for rejecting *Zippo*. On *Zippo*'s so-called "sliding scale" test, such a website can support personal jurisdiction if the defendant repeatedly and knowingly uses the website to enter into transactions with viewers in other states.<sup>93</sup> "Passive" websites that merely display information but do not allow direct interactions between website operator and viewer, by contrast, would not support jurisdiction. In the middle are websites that allow the exchange of information but not the consummation of commercial transactions. The theory underlying *Zippo* seems to be that, if a defendant deliberately casts their website "net" into the ocean of web surfers and knowingly and repeatedly catches consumers in this net from a particular state, then they have consented to jurisdiction in that state.

This analysis, however, assumes that a forum may force defendants to alter all of their extra-territorial behavior in every other state as a condition for showing lack of consent to jurisdiction in the forum. Such a definition of "consent," however, invades the sovereignty of every state in which the defendant has to alter her conduct, imposing what Jack Goldsmith calls "regulatory spillovers" on its sister states.<sup>94</sup> Kansas cannot make it a condition of avoiding jurisdiction in Kansas

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<sup>93</sup> *Zippo*, 952 F.Supp. at 1124.

<sup>94</sup> Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1200 (1998).

courts that the defendant cease to do business in Missouri: Such a rule would invade Missouri's prerogative to govern its own territory. This is true even if Kansans travel to Missouri to buy items illegal to purchase in Kansas. At most, Kansas can demand that the Missouri business take reasonable precautions to prevent spillover effects in Kansas. Likewise, Kansas cannot demand as the condition for escaping the Kansas courts' jurisdiction that a defendant make a website non-interactive in every state: Those other states, after all, may wish to encourage interactivity, and Kansas has no right to dictate those other states' website policies. Instead, Kansas can insist only that the website take reasonable – meaning cost-justified – precautions to prevent interstate spillovers.<sup>95</sup>

To define the sorts of precautions that websites ought to take, Professor Stein offers a different definition of web-based jurisdiction based on the defendant's capacity for what Stein calls "forum-differentiated behavior." Each state may rightfully insist that defendants modify its website to avoid imposing effects on that state that burden the state's valid regulatory interests, just so long as the modifications do not require the defendant to change its behavior outside the forum. The critical question, in other words, is whether the defendant can take steps to protect the forum state's valid regulatory interests without sacrificing the

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<sup>95</sup> The wholesale adoption of the *Zippo* "interactivity" test in NASCO's Charleston Principles for defining charities' obligations to register with state authorities is unfortunate in light not only of the logical flaws with the *Zippo* doctrine but also the increasing number of courts that have abandoned the doctrine. To the extent that the Charleston Principles allow charities simply to announce on their website that they are not soliciting funds from residents of a particular area, *see* Charleston Principles, III(B)(2)(b), then the Principles begin to resemble Professor Stein's test.

defendant's and other state's valid extra-forum interests.<sup>96</sup> For instance, a forum state can demand that a defendant bar the forum state's residents from accessing a website as the price for avoiding jurisdiction in the forum, just so long as the technology exists to screen out one state's residents without affecting the residents of other states.<sup>97</sup>

Should a charity be required, as the price for avoiding a forum's jurisdiction, to screen out a forum state's residents from its website if it can feasibly do so? Certainly, such a screening out of the forum state's residents is *sufficient* to protect the forum state's interests and thereby eliminate the forum's basis for jurisdiction. But is such a screening out *necessary*? The question is a close one, but I would suggest that, balancing the state's interest in self-protection and the defendant's (and non-forum states') interests in avoiding the forum's grabby jurisdictional rules, charities should not be obliged to screen anyone out. Instead, courts ought to adopt the narrowest reading of specific jurisdiction, subjecting charitable organizations to the jurisdiction of a forum on the basis of a website only if the actual words or images on the website violate the forum state's law.

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<sup>96</sup> Allan Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 Nw. U.L.Rev. 411, 428 (2004).

<sup>97</sup> Stein usefully notes that different internet media give defendants different levels of power to differentiate their behavior between different states. E-mail is, for instance, more targeted than listservs. *Id.* at 435-36 ("We thus see a spectrum of control. An individual email is a pure one-to-one communication. .... At the other end of the spectrum are mass communications facilitated by an intermediary such as listservs. The only way a participant can limit the breadth of the dissemination is by not using the medium. In the middle are web pages. The author of the web page has some technological capacity to control the reach of its dissemination, although those controls may themselves impose substantial costs on the operation of the web page").

The starting point for analysis is a basic distinction, offered by Professor Stein,<sup>98</sup> between two sorts of claims against charities. Some claims assert that web-based communications are themselves culpable conduct under state civil or criminal law: the words or pictures themselves constitute a part of the indictment or element in a complaint. As examples, consider claims alleging that a website contained defamatory, obscene, fraudulent, or trademark-diluting words or pictures. The moment that such pictures or words are viewed, the state's laws have been violated. By contrast, some claims merely assert that the web-based communication, although legally innocent in itself, was the but-for cause of the injury, usually in the sense that the website solicited a transaction or advertised some activity that led to an injury. As examples, consider claims that a state's residents responded to an advertisement for a resort on the internet and thereafter slipped and fell at the resort, suffering an allegedly tortious injury.

Considering the nature of charities, would it be unreasonable to adopt a strict rule barring jurisdiction over charities on the basis of the former sorts of contacts? Note that internet communications can lead to, but not be the basis for, an injury only if the state's resident responds to the solicitation. In this sense, the state's own resident must always consent to the transaction that leads to the injury. It is not obvious that the causal link between the advertisement and the injury should not be broken by some jurisdictional analogue to assumption of the risk. One's assessment of the issue will turn on the relative costs to non-resident charities in avoiding jurisdictional contacts and resident internet viewers, in enduring them.

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<sup>98</sup> *Id.* at 442-446.

Of course, any such limitation of charitable liability through the curtailing of vicarious liability builds a theory of causation into jurisdiction over which states are deeply divided in their substantive tort law. But, as noted above in Part III, such a bootstrapping of substantive norms into jurisdictional theories is inevitable, given that jurisdiction rests on theories of causation. All one can hope is that the norms that one enforces are simple enough to allow quick and cheap resolution at the outset of the case. The proposed jurisdictional rule suggested here has at least the virtue of simplicity. Note also that the case law is equivocal about whether an advertisement in nation-wide media is sufficient basis for jurisdiction in a state where that advertisement is the cause of the plaintiff's incurring an injury. If internet solicitation is regarded as nothing more than an advertisement in a national newspaper, then a rule barring jurisdiction solely on the basis of website communications that are not themselves elements of any offense against state law fits well into the existing case law.

C. *Jurisdiction to Legislate: The "Internal Affairs" Doctrine*

Consider, finally, the question of whether a state can require a non-resident charity to comply with the state's structural rules. Can California really enforcing its Non-Profit Integrity Act against a Massachusetts charity simply on the basis of the latter's solicitation of funds from Californians?

The constitutional doctrines are, of course, ambiguous. One might argue that *Edgar v. MITE* constitutionalizes the "internal affairs" doctrine, barring states from defining a corporation's rules governing its board, officers, and decision-

making procedures structure unless that corporation is incorporated under the state's law. But *Edgar* holds only that a state may not regulate stock transactions between non-resident corporations and non-resident shareholders concerning the stock of corporations having only tenuous connections to the state. Nothing in *Edgar*, for instance, prohibits a state from conditioning a charity's solicitation of funds from the state's residents on the charity's adhering to the state's preferred set of decision-making rules. Moreover, the "internal affairs" doctrine, according to customary conflicts-of-law principles, is the weakest of default rules that ceases to operate as soon as an "external" party is affected by a corporate decision.<sup>99</sup> If a corporation, because of its decision-making procedure, was likely to squander donor's contributions, then the state's efforts to protect potential donors from the solicitation of such corrupt organizations would technically fall within this capacious exception to the principle.

Whether California could condition solicitation on adherence to the state's own decision-making procedures, therefore, is an open question. As a doctrinal matter, such conditions on the transaction of charitable solicitation within the state would be framed as a problem of "unconstitutional conditions." But it is one of the murkiest and oldest questions of constitutional law to determine whether conditions for a corporation's transacting business are unconstitutional.<sup>100</sup> To

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<sup>99</sup> Restatement (Second,) Conflicts of Law § 301 ("The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties").

<sup>100</sup> See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657-58 (1981):

evaluate such an assertion of power, it is important to distinguish between a state's general and specific legislative jurisdictions. Charitable solicitation, however continuous or repeated, is not a plausible basis for general legislative jurisdiction. In the context of jurisdiction to adjudicate, the case law normally requires some permanent *physical* presence within the state – a building or set of employees who would count as an “office” of the regulated entity. *A fortiori* the courts ought to require far more of a presence for general legislative jurisdiction. In particular, states obviously impose extraordinary extra-territorial costs on charities – especially large-scale, multi-state charities that are prominent in healthcare – if they presume to dictate the charities' decision-making processes on the basis of non-unique contacts unrelated to those processes.

Therefore, the claim to regulate charities' decision-making processes on the basis of solicitation must be an assertion of some sort of specific jurisdiction. That is, the regulation of the charities' decision-making process must arise out of, or otherwise be related to, their solicitation of funds within the state. Such a connection between solicitation and observance of a state's decision-making

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“Some past decisions of this Court have held that a State may exclude a foreign corporation from doing business or acquiring or holding property within its borders. From this principle has arisen the theory that a State may attach such conditions as it chooses upon the grant of the privilege to do business within the State. While this theory would suggest that a State may exact any condition, no matter how onerous or otherwise unconstitutional, from a foreign corporation desiring to do business within it, this Court has also held that a State may not impose unconstitutional conditions on the grant of a privilege. These two principles are in obvious tension. If a State cannot impose unconstitutional conditions on the grant of a privilege, then its right to withhold the privilege is less than absolute. But if the State's right to withhold the privilege is absolute, then no one has the right to challenge the terms under which the State chooses to exercise that right. In view of this tension, it is not surprising that the Court's attempt to accommodate both principles has produced results that seem inconsistent or illogical.”

*Id.* (citations omitted).

procedures would seem to rest on the theory that, absent the compliance with the procedures, the money solicited would be badly or even corruptly spent. But the nexus between contact (solicitation) and regulation (of decision-making procedures) is remote. The actual solicitation will not be affected by compliance with the state's law: A charity could use precisely the same telephone script or letter to solicit funds regardless of its board's decision-making procedures. Moreover, the threatened injury justifying oversight of the board's decision-making procedures cannot have occurred at the moment of solicitation. One could not call such an assertion of jurisdiction 'specific' except in most attenuated sense of the term. With equal reason, California could ban the production of tobacco within the territory of North Carolina on the theory that tobacco production leads to the smuggling of cigarettes across state lines in violation of California's anti-smoking laws.

To evaluate such an assertion of "specific" jurisdiction, imagine that a state attorney general attempts to prevent the misuse of funds solicited from Californians much more directly – by replacing members of the board of a non-resident charity that has admittedly engaged in corrupt behavior.<sup>101</sup> Such an assertion of extra-territorial authority over a charity that was unconnected to the regulating state except by its solicitation of money would obviously exceed the attorney general's jurisdiction: It is well-established that each attorney general supervises only those charities that are actually located within the state in some sense – that is, either incorporated within the state, have their principal place of business within the state,

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<sup>101</sup> For examples of attorneys general replacing charitable boards' members, see Evelyn Brody, *Whose Public Parochialism and Paternalism in State Charity Law Enforcement*, 79 Ind. L.J. 937, 1004-08 (2004)

operate out of administrative offices within the state, etc.<sup>102</sup> But if a state attorney general may not so directly control a board to prevent corrupt expenditures, then one could argue that the attorney general also should not be permitted to leverage control over solicitation within the state to exercise similar control.

I write “one could argue” advisedly. As with most questions concerning the constitutional limits on legislative jurisdiction, the answer to this question is uncertain. However, the ambiguities should be viewed in light of charitable organizations’ constitutional entitlements, their supervision by the IRS, the high risk of inter-jurisdictional conflicts between public officers of different states, and charities’ own sensitivity to civic norms. In this light, it is difficult to resist the conclusion that these ambiguities are best resolved against broad overlapping state jurisdiction to supervise, directly or indirectly, charities’ decision-making processes.

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<sup>102</sup> *American Center for Education, Inc. v. Cavnar*, 80 Cal. App. 3d 476, 145 Cal. Rptr. 736 (1978)(when a charity is organized by California residents, administered from California offices and conducts most of its activity in California, then California courts may exercise jurisdiction over charity despite incorporation under Delaware law).