

Concepts before Percepts: The Central Place of Doctrine in Legal Scholarship

Richard A. Epstein†

Modern legal scholarship often relegates doctrinal work to a lower-status tier than empirical research, economic modeling, and philosophical speculation. That move is a big mistake. It is only by knowing how cases fit together with each other and with some overarching theory of social welfare that it is possible to be sensible in applying current doctrine to legal disputes and in formulating alternative approaches. Initial theoretical mistakes cannot be cured by their repeated application, which only renders the law more confused and indeterminate than before. The consequences of root error are accordingly examined in three areas: consequential damages, personal jurisdiction, and constitutional standing. Basic errors in each of these areas lead to major distortions of legal doctrine, which in turn lead to undesirable social outcomes.

INTRODUCTION

Today, the legal academy is awash in novel approaches to law, driven by a deep distaste for traditional doctrinal analysis. There is a strong push for empirical research, economic modeling, and philosophical speculation, all at the expense of traditional doctrinal analysis based on close reading of decided cases. That latter task is often derided as simpleminded, but done at the highest level it requires a deep understanding of how various legal doctrines interlock with both each other and general normative theory. In dealing with these questions, there are always the issues of how the particular relates to the general and how deductive reasoning relates to analogical reasoning. Both inquiries surely are important. On this score, I think of the traditional Kantian observation that concepts without percepts are

† Laurence A. Tisch Professor of Law, New York University School of Law; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer, The University of Chicago Law School. My thanks to Bijan Aboutorabi, The University of Chicago Law School Class of 2018, and Philip Cooper, The University of Chicago Law School Class of 2017, for their valuable research assistance.

empty; but percepts without concepts are blind.¹ So we need both. Yet it is critical to set out the right sequencing between them. Chronologically, legal doctrine evolves in a chicken-and-egg fashion, as hard facts present doctrinal challenges, which are understood only when tested against further cases. But when the cases come thick and fast, it becomes ever more important to begin with a strong conceptual framework that fits these particular fact patterns to a larger whole.

Too often, modern legal scholarship focuses on the wrong issues by neglecting matters of first principle. Building a legal system is like building a house or writing a song. The architect who drafts an unsound first sketch of a building will never correct that mistake by fiddling with the size of the doors or the locations of the electrical outlets. A musician who composes a lifeless melody cannot make up that initial shortfall by writing perfect harmonies. So too, a judge, lawyer, or professor who does not understand the major premise of any given area of law will always go astray. On this point, the only way to develop that initial conception is to inquire about the proper goal of the system—just what is it trying to maximize, and why? This initial step is almost always a conceptual matter, and if it is wrongly decided, then, as with architecture and music, every subsequent decision will suffer from the primary inconsistencies. If, however, it is rightly decided, then the process of analogy and comparison can proceed apace because it works off a sound base.² Indeed, the best way to understand the use of analogy is that it acts as an amplification system for the basic proposition,³ whether it applies to sound or erroneous major premises. Analogies make good rules better and bad rules worse.

The operation of this combined system pervades every area of both private and public law. Indeed, all too often public law decisions are infected by misapplication and misunderstanding of the underlying private law principles. The institutional ramifications are enormous. Indeed, the difficulties are compounded by the fact that modern Supreme Court justices and lower court judges have been raised in a hermetically sealed public law

¹ Immanuel Kant, *Critique of Pure Reason* 93 (Macmillan 1958) (Norman Kemp Smith, trans) (“Thoughts without content are empty, intuitions without concepts are blind.”).

² See Frederick Schauer and Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U Chi L Rev 249, 251–54 (2017) (describing the traditional method of legal analogical reasoning).

³ See Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv L Rev 741, 744–45 (1993).

tradition that pays little, if any, attention to private law conceptions.⁴ Empirical studies never touch these conceptual matters, so basic mistakes are in effect beyond correction.

It is therefore necessary to reconnect public with private law. Yet how? One defect in the full articulation of private law principles is that their operation can be obscured by an uncritical appeal to a strong set of intuitions about autonomy, equality, or racial justice. But these notions should not simply be accepted on faith. They must serve a social end—namely, to maximize the welfare of all individuals under inevitable conditions of scarcity. Accordingly, neither egoism nor radical individualism is a viable social philosophy. It is not enough to say that X is good if A desires X. The clash of desires between A and everyone else is also an essential part of the story. The dominant methodological challenge, therefore, is to construct an analysis strong enough to deal with these ever-present clashing desires without ultimately resting on ad hoc intuitions.

To be sure, these intuitions are often indispensable stepping-stones to understanding how the overall system works. Yet they are not sufficient substitutes for reasoned judgments. This tension is evident from the Roman law tradition, whose constant appeals to natural reason (*ratio naturalis*) stand in for welfarist arguments that the Roman jurists, given their contemporary economic tools, could not articulate.⁵ They instead relied on the durability of practices within a particular society, as well as the commonality of practices across different and unrelated legal systems. But neither of these signposts alone, nor the two taken together, completes the journey. The great advantage of the Pareto and Kaldor-Hicks measures of social welfare is that they respect the subjectivity of individual preferences while using a compensation formula to measure collective social welfare.⁶

The Pareto formula achieves this end by insisting that any state of affairs in which one individual is left better off and no individual is left worse off should be preferred to its alternative.⁷ The Kaldor-Hicks formula allows for changes that make one person better off and another worse off, so long as it is possible

⁴ See Chaim Saiman, *Public Law, Private Law, and Legal Science*, 56 Am J Comp L 691, 692–97 (2008) (describing the movement in twentieth-century American law toward “public law modes of reasoning”).

⁵ See, for example, Gaius, *The Institutes of Gaius: Part I* bk I, § 1 at 2 (Clarendon 1946) (Francis de Zulueta, ed).

⁶ See Richard A. Posner, *Economic Analysis of Law* 13–17 (Aspen 5th ed 1998).

⁷ *Id.* at 14.

in principle for the winners to compensate the losers so that all parties regard themselves as better off than before under their own subjective measures. Both formulas preclude negative-sum games but respond differently to positive-sum games. With Pareto, each actor has to be left better off. With Kaldor-Hicks, hypothetical compensation from winners to losers, with some left over, means that the total is positive sum, even if the position of some players turns out negative.⁸

Under either measure, the central task is to look at some ex ante state of affairs and then to ask, person by person, whether some legal initiative works an improvement. It goes without saying that any initiative that flunks Kaldor-Hicks (because it is negative sum) also flunks Pareto, even if the converse is not true. All voluntary contracts satisfy the more exacting Pareto standard as between the parties.⁹ Hence, I shall break the world into two classes of cases: those involving voluntary transactions between two (or more) parties, and those involving interactions between strangers, that is, individuals with no antecedent relationship between them. I hope to show how this simple framework demonstrates that lines of doctrinal development are profoundly misguided, and why these fundamental errors are likely to have major negative consequences, even though it is notoriously difficult to measure empirically the global losses that come from the faulty analysis of such basic propositions as “aggression is prima facie wrong” and “promises should be prima facie enforceable.”

In this Essay, I look at three initial missteps that historically have proved most difficult to correct. All three show how errors that creep into the private law have infected the public law. The first of these is the role of contract damages. The second concerns the rules governing personal jurisdiction in private litigation. The third involves the rules of standing in both private and public laws. These are by no means the only cases one could choose. The difference between broad and narrow definitions of product defectiveness is another.¹⁰ The supposed distinction

⁸ See *id.* at 15.

⁹ See Qi Zhou, *An Economic Perspective on Legal Remedies for Unconscionable Contracts*, in Mel Kenny, James Devenney, and Lorna Fox O'Mahony, eds., *Unconscionability in European Private Financial Transactions: Protecting the Vulnerable* 129, 132 (Cambridge 2010).

¹⁰ The broad definition of defectiveness allows someone to call all cigarettes defective under a risk/utility standard because they contain tar and nicotine. The traditional definition of a latent condition harmful in ordinary use brands as defective only cigarettes that

between physical and regulatory takings is yet another example of an intellectual train wreck wrought by an unsound initial decision.¹¹ But for these purposes, three examples will suffice.

I. CONTRACT DAMAGES

The initial premise of any contractual analysis is that any bargain between two parties is formed to maximize the joint welfare of both parties from the ex ante perspective. The rules on contract damages are subject to this constraint, just as are the rules governing formation, interpretation, mistake, frustration, and conditions. This simple assumption should make us wary of any a priori claims that some natural, Aristotelian typology can adequately treat the full range of damages issues. Nonetheless, the standard account of contract damages advanced by Professor Lon Fuller and William Perdue in the 1930s¹² makes just this mistake. Fuller and Perdue divided damage remedies into three classes:¹³ *restitution*, to restore the money paid or the thing delivered to the other party; *reliance*, to make the innocent party as well-off after the breach as he was before contract formation; and *expectation*, “to put the plaintiff in as good a position as he would have occupied had the defendant performed his promise.”¹⁴ Yet this elegant classification effort fails for one reason: Fuller and Perdue never explain how these damage provisions benefit the parties in particular cases, or why they would voluntarily limit themselves to a menu that contains only three options. Fuller and Perdue get things backward; the better way to understand contract damages is to see what damage provisions informed parties include in their agreements and then to seek to explain why they are there. That inquiry yields, with respect to consequential damages, the

are adulterated in some fashion. See, for example, Restatement (Second) of Torts § 402A, comment i (1964). The difference between these two standards is at least a millionfold. For the most influential articulation of the broader definition, see John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss L J* 825, 837–38 (1973). For my defense of the older standard, see Richard A. Epstein, *The Risks of Risk/Utility*, 48 *Ohio St L J* 469, 474–77 (1987).

¹¹ See, for example, *Penn Central Transportation Co v New York City*, 438 US 104, 128–35 (1978). For one critique, see Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect between Public and Private Law*, 30 *Touro L Rev* 265, 281–85 (2014).

¹² See L.L. Fuller and William R. Perdue Jr, *The Reliance Interest in Contract Damages: 1*, 46 *Yale L J* 52, 53–57 (1936).

¹³ *Id* at 53–54.

¹⁴ *Id* at 54.

observation that the most common, battle-tested, and refined provisions often use explicit, liquidated measures.¹⁵ The question is which provisions and why.

The dominant constraint on contract damages is that a defendant in breach must be able to pay damages out of the revenues that he receives from the other party under the contract. In some cases, that constraint will not eliminate an award of consequential damages. One notable situation in which expectation damages work arises when a seller in breach pays the contract-market differential without any allowance for consequential damages when the buyer can cover promptly in the market. The expectation measure of damages means that the seller has no incentive to breach because he will have to disgorge his profits to the innocent buyer. The revenue constraint on the seller is also met, because he can use the proceeds from the improper sale to fund (either directly or through insurance) the damages he has to pay for breaching the initial contract. At the same time, the mitigation requirement imposed on the buyer—the purchase of cover—does not open up any opportunities for gaming, as the market price needed to obtain the perfect substitute is easily verified. In this context, the widely adopted expectation rule functions efficiently.

Yet the same optimistic conclusion does not hold in cases in which the innocent buyer cannot cover in the event of breach. In these cases, consequential damages, perhaps far in excess of the contract price, arise. For example, a seller's camera film could fail on a nature excursion in a remote location, producing from an expensive venture lost profits far exceeding the cost of the film. Requiring the seller to compensate for this loss is untenable, as the resulting astronomical increase in the price of film needed to offset the expected loss could destroy the market for all prospective low-risk buyers with more mundane uses. Price changes will not work, so other devices are necessary to keep buyers in the market. Too often, the standard conceptual response tweaks the formula for expectation damages to allow them only in some subclass of cases, thereby reducing the pressure on the initial revenue constraint.

¹⁵ For an illustration involving domain names wherein no such provision was included, see generally *Kremen v Cohen*, 337 F3d 1024 (9th Cir 2003). For the aftermath, see Richard A. Epstein, *The Roman Law of Cyberconversion*, 2005 Mich St L Rev 103, 119 (noting that the domain name registrar from *Kremen* subsequently included a prohibition against consequential damages in its limitation of liability).

Just this approach is taken in *Hadley v Baxendale*,¹⁶ which denied the innocent shipper of goods lost profits when his mill was idled for want of the timely redelivery by the carrier of a broken crankshaft sent off for repair.¹⁷ The court determined damages using a restrictive standard that allowed recovery only for those losses jointly contemplated by the parties.¹⁸ The weakness in *Hadley's* approach should be apparent from this simple observation. The sole use of the formula in *Hadley* was to rule out damages measured by lost profits. This ad hoc rule did nothing, however, to specify the correct measure of damages and its method of calculation. Nor did it explain how this rule could be generalized to other commercial settings. The reason is clear enough: no generalized form of words can provide the correct measure of damage by resort to some abstract schema that bears no relationship to the contractual objectives of the parties. What is needed is a specific contractual provision, typically found today in many standard contracts for the carriage of goods, that specifies in advance the maximum amount that can be recovered in the event of shipping errors.

Precise damages formulas allow the parties to control two risks simultaneously: they reduce the probability of breach and mitigate adverse consequences associated with breach. The liquidated damages formula works effectively on both counts. Imagine the contract imposed a fixed loss of \$1,000 on the carrier in *Hadley* for delay. Because the shipper also knows the cost of shipping, he can infer the probability of breach from those two pieces of information. More specifically, if the price of shipping is \$10, the shipper can calculate a 1 percent chance of loss. (Given the costs of contract performance, like tracking the goods, that estimate is surely high; the actual number is probably less than a hundredth of that.) In effect, the greater the stipulated damages, the stronger the signal of the carrier's reliability.

The second problem involves controlling the behavior of the shipper, both before and after breach. The *Hadley* doctrine requires the shipper to mitigate damages by taking subsequent steps to reduce the severity of the loss.¹⁹ Ideally, those expenditures would be made until the last dollar spent in mitigation equals the last dollar incurred in losses. In the easy case, whenever a

¹⁶ 156 Eng Rep 145 (Ex 1854).

¹⁷ *Id.* at 145–46, 151–52.

¹⁸ *Id.* at 151.

¹⁹ *Id.*

carrier, buyer, or employer announces that he intends to breach, the shipper, seller, or employee must stop work immediately and receive damages equal to the costs expended, future profits, and termination costs, so that the traditional expectation damages formula works well.²⁰ However, that formula does not apply to cases like *Hadley*, in which the innocent party has to engage in subsequent actions to mitigate the loss, such as finding a substitute crankshaft. These delicate calculations are always suspect; the shipper may expend excessive amounts in mitigation and seek to recover them from the carrier. Conversely, the shipper could spend too little in mitigation, knowing that the residual loss falls on the carrier. The use of a fixed payment for breach solves these incentive problems. The shipper gets the same amount after breach no matter what course of action he takes; there is a total separation between the damages recoverable and the steps taken in mitigation, removing the problem of moral hazard and encouraging the buyer to take only cost-effective steps. In addition, the shipper now knows that his expected losses upon breach will designedly be far greater than the liquidated award, so he will adopt behaviors *prior* to breach to control post-breach damages. Thus, it is common to ship two versions of a key part to a plant by separate carriers taking separate routes, avoiding *Hadley's* business-interruption problem.

The key point, however, is that there is nothing the law can do to select the number or formula that fits every liquidated damages clause. That is a matter for private ordering, and the great danger of treating the Fuller and Perdue formula as the initial benchmark is that private provisions stipulating accurate liquidated damages can come to be viewed as suspect,²¹ when in fact they offer a neat solution to the problem.

As is often the case, the way courts understand these private law principles carries over to public law issues. Thus, in *Omnia Commercial Co v United States*,²² a group of individuals, "the associates," sold to Omnia all their rights to receive some

²⁰ See, for example, *Clark v Marsiglia*, 1 Denio 317, 318–19 (NY App 1845) (*per curiam*) (denying a painting cleaner recovery for the value of work done after the defendant announced his intention to breach the contract).

²¹ See, for example, UCC § 2-718 (allowing liquidated damages "only at an amount which is reasonable"); Restatement (Second) of Contracts § 356 (1979) (mandating that liquidated damages be "reasonable"). See also *Lake River Corp v Carborundum Co*, 769 F2d 1284, 1288 (7th Cir 1985) (noting the "[d]eep . . . hostility to penalty clauses [] in the common law").

²² 261 US 502 (1923).

eighteen thousand tons of steel due to them under a contract with the Allegheny Steel Company for the sum of \$990,000.²³ That positive price reflected the increase in value at the time of the purchase, which was attributable to the surge in the demand for steel on the country's entry into World War I.²⁴ The United States requisitioned Allegheny's entire steel plate production, and it appears that it paid Allegheny the amount that it would have received had it delivered the steel to Omnia.²⁵ This last point is left somewhat hanging in the opinion, which does not state the amount paid or the grounds by which it was determined. But it does make it clear that Omnia received zero compensation when the net positive value of its contract was undone by the government intervention, which gutted the contract of assignment.²⁶

In principle, the correct sum of damage for the taking of the steel should be its fair market value at the time at which it is taken, at which point Allegheny could collect its contract price from the government, while Omnia received the fair market value of its contract. To add to the confusion, the plaintiffs did not claim for the fair market value, but instead asked for the \$990,000 they paid to take the assignment of the contract.²⁷ That measure of damages is incorrect, because the value of the contract could have fluctuated because of market forces between the time of the assignment and the time of the taking. But instead of correcting this error, it appears that the Court allowed compensation only to Allegheny, and then only for the amount that it would have received under the contract.

Unfortunately, the exact dollar figures are not given, but it is clear that if the government had paid an amount equal to the seller's sale price plus this assignment fee, the case would have never arisen, even if it had selected an incorrect figure. The government could have placed this sum, or alternatively the fair market value of the steel, into court under an interpleader action, and then let it be paid out between the parties in accordance with their respective contractual interests.²⁸ Instead, the purpose of its maneuver to blow up the agreement had to be to acquire the

²³ Id at 503.

²⁴ Id at 507.

²⁵ Id at 503.

²⁶ *Omnia*, 261 US at 507–08.

²⁷ Id at 503.

²⁸ For an example of this approach in practice, see *White v Federal Deposit Insurance Corp*, 19 F3d 249, 251 (5th Cir 1994).

steel at below-market value, knowing that the seller could not complain given that it received the same amount it would have if the steel had been delivered to Omnia. In any event, Omnia sued for its lost payments to obtain the assignment, but its claim was denied on the ground that the government's action had so discharged the contract that no money was owed for the loss of its value.²⁹

The entire transaction is fishy from the outset because it gives the government a bargain price on the steel, but only during the executory period. Indeed, if the contract had been discharged because of impossibility of performance, the government should have had to pay Allegheny the full value of the steel; Omnia could then have sued Allegheny for the loss of its contract value, so that both constraints of the deal would be satisfied. Under this transaction, the government pays compensation only for the steel taken, and the buyer gets to keep the benefit of its bargain notwithstanding the disruption of the transaction.

So what drove the Court's analysis? Justice George Sutherland wrote:

The Government took over during the war railroads, steel mills, ship yards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.³⁰

This argument looks plausible only because it confuses the two kinds of expectation damages mentioned above. There is, in fact, no parade of horrors if the government must pay the fair market value of the goods or services that it takes, even when the value of this product is inflated by war. But it would be a very different thing if the government were forced to pay consequential damages when the war makes it impossible for independent parties to honor their own promises going forward. The request here, however, is not for the government to cover Omnia's lost profits from a downstream buyer. The requisition does make further performances impossible, which means that

²⁹ *Omnia*, 261 US at 511.

³⁰ *Id.* at 513.

compensation helps reduce potential dislocations. But thereafter, it is well understood that the usual rule of frustration applies as much to government actions as natural disasters, so that the entire roster of private parties is forced to eat their own costs. This doctrine of frustration goes back at least to *Taylor v Caldwell*.³¹ There is no point in shifting dollars around when the damages remedy in the ex post world cannot alter primary conduct, which is certainly the case with cases of nonperformance brought about by wartime interventions. Instead, the proper approach is to let the parties negotiate between themselves as to how to respond to these governmental disruptions, just as they deal with disruptions brought about by acts of God.

The key point here is that once the correct private law theory is understood, the public law analysis becomes much more tractable because it can build on the private precedents. On this view, *Omnia* should come out the other way, by awarding the plaintiff just compensation under the Takings Clause equal to the value of its lost expectation for the loss of its right to claim either damages or specific performance under the underlying contract. There are no “appalling consequences” to this doctrine once its full implications are understood. But this constitutional error propagated itself when *Omnia* was uncritically cited, for example, by Justice Felix Frankfurter in *Kimball Laundry Co v United States*,³² for the highly dubious proposition that “loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.”³³ But goodwill has clear market value that does not depend on some idiosyncratic set of forward-looking transactions. The loss of goodwill from the destruction of a business should be compensable under the private law. Get the private law wrong, and the public law suffers in consequence, in this instance by an excessive willingness to condemn private property.

³¹ 122 Eng Rep 309, 315 (QB 1863) (excusing performance of a contract to rent a music hall after it was destroyed by a fire).

³² 338 US 1 (1949).

³³ Id at 5. This proposition is subject to the obvious criticism that goodwill is of course capable of valuation and is transferable. One needs only to think of the principles underlying trademark law. See generally, for example, Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 BU L Rev 547 (2006).

II. PERSONAL JURISDICTION

Every court must necessarily determine the scope of its own jurisdiction: which cases the court should hear, and which it should turn away.³⁴ This question raises two other considerations. Does the court wish to hold itself open to controversies that arise anywhere in the world—as it might do, for example, with respect to disputes on the high seas? Next, under what circumstances can one party haul another into a particular court against his will? Obviously, without such compulsion a system of law is at an end. But which cases belong in which court? And why?

The American analysis of personal jurisdiction got off on the wrong foot in *Pennoyer v Neff*.³⁵ There, John H. Mitchell supplied services in Oregon to Marcus Neff for less than \$300.³⁶ Neff defaulted on the payment and left the state.³⁷ Mitchell then sued him by publishing notice in Oregon under Oregon law.³⁸ He did not attempt to give personal notice to Neff, who was at that time in California.³⁹ Mitchell obtained a default judgment and satisfied it by seizing Neff's land in Oregon, which he eventually assigned to Sylvester Pennoyer.⁴⁰ Neff then sued to reclaim the land on the theory that the Oregon court lacked personal jurisdiction over him in the prior case.⁴¹ Justice Stephen Johnson Field agreed with Neff in these resounding terms:

The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this Court, an illegitimate assumption of power, and be resisted as mere abuse.⁴²

That result would surely be correct if Neff lacked prior dealings with anyone inside Oregon; if one state could claim jurisdiction over any transaction that occurred anywhere, so could all others. Territoriality is therefore a key bulwark in the effort to

³⁴ For my more expanded account of these issues, see generally Richard A. Epstein, *Consent, Not Power, as the Basis of Jurisdiction*, 2001 U Chi Legal F 1.

³⁵ 95 US 714 (1878).

³⁶ *Id.* at 719.

³⁷ See *id.* at 716–17.

³⁸ *Id.* at 717.

³⁹ *Pennoyer*, 95 US at 717.

⁴⁰ *Id.* at 719–20.

⁴¹ *Id.* at 721–22.

⁴² *Id.* at 720.

create equal power among rival sovereigns as a safeguard against political turmoil.⁴³ In *Pennoyer*, however, Oregon was the only state associated with both parties at the time of the formation of their deal.⁴⁴ At this point, the correct first move is to ask: What choice of personal jurisdiction between these two parties is efficient in the ex ante state of the world? In this way, the analysis tracks what should be the first move in the realm of consequential damages; that is, to ask what measure of damages the parties would have selected based on the information available at the time of contract formation.

In an ordinary commercial contract, the parties are generally entitled to choose whatever jurisdiction they want, so long as that jurisdiction will have them. When that is done explicitly, the correct rule is to abide by that choice in the absence of any form of contractual abuse. Thus, in *Carnival Cruise Lines, Inc v Shute*,⁴⁵ the ex ante contractual rules on jurisdiction and choice of law were binding in accidents that took place on the high seas outside of US jurisdiction in the absence of any sharp practice.⁴⁶ In the event that the parties are silent, the correct gap-filling measure is to pick the jurisdiction that maximizes the joint welfare of the parties from the ex ante perspective. Under this approach, the analysis shifts from the time when Mitchell sued Neff to the time when the parties struck their initial deal in Oregon. Ex ante, it is generally uncertain which of the two parties to an executory agreement will be in breach, so both parties from behind the veil of ignorance prefer the rule that minimizes the costs of enforcing a contract to be performed in a contemplated location. From this standpoint, is there any doubt that Oregon is the optimal place for litigation? Neff's decision to flee to (or perhaps just leave for) California is a good occasion to insist

⁴³ See *Underhill v Hernandez*, 168 US 250, 252 (1897):

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

⁴⁴ See Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash L Rev 479, 481–83 (1987) (noting that Neff came to Oregon from Iowa, while Mitchell had previous connections to Pennsylvania and California).

⁴⁵ 499 US 585 (1991).

⁴⁶ *Id.* at 595. For the opposite situation, in which a well-hidden and excessively burdensome arbitration provision was invalidated, see *Brower v Gateway 2000, Inc*, 676 NYS2d 569, 575 (NY App 1998).

on the proper ex ante allocation, for otherwise the unilateral action of one contracting party would defeat the legitimate expectations of the other in a classic case of contractual opportunism. To be sure, notice of suit is required, as in intrastate disputes.⁴⁷ But Neff had the requisite constructive notice even though Mitchell could not locate him, removing any due process concern of fundamental unfairness.⁴⁸

To be sure, the contractual approach does not necessarily require that Oregon be the *only* state where suit could be brought. Unless there were contractual arrangements to the contrary, Mitchell should also be able to sue Neff in any state in which the latter man took up residence—although Neff could not sue Mitchell in Neff's new state. While reading implied terms into incomplete contracts often presents hard cases, *Pennoyer* was not one. Yet at no point in *Pennoyer* does Field even ask the right question, thanks to his misplaced concern with the inherent territorial limitations of jurisdiction under the Due Process Clause of the Fourteenth Amendment⁴⁹—which, ironically, had not been adopted at the time the parties contracted or the trial court entered its initial judgment.⁵⁰

This contractual approach does not, of course, apply to non-contractual disputes—for example, disputes over the ownership of land, in which the antecedent question is the location of the land itself. Thus, the contractual approach ought not apply to the quasi in rem jurisdiction invoked in *Pennoyer*, in which Neff's land was unrelated to the lawsuit.⁵¹ From the ex ante perspective, quasi in rem jurisdiction offers a terrible fit, because the property seized had no necessary connection to the formation or performance of the underlying contract. To be sure, that focal-point equilibrium might be the headquarters of a corporation whose shares are seized in satisfaction of a claim involving the corporation. But that conclusion holds only if the corporate charter identified that location for all such transactions, which is not likely to be the case for disputes that arise out of the purchase and sale of corporate shares in some remote

⁴⁷ See generally *Mullane v Central Hanover Bank & Trust Co*, 339 US 306 (1950).

⁴⁸ *Pennoyer*, 95 US at 719–20. See also *Neff v Pennoyer*, 17 F Cases 1279, 1285 (CC D Or 1875).

⁴⁹ US Const Amend XIV, § 1.

⁵⁰ *Pennoyer*, 95 US at 719.

⁵¹ See *id* at 719–20.

location, even though that jurisdiction might be appropriate for derivative suits concerned with the director's behavior.⁵²

Getting the initial theory right helps clarify later Supreme Court cases that do not jibe with *Pennoyer's* faulty ex post analysis. *International Shoe Co v Washington*⁵³ considered whether International Shoe, which was headquartered in St. Louis and incorporated in Delaware, had sufficient contacts with the state of Washington to subject it to jurisdiction in Washington courts for contributions to the state unemployment fund, consistent with the due process requirements of the Fourteenth Amendment.⁵⁴

The hard question is why the case even reached the Supreme Court. To be sure, Washington exerted its monopoly power over International Shoe, but only in connection with the company's in-state activities. At this point, an optimal contract clearly would allow Washington to pursue International Shoe in the place where it did business, but only to the extent of the business done within the state, which is all that Washington cared about. The state had no reason to insist on exercising jurisdiction over other transactions that could hurt International Shoe but not help it. So there was no need to resort to a test insisting that, "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁵⁵ This amorphous formula could easily be interpreted to subject International Shoe to Washington jurisdiction in unrelated disputes that would be more properly brought in Missouri, its home base. By contrast, the contractual approach clearly explains why there should be special jurisdiction in this case, but no general jurisdiction extending to unrelated disputes.

The same approach also explains *McGee v International Life Insurance Co*,⁵⁶ in which the defendant insurer should, absent

⁵² In *Shaffer v Heitner*, 433 US 186 (1977), the Supreme Court held that simple ownership of stock by members of the board of directors of a corporation incorporated in Delaware did not give the state jurisdiction over the directors, most of whom were not residents of the state. See *id* at 216. But if these directors were widely dispersed, from the ex ante perspective, Delaware might be a focal-point jurisdiction on implied contractual grounds that do not involve quasi in rem jurisdiction.

⁵³ 326 US 310 (1945).

⁵⁴ *Id* at 311–12.

⁵⁵ *Id* at 316, quoting *Milliken v Meyer*, 311 US 457, 463 (1940).

⁵⁶ 355 US 220 (1957).

explicit provisions to the contrary, be amenable to suit in the state where it sold policies, but again only at the insistence of the local resident Lulu McGee, not others who might seek to piggyback on her claim.⁵⁷ A different situation would arise if McGee moved to another state where International Life did not do business, as with Neff's unilateral relocation in *Pennoyer*. This insight explains why *McGee's* follow-up case, *Hanson v Denckla*,⁵⁸ was rightly decided when it denied personal jurisdiction over the defendant trustee. A settlor moved to Florida after forming a Delaware trust.⁵⁹ The trustee was an indispensable party to any dispute over the disposition of trust assets.⁶⁰ The Supreme Court held that a Florida court's resolution of a will dispute did not bind the trustee.⁶¹ Once again, the unilateral movement of one party out of the jurisdiction did not let that party impose its jurisdictional preferences on other parties in the absence of specific consent. The minimum-contacts test of *International Shoe* should be beside the point given the ex ante economics of the transaction.

The Court's failure to consistently follow the ex ante approach also explains the unfortunate decision in *Burnham v Superior Court of California, County of Marin*,⁶² in which Justice Antonin Scalia relied on *Pennoyer's* territorial principle to permit California to assert jurisdiction over nonresidents who are physically in the state for a brief time, even with regard to an unrelated custody suit originating in New Jersey.⁶³ The defendant claimed that the territorial rule did not apply under *International Shoe* because he did not have continuous and systematic contacts with California; however, the Court found this irrelevant whenever there was actual physical presence.⁶⁴

The correct ex ante approach would have asked this simple question: Was there implied consent to California jurisdiction when a couple had separated in New Jersey with an understanding that the wife would thereafter file for divorce pursuant to a prior agreement?⁶⁵ Scalia, however, ignored that question.

⁵⁷ See id at 223.

⁵⁸ 357 US 235 (1958).

⁵⁹ Id at 238.

⁶⁰ Id at 254.

⁶¹ Id at 251.

⁶² 495 US 604 (1990).

⁶³ See id at 610–16 (Scalia) (plurality).

⁶⁴ See id at 619 (Scalia) (plurality).

⁶⁵ See id at 607 (Scalia) (plurality).

Nonetheless, the straightforward *ex ante* analysis holds that the litigation should proceed in the place where it was initiated, absent evidence to the contrary, which does not include the defendant's fortuitous appearance in California. To this day, *Pennoyer's* territorial fixation permits "tag" jurisdiction when it makes no sense, all because *Burnham* missed all the relevant *ex ante* considerations.

III. STANDING

The analysis of the law of standing—which, like the discussion of jurisdiction, is concerned with which claims will be allowed to go forward, and which will be stifled without reaching the merits—follows exactly the same path. Modern American constitutional law takes as a bedrock proposition that a plaintiff must have standing against a given defendant to maintain suit. However, this principle of *locus standi* long predates the ratification of the American Constitution.⁶⁶ It is part of the ordinary law of England, where it helps define who is entitled to raise claims in particular cases. In this context, it is a sound doctrine of judicial administration, but not one of constitutional law. One easy application of the standing doctrine arises when A runs over B. B, who has suffered the distinct injury from the interaction, can sue. C, a stranger to the harm, cannot sue. The standing rule assigns the initial cause of action to the party with the largest distinctive stake in a case. Nonetheless, on the continuum between A and C lie other persons who are neither strangers nor direct victims. For example, the common-law doctrine of *per quod servitium amisit* allowed a husband to sue for the loss of services sustained from the tortious killing of his wife,⁶⁷ but no analogous actions are available to numerous friends and acquaintances suffering associational losses. The administrative costs are too high relative to the potential gains from such suits. Elsewhere, the line between general and special damages has long been part of the law of public nuisance, allowing private

⁶⁶ See H.W.R. Wade, *Administrative Law* 95, 120–21 (Clarendon 1961). See also Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 *Brooklyn L Rev* 1001, 1009–20 (1997) (tracing the history of standing requirements in English common law).

⁶⁷ See generally, for example, *Baker v Bolton*, 1 *Camp* 493 (KB 1808), reprinted in 170 *Eng Rep* 1033 (denying recovery for the husband whose wife was killed, not injured), superseded by Lord Campbell's Act, 9 & 10 *Vict*, ch 93 (1846). See also Wex S. Malone, *The Genesis of Wrongful Death*, 17 *Stan L Rev* 1043, 1061 (1965).

rights of action only to persons who sustain special damages.⁶⁸ For example, general damages are delays in movement along the public highways resulting from the blockage of a road. Special damages are personal injuries suffered as a result of the blockage—injuries above and beyond those suffered by the public at large, which is protected not by private actions but by a system of fines and public injunctions. These institutional arrangements, whose English origins long predate Article III of the US Constitution, work as well today as in past times in both state and federal courts.

Article III also confers equitable jurisdiction on federal courts, stating that “[t]he judicial Power shall extend to all Cases, in Law and Equity.”⁶⁹ Equitable jurisdiction raises no distinct standing issues in two-party disputes, in which plaintiffs seek specific performance, injunction, or foreclosure. But equitable jurisdiction has long extended to cases in which individual members, partners, or shareholders (collectively, “members”) of collective organizations bring suit to enjoin ultra vires actions (actions “beyond the powers”) of the officers of these organizations.⁷⁰ In these cases, equitable jurisdiction responds to the obvious fear that a disorganized group of members will be remediless unless one person takes the lead to vindicate the rights of others. Those suits would never happen if the moving party received only the same in rem relief as all other members from undoing the illegal transaction. One who bears the full cost of litigation cannot hope to come out ahead if he gets only a fractional part of the gain. So, under the standard common-fund doctrine developed for private disputes, the moving litigant gets nothing if he fails, but compensation for expenses if he succeeds (charged against the assets of the group).⁷¹

Why then not allow that approach against the government, when individual plaintiffs face the same difficulty in coordinating relief against ultra vires actions? There is no such restriction against such equitable disputes either in England or in the states. So why not use those same principles in federal court

⁶⁸ YB Mich 27 Hen VIII, f 27, pl 10 (1536), reprinted and translated in Richard A. Epstein and Catherine M. Sharkey, *Cases and Materials on Torts* 621 (Aspen 11th ed 2016). This anonymous case first recognized a public nuisance tort.

⁶⁹ US Const Art III, § 2.

⁷⁰ See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L J 77, 97 n 104 (1997).

⁷¹ See Monique Lapointe, Note, *Attorney’s Fees in Common Fund Actions*, 59 Fordham L Rev 843, 843–45 (1991).

given its explicit grant of equitable jurisdiction? The great twin cases of *Massachusetts v Mellon* and *Frothingham v Mellon*⁷² restricted this well-established mechanism on the grounds that the United States was a larger polity,⁷³ which is an absurdity in a world in which equally complex collective action problems can begin with as few as five persons, as often happens when surface owners work to figure out how to divide the oil that comes from beneath their ground.⁷⁴ It is clear that any well-organized private agreement will permit derivative actions of this sort as the only way to induce some members to take the lead in these lawsuits. So as long as there is judicial review, it should be available to challenge ultra vires actions of the federal government.

At issue in the *Mellon* cases was the constitutionality of the Sheppard-Towner Maternity Act,⁷⁵ which authorized the allocation of federal benefits to the states to “protect the health of mothers and infants.”⁷⁶ Both Mrs. Frothingham and the state of Massachusetts challenged the legislation on the ground that the United States did not have the power to tax and spend for programs that benefited particular individuals, for such initiatives were not for the “general Welfare of the United States”⁷⁷ inasmuch as they did not provide indivisible benefits that helped all citizens but rather transferred payments between different groups of citizens.⁷⁸ I think that this criticism is correct,⁷⁹ but the Court did not even consider this argument. Rather, it simply found that no one had standing to mount a challenge because no state and no individual bore special burdens, even if there were individuals who received reciprocal special benefits.⁸⁰

The situation worsened fifteen years later in *Alabama Power Co v Ickes*,⁸¹ in which a private utility company challenged federal subsidies supplied to four of its municipal competitors, claiming that these ultra vires subsidies put it at a competitive disadvantage in the local power market.⁸² If *Mellon* had come

⁷² 262 US 447 (1923) (consolidating the cases).

⁷³ See id at 485–86.

⁷⁴ See Gary D. Libecap, *Contracting for Property Rights* 93–114 (Cambridge 1989).

⁷⁵ 42 Stat 224 (1921).

⁷⁶ *Mellon*, 262 US at 479.

⁷⁷ US Const Art I, § 8, cl 1.

⁷⁸ *Mellon*, 262 US at 479–80.

⁷⁹ See Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 194–98 (Harvard 2014).

⁸⁰ *Mellon*, 262 US at 488.

⁸¹ 302 US 464 (1938).

⁸² Id at 473–75.

out the other way, this challenge would have been redundant, because any citizen or state could have raised the ultra vires argument. Instead, the plaintiff was met with the common law-like objection that these competitive harms were but a classic case of *damnum absque injuria*, or harm without legal injury.⁸³ That principle is a way of saying that disappointed competitors have no standing to challenge their successful rivals, and as such stands as an essential bulwark of the competitive market system—or at least it would in a world without public subsidies. As a first approximation, it is an embodiment of the Millian harm principle that

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.⁸⁴

That rule would be distorted beyond all recognition if these losses gave rise to any form of legal action.⁸⁵ But the analysis is quite different when the competitive advantage comes from an illicit subsidy that the government has no power to make, for now the lawsuit is no longer challenging pure competition but market-distorting government intervention. This final opportunity to limit the scope of *Mellon* was sharply rebuffed, insulating all forms of potential government misconduct from private challenge.

The articulation of this general rule makes it all too difficult to raise structural challenges to government misbehavior. The concern came to a head in *Lujan v Defenders of Wildlife*,⁸⁶ in which the simple question was whether the provisions of the Endangered Species Act of 1973⁸⁷ governed American activities in foreign nations.⁸⁸ In this instance, the sensible action would be for any party to seek to enjoin the secretaries of commerce and of the interior from promulgating such regulations if they lack the requisite statutory authority. It is a bit trickier to see how any private party could force the government to promulgate

⁸³ Id at 479.

⁸⁴ John Stuart Mill, *On Liberty* 21–22 (John W. Parker 2d ed 1859).

⁸⁵ For some of the complications in connection with rate regulation, see Richard A. Epstein, *The Harm Principle—and How It Grew*, 45 U Toronto L J 369, 408–09 (1995).

⁸⁶ 504 US 555 (1992).

⁸⁷ Pub L No 93-205, 87 Stat 884, codified as amended at 16 USC § 1531 et seq.

⁸⁸ *Lujan*, 504 US at 557–58.

regulations covering the topic. But that last point goes to the traditional limitations on courts of equity to order affirmative relief, which help explain why courts tend to resist ordering specific performance of employment contracts,⁸⁹ when individual standing is never an issue. But there are no new complications here, for the traditional rules governing equitable remedies easily carry over to actions brought in federal court. The correct approach is to first recognize standing and to deal with remedial limitations thereafter under standard equitable principles developed for just that purpose.

Rather than deal with these issues head-on, Justice Scalia (again) shoehorned the case into the wrong model of discrete injuries by engaging in fictions that only reveal the fatal weaknesses of his doctrinal analysis. The plaintiffs sought to challenge federally funded projects undertaken by American companies abroad on the ground that they threatened certain endangered species.⁹⁰ To gain standing, they alleged injury in fact by pointing to their intention to travel to foreign sites, where they would be denied the chance to observe the endangered species if these precautions were not taken.⁹¹ In Scalia's standing analysis, however, we are told that everything turns on the extent to which the plaintiffs intended to "acquire airline tickets to the project sites or announce a date certain upon which they will return."⁹² This basic concession means that someone will always be able to contrive standing by the simple expedient of manufacturing a prospective plan to cross paths with the government action. But if the standing requirement is supposed to represent some serious structural limitation built into the Constitution—parallel to the prohibition on advisory opinions⁹³—then these transparent efforts at circumvention should be roundly rejected.

Unfortunately, the ostensible fixes proposed in *Lujan* are not available in all cases. For example, who has standing to

⁸⁹ See Anthony T. Kronman, *Specific Performance*, 45 U Chi L Rev 351, 357 n 26 (1978).

⁹⁰ *Lujan*, 504 US at 559.

⁹¹ Id at 563–64.

⁹² Id at 579 (Kennedy concurring in part and concurring in the judgment). See also id at 564 (“[S]ome day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.”) (emphasis omitted).

⁹³ See generally Letter from the Justices of the Supreme Court to George Washington (Aug 8, 1793), in Maeva Marcus, ed, 6 *The Documentary History of the Supreme Court of the United States, 1789-1800* 755 (Columbia 1998).

challenge the decisions of the Obama administration to waive minimum coverage requirements under the Affordable Care Act⁹⁴ and similar statutes that businesses and labor unions must meet? The ad hoc nature of these exceptions is a serious challenge to any coherent system of the rule of law, but they pass undetected under the judicial radar. The same argument has been advanced about the ability of states to challenge President Barack Obama's use of executive power to alter the rights of noncitizen parents to remain in the United States along with their children who are citizens by virtue of having been born here.⁹⁵ The concerns vastly transcend the merits of the particular lawsuit. Indeed, they go to the foundations of *Marbury v Madison*.⁹⁶ Do we really want to cut off judicial review of matters that go to the heart of the structural Constitution? No misreading of the basic provisions of Article III should lead to that result. The failure to understand the relationship between the private law of equity and the constitutional requirements of Article III is no small affair. In a substantial set of cases, the inability to challenge overreaching government actions upends the entire project of judicial review.

CONCLUSION

I have examined these different legal areas to illustrate this basic proposition: the major legal challenges in both private and public law do not lie in detailed empirical questions, but in the conceptual foundations of substantive private law. The private law questions require a clearheaded view of what rules optimize some measure of social welfare in the ex ante state of the world, whether we speak of consequential damages, jurisdictional limitations, or standing—all of which, when rightly understood, turn out to pose similar questions. This general proposition is not meant to denigrate the importance of empirical work, which is often indispensable to measure the relevant trade-offs called for by a sound conceptual analysis. Yet throughout this process the key conceptual insight is that the organization of public law rests on the same building blocks as the private law. The common effort to do public law without a real mastery of private law

⁹⁴ Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010).

⁹⁵ See *Texas v United States*, 809 F3d 134, 163 (5th Cir 2015) (finding state standing), *aff'd* by an equally divided Court, *United States v Texas*, 136 S Ct 2271 (2016) (*per curiam*).

⁹⁶ 5 US (1 Cranch) 137 (1803).

principles too often degenerates into serious intellectual confusion with profoundly negative social consequences. So long as conceptual uncertainty remains, no factual inquiries or empirical research can cure the deficit. If basic concepts are misunderstood, the final analysis will also go awry. It is that simple.