Federalism and Substantive Due Process: A Comparative and Historical Perspective on *International Shoe* and Its Progeny

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INTRODUCTION

Any comparative perspective on *International Shoe* and its progeny must begin with an acknowledgment of the two outstanding articles already written on this subject by Professor Friedrich Juenger. Professor Juenger's 1984 article, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*,[1] and his 1993 article, *American Jurisdiction: A Story of Comparative Neglect*,[2] demonstrate exceedingly well the inadequacies and internal inconsistencies of United States Supreme Court case law concerning personal jurisdiction. They also demonstrate the Supreme Court's total disregard for highly relevant comparative materials concerning jurisdiction.

One looking at United States jurisdictional law from afar, either geographically or historically, can only agree with the general thrust of Professor Juenger's criticisms, as well as most, if not all, of the particulars of his critique. Thus, I will not reiterate them herein. My object in this Article is a different one. It is an attempt to explain why the United States law of personal jurisdiction is as confused and misguided as Professor Juenger rightly states it is.

In my view, the principal reason for the present state of the law is the Supreme Court's attempt to deal with two completely separate problems in the same due process jurisprudence con-

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[1] 82 MICH. L. REV. 1195 (1984).

[2] 65 U. COLO. L. REV. 1 (1993).

cerning personal jurisdiction. The first problem is the Court's development of rules allocating personal jurisdiction among the states, which can be termed the federalism thread. The second problem is the Court's limitation on all excesses of personal jurisdiction that flow from concepts of constitutional due process — the substantive due process thread.

It is my thesis that these are two distinct problems that should have been dealt with separately and differently by the Supreme Court. Moreover, and equally significantly, the first problem — the allocation of personal jurisdiction among the states — cannot be remedied by sporadic case law decisions, but rather requires a comprehensive legislative solution. The substantive due process thread, on the other hand, is not only susceptible to case law development, but is most appropriate for such development. Unfortunately, in its personal jurisdiction jurisprudence, the Supreme Court has employed, at times, a maximalist substantive due process approach,[3] apparently without recognizing that such an approach is no more appropriate to personal jurisdiction today than it was to progressive economic regulation in the *Lochner* era.[4]

Parts I and II of this Article examine the Supreme Court's development of the federalism and substantive due process threads in its personal jurisdiction jurisprudence. Part III then analyzes the Court's decisions on a comparative law basis. The Article concludes by proposing that the Supreme Court abandon the federalism thread altogether, and that Congress formulate comprehensive federal legislation allocating personal jurisdiction among the states. Such congressional legislation could be based on comparative law sources, including the Brussels Convention.

As to the substantive due process thread, I propose that the Supreme Court abandon its maximalist due process approach in favor of a minimalist approach. A minimalist approach would

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[3] The term maximalist substantive due process indicates a regime of severe limitations on states' authority, which the Supreme Court imposed through its use of the Fourteenth Amendment's Due Process Clause. *See infra* note 4 and accompanying text.

[4] The *Lochner* era refers to the period in which the Supreme Court used a maximalist substantive due process approach. *See supra* note 3 (defining maximalist substantive due process). Using this approach, the Supreme Court invalidated progressive state legislation concerning the economy in general and labor relations in particular. The era takes its name from the leading case of Lochner v. New York, 198 U.S. 45 (1905).

allow Congress to adopt the type of comprehensive federalism scheme noted above. Even more significantly, unless and until Congress adopts such a scheme, a minimalist substantive due process approach would allow the individual states to make the requisite policy determinations concerning personal jurisdiction. In so doing, the states could also avail themselves of comparative law sources, including the English Rules and the Brussels Convention.

I. THE FEDERALISM THREAD

A. Development of Principles Allocating Personal Jurisdiction Among the States

I have written elsewhere, as part of a discussion concerning procedural unification in the European Union, that a major and most successful procedural unification effort is the well-known Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,[5] which applies to the states of the European Union. The Brussels Convention was adopted pursuant to Article 220 of the Rome Treaty.[6] Article 220 obliged the member states to enter into negotiations to secure, for the benefit of their nationals, the simplification of formalities governing the reciprocal recognition and enforcement of judgments. While the Rome Treaty did not so require, a comprehensive scheme of personal jurisdiction also was included in the Brussels Convention.[7]

To create a common market, it is most desirable, if not imperative, that there be developed a system for the effective reciprocal enforcement of judgments among the member states of such a common market. The United States[8] and Swiss[9] federal constitutions, as well as the Rome Treaty, have recognized ex-

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[5] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229 [hereafter Brussels Convention].

[6] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereafter Rome Treaty].

[7] Stephen Goldstein, On Comparing and Unifying Civil Procedural Systems, Butterworth Lectures 47 (1995) (unpublished manuscript, on file with the *University of California at Davis Law Review*).

[8] U.S. CONST. art. 4, § 1.

[9] BV, CST, COST. FED. art. 61.

pressly this fact. However, the relationship between a common market with reciprocal enforcement of judgments and the development of uniform or harmonized rules of personal jurisdiction among the member states has not been expressly recognized by the United States Constitution or the Rome Treaty.[10]

On the other hand, the framers of the Brussels Convention of the then European Community sought not only to implement the provisions of Article 220 of the Rome Treaty (by which the member states undertook to simplify formalities governing the reciprocal recognition and enforcement of judgments) but also "to determine the international jurisdiction of the[ir] courts,"[11] a matter not covered by the Rome Treaty. In so doing, the framers of the Brussels Convention recognized, rightly, that the purposes of the Rome Treaty could not be achieved unless the Convention also contained rules governing personal jurisdiction.

In my view, this is so for two reasons. First, such personal jurisdiction rules are themselves highly desirable, if not absolutely necessary, for the development of an effective common market. Second, certain minimal provisions as to personal jurisdiction are a necessary corollary to rules requiring the reciprocal enforcement of judicial judgments. For states to agree to enforce judgments of other member states, they must be assured, at a minimum, that other member states will not enter judgments in cases in which they should not be adjudicating at all. Thus, at a minimum, a scheme of mutual enforcement of judgments must prohibit the exercise of "exorbitant" forms of personal jurisdiction, as does Article 3 of the Brussels Convention. Moreover, it is desirable, if not absolutely essential, that a comprehensive scheme for the reciprocal enforcement of judgments among a group of states not only prohibit exorbitant forms of personal jurisdiction, but also provide for an affirmative complementary system of allocating personal jurisdiction among member states, as does the Brussels Convention.

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[10] The Swiss federal constitution contains provisions concerning the allocation of personal jurisdiction among the cantons along with provisions concerning the reciprocal enforcement of judgments among them. BV, CST, COST. FED. arts. 46, 59.

[11] Brussels Convention, *supra* note 5, at pmbl. Judicial jurisdiction of a state over a defendant is generally known in Europe as international jurisdiction. But in the United States, it is generally referred to as jurisdiction over the person (of the defendant), or personal jurisdiction.

In the United States, however, the Constitution, while providing for full faith and credit to judgments, does not refer at all to personal jurisdiction. I have not attempted an historical investigation as to why this is so. I might speculate that the reason for this omission was that the rules of jurisdiction in the common law world appeared so clear, so well understood, and so well accepted at the end of the eighteenth century that their harmonization at the federal level was not even considered. Whatever the reasons for this omission in the Constitution, it is most significant that Congress has not yet enacted any general federal legislation that would prohibit exorbitant forms of personal jurisdiction in the states, let alone develop a general scheme for allocating personal jurisdiction among the states. It is clear that Congress has such legislative authority under the Interstate Commerce Clause, and indeed may also have such authority under the Full Faith and Credit Clause itself.

Be that as it may, a reciprocal system of enforcement of judgments requires, at a minimum, the prohibition of exorbitant forms of jurisdiction among the member states of the system. Such a reciprocal judgment enforcement system and the development of a common market among the member states makes it highly desirable that member states be parties to a relatively comprehensive scheme that allocates personal jurisdiction among them. In the absence of explicit constitutional or congressional directives in this area, the Supreme Court had no choice but to attempt to fill this void by developing what I refer to as the federalism thread.

Indeed, this federalism thread has been a recurring theme in Supreme Court case law since *Pennoyer v. Neff*.[12] Unfortunately, confusion between the federalism thread and the substantive due process thread has been a major source of the inconsistency and confusion in United States personal jurisdiction law.

Before continuing my analysis of the federalism thread, I must clarify that while the federalism thread is not devoid completely of concerns for the "legal protection of persons" who are domiciliaries in the member states (as made clear by the Preamble to the Brussels Convention), the federalism thread's primary concern is not the protection of defendants, but rather the

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[12] 95 U.S. 714 (1877).

allocation of judicial authority among the member states. Moreover, to the extent it is concerned with defendants, as distinguished from states, the federalism thread's concern is primarily, if not exclusively, with those defendants who are domiciliaries of the member states.

In *Pennoyer*, Justice Field did not rely on the fact that the individual states are members of a federal union. Rather, he explicitly addressed the issue of limitations on the personal jurisdiction of the states on the assumption that the states of the Union were independent and thus subject to the principles of public law applicable to independent states. On the other hand, the *Pennoyer* opinion was based expressly on the fact that these "independent" states have agreed among themselves, through their adherence to the Constitution, to a regime of required reciprocal enforcement of judgments, that is, the Full Faith and Credit Clause.[13]

The Full Faith and Credit Clause required the Supreme Court to determine issues of personal jurisdiction even prior to the adoption of the Fourteenth Amendment's Due Process Clause.[14] The lack of personal jurisdiction in the state rendering a judgment, according to principles determined by the Court, not only freed the other states from their obligation to give full faith and credit to such judgment, but apparently also forbade the other states from doing so.[15] The fact that the Court's opinion in *Pennoyer* was based on the theory that limitations on the personal jurisdiction of the states arise primarily from the Full Faith and Credit Clause, rather than the Due Process Clause acting independently, is emphasized by the dissent of Justice Hunt, which he based explicitly on a rejection of such a connection between the two clauses.[16]

According to the Supreme Court, this situation remained true following the adoption of the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provided the procedural means by which the Supreme Court could declare invalid a state court judgment rendered without the requisite jurisdic-

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[13] *See id.* at 722.

[14] *Id.* at 729-32.

[15] *See id.* at 729.

[16] *Id.* at 741 (Hunt, J., dissenting).

tion. Thus, the Fourteenth Amendment provided for the first time a constitutional basis for an appeal to the Supreme Court from the state court system that rendered the judgment.

In sum, *Pennoyer v. Neff* had very little, if anything, to do with traditional notions of due process. Rather, it is a clear example of what I have termed the federalism thread; in this case the imposition of limitations on the personal jurisdiction of states that flow from their status within a regime of compulsory mutual enforcement of judgments.

B. International Shoe's Rejection of the Federalism Thread

The most revolutionary aspect of *International Shoe* was the Court's rejection of the federalism thread of *Pennoyer.* In *International Shoe,* the Court based its federal constitutional review of personal jurisdiction of the states solely on the due process thread. Part II of this Article discusses in greater detail the substantive due process thread of *International Shoe.* For our immediate purposes, however, it should be emphasized that had the *International Shoe* analysis been followed consistently thereafter, the federalism thread would have ceased to exist. Yet this did not happen. The progeny of *International Shoe* continued, albeit inconsistently, to rely on the federalism thread.

C. The Court's Return to the Federalism Thread

Chief Justice Warren's opinion in *Hanson v. Denckla*[17] was based explicitly on the proposition that the constitutional restrictions on the personal jurisdiction of the states "are more than a guarantee of immunity from inconvenient or distant litigation. They are a guarantee of territorial limitations on the power of the respective [s]tates."[18] Standing alone, this statement could be seen to refer not to the federalism thread, but rather to the substantive due process thread, as will be explained in Part II. In context, however, it is clear that Chief Justice Warren was referring to the federalism thread. This is supported by the opinion's analysis of, and reliance on, *Pennoyer,* as distinguished

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[17] 357 U.S. 235 (1958).

[18] *Id.* at 251.

from its minimal references to *International Shoe*.[19] It is further supported by the important interplay between full faith and credit and due process in the opinion.[20]

Hanson's reliance on the federalism thread was also supported by Justice Black's dissent. In contrast to his very emotional and angry opinion in *International Shoe* concerning the substantive due process aspect of the majority opinion,[21] Justice Black's dissent in *Hanson* was most tempered. Moreover, he did not really dissent from the majority's basic analysis, but opposed the result the majority reached. Indeed, Justice Black's dissent expressly acknowledged that "of course we have not reached the point where [s]tate boundaries are without significance, and I do not need to suggest such a view here."[22] For Justice Black, the significance of state boundaries must be viewed within the context of the federalism thread rather than the substantive due process thread, which, of course, he rejected completely. Thus, in terms of the thesis of this Article, *Hanson* represents a retreat from the substantive due process thread of *International Shoe* and a return to the federalism thread of *Pennoyer*.

The next and indeed most significant manifestation of the federalism thread in the post-*International Shoe* case law is found in Justice White's opinion for the Court in *World-Wide Volkswagen Corp. v. Woodson*.[23] In referring to the minimum contacts test of *International Shoe*, Justice White states:

> The 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 [s]tates, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[24]

As stated above, and as will be explained further in Part II, the *World-Wide Volkswagen* Court, in my view, wrongly attributed this

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[19] *Id.* at 249-51.

[20] *Id.* at 255.

[21] International Shoe Co. v. Washington, 326 U.S. 310, 322-26 (1945) (Black, J., dissenting).

[22] *Hanson*, 357 U.S. at 260 (Black, J., dissenting).

[23] 444 U.S. 286 (1980).

[24] *Id.* at 291-92.

express federalism thread to *International Shoe.* On the other hand, the Court clearly was correct in recognizing federalism as an inconsistent, but nonetheless persistant, thread in the case law since *Pennoyer.* Therefore, it is hard to understand the extraordinarily strong reaction of Professor Juenger to the federalism thread in this opinion: "How could Justice White muster a majority for the astonishing proposition that the Due Process Clause protects sovereigns rather than people?"[25]

In contrast to Professor Juenger, it is my thesis that, since *Pennoyer,* the Supreme Court has relied on the federalism thread to employ the Due Process Clause to regulate personal jurisdiction among the states, which had formed a common market and entered into a constitutional agreement for reciprocal enforcement of judgments. In light of this fact, I do not understand why, two years later, Justice White felt compelled to retreat from his position in *World-Wide Volkswagen,* in the following footnote from his *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* opinion:

> The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the power of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[26]

In contrast to *World-Wide Volkswagen,* this statement clearly relates the limitation of state authority aspect of the minimum contacts test to the substantive due process thread, rather than to the federalism thread, as did *International Shoe.* I will discuss this footnote further in Part II.

For purposes of this discussion, Justice White's footnote represents a complete, and astonishingly off-hand, retreat from the

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[25] Juenger, *supra* note 2, at 16.

[26] Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982).

Court's express reliance on the federalism thread in *World-Wide Volkswagen* and *Hanson*. As stated by Justice Powell, concurring in the judgment:

> Before today, of course, our cases had linked minimum contact and fair play as *jointly* defining the "sovereign" limits on state assertions of personal jurisdiction over unconsenting defendants. See *World-wide Volkswagen Corp. v. Woodson*, see *Hanson v. Denckla*. The Court appears to abandon the rationale of these cases in a footnote. But it does not address the implications of its action. By eschewing reliance on the concept of minimum contact as a "sovereign" limitation on the power of [s]tates . . . the Court today effects a potentially substantial change of law. For the first time it defines personal jurisdiction solely by reference to abstract notions of fair play. And, astonishingly to me, it does so in a case in which this rationale for decision was neither argued nor briefed by the parties.[27]

I would add only the following comments. It is true, as Justice White states in his footnote, that the Due Process Clause makes no mention of federalism concerns. Yet it is also true that, since *Pennoyer*, this clause has been used, rightly or wrongly, to limit personal jurisdiction of the states based, at least in part, on the federalism thread, as expressly stated in *Hanson* and *World-Wide Volkswagen*.

Moreover, Justice White's statement — supported neither by citation to authority nor by further analysis — that basing restrictions on personal jurisdiction on federalism concepts would be inconsistent with the acknowledged power of the defendant to waive requirements of personal jurisdiction is clearly misguided. In procedural systems based on party initiative and responsibility, there is generally no necessary identification between the interests protected by a given rule and the power of the parties to the litigation to waive such rule. Thus, for example, rules of res judicata and statutes of limitations generally are acknowledged to protect institutional interests of the courts as well as party interests. Yet these rules can be waived. More particularly, in both England[28] and Israel[29] the requirements of personal

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[27] *Id.* at 714 (Powell, J., concurring) (citations omitted).

[28] *See* Rules of the Supreme Court, Order 12, Rule 8 (1965) (U.K.).

[29] *See* Rules of Civil Procedure, Rule 502 (b) (1984) (Isr.).

jurisdiction are viewed as restrictions on the sovereignty of the courts of the respective states, yet the requirements can be waived by defendants. Perhaps most significantly, this is also true as to restrictions on personal jurisdiction that the Brussels Convention imposes on the contracting states.[30]

I should also note that the federalism thread was not merely a verbal rationalization in the Court's opinions in *Hanson* and *World-Wide Volkswagen*, but rather it was the basis of the decisions in those cases. The result in these two cases can be justified only on the basis of the Court's acceptance of the federalism thread as the determining factor.

Since Justice White's footnote in *Insurance Corp. of Ireland*, the federalism thread has not been relied on explicitly in the Supreme Court case law. Moreover, the fact that, in *Helicopteros Nacionales de Colombia v. Hall*,[31] the Court applied principles developed in cases concerning United States defendants to a foreign defendant, without even considering the relevance of the difference, is completely inconsistent with the federalism thread and can be explained only as a complete rejection of that thread. On the other hand, the federalism thread has refused to disappear completely, at least from the thinking of some Supreme Court Justices.

For example, the dissent of Justice Stevens, joined by Justice White, in *Burger King Corp. v. Rudzewicz*,[32] speaks only of the "unfairness" involved in allowing the large franchiser to bring an action against the small franchisee in the former's home state. Yet it seems to me that this minority position is tenable only if it is based on the federalism thread; that is, the view that personal jurisdiction rules are aimed at providing for a "fair" allocation of personal jurisdiction among the several states of the federal union. Similarly, despite its express substantive due process basis, the Supreme Court's decision in *Asahi Metal Industry Co. v. Superior Court*,[33] in which eight Justices (including Justice

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[30] *See* Brussels Convention, *supra* note 5, arts. 15, 20. The only exception to this principle concerns some very specific types of cases, such as those concerning rights in real property and dissolution of corporations, as to which there is exclusive judicial jurisdiction, beyond party control, in the relevant member state. *See id.* arts. 16, 19.

[31] 466 U.S. 408 (1984).

[32] 471 U.S. 462, 487 (1985) (Stevens, J., dissenting).

[33] 480 U.S. 102 (1987).

Brennan) agreed to the complete preemption of state court discretion in a case concerning a foreign defendant, is only tenable, if at all, on the basis of another aspect of federalism: the complete preemption of state law as to personal jurisdiction by federal law in cases involving foreign defendants.[34]

Finally, I should note that federalism aspects of the constitutional rules determining personal jurisdiction form an important part of Justice Brennan's concurring opinion in the 1990 *Burnham v. Superior Court*[35] decision, which upheld service of process, by itself, as a sufficient basis for personal jurisdiction. The fact that the federalism thread is part of Justice Brennan's approach is most surprising in light of his previous opinions on this matter. As such, *Burnham* demonstrates further the federalism thread's amazing resistance to all attempts to eliminate it completely.

II. THE SUBSTANTIVE DUE PROCESS THREAD

A. International Shoe's *Substantive Due Process Approach*

As discussed in Part I, unlike *Pennoyer v. Neff* and, indeed, unlike some of its own progeny, *International Shoe* clearly and expressly based its limits on state personal jurisdiction on constitutional due process. However, in so doing, the Court did not limit itself to procedural due process concerns, such as notice and the right to be heard. Rather, the Court based its minimum contacts test on substantive due process concerns relating to limitations on state authority. Thus, the term "traditional notions of fair play and substantial justice," which had applied in *Milliken v. Meyer*[36] to procedural due process, was attached in *International Shoe* to a new substantive due process test of minimum contacts required to justify state power. Of course, *International Shoe* resulted in the expansion of state power. Yet, as foreseen clearly in Justice Black's forceful, indeed angry opinion,

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[34] Such a position has never been adopted explicitly in any Supreme Court decision. Most clearly, it has never been part of the federalism thread discussed herein, which deals exclusively with the internal situation of the United States federation, as distinguished from national preemption in terms of foreign defendants. However, without such a nationalist-federalism premise, the Court's decision in *Asahi* is completely untenable.

[35] 495 U.S. 604, 628 (1990) (Brennan, J., concurring).

[36] 311 U.S. 457 (1940).

this unlimited substantive due process approach could be used in later cases to restrict state authority. And, indeed, it was.

International Shoe's substantive due process approach to jurisdiction is most surprising in light of the 1945 view of the *Lochner*-era due process jurisprudence, which was in clear disrepute.[37] Apparently only Justice Black, one of the most adamant opponents of substantive due process, saw clearly what Chief Justice Stone's opinion for the Court might be doing.

Yet, standing by itself, *International Shoe* easily could have developed into a minimalist substantive due process doctrine such as that articulated by Justice Douglas in 1955 in *Williamson v. Lee Optical of Oklahoma*.[38] Such an approach would have paralleled the Supreme Court jurisprudence in the analogous field of state choice-of-law doctrine. That it did not do so was a result of later cases, particularly the influence of the federalism thread in *Hanson v. Denckla*, discussed in Part I, and the development of a maximalist substantive due process approach in a series of decisions written by Justice Marshall.

B. The Maximalist Substantive Due Process Approach

The first and most important of the maximalist substantive due process decisions was *Shaffer v. Heitner*.[39] Indeed, Justice Marshall's majority opinion in *Shaffer* reads much like that of Justice Peckham in *Lochner* in its reasoning from unsubstantiated first premises and in its insistence on limiting the legitimate state interests it will consider to those that it finds that the state has previously enunciated, rather than interests that the state could have rationally considered. Both opinions also contain

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[37] *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Olsen v. Nebraska, 313 U.S. 236 (1941).

[38] 348 U.S. 483 (1955); *see also* Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan, J., concurring).

[39] 433 U.S. 186 (1977). It is not my intention to discuss whether quasi in rem jurisdiction is desirable, or even whether, pursuant to the federalism thread, it should have been held invalid as an exorbitant form of jurisdiction within a common market or pursuant to a scheme of reciprocal enforcement of judgments to which all states are a party. The first issue is no concern of the Constitution as such, and the second was not the basis of the opinion. Rather the basis of the *Shaffer* opinion was a maximalist form of substantive due process restricting state power. As such, the opinion can rightly be compared to that of the notorious 1905 decision in Lochner v. New York, 198 U.S. 45 (1905).

artificial constructions that ignore the reality of the case before it. Moreover, both opinions lack any presumption of constitutionality of state action. Rather than such a presumption, there is almost the opposite presumption; that is, the burden is on the state to prove the legitimacy of its actions. Finally, there is the same disregard for the relevance of what other nations are doing regarding the question of legitimate use of state power in the United States. In my view, the similarity between the opinions of the court of Justice Peckham in *Lochner* and Justice Marshall in *Shaffer* is striking.

No less striking is the similarity between the dissent of Justice Harlan in *Lochner*[40] and the opinion of Justice Brennan, concurring in part and dissenting in part, in *Shaffer*. Both Justices Harlan and Brennan accept the basic substantive due process rationale of the majority. However, they reject the artificial restrictions on legitimate state interests imposed by the majority. Both Justices Harlan and Brennan also proceed from a premise of constitutionality of state action, rather than the opposite. Thus, in *Shaffer*, Justice Brennan, freed from the shackles of the *Lochner*-type opinion of the Court, realized correctly that, in the words of Professor Juenger, "*Shaffer* was a man-bites-dog kind of case."[41]

In comparing *Lochner* and *Shaffer*, the reader might well ask, if Marshall is like Peckham, and Brennan like Harlan, who is the equivalent of Justice Holmes, who wrote the most compelling dissent against *Lochner*?[42] The answer, unfortunately, is no one. One might speculate that if Justice Black had still been on the Court at the time of *Shaffer*, he might have written an opinion comparable to that of Holmes in *Lochner*.[43] However, he was no longer there, and Justice Scalia had yet to be appointed.[44]

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[40] Throughout the remainder of this article, references to Justice Harlan and his views refer to the views of the first Justice John M. Harlan as they were expressed in his *Lochner* dissent, and not to the second Justice John M. Harlan, although in fact the views of the latter as to substantive due process were quite similar to those of the former. *See supra* text accompanying note 38 (discussing Supreme Court's minimalist substantive due process approach).

[41] Juenger, *supra* note 2, at 15.

[42] 198 U.S. at 74.

[43] *Compare* International Shoe Co. v. Washington, 326 U.S. 310, 322, 326 (1945) (Black, J., dissenting) *with* Baldwin v. Missouri, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting).

[44] *See* Burnham v. Superior Court, 495 U.S. 604 (1990) (plurality opinion).

Justice Stevens' concurring opinion, in which he tries to restate the minimum contacts/substantive due process test of *International Shoe* as one of procedural due process, is also of interest. Basically, Justice Stevens writes that the requirement of "fair notice" also includes "fair warning" that a particular activity may subject a person to the jurisdiction of a foreign sovereign.[45] While this idea is intriguing, it seems to be more of a rationale for substantive due process than an alternative for it. In either event, Justice Stevens' approach would seem to support only minimal restrictions on state assertions of personal jurisdiction; restrictions no greater than those allowed under the view of Justice Brennan.

Indeed, given this view, it is difficult to understand how Justice Stevens concurred in the result in *Shaffer*. On the other hand, Justice Stevens' view did allow him to see what was really involved, instead of being trapped by artificial constructions, which led to his dissent in *Rush v. Savchuk*.[46] While referred to occasionally by other Justices,[47] Justice Stevens' position has not achieved independent significance in Supreme Court jurisprudence. Moreover, in his own later opinions, Justice Stevens generally has not relied on this position expressly, even in his dissent in the *Burger King* case,[48] in which, as discussed below, he writes in terms reminiscent of his *Shaffer* concurrence.

Following his 1977 opinion in *Shaffer*, Justice Marshall wrote two more personal jurisdiction opinions for the Court in the next three years: *Kulko v. Superior Court*[49] and *Rush v. Savchuk*.[50] In both cases, the Court struck down state assertions of personal jurisdiction. Both opinions reflect the same maximalist substantive due process thinking articulated in *Shaffer*. Consistent with his more restricted view of substantive due process as expressed in *Shaffer*, Justice Brennan dissented in both cases. Less understandable, in light of his position in *Shaffer*, and

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[45] Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

[46] 444 U.S. 320, 333 (1980) (Stevens, J., dissenting).

[47] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471 (1985) (Brennan, J.); Kulko v. Superior Court, 436 U.S. 84, 97 (1977) (Marshall, J.) (referring obliquely without express citation to opinion of Justice Stevens).

[48] *Burger King*, 471 U.S. at 487 (Stevens, J., dissenting).

[49] 436 U.S. 84 (1977).

[50] 444 U.S. 320 (1980).

his later dissent in *Rush*, is the fact that Justice Stevens joined Justice Marshall's opinion for the Court in *Kulko*. The explanation for this is, perhaps, Justice Marshall's oblique reference in *Kulko* to the "foreseeability" aspect of the substantive due process approach.[51]

It should be emphasized that *Rush* was a companion case to *World-Wide Volkswagen*. Yet most curiously, the opinion for the Court in *World-Wide Volkswagen* was written by Justice White pursuant to the federalism thread, whereas Justice Marshall wrote the *Rush* opinion in accord with his maximalist substantive due process view. Justice White joined the Marshall opinion for the Court in *Rush* without writing separately. However, the most remarkable thing about these companion cases is the fact that Justice Marshall dissented in *World-Wide Volkswagen* in an opinion that I cannot reconcile at all with his opinions for the Court in the other cases discussed herein.

Somewhat less startling, but still puzzling about the three cases — *Kulko*, *World-Wide Volkswagen*, and *Rush* — is that Justices White and Powell partly joined the minimalist due process approach of Justice Brennan. Justices White and Powell joined Justice Brennan's dissent in *Kulko*, yet thereafter, and without explanation, supported far greater restrictions on personal jurisdiction. Justice White later wrote the federalist opinion for the Court in *World-Wide Volkswagen* (with Justice Powell joining), and both Justices White and Powell joined the Marshall maximalist substantive due process opinion for the Court in *Rush*. Thus, the confusion in the Supreme Court case law exists not only among the Justices but also within the opinions of individual Justices themselves.

Finally, Justice Stevens' peculiar procedural due process approach expressed in *Shaffer* allowed him in *Rush* to see through the *Lochner* artificial substantive due process approach of the Court. Justice Stevens recognized that the case actually dealt with a form of direct action against the insurance company that was properly brought in a state in which the insurance company was doing business. To say the least, Justice Stevens has not been consistent in his approach either.

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[51] *See Kulko*, 436 U.S. at 97.

This brings us to the 1982 *Insurance Corp. of Ireland*[52] case, which is most noteworthy for a footnote in which Justice White retreated from the federalism thread of his opinion in *World-Wide Volkswagen*, and based his view clearly on substantive due process — "the individual liberty interest preserved by the Due Process Clause."[53] Yet the *Insurance Corp. of Ireland* footnote contains no hint as to whether the substance of this individual liberty interest is the maximalist position of Justice Marshall or the minimalist position of Justice Brennan.

In *Insurance Corp. of Ireland*, the Court upheld the assertion of personal jurisdiction involved. Yet the case itself is a peculiar one, which is not significant in the general development of the law of personal jurisdiction. Nor do the positions taken by Justice White in other cases help in determining his views on the matter. As we have seen, Justice White's views prior to *Insurance Corp. of Ireland* were not consistent. This lack of consistency continued after the *Insurance Corp. of Ireland* footnote.

The 1984 case of *Helicopteros Nacionales de Colombia v. Hall*[54] is a clear continuation of the maximalist substantive due process approach. This time Justice Blackmun wrote the opinion, with only Justice Brennan dissenting. Uniquely in this line of cases, none of the other seven Justices who joined Justice Blackmun's opinion for the Court wrote separately. This is particularly noteworthy because the facts of this case were unusual. Unlike the other cases discussed above, the defendant was not a citizen of the United States residing in a state other than the forum, but rather was a foreign corporation. Yet the Court's substantive due process opinion ignores this fact completely and applies, without discussion, cases concerning United States defendants to the situation of a foreign defendant. While this complete disregard for the defendant's status as a foreign corporation is, perhaps, understandable under a substantive due process approach, it is, as I have already mentioned and, as I will discuss more fully in Part III, completely at variance with the federalism thread.

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[52] Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

[53] *Id.* at 702.

[54] 466 U.S. 408 (1984).

The next case in this series is *Burger King Corp. v. Rudzewicz*,[55] in which, for the first time, the opinion of the Court was written by Justice Brennan. This was an easy case, even pursuant to the maximalist due process approach. Justice Brennan's opinion for the Court is a consensus one, citing all prior decisions and opinions that would support the result, including that of Justice Stevens concurring in *Shaffer*.[56] Thus, Justice Brennan did not use his majority opinion in this case to move the case law closer to his minimalist substantive due process view as expressed in his prior dissents.

What is most remarkable about the *Burger King* case is not the majority opinion, but rather the dissent of Justice Stevens, joined by Justice White. This dissent acknowledges that, on the facts of the case, even the *Lochner*-type maximalist restriction test of state authority found in prior cases had been met, but still "there is a significant element of unfairness in requiring a franchisee to defend a case of this kind in the forum chosen by the franchis[e]r."[57] As I have discussed in the preceding section on the federalism thread, this view is tenable, if at all, only if it is based on the view that the Supreme Court case law as to personal jurisdiction is aimed at providing for a "fair" allocation of personal jurisdiction among the several states. Yet, the *Burger King* dissent is not written on that basis, but rather on a substantive due process basis. Moreover, while Justice Stevens uses language reminiscent of his foreseeability test for substantive due process, which he proclaimed in his *Shaffer* concurrence, he pointedly does not refer to his *Shaffer* opinion in *Burger King*. Indeed, Justice Brennan's majority opinion explicitly quotes Justice Stevens' concurrence in *Shaffer* as support for the majority view, as, indeed, it is.[58]

In my view, as a due process opinion, Justice Stevens' dissent in *Burger King* is completely untenable. It would replace all state discretion as to personal jurisdiction with a case-by-case analysis by the Supreme Court of what is fair. One can only imagine what would be the response of Justice Black. Indeed, Justice

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[55] 471 U.S. 462 (1985).

[56] *Id.* at 472.

[57] *Id.* at 487 (Stevens, J., dissenting).

[58] *Id.* at 472.

Stevens found it so hard to support his position that he did not even try to do so. Rather almost all of his "argument" consists of a lengthy quote from the opinion of the lower court, which the majority most properly reversed.[59]

My objection to the Stevens dissent is not based on a disagreement concerning what might be viewed as fair or unfair. While reasonable people may differ on the issues of this case, it is not unreasonable to propose that it would have been more fair if the litigation had taken place in the small franchisee's home state rather than that of the large franchiser. And indeed, a comprehensive allocation of personal jurisdiction among states of a federal union might well reach that result.

As a matter of substantive due process, however, I know of no recent greater usurpation of state authority than the view expressed by Justice Stevens. The question of fairness here is first and foremost a matter for the Florida Legislature through its long-arm statute. Secondly, and no less importantly, the application of the statute in the particular case should be subject to judicial discretion at the trial court level. As we shall see in Part III, in countries like England and Israel such case-by-case discretion as to "fairness" is built into the long-arm statute itself. And, if that is not so, such discretion can be exercised through the doctrine of forum non conveniens or its equivalent as to federal courts, change of venue pursuant to 28 U.S.C. § 1404. All of this, however, was irrelevant to the dissent of Justice Stevens, which discussed Fourteenth Amendment substantive due process as if that were the only fairness criterion that could be employed in the service of determining personal jurisdiction.

Justice Stevens' dissent in *Burger King* (which Justice White joined) would have remained a mere curiosity, to which I would not have devoted so much discussion, had not its theory become the basis of an opinion accepted by eight of the nine Supreme Court Justices, a year and eight months later, in *Asahi Metal Industry Co. v. Superior Court.*[60] *Asahi* involved an action by a California resident who was injured, and his passenger wife killed, when, in California, he lost control of his motorcycle and collided with another vehicle. Alleging that the accident was the

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[59] *Id.* at 488-90 (Stevens, J. dissenting).

[60] 480 U.S. 102 (1987).

result of a faulty tire, the plaintiff brought an action in California state court against the Taiwanese manufacturer of the tire who, in turn, filed a third-party indemnity action against the Japanese manufacturer of the tire valve. Before trial, the plaintiff settled his claims against the Taiwanese manufacturer and other defendants, leaving only the Taiwanese third-party indemnity action against the Japanese valve manufacturer.

One approaching this problem from a comparative law perspective would expect the California court to address the following questions: (1) the application of the relevant California long-arm provisions as applied to indemnity actions in general; (2) the exercise of judicial discretion on the facts of this case, which is generally part of the application of long-arm provisions in the common law world; and (3) a reappraisal of the first two determinations in light of the settlement of the original action, leaving only the indemnity action.

However, instead of such an analysis, the confused state of personal jurisdiction law in the United States led the California Supreme Court to begin its opinion with the following question: "Can California constitutionally exercise personal jurisdiction over a manufacturer of component parts who made no direct sales in California but had knowledge that a substantial number of his parts would be incorporated into finished products sold in the state?"[61] And, indeed, this most artificial and least meaningful question imaginable was the only issue that the California Supreme Court addressed. I will return to this point in Part III. For now, I should note that the California Supreme Court answered the question in the affirmative. The United States Supreme Court then granted certiorari and reversed this decision.

In a series of opinions — only part of which represented an opinion of the Court — eight Justices addressed expressly the artificial question; four agreed with the California Supreme Court and four disagreed with it. The four who disagreed with it did so in an opinion, written by Justice O'Connor, which relied principally on *World-Wide Volkswagen*. This opinion ignored the federalism thread on which *World-Wide Volkswagen* was based. Instead, O'Connor's opinion was based solely on *Lochner*-style

[61] Asahi Metal Indus. Co. v. Superior Court, 702 P.2d 543, 544 (Cal. 1985).

substantive due process applied to a foreign corporation. The four who agreed with the California Supreme Court did so in an opinion written by Justice Brennan, who, of course, dissented in *World-Wide Volkswagen.* Two other dissenters in that case, Justices Marshall and Blackmun, joined Justice Brennan, with the fourth Justice being the author of the *World-Wide Volkswagen* opinion, Justice White. Justice Stevens, who had joined in Justice White's opinion for the Court in *World-Wide Volkswagen* declined to determine the issue that split the Court, but hinted that he inclined more to the Brennan view than to that of O'Connor.

However, the most important and startling aspect of *Asahi* is not this split in the Court as to the meaning of *World-Wide Volkswagen,* but rather the fact that eight of the nine Justices agreed that, regardless of whether the traditional substantive due process minimum contacts test had been met in this case, the decision of the California Supreme Court had to be reversed since the assertion of personal jurisdiction violated "traditional notions of fair play and substantial justice" in light of all the facts of the case. In other words, eight of the nine Justices, including Justice Brennan, accepted the view of Justices Stevens and White in the *Burger King* case that the Supreme Court should invalidate state assertions of personal jurisdiction if, on the particular facts of the case before it, a majority of the Justices found the assertion of jurisdiction to be "unfair."

What an usurpation of state discretion! What unbridled discretion! What an unruly constitutional horse! The view of these eight Justices is an even more extreme version of substantive due process than any of the *Lochner*-era decisions. One can only sympathize with Justice Black as his worst fears in *International Shoe* had come true. He, surely, must have turned over wildly in his grave.

Nor can the view of these eight Justices be rationalized, as was, perhaps, Justice Stevens' dissent in *Burger King,* as part of the federalism thread, whereby the Supreme Court, as the federal authority, is creating a comprehensive scheme pursuant to which interstate litigation would be conducted in the best possible state. This is so because the defendant in *Asahi* was a foreign corporation. Indeed, unlike the *Helicopteros Nacionales de Colombia* case, in which just three years earlier all of the Justices had ignored the fact that the defendant involved was a foreign

corporation, in *Asahi*, Justice O'Connor's opinion of the Court for the eight Justices expressly refers to the foreignness of the defendant as a factor in its "fairness" analysis:

> Certainly the burden on the defendant in this case is severe. Asahi has been commanded by the Supreme Court of California not only to traverse the distance between Asahi's headquarters in Japan and the Superior Court of California in and for the County of Solano, but also to submit its dispute with Cheng Shin to a foreign nation's judicial system. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing reasonableness of stretching the long arm of personal jurisdiction over national borders.[62]

Certainly these factors quoted by the Supreme Court are relevant to the assertion of personal jurisdiction over foreign defendants and should be taken into account by the relevant jurisdiction, both in formulating its long-arm rules, and in their application in the particular case. Here, however, that relevant jurisdiction is California, not the United States Supreme Court applying unbridled substantive due process.

As noted in Part I's discussion of the federalism thread, the Supreme Court's intervention here could, perhaps, be supported on the basis of a general preemption of state law by a uniform federal law concerning personal jurisdiction over foreign defendants. Yet the Supreme Court jurisprudence has never hinted at such a preemption. As a matter of due process, the *Asahi* opinion by eight Justices is, in my view, completely unsupportable.

The only Justice who did not join in this unbridled substantive due process approach was Justice Scalia. However, he did not express his views separately on the matter. On the other hand, perhaps, it is not coincidental that three years later, in 1990, Justice Scalia was the author of one of the two main opinions in *Burnham v. Superior Court*,[63] in which a unanimous Supreme Court upheld personal jurisdiction based on service of process on a defendant only temporarily in the state.

Whatever one's view of the desirability of such transient personal jurisdiction (I, for one, am not convinced that it is undesirable, if tempered with an appropriate doctrine of forum non

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[62] *Asahi*, 480 U.S. at 114 (plurality opinion).

[63] 495 U.S. 604 (1990) (plurality opinion).

conveniens),[64] the issue in *Burnham* was not the desirability of such jurisdiction, but rather its constitutionality under the substantive due process thread of the Supreme Court jurisprudence. In light of *Shaffer*, *Kulko*, *Rush*, *Helicopteros*, and *Asahi*, it is remarkable that the Supreme Court unanimously upheld such jurisdiction.

Of course, there are differences between the opinions of Justice Scalia for four Justices and that of Justice Brennan for four others, as well as the individual view of Justice Stevens. If we wanted to stretch the analogy, perhaps Justice Scalia's opinion in *Burnham* could be compared with that of Justice Holmes' dissent in *Lochner*, whereas Justice Brennan has returned to the Harlan approach he advocated consistently since his dissent in *Shaffer*, with his only aberration being the inexplicable decision in *Asahi*.

Whatever the meaning of these differences, they pale in light of the basic agreement among all the Justices in *Burnham*. This agreement reflects a minimalist substantive due process approach that undercuts the rationale of *Shaffer* and its above-mentioned progeny and returns the situation to its starting point: *International Shoe*, with its potential for the minimalist substantive due process approach, despite Justice Black's apprehensions.

Since the result in *Burnham* is so at odds with *Shaffer* and its progeny (including *Asahi*, which preceded *Burnham* by only three years), one cannot be certain, but can only hope, that *Burnham* represents a new beginning rather than merely another aberration in the Supreme Court jurisprudence.

III. A COMPARATIVE ANALYSIS OF UNITED STATES PERSONAL JURISDICTION JURISPRUDENCE

To create a common market, it is desirable, if not absolutely necessary, that the rules of personal jurisdiction among the member states of the common market concerning domiciliaries of member states be determined by some instrument of the common market. Certain minimum provisions governing personal jurisdiction are a necessary corollary to provisions requiring

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[64] *See* Stephen Goldstein, *International Jurisdiction Based Solely on Service of Process—Now an Actuality*, 10 MISHPATIM 409 (1980) (Hebrew).

the reciprocal enforcement of judgments. These would include the prohibition of "exorbitant" forms of personal jurisdiction, such as those contained in Article 3 of the Brussels Convention. Finally, it is desirable, if again not absolutely essential, that a comprehensive scheme for the reciprocal enforcement of judgments among a group of states not only negatively prohibit exorbitant forms of personal jurisdiction but also provide for an affirmative complementary system of allocation of personal jurisdiction among the member states.

Because the United States lacks both constitutional provisions in this matter (such as those found in the Swiss Constitution) and congressional legislation that could be compared to the Brussels Convention, it is not surprising that the Supreme Court, as a federal body, attempted to fill this void. I, for one, do not fault the Court for this attempt. However, it must be admitted that the Court's attempt has been a complete failure, primarily because the Court has failed to deal with the federalism and the due process threads of personal jurisdiction separately.

The Court's failure is also attributable to the inability of sporadic judicial decisions to create the desired comprehensive scheme for allocating personal jurisdiction among the states. Thus, the Court's retreat from the federalism thread after its decisions in *Hanson* and *World-Wide Volkswagen* is to be welcomed. I suggest that the Court renounce completely its reliance on the federalism thread, although such a complete renunciation alone is not enough.

A. The Brussels Convention as a Model for a Comprehensive Legislative Scheme Allocating Jurisdiction Among the States

A complete judicial renunciation of the federalism thread is not sufficient by itself because a vacuum would continue to exist. Congress must be encouraged to adopt a comprehensive scheme for allocating personal jurisdiction among the states.[65]

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[65] In the absence of such congressional legislation, an interstate compact might be a possible alternative. *See* Juenger, *supra* note 2, at 21-23 (suggesting participation of United States in an international compact).

The draftsmen of such a comprehensive congressional scheme could well look to the Brussels Convention as a model.

The relevant provisions of the Brussels Convention prohibit forms of personal jurisdiction deemed to be exorbitant. They create a general principle of jurisdiction in the state in which the defendant is domiciled, but then supplement this provision with a comprehensive long-arm scheme. In addition, there are special provisions concerning multiple defendants and third-party actions, as well as counterclaims.

In situations in which it is thought that there are special interests to be protected, such as matters relating to insurance and consumer contracts, the Convention sets forth special rules to protect the weaker party. Comprehensive United States legislation in this area might consider the possibility of such special rules for such matters as franchise contracts, as suggested by Justice Stevens in his *Burger King* dissent, as well as for cases involving freedom of speech and the press.

Finally, the Brussels Convention deals explicitly with problems of provisional relief where the appropriate state for such relief is not the state that has jurisdiction over the substantive action.[66] The Convention also deals with issues of lis pendens and related actions pending simultaneously in different states.

I do not mean to suggest that the United States should copy the specific provisions of the Brussels Convention. Some of these provisions are somewhat problematic. Others may be appropriate for the European Union, but not for the United States. The Brussels Convention is suggested only as a good model for appropriate congressional legislation.

A fundamental issue that must be faced by any comprehensive congressional scheme is the effect of its rules concerning defendants who are not domiciled in the United States. The basic principle of the Brussels Convention is that its rules, including the prohibition of exorbitant judicial jurisdiction, only bind member states in cases that involve defendants domiciled in another member state. Because of this principle, Professor

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[66] *See generally* Stephen Goldstein, Provisional Relief and International Jurisdiction: Israel, The European Union and the Relations Between Them 34-37, 41 (on file with author) (to be published in book of papers presented to Med-Campus Program, University of Ghent, Oct. 20-21, 1994).

Juenger has characterized the Brussels Convention as being "marred by provisions that discriminate against parties outside the Common Market, rules that are clearly unwarranted, violate comity, and deserve censure."[67] In contrast, the one redeeming feature Professor Juenger finds in the United States jurisprudence is that it does not share this fault of discrimination. He observes that "[s]ince state court jurisdiction is circumscribed by the Fourteenth Amendment and since nonresident aliens are entitled to due process protection, the American law on jurisdiction is, on its face, nondiscriminatory, although the Supreme Court has never expressly confirmed the conclusion."[68]

In my view, the situation is more complex. First, Professor Juenger's statement that "the Supreme Court has never expressly confirmed this conclusion" is, indeed, an understatement. As discussed above, the treatment of foreigners in United States personal jurisdiction case law is a product of: (1) the Court ignoring the issue; (2) inconsistent approaches to the issue (as illustrated by the *Helicopteros* and *Asahi* cases);[69] and (3) the Court's failure to understand the federalism thread in its decisions.

The last of these reasons is most important, for the federalism thread does justify, at least partially, the "discriminatory" approach of the Brussels Convention. The federalism thread regulating the personal jurisdiction of member states is itself composed of two elements: facilitation of a common market and a quid pro quo for a compulsory system of reciprocal enforcement of judgments.

In terms of facilitating a common market, rules favoring domiciliaries of the member states over outsiders are not only justifiable, but they are the essence of the creation of such a market. Insiders are by definition different than outsiders in the scheme of such a common market. Thus, the Brussels Convention should no more be faulted on that account than should other rules of the European Union, such as those concerning the free movement of people and goods, which "discriminate" against those who are not domiciled in a member state.

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[67] Juenger, *supra* note 2, at 20.

[68] Juenger, *supra* note 1, at 1210-11.

[69] *See* Juenger, *supra* note 2, at 16.

In contrast, the aspect of the federalism thread that derives from the existence of a compulsory system of enforcement of judgments does raise greater problems concerning "discrimination" against outsiders. As discussed above, for states to agree to enforce reciprocally judgments of other member states, they must be assured, at a minimum, that other member states will not enter judgments in cases in which they should not be adjudicating at all. Thus, at a minimum, a scheme of mutual enforcement of judgments must prohibit the exercise of "exorbitant" forms of personal jurisdiction.

The Brussels Convention prohibits the use of exorbitant jurisdiction only as to defendants domiciled in a member state. The Convention expressly permits their use as to those domiciled in other states. However, there generally is no special treatment under the Convention concerning judgments of member states entered against outsiders pursuant to exorbitant personal jurisdiction. Such judgments must generally be enforced by other member states as are all member state judgments. This is, indeed, a defect in the Brussels Convention, and should be corrected by either prohibiting the use of exorbitant jurisdiction against outsiders, or in the alternative, by exempting judgments against outsiders that are based on exorbitant jurisdiction from the Convention's provisions requiring their compulsory enforcement by other member states.

The framers of the Brussels Convention were aware of this problem, as evidenced by Article 54 of the Convention. This provision permits a member state to refuse to enforce a judgment against a domiciliary of a non-member state on the ground that it is a form of exorbitant jurisdiction that is prohibited as to a defendant domiciled in a member state, if the member state has ratified a treaty to that effect with the non-member state in which the defendant is domiciled. While this provision clearly recognizes the problem, it does not solve it. First, it is not clear to what extent the provision can be effectuated in practice by the negotiation of the relevant treaties.[70] Second, such treaties should not be necessary. The Brussels Convention

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[70] *See* Juenger, *supra* note 1, at 1211 n.121.

itself should exclude judgments based on exorbitant jurisdiction from its compulsory enforcement provisions if it does not prohibit the use of exorbitant jurisdiction against outsiders.

Thus far I have discussed the federalism thread as it relates to the allocation of jurisdiction among the member states of a common market or other federation. This is the basis of the Brussels Convention as well as the United States Supreme Court jurisprudence regarding the federalism thread. However, the above discussion of foreign defendants invokes another possible aspect of the federalism thread in a strong federal union such as the United States. That aspect is the possibility that federal law would preempt state law as to foreign defendants on the grounds that there should be uniformity within the federation concerning foreign defendants.

It is quite understandable that the Brussels Convention does not hint of any such position since neither the historic European Economic Community, nor the current European Union, is the type of strong federation that would adopt such a preemption approach. The United States, however, may be different in this regard. As mentioned above, such a preemption approach is the only possible justification for the Court's decision in *Asahi*. In any event, the drafters of comprehensive congressional legislation governing personal jurisdiction should also consider this preemption aspect of the federalism thread.

This brings us to the due process thread. The aspects of procedural due process involved in personal jurisdiction, such as notice, right to be heard, and so forth, have presented no real problems in the case law. The real problems relate to the use of substantive due process concepts as a restriction on state authority. *International Shoe* was revolutionary in its shifting the concern from the federalism thread, derived from full faith and credit to judgments, to substantive due process.

The *International Shoe* opinion left open the question of the substance of such substantive due process. To be sure, *International Shoe* rejected the Black-Holmes position, which rejects completely substantive due process. However, it left open the choice between what I have termed the Harlan-Douglas-Brennan minimalist approach and the Peckham-Marshall maximalist approach. It was *International Shoe*'s progeny that set the Court onto the maximalist approach. This was accomplished by the

string of opinions written by Justice Marshall, starting with *Shaffer*, which in turn, had been influenced by the federalism thread opinion of Chief Justice Warren in *Hanson*. In these decisions, Justice Brennan, the proponent of the Harlan view in *Lochner*, was consistently in dissent. In *Helicopteros*, the maximalist opinion for the Court was written by Justice Blackman, with Justice Brennan continuing in dissent.

Yet, the high (or low) point of displacement of state authority was the extraordinary acceptance by eight Justices in *Asahi* of the dissenting view of Justice Stevens in the *Burger King* case. This approach holds that the United States Supreme Court may overturn a state assertion of personal jurisdiction based on the views of the majority of the Justices of the Supreme Court as to what is "fair" on the facts of an individual case. Fortunately, the precedential value of this extraordinary decision was limited by the recent *Burnham* decision.

In *Burnham*, Justice Scalia, who was alone in not joining his colleagues in *Asahi*, for the first time in cases concerning personal jurisdiction, wrote an opinion for four Justices that was reminiscent of the dissents of Justice Holmes in *Lochner* and Justice Black in *International Shoe*. Justice Brennan returned to his general position, after the *Asahi* aberration, and wrote an opinion for four other Justices that is reminiscent of that of Justice Harlan in *Lochner* and follows the basic Brennan approach.

One hopes *Burnham* represents a precedential rejection of the maximalist *Lochner* due process view as expressed in *Shaffer* and its progeny. As such, it would return us to *International Shoe* with only the relatively narrow choice remaining between that of Justice Black, who completely rejected the due process approach (which I find in the Scalia opinion) and that of the Harlan-Brennan approach. Both approaches are very far from the maximalist *Lochner* approach of Justice Marshall, with the difference between them being minimal.

In this view, *Burnham* correctly unites the substantive due process jurisprudence concerning personal jurisdiction with the general substantive due process jurisprudence concerning state regulation of economic matters. Moreover, *Burnham* brings the jurisprudence in this field into harmony with that concerning the related field of choice of law. In this latter area, the Su-

preme Court, rightly, has not attempted to impose a maximalist due process approach, but has followed a minimalist Harlan-Brennan approach, thereby giving great latitude to the states to develop their choice-of-law rules.[71] The difference between the Supreme Court cases concerning personal jurisdiction and choice of law is even more striking in light of the clear connection between the two issues in the Court's opinion in *International Shoe* itself; a connection which might have been the basis for continuing to treat the two issues alike.

This close connection was interrupted, in a quite casual manner and with no real analysis of the issue, by Chief Justice Warren in his federalism thread opinion for the Court in *Hanson*. While one might be able to justify completely different approaches to personal jurisdiction and choice of law pursuant to the federalism thread, in my view, there is no justification for such a difference concerning the due process thread.

Here again, however, we see the confusion created by the coexistence of these two threads in the Supreme Court case law. The differences between choice of law and personal jurisdiction enumerated in the federalism thread case of *Hanson* was adopted, thereafter, by the maximalist substantive due process cases starting with *Shaffer*, despite Justice Brennan's persuasive dissent on this issue.

B. A Proposed Return to a Minimalist Substantive Due Process Approach

A minimalist substantive due process approach to personal jurisdiction would, as it has done to choice of law, free other governmental organs to make the appropriate policy decisions. It would free Congress to allocate jurisdiction appropriately among the states without fear of violating substantive due process. Moreover, it would allow the United States to enter into international agreements in this area.[72] Most importantly, unless and until Congress legislates definitively in the personal jurisdiction arena, a minimalist approach would allow the states to determine the policy issues involved. Indeed, perhaps the worst prac-

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[71] *See* Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

[72] *See* Juenger, *supra* note 2, at 21-23.

tical effect of the Supreme Court jurisprudence concerning personal jurisdiction, as compared to that concerning choice of law, is that the former has stifled any real development of the law by the states.

It may well be true, as stated by Professor Juenger, that, in light of the confusion and inconsistency of the United States Supreme Court case law concerning personal jurisdiction, "one cannot but sympathize with California's refusal to clutter its statute book with irrelevant details;"[73] instead adopting a general long-arm clause designed to extend its jurisdiction as far as the changing Supreme Court jurisprudence would allow. Yet it must be agreed that such a situation is regrettable, to say the least. As discussed above, one of the most troubling aspects of the *Asahi* case was the opinion of the California Supreme Court, which did not even consider any principles of California policy. A minimalist substantive due process approach would free the states to make such policy decisions.

At the first level, the legislature would be free to determine its long-arm jurisdiction based on its policy views. In so doing, it would be worthwhile to seek advice and inspiration from comparative law sources. In this regard, without subscribing to all the particulars of the English scheme, particularly as they have been interpreted by the English courts, the English rules concerning service out of the jurisdiction would serve as a good model. The use of this model would also suggest to the states the creation of special rules for cases concerning multiple defendants and third-party actions. These matters have become completely lost in the United States Supreme Court jurisdiction, which has focused completely on individual defendants.

Use of the English model also would require the states to address the issue of judicial discretion in individual cases. The English scheme has three elements. The first element is a list of alternative situations equivalent to detailed long-arm statute provisions in the United States.[74] The second and third elements add to the necessity of the case falling within one of the specified general situations. These elements give the trial court discretion to restrict service on a foreign defendant based on

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[73] *Id.* at 11.

[74] *See* Rules of the Supreme Court, Order 11, Rule 1 (1965) (U.K.).

the court's preliminary evaluation of whether the plaintiff has at least a "good, arguable case" on the merits,[75] and require that, based on the competing equities and conveniences involved, England is clearly the appropriate forum for the trial of the case.[76]

This last provision would have allowed the trial court in *Burger King* discretion to refuse to compel the small franchisee to defend the action in the state of the large franchiser. It would also have allowed the trial court in *Asahi* to dismiss the action against the foreign third-party defendant following the dismissal of the original claim. In general, such discretion could be used to deal with the special concerns of weaker parties, such as consumers. Alternatively, a state could decide to follow the example of the Brussels Convention in which some of these concerns are addressed not on a case-by-case discretionary basis, but rather in the long-arm provisions themselves, with special provisions applicable to insurance and consumer contracts.

Finally, after *Burnham*, the states are free to decide for themselves whether they want to continue to use service of process on transients as a sufficient basis for jurisdiction. While this form of jurisdiction has been criticized strongly,[77] it continues to exist in England and in Israel, where, in both jurisdictions, it is quite properly tempered by the doctrine of forum non conveniens.[78] In my view, this is an acceptable resolution of the issue.[79] However, I would emphasize again that the most important issue is not the specific rules adopted by a given state, but rather the exercise of decisionmaking by the states in this area.

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[75] Vitrovice Horni A. Hutni Tezirstvo v. Korner [1951] All E.R. 334, 338 (H.L.) (appeal taken from court of appeals); *see also* The Brabo [1949] 82 Lloyd's List L. Rep. 251 (H.L.) (appeal taken from court of appeals).

[76] *See generally* The Spiliada [1987] 1 Lloyd's Rep. 1, 10 (H.L.) (appeal taken from court of appeals) (stating that issue is where case may be most suitably tried). For a discussion of the equivalent provisions of Israeli law as to all three of the above criteria for imposing judicial jurisdiction on foreign defendants, see generally Stephen Goldstein, *Jurisdiction over Foreign Manufacturers Concerning Damage That Occurs in Israel*, 14 ISRAEL L. REV. 504 (1979).

[77] *See, e.g.*, Juenger, *supra* note 2, at 7, and sources cited therein.

[78] *See generally* Stephen Goldstein, *Rules for Declining to Exercise Jurisdiction in Civil and Commercial Matters — Forum non Conveniens, Lis Pendens, in* ISRAELI REPORTS TO THE XIV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 107 (A.M. Rabello ed., 1994).

[79] *See* Goldstein, *supra* note 64, at 415-17.

CONCLUSION

In its jurisprudence concerning constitutional limitations on the assertion of personal jurisdiction among the states, the United States Supreme Court has attempted to deal with two quite separate problems. The first problem is the development of rules allocating personal jurisdiction among the states of a federal Union which have agreed to enforce reciprocal judgments rendered by such states — the federalism thread. In so doing, the Supreme Court was responding to the needs of a common market for the reciprocal enforcement of judgments, as exemplified by the Swiss Constitution and the Brussels Convention.

In the absence of such an allocation system being developed by another federal entity, the Supreme Court's entry into this area is understandable. Unfortunately, the Court has failed to create such an allocation system. This failure is the result of two main factors. First, such a system cannot be developed adequately by sporadic case law, but rather requires a comprehensive legislative approach. Thus, the Supreme Court should abandon its efforts in this regard and Congress should be encouraged to legislate comprehensively in this field.

The second reason for the Court's failure to accomplish a comprehensive federal personal jurisdiction allocation scheme for the states is that it has attempted, at the same time, and in the same cases, to deal with an entirely different problem: the imposition of limitations on excesses of state assertions of personal jurisdiction that flow from concepts of substantive due process. This substantive due process thread, unlike the federalism thread, is susceptible to case law development and, indeed, is most appropriate for such development. *International Shoe* clearly placed the jurisprudence in this area on the substantive due process thread, as distinguished from the federalism thread. However, the federalism thread did not die, but continued, albeit inconsistently, even after *International Shoe*.

International Shoe itself does not require very substantial limits on state assertions of personal jurisdiction. Rather, it leaves open the question of the extent of such limitations. However, in part due to the influence of the federalism thread, most of the Supreme Court case law following *International Shoe* has unduly limited state assertions of personal jurisdiction by adopting a maximalist substantive due process approach. This maximalist

approach is quite similar to the rightly repudiated *Lochner*-era substantive due process jurisprudence. One hopes *Burnham* represents a repudiation of this maximalist substantive due process approach and the acceptance of a minimalist approach. This would be consistent with the generally accepted approach to matters of property since the 1940s, as well as with the specific due process approach in the related area of choice of law.

The application of a minimalist substantive due process approach would force the states to make the appropriate policy decisions concerning personal jurisdiction, both on a general legislative level and on a specific case-by-case adjudicatory level. When the states are free to do so, they would be well advised to look toward comparative law sources, such as the Brussels Convention and the English Rules when making their own policy decisions.