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Foreword

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We have all heard that the pace of change is speeding up. Certainly, that seems true in the law. But, the pace of change in personal jurisdiction is glacial rather than dramatic, even in these times of global warming. The Supreme Court decided *International Shoe Co. v. Washington*[1] fifty years ago this December. At the time, and for at least the next thirty years, the "minimum contacts" doctrine announced in *International Shoe* seemed the right vehicle to replace the rigid and outdated territorial power theory of *International Shoe*'s discredited antecedent, *Pennoyer v. Neff*.[2] If *Pennoyer v. Neff* "dominated the American law of jurisdiction for nearly three-quarters of a century"[3] before *International Shoe*, *Shoe*'s reign seemingly has ended a full quarter century sooner. And maybe even that is overstating the case. It took thirty-two years after *International Shoe* for the Court to overrule *Pennoyer* in *Shaffer v. Heitner*.[4] Yet, in *Burnham v. Superior Court*,[5] just thirteen years later, *Shaffer* was reinterpreted and narrowed in an unrecognizable fashion.

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[1] 326 U.S. 310 (1945).

[2] 95 U.S. 714 (1877).

[3] Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272.

[4] 433 U.S. 186, 212 n.39 (1977).

[5] 495 U.S. 604 (1990).

Although *Shoe*'s minimum contacts test during the last half-century may have dominated, and may continue to influence profoundly, personal jurisdiction in the United States, *International Shoe* has never completely fulfilled its promise to provide an adequate general theory of state-court jurisdiction.[6] *International Shoe*'s approach has never fully overcome the vagueness of the minimum-contacts general principle.[7] In addition, the meaning and relevance of "how contacts count"[8] has never been fully resolved.

This Symposium marks the fiftieth anniversary of *International Shoe* by examining its impact, attributes, failings, and future. It also offers alternatives to *International Shoe*'s approach to personal jurisdiction. The contributors to the Symposium are hard at work on the next generation of personal jurisdiction rules, erected this time over the still unfinished grave of *International Shoe*.[9]

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[6] In 1965, Professor Hazard hopefully predicted that all "jurisdictional problems [would] be approached as ones of the existence of minimum contacts between the forum and the transaction in litigation." Hazard, *supra* note 3, at 281. This point seemed to have been reached in *Shaffer* when Justice Marshall, writing for the Court, declared, "We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. *Shaffer*, 433 U.S. at 212. When Professor Hazard wrote this prediction, he fully expected that "the minimum contacts principle, particularized in needful special areas, attended by a notice requirement, and supplemented by systems of time bar," would provide an adequate theory of state-court jurisdiction. Hazard, *supra* note 3, at 283.

[7] Hazard, *supra* note 3, at 283. Hazard expected that the defect would be overcome by "arbitrary particularization . . . within the general minimum-contacts framework." *Id.* From our vantage point some 50-years down the road, however, the "pointillist process of locating particular cases on one side of the line or the other" seems to have no end. *Id.* at 274. And, the one seemingly secure aspect of *International Shoe* — "the theoretical structure of the rules for service of process in damage actions . . . established in *International Shoe*'s minimum-contacts concept" — has unravelled as well. *Id.* Over its 50 year hegemony, the minimum contacts test has been associated and then disassociated with so-called interstate federalism at least three times. *See* Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983). Ultimately, the minimum contacts doctrine has been discarded in the critical instance of in-person service in the forum state. In its place the Justices erected a babel of "rules," that explain little more than the outcome of the case.

[8] *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

[9] Professor Silberman, writing about *Shaffer v. Heitner*, declared that "the *Pennoyer* grave, of course, has been dug for years, but it has taken until now for the coffin to be closed, nailed shut, and interred forever." Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 34 (1978). *International Shoe* might be in critical condition; there may be gravediggers at work; but our Symposium participants, for better or worse,

In fact, most of our writers have spent their academic careers first in trying to preserve and make sense of the minimum-contacts test. Only now, in despair, have they thrown it aside and begun in earnest to search for something better. Before I take a closer look at some of the themes that can be found among our distinguished commentators, it is worth a moment to remember the *International Shoe* case itself, whose background was wonderfully unearthed by Professors Cameron and Johnson.

I. *INTERNATIONAL SHOE*: THE CASE

In December of 1945, the Supreme Court seized upon a vehicle for clarifying the uncertainties generated by *Pennoyer* and its descendants[10] and delivered the now-famous opinion of *International Shoe Co. v. Washington*.[11] The opinion came in a time of flux. Commerce was diversifying and expanding, and Congress was well on its way, with the Supreme Court's help, to asserting its commerce powers to the fullest extent permissible. Corporations were developing new ways of transacting business on a national and international scale. Although burgeoning commerce cared little for political subdivisions, the states, of course, continued to take their borders very seriously. When the State of Washington tried to assert its taxing powers over the International Shoe Company, the Company dug in its heels, and a long course of litigation ensued.[12]

The International Shoe Company used a business scheme that challenged the traditional structure of a corporation. Instead of sprinkling costly production and distribution facilities about the country, the Delaware-born Company consolidated its operations in Missouri and several other states.[13] The Company relied on a local salesforce working on commission. In Washington, the Company opened no offices, nor did it maintain retail outlets. It

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are at work on the replacement before the body is cold.

[10] *See* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman?: Forum Selection and Outcome Determination under* International Shoe, 28 U.C. DAVIS L. REV. 769 (1995) (stating that *International Shoe* Court listened to critics of current jurisdiction doctrine and tried to repair jurisdiction rules).

[11] 326 U.S. 310 (1945).

[12] Washington sought to collect taxes for tax years 1937-40, but it was not until 1945 that the Supreme Court delivered its opinion. *Id.* at 310, 313.

[13] *See id.* at 312-14 (explaining International Shoe's business practices).

employed approximately one dozen sellers who were supervised directly by St. Louis managers. Each seller had limited stock to use as samples, exhibiting only one of any pair of shoes, and occasionally rented space to exhibit the product lines. When a sale was made, the Company shipped a customer's order directly from points outside Washington. The sellers did not collect debts or manage the Company — they simply sold shoes.[14]

Washington's Office of Unemployment wanted to tax the seller's commissions. Washington defrayed its unemployment compensation system by extracting a percentage of the wages that each employer paid to its employees within the state.[15] While trying to collect taxes for the years 1937-40, the Office of Unemployment served a notice of assessment upon a Company salesman residing in Washington and sent a copy by registered mail to the Company's headquarters in St. Louis. Counsel for the Company appeared specially before the Office of Unemployment. They argued that the corporation was not present in the state; that it had no agent upon whom service could be made; and that it was not an employer within the meaning of Washington's unemployment compensation laws.[16] The appeals tribunal of the Office of Unemployment disagreed, as did the Commissioner of the agency, the superior court, the Washington Supreme Court, and, ultimately, the United States Supreme Court.

In each proceeding, the Company protested Washington's assertion of jurisdiction, claiming that the state violated the Due Process Clause of the Fourteenth Amendment.[17] The Company also argued that Washington's unemployment compensation system posed an unconstitutional burden on interstate commerce.[18] The highest court granted review to consider International Shoe's constitutional claims. The Supreme Court quickly brushed aside the Company's arguments that Washington's unemployment taxes unduly burdened interstate commerce.[19]

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[14] There is every reason to suspect International Shoe's arrangements were set up precisely to avoid personal jurisdiction. Cameron & Johnson, *supra* note 10, at 790-91.

[15] *International Shoe*, 326 U.S. at 311-12.

[16] *Id.* at 312.

[17] *Id.* at 315.

[18] *Id.*

[19] *Id.*

In the bulk of the opinion, the Court labored to develop a broadly applicable test to determine whether Washington's assertion of in personam jurisdiction comported with due process. First, the Court observed that the requirement of physical presence in the forum state had given way to personal service and summons. As a result, in the Court's words, due process required only that a defendant have certain "minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[20]

Physical presence as a jurisdictional concept, however, did not die with the *International Shoe* decision. The Court redefined the concept by emphasizing that the term "physical presence" merely symbolizes those activities that are significant enough to satisfy due process principles.[21] If a corporation's activities within a state are continuous and systematic, and give rise to the liabilities sued upon, then the corporation is "present" for jurisdictional purposes. Moreover, the Court pointed to cases subjecting a corporation to personal jurisdiction based on contacts with the forum state unrelated to the lawsuit. In this situation, the corporation's operations must be substantial enough to justify suit.[22]

The Supreme Court added a few qualifiers. Testing for personal jurisdiction cannot involve a mechanical, quantitative rule.[23] Instead, a court should examine the nature and quality of the activity, keeping in mind the general principles of fair and orderly administration of the laws. Also, exercising the privileges and benefits of conducting operations within the forum tends to show that a corporation incurs corresponding obligations. Subjecting a company to a suit that seeks to enforce those obligations can hardly be surprising.[24]

Without hesitation, the Supreme Court applied its new test and found that International Shoe was subject to Washington's jurisdiction. In checklist fashion, the Court described the

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[20] *Id.* at 316.
[21] *Id.* at 316-17.
[22] *Id.* at 318.
[23] *Id.* at 319.
[24] *Id.*

Company's systematic contacts with Washington and the resulting benefits to the Company derived from conducting business in Washington. As a result, the Company incurred obligations, and the Company would have to answer to those obligations in Washington. The Court tied the final knot by stating that the same activities establishing presence establish the state's right to tax and to collect that tax through the judicial system.[25]

Justice Black delivered a strong separate opinion, taking a dim view of the elaborate framework established by his brethren.[26] Justice Black thought the Court, to use Justice Blackmun's phrase, "launche[d] a missile to kill a mouse."[27] His separate opinion began with the argument that the Court should have dismissed International Shoe's appeal because it reached the bounds of frivolity.[28] Next, he decried the vague constitutional criteria announced by the majority and argued that the Constitution leaves states free to sue those corporations whose agents "do business" in the state.[29] To Justice Black, the sin of the majority lay in permitting undue restriction of states' rights under the rubric of the Fourteenth Amendment.[30] Even though the Court in this case upheld the state's power, Justice Black feared opening the flood gates to allow courts to trample state power in the future.[31]

II. OUT OF THE ASHES: *INTERNATIONAL SHOE* TODAY

A. What's Gone Wrong?

Cameron and Johnson identify the simple and very fundamental failure of the minimum-contacts formula: despite its simplicity, it has failed to give a definitive answer to whether a state court can exercise jurisdiction over non-resident defendants in

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[25] *Id.*

[26] *Id.* at 322.

[27] Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2904 (1992) (Blackmun, J., dissenting).

[28] *International Shoe*, 326 U.S. at 322. Justice Black thought it self-evident that personal service and notice by registered mail upon a corporation doing business in Washington comported with procedural due process. *Id.* at 323.

[29] *Id.* at 324.

[30] *Id.* at 325-26.

[31] *Id.* at 326.

some of the most commonplace situations.[32] There is still no clear test for when a manufacturer of component parts of a product may be sued in the state where the product causes personal injury. As Professor Weintraub puts it, "the threshold issue of personal jurisdiction has become one of the most litigated" issues in civil actions. This uncertainty poorly serves resident plaintiffs and non-resident defendants, domestic and foreign, alike. If the minimum contacts test cannot provide certainty in the relatively "simple" domestic cases — such as when a non-resident manufacturer of a component part of a product may be sued in the state where it caused injury — it is no surprise that it is equally ineffective and frustrating in complex litigation and international litigation.

Although it is easy to identify the failings of the minimum contacts test, there is significantly less agreement about the causes of the failure and the recommended cure. It is here that the Symposium participants offer especially creative analyses. Everyone seems to agree that the doctrine needs work or reformation. Participants disagree, however, on the desired end, the reasons for that end, and the means to that end.

In seeking to understand *International Shoe* and determine its place in jurisdictional thinking today, the Symposium's contributors begin by returning to the origins of the application of the Fourteenth Amendment in evaluating assertions of jurisdiction — to *Pennoyer* itself. Continuing a theme he first adumbrated in the very pages of this law review,[33] Professor Borchers contends, contrary to widely prevailing opinion, that *Pennoyer* does *not* stand for the proposition that the Due Process Clause of the Fourteenth Amendment directly limits the jurisdictional reach of state courts. Given the dubious pedigree for constitutional limits on state court jurisdiction, Professor Borchers then considers whether these constitutional limits serve any recognizable constitutional values. Borchers rejects "interstate federalism" or "sovereignty," "forum state interests," and "preventing jurisdictional surprise" as candidates. He then finds that only traditional substantive and procedural due process justifications support a limit-

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[32] Cameron & Johnson, *supra* note 10, at 773.

[33] *See* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19, 25-51 (1990).

ed "rationality-plus-fair-hearing" test to replace the current rules. This would leave to the legislatures the principal task of constructing jurisdictional rules. Thus, his solution to *International Shoe*'s failure is to narrow its reach, to reject "constitutionalized personal jurisdiction," and to let the political branch do the work.

Responding to Borchers, Professor Oakley squarely challenges what he cails "the revisionist history of *Pennoyer v. Neff*."[34] Oakley reminds us that to accept Borchers' claim requires dumping nearly 120 years of Supreme Court precedent. It is better to accept that, under the Due Process Clause, using the minimum contacts analysis depends on territorially based limits. For Oakley, jurisdictional rules frequently do pose issues of individual rights or federal structure that are serious enough to justify constitutional regulation.[35]

Professor Weintraub falls somewhere between Oakley and Borchers in his analysis of *International Shoe* and his suggestions for reform. Calling the Supreme Court's jurisdictional doctrine a "labyrinth," Weintraub declares unequivocally that we must find a way out. His preference is close to Borchers': "to dismantle the many barriers to personal jurisdiction erected under the supposed aegis of the Constitution and interfere only in the unlikely event that a state court has offended basic concepts of fairness to absent defendants."[36] His choice is a "basic fairness" test for interstate jurisdiction similar to the test for venue. Any forum with a "rational interest" in the dispute should be allowed to adjudicate it. For international defendants, jurisdiction should be based on a national contacts analysis. As an alternative, if radical reform is impossible, Weintraub would settle for better state-enacted jurisdictional rules. Such a rule may involve subjecting products liability defendants to suit at the place of injury if the product reached the forum through normal channels of

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[34] John B. Oakley, *The Pitfalls of "Hint and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 U.C. DAVIS L. REV. 591 (1995).

[35] Oakley, *supra* note 34, at 643-44.

[36] Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 532 (1995).

commerce. He suggests the European Community's Brussels Convention, the subject of several other commentators, as a model for such rules.[37]

Finally, Professor Silberman echoes Weintraub's complaints that the Court has added layers of unnecessary complexity to the due process analysis.[38] She also looks to the European experience under the Brussels Convention and in England under English Order 11.[39] Professor Silberman also believes legislative guidance would help, even in formulating standards for the elusive notion of general jurisdiction.[40]

B. Does Jurisdiction Matter?

Does the highly conceptual debate over *International Shoe*'s proper interpretation and application have a practical consequence, or is it "much ado about nothing"? Professors Cameron and Johnson conducted a searching examination of the Supreme Court's personal jurisdiction cases decided in the *International Shoe* era. By interviewing counsel in the cases and searching public records, they determined the disposition of nineteen cases that involved jurisdiction questions. In seventeen of those cases, the jurisdictional winner ultimately prevailed on the merits,[41] a surprisingly high correlation, confirming the litigator's perception that it's better to do battle on ground of your own choosing. The authors view their sample with some skepticism, but even the qualitative data shows that jurisdiction and forum shopping weighed heavily on the minds of the litigants and their attorneys.[42] Thus, the effect of jurisdictional rules is not restrict-

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[37] Another example Professor Weintraub gives is the Uniform Interstate and International Procedure Act, 13 U.L.A. § 1.03(a)(4) (1962), although he suggests even this form of a statute may not pass muster under the test of Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987). Weintraub, *supra* note 36, at 532.

[38] Professor Silberman's specific complaint is the separation of minimum contacts from the reasonability factors in *Asahi*. *See* Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 759-60 (1995).

[39] Silberman, *supra* note 38, at 762-65.

[40] *See generally* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988).

[41] Cameron & Johnson, *supra* note 10, at 820-21.

[42] *Id.* at 826-27.

ed to academic debate; the rules appear to have real consequences, especially when a litigant is standing at the courthouse door deciding whether to enter.[43]

Cameron and Johnson then go on to consider the implications of their findings. One clear consequence of the combination of jurisdiction's effect on outcomes and *International Shoe*'s doctrinal uncertainty and disarray is increased litigation. To the extent uncertainty breeds litigation, the clamor for clearer jurisdictional rules has merit. As a solution, the authors suggest modest reforms. First, judicial deference to legislative determinations holds promise. Courts are not well-suited to announce broad rules. Furthermore, the courts are deciding property interests — the costs and burdens of litigation. Why apply strict scrutiny to jurisdictional questions and minimum rationality to other economic regulation by legislatures? Second, perhaps jurisdictional rules could conform to venue statutes. Third, more emphasis on conflict of law principles may be an appropriate way to police forum shopping. In short, jurisdiction is important, and it needs help.

Although agreeing with the general proposition "that procedural issues, such as personal jurisdiction, have a strong relationship to the substantive outcome of cases,"[44] Professor Chemerinsky questions the conclusions reached by Professors Cameron and Johnson. First, though recognizing the correlation between jurisdictional outcome and the disposition of a case, Professor Chemerinsky disputes that causation has been established (*i.e.*, that the jurisdictional decision caused the outcome). Second, questioning the claims of many of the participants in the Symposium, he claims that jurisdictional doctrine has become more certain in recent years and, in any event, claims that more certainty may not be desirable because it may diminish the ability of the courts to regulate the fairness of assertions of jurisdiction. Finally, Professor Chemerinsky claims that, because of the constitutional rights implicated, deference to the assertions of jurisdiction by state courts is not the answer to repairing *International Shoe*.

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[43] *Id.*

[44] Erwin Chemerinsky, *Assessing Minimum Contacts: A Reply to Professors Cameron and Johnson*, 28 U.C. DAVIS L. REV. 863 (1995).

C. International Shoe and Complex Litigation

As is the case with virtually all of our traditional models of civil procedure, personal jurisdiction analysis has relied on a model of civil litigation that is becoming increasingly obsolete. Both *Pennoyer* and *International Shoe* picture jurisdiction battles taking place between a single plaintiff and a single defendant. While this may at one time have been the dominant mode of civil litigation, the picture today is much more complex. Modern litigation, especially in the federal courts, has many claims and many parties. Consequently, the dualistic notion that personal jurisdiction is a question of whether the litigation is carried on where plaintiff wishes or where defendant wishes, is simply wrong. Although it was not a focus of the Court's three principal opinions, the complex litigation model may well have influenced the Court's thinking in the welter of opinions in *Asahi Metal Industry Co. v. Superior Court*.[45] The Court failed to find an appropriate framework for jurisdiction based on the stream of commerce theory in a case in which the plaintiff was no longer involved and the remaining issue was one of indemnity between an original defendant and a third-party defendant.

In their two impressive articles, Professor Martin Redish and co-author Eric Beste[46] and Professor Linda Mullenix[47] explore the effects of current jurisdictional rules on complex litigation, with an emphasis on the highly controversial mass tort actions. It is no surprise that both articles conclude that current doctrine is either irrelevant or positively harmful to finding creative ways of dealing with a form of litigation that continues to bedevil the courts near the twilight of the twentieth century. The asbestos litigation crisis in particular has proved nearly intractable to judicial resolution.

Professor Redish and Beste begin their analysis with yet another attack on the post-*International Shoe* formulae for analyzing personal jurisdiction. Joining other commentators, they find incoherent a jurisdictional theory resting allegedly on due pro-

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[45] 480 U.S. 102 (1987).

[46] Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917 (1995).

[47] Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871 (1995).

cess concerns that has become dominated by the idea that a defendant must "purposely avail" itself of the benefits or privileges of the forum state's laws. As a result, they argue, state courts are hamstrung in efforts to resolve mass tort actions. It is highly unlikely that all potential parties — plaintiffs and defendants — will have purposely availed themselves of any one forum's benefits and privileges.[48] Following the proposals offered by previous commentators, Redish and Beste seek a return of personal jurisdiction to what they call a "pragmatic calculus" due process model of jurisdictional analysis, based on *Mathews v. Eldridge*.[49] Under their proposal, true due-process-based jurisdictional analysis asks only whether a litigant will suffer meaningful procedural unfairness as a result of an assertion of jurisdiction. This analysis would do away with the purposeful availment test in mass tort actions.[50] It would allow considerably expanded jurisdictional opportunities, especially in federal court where sovereignty concerns make it easier to assert jurisdiction over United States citizens anywhere in the United States.[51]

Professor Mullenix's article explores the implications of jurisdictional doctrine for the increasingly popular mandatory class actions under Federal Rule of Civil Procedure 23(b)(1). Taking Redish and Beste's analysis even further, she turns to the neglected subject of the due process rights of absent class members. Her particular concern is the mandatory settlement tort class action, where class members cannot opt out even though their damage claims will be resolved. In the next century, Mullenix believes, the "sovereignty versus fairness" debate that has divided the courts in the wake of *International Shoe* will be recast in terms of a similar debate over individual versus aggregate justice. In this context, the question is whether to provide mandatory class action plaintiffs with a universal opt-out provision at the possible expense of destroying the certainty provided by mandatory class actions.

Mass tort litigation has been affected by the unsettled state of the law over whether plaintiffs can opt out of class actions seek-

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[48] Redish & Beste, *supra* note 46, at 921.

[49] 424 U.S. 319 (1976); Redish & Beste, *supra* note 46, at 950-51.

[50] *See* Redish & Beste, *supra* note 46, at 962.

[51] *Id.*

ing both equitable and monetary relief. To date, no federal court has read *Phillips Petroleum Co. v. Shutts*[52] to allow plaintiffs to opt out as a matter of right in a mass tort case. Thus, the tension between mandatory class actions and due process concerns remains. Mullenix considers three possibilities for reform: the Supreme Court could hear another appeal encompassing a mass tort with monetary and equitable claims to give further guidance on the constitutional due process requirements for plaintiffs in such cases; the Advisory Committee on Civil Rules could change the class action provisions; or, Congress could rewrite the rule. Professor Mullenix proposes that constitutional requirements in mandatory class actions include notice, an opportunity to be heard, and, most critically, an opt-out right or its substantial equivalent for all absent class members.[53]

Professor Mullenix laments the Supreme Court's refusal to decide the case of *Ticor Title Insurance Co. v. Brown*,[54] which continues to leave open many questions concerning mandatory class actions. The Court of Appeals for the Ninth Circuit has held that plaintiffs have a constitutional due process right to opt out of class actions for monetary damages. Other courts of appeal adhere to prior practice prohibiting class members from opting out as a matter of right in Rule 23(b)(1) class actions. The Supreme Court's refusal to decide *Ticor Title* is a lost opportunity to clarify the due process rights of absent class members.

IV. INTERNATIONAL PERSPECTIVES ON *INTERNATIONAL SHOE*

A theme running through much of the critique of *International Shoe* in the previous contributors' articles has been admiration and support of jurisdiction-allocation schemes based on legislative enactments, especially those of continental Europe. The final set of articles takes a critical look at these regimes and whether they truly offer a superior analysis.

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[52] 472 U.S. 797 (1985) (upholding state class action binding absent plaintiff members of class who lacked sufficient minimum contacts with forum but who had been given notice of action and opportunity to opt out).

[53] Mullenix, *supra* note 47, at 876.

[54] 114 S. Ct. 1359 (1994) (dismissing writ of certiorari as improvidently granted to Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992)).

Professor Goldstein begins his comparative analysis with his own critique.[55] He believes the problems with United States personal jurisdiction doctrine stem from the Court's attempt to perform two quite different tasks in its due process jurisdiction jurisprudence. The Court has tried both to allocate personal jurisdiction among the several states and to limit excessive assertions of jurisdiction by the states. While this second aim is amenable to judicial control, the first is principally a legislative, not a judicial, function. With *Pennoyer* as the allocational fountainhead and *International Shoe* as the true forbearer of due process limitations on jurisdiction, the Court has wandered from one thread to the other over the years since *International Shoe*. *Hanson v. Denckla*[56] and *World-Wide Volkswagen*[57] belong in the *Pennoyer* camp, while *Shaffer v. Heitner*,[58] *Kulko v. Superior Court*,[59] and *Rush v. Savchuk*[60] all are substantive due process progeny of *International Shoe*. The two threads continue to weave their way in and out of cases and individual Justices' opinions to this very day.

As a solution, Professor Goldstein advocates congressional enactment of a comprehensive scheme of allocating personal jurisdiction among the states. Such a scheme should resemble the Brussels Convention. It should, at a minimum, prohibit "exorbitant" forms of personal jurisdiction; it should affirmatively allocate jurisdiction among the states; and it should adopt a comprehensive scheme for the reciprocal enforcement of judgments among the states. Other desirable features include specific procedural and substantive provisions. The procedural provisions deal with multiple defendants, third-party actions, and counterclaims. The substantive provisions provide special protection for the weaker party in insurance and other consumer contract disputes and special rules for franchise contract actions and cases involving freedom of speech and the press.

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[55] Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on* International Shoe *and Its Progeny*, 28 U.C. DAVIS L. REV. 965 (1995).

[56] 357 U.S. 235 (1958).

[57] 444 U.S. 286 (1980).

[58] 433 U.S. 186 (1977).

[59] 436 U.S. 84 (1978).

[60] 444 U.S. 320 (1980).

However, Professor Goldstein partially disagrees with Professor Juenger's critique that the Brussels Convention discriminates against outsiders, one of the few faults United States personal jurisdiction law avoids. First, Goldstein argues, any claimed non-discrimination virtue in United States Supreme Court decisions is almost entirely speculative — it is not an announced standard. Second, treating insiders differently from outsiders is perfectly consistent with the idea of a common market. In the end, he does suggest two alternatives: amending the Convention to prohibit exorbitant exercises of jurisdiction against outsiders as well as insiders or relaxing the compulsory enforcement of judgments against outsiders that are based on exorbitant exercises of jurisdiction.

As for procedural concerns, Professor Goldstein advocates using the English model for service outside the jurisdiction. It has two elements: (1) a detailed long-arm-type provision; and (2) discretionary elements that allow the trial court to disallow service on a foreign defendant if the plaintiff does not show a "good, argumentable case" on the merits or if the competing equities and conveniences show that England is clearly an inappropriate forum for trial of the case.

In his article,[61] Professor C.G.J. Morse examines the implications of the Brussels Convention for personal jurisdiction in the United States. The Brussels Convention exists to promote "legal protection" and "legal certainty" among the member states. In the abstract, Morse applauds these goals, but he recognizes that current practice leaves much to be desired and that practical problems will keep a supposedly uniform set of jurisdictional rules from "leveling the playing field."

The Brussels Convention provides that defendants shall be sued in the state of their domicile, unless the Convention permits otherwise. Some possible forums include the situs of a tort, the place of performance of a contract, or the situs of real property. Enforcement of judgments approaches perfect uniformity, and the enforcing court has little opportunity to review the judgment. Litigation about where to litigate has not gone away, however, because England has developed its own forum non

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

conveniens doctrine. Litigation over the meaning of various provisions of the Brussels Convention continues to proliferate.

Some interpretative difficulties arise from the Convention's accommodation of four languages. Also, the Convention may actually be too simple to deal with the practicalities of transnational litigation. Also, questions arise over how to proceed when the courts of non-contracting states are involved.

Finally, the manner in which the European Court of Justice interprets the Convention may cause difficulties. The European Court is charged with developing an autonomous interpretation, free from the strictures of member states' laws. This autonomous interpretation, however, has some exceptions. Similarly, national laws may provide the best corpus from which to construct an autonomous rule.

In short, Morse suggests that even an innovation may be in need of experimentation. He concludes that litigation about where to litigate is far from over and that the European Court's decisions on the Convention may cause future uncertainty.

To this analysis, Professor Juenger adds his distinct voice.[62] Summing up United States jurisdictional doctrine, he quotes Justice White from *World-Wide Volkswagen*:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for the litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.[63]

As Juenger states, if any one theme can be found among the Symposium's participants, it is that our jurisdictional doctrine, as currently understood, "is impervious to common sense and practicability." The tensions inherent in *International Shoe* and its progeny (and for that matter, its predecessor, *Pennoyer*) between notions of territoriality and fairness continues to create incoherent and uncertain case law. Professor Juenger laments the unlikelihood that we will adopt the good sense of the Brussels

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[62] Friedrich K. Juenger, *A* Shoe *Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995).

[63] 444 U.S. at 294.

Convention and the likelihood that we will extend the error of our domestic doctrine internationally.

Finally, Professor Bruch offers her insights with respect to some of the difficult personal jurisdiction issues that arise in the family law context.[64] The thrust of her argument is that many who analyze jurisdictional doctrine "overlook important opportunities for refining or revising *International Shoe* at the state court level through legislative enactments that are inconsistent with announced doctrine, but sufficiently well-grounded to inspire constitutional respect."[65] Professor Bruch argues that, although the Supreme Court correctly has made divorce a general exception to jurisdictional rules, it has erred in applying the *Shoe* test to child custody and child support disputes. Thoughtfully analyzing the legislative possibilities in the area, she borrows on her extensive experience in analyzing how family law matters are treated under uniform statutes and international conventions and offers concrete legislative proposals that, in her view, would solve many of the existing problems.

CONCLUSION

In the end, the constitutional basis for personal jurisdiction in the United States offers little hope that we can learn from the legislative solutions adopted elsewhere. Unless we can adopt the radical reverse law reform to reunderstand *Pennoyer* and *International Shoe* as advocated by Borchers and others, it looks as though we will have to make due with the arbitrary particularization and ad hoc decision-making that characterize the past fifty years of *International Shoe*. There are virtues in vagueness and uncertainty — they do allow courts to make individual judgments of what is fair and just and reasonable in ways that bright lines do not. But is the cost of constant litigation and seemingly endless reformulations of the minimum contacts test worth the price? The Symposium's collective judgment is "no."

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[64] Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting* International Shoe *to Family Law*, 28 U.C. DAVIS L. REV. 1047, 1049 (1995).

[65] *Id.* at 1047.