"Two Cheers" For *International Shoe* (and None for *Asahi*): An Essay on the Fiftieth Anniversary of *International Shoe*

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A fiftieth birthday is a good time for taking stock. By most criteria, the decision in *International Shoe v. Washington*[1] has stood up well. After all, it is extensively cited, and one is hard-pressed to find a jurisdictional decision by any court in the United States in which it is not mentioned. Unlike several other jurisdictional chestnuts,[2] it endures. For all the moaning about the woeful state of jurisdiction jurisprudence, the blame is not usually directed to the *International Shoe* case itself. It is odd that this should be the case in that *International Shoe* gave us the modern constitutional due process standard for the exercise of adjudicatory jurisdiction: that a defendant "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[3]

At the time, of course, Justice Black did warn that the "minimum contacts" test was an unworkable one, and he certainly was right in predicting that such elastic criteria would leave judges as the "supreme arbiters" of jurisdictional standards.[4] Nonetheless, the *International Shoe* decision created the context for legis-

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

[2] *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1878); Harris v. Balk, 198 U.S. 215 (1905). The Court summarily dismissed both *Pennoyer* and *Harris* in a footnote in *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977), stating "To the extent that prior decisions are inconsistent with this standard, they are overruled." *See generally* Linda J. Silberman, Shaffer v. Heitner: *The End of An Era*, 53 N.Y.U. L. REV. 33-71 (1978).

[3] 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[4] *Id.* at 326.

latures to enact specific-act statutes,[5] which provided for the exercise of jurisdiction over nonresident defendants for claims resulting from tortious acts or injuries that occurred within state boundaries or from activities arising out of business transacted in the state.[6] The result was a set of relatively straightforward jurisdictional rules, at least for claims that were based on particular activities.[7] Even when states took the option of enacting "sky's the limit" statutes,[8] the tort and contract categories in other statutes gave meaning to the amorphous types. The state statutes did give rise to some difficult issues of interpretation.[9] *International Shoe*, by superimposing a constitutional test for measuring any such statutory assertions of jurisdiction, created opportunities for challenge and incentives for litigation. Over time, however, the viability of the constitutional common-law method emerged and subsequent Supreme Court cases provided a measure of guidance for the assertion of jurisdiction. A state's exercise of jurisdiction was constitutionally suspect if the nonresident defendant's conduct was not purposefully directed to the forum state,[10] but the due process standard could be met by a defendant's single act if the state's regulatory interest was strong and the defendant engaged in activity directed at the state.[11]

A jurisdictional system grounded more on discretion and less on strict constitutional principles would have produced more certainty and less litigation;[12] however, there can be little dis-

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[5] *See* ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 4.01, at 4-3 to 4-5 (2d ed. 1991).

[6] *See, e.g.*, UNIF. INTERSTATE AND INTERNATIONAL PROC. ACT § 103(a)(1), (4), 13 U.L.A. 362 (1964).

[7] Present-day statutes are collected in CASAD, *supra* note 5, app. E.

[8] Such statutes allow the courts of the state to exercise jurisdiction on any basis not inconsistent with constitutional restrictions. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973); R.I. GEN. LAWS § 9-5-33 (1985).

[9] *Compare* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761 (Ill. 1961) (holding that "tortious act" referred to both act of negligence and injury) *with* Feathers v. McLucas, 209 N.E.2d 68 (N.Y.), *cert. denied*, 382 U.S. 905 (1965) (ruling that reference to "tortious act" did not include injury). Extensive case law also developed as to the type of conduct that constituted "transaction of business." *See* CASAD, *supra* note 5, §§ 4.02[1][a]-4.03[3], at 4-23 to 4-68.

[10] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (rejecting on constitutional grounds assertion of jurisdiction by the state where accident took place because defendants' market did not include forum state).

[11] *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[12] I have urged such an approach based more on discretion than constitutional princi-

sent from Chief Justice Stone's pronouncement in *International Shoe* that "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit and those which do not, cannot be simply mechanical or quantitative."[13] In retrospect, the facts of *International Shoe* — a state claim for taxes for an unemployment compensation fund based on the sales activities of eleven to thirteen salesmen in the state acting on behalf of a nonresident corporation — appear to make the case an easy one for the assertion of jurisdiction. But other situations, particularly those where the claim is unrelated to the nonresident's activities — cases of general jurisdiction — were and continue to be troublesome.[14] It may well have been Chief Justice Stone's attempt to address the broader issue of general jurisdiction over foreign corporations that led him to translate jurisdictional criteria into such vague terms as "minimum contacts" and "substantial justice."[15] Chief Justice Stone was writing against a backdrop where concepts of "corporate presence" and "implied consent" provided the doctrinal framework for jurisdiction over corporations.[16] Given the unsatisfactory nature of those concepts as a means of setting jurisdictional standards with respect to both related and unrelated claims, the test articulated in *International Shoe* offered a different vision of jurisdictional theory.[17]

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ple in another writing. *See* Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 583-90 (1991).

[13] International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[14] The Court in *International Shoe* cited a number of cases for the proposition that isolated activities are insufficient to subject a corporate defendant to suit on causes of action unconnected to such activity. *See, e.g.*, Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8 (1907); St. Clair v. Cox, 106 U.S. 350 (1882). The Court also noted cases where the corporation's operations were substantial enough to justify suit on such unrelated claims. *See* Missouri, K. & T. Ry. Co. v. Reynolds, 255 U.S. 565 (1921); Tauza v. Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917).

Post-*International Shoe* cases have also left unclear just where the line is to be drawn. *Compare* Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) *with* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

[15] As Justice Scalia noted in Burnham v. Superior Court, 495 U.S. 604, 619 (1990), the due process standard of "traditional notions of fair play and substantial justice" was developed in seeking a corporate analogy to the individual's "physical presence" or domicile.

[16] *See generally* Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

[17] Several commentators at the time praised *International Shoe* as removing the fictitious

Unfortunately, that vision is an excessively blurred one. State legislative efforts do not appear to count for much in the constitutional jurisprudence.[18] Although dicta in several Supreme Court cases alludes to the importance of such state assertions of interest,[19] the Court does not seem inclined to move in that direction. Rather, the Court appears to have expanded its search for other fairness criteria in setting the constitutional standard. I do not quarrel with decisions such as *World-Wide Volkswagen Corp. v. Woodson*,[20] which imposed a requirement that the defendant engage in a purposeful act directed at the forum state, although the dicta about interstate sovereignty and federalism were misguided and ultimately recanted.[21] Much more troublesome have been the Court's decisions in *Burger King Corp. v. Rudzewicz*[22]

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aspects imposed by geographical and entity concepts in order to treat the issue of jurisdiction on a realistic basis. *See* Comment, *Reasonableness as a Test of Jurisdiction Over Foreign Corporations*, 41 U. ILL. L. REV. 228, 235-36 (1946); *Recent Decision, Conflict of Laws — Personal Jurisdiction Over Foreign Corporations*, 21 N.Y.U. L.Q. 442-45 (1946). Other scholars remained unconvinced that the new test offered any real improvement. As an example, see J.B. McBaine, *Jurisdiction Over Foreign Corporations: Actions Arising Out of Acts Done Within the Forum*, 34 CAL. L. REV. 331, 336 (1946):

> That the 'presence' theory is vague and unsatisfactory will be conceded but is not the 'fair play and substantial justice' theory also somewhat vague and unsatisfactory? Neither rule will afford definite information to corporations contemplating some activities in other states. They must, in the future as in the past, act at their peril. In the future as in the past the facts in each case must be examined by the court; and each case presents a constitutional law problem. It is believed that this is not a desirable state of the law in the United States where business transactions are not fenced in by state lines. It is suggested that a proper and simpler solution to this important problem is to hold that an appropriate court of a state has jurisdiction of an action against a foreign corporation which arises out of acts done by its agent or agents which culminates in creating liability provided due notice of action is given.

Id.

[18] *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978).

[19] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 216 (1977) (finding no state interest in asserting jurisdiction over corporate fiduciaries in absence of statute); Hanson v. Denckla, 357 U.S. 235 (1958) (noting absence of any state statute).

[20] 444 U.S. 286 (1980).

[21] *See* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).

[22] 471 U.S. 462, 477-78 (1985). Justice Brennan suggested that once a defendant purposefully establishes minimum contacts with the forum state, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 476. Among the factors to be considered are the burden on the defendant, the forum state's interest in adjudication, the

and *Asahi Metal Industry Co. v. Superior Court,*[23] where the Court introduced an additional layer of analysis — a "reasonableness" standard — to *International Shoe's* "minimum contacts." I had always understood the "minimum contacts" test to require that the defendant's activities in the state be balanced against the state's regulatory and litigation interests — hence the requirement that the defendant have "certain minimum contacts . . . *such that* the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[24] In other words, the level of contacts required depended on the particular nature of the claim, the type of litigation, and possibly the parties.

The *Asahi* decision appeared to shift the focus. The Court's opinion, written by Justice O'Connor, was divided into various parts[25] and as a result appears to have altered the original formulation of the *International Shoe* test. Part IIA of the opinion analyzed the defendant's "minimum contacts" with the forum state, with the Justices splitting four to four as to whether the defendant's act of placing goods into the stream of commerce satisfied that requirement. Part IIB of the opinion addressed whether jurisdiction, assuming the existence of the defendant's "contacts," would be "reasonable." Eight Justices held that it would not. (Notably absent was Justice Scalia, who had joined Part IIA of the opinion in holding that the contacts of the defendant were insufficient to confer jurisdiction; Justice Scalia apparently adhered to the traditional analysis of *International Shoe,* looking no further than the lack of minimum contacts to determine the unconstitutionality of jurisdiction). Critical to the Court's finding of "unreasonableness" was the fact that the only claim remaining after settlement of the California plaintiff's

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plaintiff's interest in obtaining convenient and effective relief, the interstate interest in an efficient resolution, and the shared interest of the states in furthering substantive social policies. Justice Brennan identified two roles of "reasonableness": (1) "to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required," and (2) to defeat the exercise of jurisdiction "even if the defendant had purposefully engaged in forum activities." *Id.* at 477.

[23] 480 U.S. 102 (1987).

[24] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (emphasis added).

[25] 480 U.S. 102 (1987) (Part I, "Statement of Facts"; Part IIA, "Minimum Contacts"; Part IIB, "Reasonableness"; and Part III, "Conclusion").

personal injury suit was an indemnity claim by one foreign (Taiwanese) manufacturer against another foreign (Japanese) manufacturer, involving a transaction with roots in Taiwan. The Court noted that the "unique burdens placed upon one who must defend oneself in a foreign legal system" should be given significant weight in making that assessment.[26] Were the "reasonableness" inquiry confined to a concern for *foreign country* defendants, the decision might be more defensible.[27] But there is no suggestion that *Asahi* is being read that way by the state and federal courts applying its reformulated constitutional standard. Instead, with respect to both domestic and foreign defendants, the courts are first looking for "contacts;" and the inquiry is apparently a "yes" or "no" and not a "relative" matter. Once the requisite contacts are found, the courts proceed to assess jurisdiction on more general "fairness" grounds.

Perhaps *Asahi*'s gloss on *International Shoe* is more semantic than substantive, and is explainable as the inevitable result of an opinion by a fractured court trying to reach consensus in a particular case. But the decision has created a formal two-step level of analysis, where contacts are an end in themselves to be overlaid with a more general inquiry about "fairness." It may be too soon to assess whether *Asahi* actually will produce free-form inquiries incorporating choice of law, overall convenience, and specific individual characteristics in deciding jurisdiction, as some have predicted.[28] The fear may be more apparent than real. In only a few cases have courts relied on the "unreasonableness" prong to reject jurisdiction after finding requisite contacts, and those cases fit the comity concerns of *Asahi* regarding foreign defendants.[29] More often, when courts find the contacts

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[26] *Id.* at 114.

[27] *See* AM. LAW INST., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (suggesting "reasonableness" as one principle of international relations law). *See generally* Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 509 (1993).

[28] I myself offered warnings on *Asahi*. *See* Silberman, *supra* note 12, at 581 (criticizing decision in *Asahi*); *see also* Stephen B. Burbank, *Practice and Procedure: The World in Our Courts*, 89 MICH. L. REV. 1456, 1468 (1991).

[29] *See, e.g.*, Lichon v. Aceto Chemical Co., 538 N.E.2d 613 (Ill. App. Ct. 1989) (finding minimum contacts where English manufacturer shipped hazardous chemicals into United States, but holding jurisdiction "unreasonable" in interest of foreign relations); Core-Vent

sufficient, they also find the jurisdiction "reasonable."[30] Conversely, a lack of contacts is usually not overcome by arguments about the "reasonableness" of the assertion of jurisdiction.[31] Perhaps it is due to the great strength and endurance of *International Shoe* that *Asahi*'s unfortunate reformulation of its "minimum contacts" test has not created quite the predicted chaos.

Corp. v. Nobel Industries AB, 11 F.3d 1482 (9th Cir. 1993) (finding minimum contacts for foreign doctors, who published allegedly false and defamatory articles about California plaintiff's product in professional journal distributed world-wide, but holding jurisdiction over foreign individuals in suit on behalf of international corporation would nonetheless be "unreasonable"); St. Jarre v. Heidelberger Druckmaschinen, A.G., No. 93-1848, 1994 U.S. App. LEXIS 5604 (4th Cir. Mar. 25, 1994) (per curiam) (holding exercise of jurisdiction over German manufacturer, whose product reached forum state because of intervening sales by third parties, would be unfair and unreasonable).

[30] *See, e.g.*, Tobin v. Astra Pharmaceutical Products, 993 F.2d 528 (6th Cir. 1993) (finding sufficient contacts and holding jurisdiction reasonable where Dutch drug manufacturer used American distributors to market its product in every state, sought FDA approval, and conducted clinical studies in United States). The court noted that once contacts are found, it is the rare case where jurisdiction would not be reasonable. *Id.* at 544; *see also* Tatro v. Manor Care, Inc. 625 N.E.2d 549 (Mass. 1994) (sustaining jurisdiction over California hotel on both "contacts" and "reasonableness" grounds where Massachusetts plaintiff was injured in California and where hotel solicits conference business from all over United States).

[31] *See, e.g.*, Wilson v. Belin, 20 F.3d 644 (5th Cir.) (holding contacts with Texas were insufficient and that court had no reason to reach question of reasonableness when nonresident defendant responded on telephone to Texas reporter's questions about Pennsylvania plaintiff, and defendants were later quoted in Texas newspaper), *cert. denied*, 115 S. Ct. 322 (1994); Donatelli v. National Hockey League, 893 F.2d 459 (1st Cir. 1990) (stating that if defendant did not have minimum contacts with forum, "resort to the secondary criteria, or Gestalt factors, is unnecessary"); Waste Management v. Admiral Ins. Co., 649 A.2d 379 (N.J. 1994) (holding that "territory of coverage" clause in insurance policy is not sufficient contact on which to assert jurisdiction over nonresident insurance carrier — where threshold requirement of minimum contacts is not met, court does not consider "fair play and substantial justice" criteria).

One can envision how a "reasonableness" test in the absence of "contacts" might work. Taking a cue from the English and the Europeans, it might be "reasonable" to assert jurisdiction over nonresident defendants who are "necessary parties" to proceedings in which jurisdiction is properly asserted over other defendants. *See, e.g.*, Rules of the Supreme Court, Order 11, Rule 1(c) (1991); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, EC O.J. (C 189), July 28, 1990 [hereafter Brussels Convention], art. 6(4). For other countries that have adopted such a jurisdictional rule, see THE OFFICIAL REPORT ON THE CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (hereafter JENARD REPORT), EC 22 O.J. C 591, at 22-28. United States courts have generally rejected this approach. *See, e.g.*, Waste Management v. Admiral Ins. Co., 649 A.2d 379 (N.J. 1994) ("[J]urisdiction over one defendant may not be based on the activities of another defendant"). *But cf.* Ashley v. Abbott Laboratories, 789 F. Supp. 552 (E.D.N.Y. 1992) (asserting jurisdiction over California manufacturer which did not market its product in forum state but was part of national market).

In thinking about the next step for American jurisdictional theory, some benefit may be gained from a look at the experience of other countries.[32] Both the English and the Europeans, whose jurisdictional reach is at least as broad as the United States in most cases and in some instances reaches further,[33] offer substantially more jurisdictional precision in their laws. English Order 11[34] sets forth a series of rules for the assertion of jurisdiction over foreign defendants[35] — rules not too different from American specific-act statutes. Order 11 exercises of jurisdiction are not automatic,[36] and notions of "fairness" are introduced as a matter of judicial discretion, similar to considerations of forum non conveniens.[37] The difference between the constitutional standard of "reasonableness" in the United States and the "leave-to-serve-out discretion" of Order 11 in England is significant. In the United States, the issue is a legal constitutional one with no acknowledged deference given to the trial judge. In England, the judgment of the first decision-maker will be

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[32] *See* Linda Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, VAND. J. TRANS. L. (forthcoming 1995); *see also* Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 COLO. L. REV. 1 (1993); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992).

[33] *See generally* Andreas F. Lowenfeld, *International Litigation and the Quest for Reasonableness*, (Hague Academy General Court in Private International Law), 245 RECUEIL DES COURS 81 (1994).

[34] Rules of the Supreme Court, Order 11, Rule 1(1) (1991) (U.K.).

[35] For example, English courts can assert jurisdiction over nonresidents for claims to enforce or obtain relief resulting from contracts made within the jurisdiction, or made through an agent trading or residing within the jurisdiction. Rules of the Supreme Court, Order 11, Rules 1(d)(i-ii). Courts can assert jurisdiction on a claim for breach of contract if the breach was committed within the jurisdiction or if performance was hampered within the jurisdiction. *Id.* at Rule 1(e). Jurisdiction for tort claims is based on acts committed or damage sustained within the jurisdiction. *Id.* at Rule 1(f).

[36] Order 11 sets forth provisions for leave to "serve out of the jurisdiction." Leave is granted only when the case is a "proper one for service out of the jurisdiction." *See* Rules of the Supreme Court, Order 11, Rule 4 (2). Service out of the jurisdiction under Order 11 is appropriate without leave of court in cases within the Brussels Convention.

[37] Plaintiff must show that England is clearly the appropriate forum for the trial of the action, taking into account the nature of the dispute, the availability of witnesses and their evidence and expenses. *See* A.V. DICEY & J.H.C. MORRIS, THE CONFLICT OF LAWS 411-12 (Lawrence Collins ed., 12th ed. 1993). One difference between this discretion and forum non conveniens may go to the issue of burden of proof. Under Order 11, the plaintiff must establish that England is the appropriate forum. *See id.* at 318, 412-13. On a forum non conveniens motion, however, the defendant usually carries the burden. *See id.* at 402.

overturned only for an abuse of discretion.[38] The contrast in approach is also seen in the provisions of the Brussels Convention[39] applicable to the European Union, which offer rules for the assertion of specific or "special" jurisdiction similar to American long-arm statutes. Under the Convention, for example, jurisdiction is permitted in matters relating to a contract in the place of performance, but not in the place of contract.[40] In matters relating to tort, jurisdiction is permitted where the harmful event occurred.[41] Questions of interpretation regarding the jurisdictional standards of the Convention have inevitably arisen in both national courts and in the European Court,[42] just as similar jurisdictional issues have confronted courts in the United States. But the European Court confronts the text of the Convention in rendering an interpretation to effectuate its policies, whereas the Supreme Court can only reach for some natural justice principle brooding omnipresent in the sky.

On the issue of general jurisdiction, comparisons with England and Europe are more difficult. Under the English rules, a person domiciled or residing within the jurisdiction can be served with process either within or without the jurisdiction.[43] Under the Brussels Convention, domicile is a basis for jurisdiction.[44] However, the Convention lists the mere presence of a defendant within the state ("tag" jurisdiction) as an exorbitant basis of jurisdiction which cannot be asserted against a defendant domiciled in a Member State.[45] The U.S. Supreme Court's decision in *Burnham v. Superior Court*[46] is not necessarily at

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[38] *See* Roneleigh Ltd. v. MII Exports, [1989] 1 W.L.R. 619 (C.A.).

[39] *See* Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 36, *reprinted in* 18 I.L.M. 21 (1979).

[40] *Id.* Article 5(1) of the Convention provides for a person domiciled in a contracting state to be sued in another contracting state "in matters relation to a contract, in the courts for the place of performance of the obligation in question. . . " *Id.*

[41] *Id.* Article 5(3) of the Convention provides for a person domiciled in a Contracting State to be sued in another Contracting State "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred." *Id.*

[42] *See* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992).

[43] Rules of Supreme Court, Order 10, Rule 1, Order 11, Rule 1(1)(a) (1995).

[44] Brussels Convention, art. 2.

[45] *Id.* art. 3; *see* JENARD REPORT, *supra* note 31, at C 59/19-20.

[46] 495 U.S. 604 (1990).

odds; in *Burnham*, the Supreme Court upheld California's assertion of jurisdiction on the basis of the defendant's presence. Writing for himself and three Justices, Justice Scalia found jurisdiction was constitutional because "it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"[47] In responding to Justice Brennan's statement in a concurrence that evolving principles were necessary for the growth of the legal system,[48] Justice Scalia noted that individual states were free to abandon the concept of in-state service as a basis of jurisdiction, but had "overwhelmingly declined" to do so.[49]

As applied to corporations, general jurisdiction is more complicated. In England, an overseas company that carries on business within the United Kingdom is subject to jurisdiction there.[50] The relevant criteria for carrying on business are a product of statutory definition and case interpretation.[51] The inquiry is similar to attempts by American courts to decipher when a corporation is present, or when a corporation has engaged in continuous and systematic activity. Under the Brussels Convention, only if the "seat of a company" is in the forum state is there a basis for general jurisdiction.[52] Presence of a corporation by virtue of a branch office — generally a basis for jurisdiction in the United States — is relevant only if the dispute arises out of the operations of that particular branch or of-

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[47] *Id.* at 619. Justice Scalia was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice White. *Id.* at 607.

[48] *Id.* at 631 n.3. Justice Brennan, joined by Justices Marshall, Blackmun, and O'Connor, found jurisdiction based on presence constitutional on the basis of both "contacts" (the physical presence of the defendant) and overall fairness (in the form of benefits that the defendant received, the limited burdens of travel and communication in a modern age, and expectations). For analysis of the various opinions in Burnham, see Symposium, *The Future of Personal Jurisdiction: A Symposium on* Burnham v. Superior Court, 22 RUTGERS L.J. 559 (1991).

[49] *Burnham*, 495 U.S. at 627. Whether continuous and systematic activities by an individual defendant would support jurisdiction over an unrelated claim is less clear to the Court, *id.* at 610 n.1, but domicile does appear to endure. *See* Milliken v. Meyer, 311 U.S. 457 (1940); *see also* CASAD, *supra* note 5, § 3.01[4][a], at 3-29.

[50] *See* DICEY & MORRIS, *supra* note 37, at 306-08.

[51] *See, e.g.*, South India Shipping Corp. v. Export-Import Bank of Korea, [1985] 1 W.L.R. 585 (C.A.).

[52] Brussels Convention, art. 53.

fice,[53] thereby creating another type of "special" or "specific" jurisdiction.

With respect to general jurisdiction in the United States, the *International Shoe* criteria have offered little guidance. Ironically, it may have been the Court's concern about the general jurisdiction cases that prompted the move to the minimum contacts test, in an attempt to find a mechanism to distinguish between those claims which were and those claims which were not related to the corporation's forum activities. However, there has been little guidance from the legislatures or the courts in shaping the contours of minimum contacts when the claim is an unrelated one. Unlike specific jurisdiction, where state statutes gave form to jurisdictional categories, general jurisdiction has been relegated to case law or defined only in very general terms by statute.[54] General jurisdiction in the United States tends to be both too broad and too narrow. Nationwide corporations with general operations in all states are suable everywhere, presenting unlimited opportunities for forum-shopping for everything from generous juries and liberal forum-access provisions to favorable choice-of-law rules and longer statutes of limitations.[55] At the same time, when a corporate defendant's activities are considered slight, neither the nature of the claim nor the inclusion of other defendants appear particularly important to the jurisdictional inquiry.[56] Although some commentators have

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[53] *Id.* art. 5(5).

[54] *See, e.g.*, N.Y. CIV. PRAC. L & R. 301 (McKinney 1990) ("A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore"); FLA. STAT. ANN. § 48.193(2) (West 1994) ("A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.").

[55] *See* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989).

[56] *See, e.g.*, Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984). For arguments that the analysis should be different, see generally Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988). *Compare* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988). One recent decision suggests that jurisdiction should be seen along a continuum of general to specific jurisdiction and that the level of contacts needs to increase as the nexus between the contacts and the cause of action decreases. *See* Presbyterian Univ. Hosp. v. Wilson, No. 42, 1995 LEXIS 33 (Md. Ct. App. Mar. 9, 1995) (upholding jurisdiction of Maryland court over Pennsylvania hospital which treated Maryland patient, was registered as Maryland MA provider, and was designated as transplant referral center).

pressed for the elimination of general jurisdiction altogether,[57] I believe it continues to serve a useful purpose. Again, we might do better to legislatively identify criteria for general corporate presence, such as the establishment of offices or a formal place of business; general corporate amenability would be narrowed and forum non conveniens could serve as an additional vehicle to move a case from an unrelated and unfair forum to a more appropriate court.[58]

State legislatures, and perhaps even Congress, can help counter existing jurisdictional uncertainty in the form of legislative proxies. For example, in an earlier article, I suggested that Congress enact a statute setting forth a national standard for asserting jurisdiction over foreign country defendants. This standard would apply in both state and federal courts, and include specific criteria such as a monetary or quantitative amount of business done within the United States as the threshold for such amenability.[59] Alternatively, state statutes could address questions such as the stream-of-commerce issue left open in *Asahi*.[60]

Obviously, the Supreme Court is not going to unravel its long history of constitutional jurisdiction jurisprudence. But some shift is possible. For example, the Supreme Court could acknowl-

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[57] *See* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 271-80 (1991).

[58] *See* William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1711 (1992).

[59] Silberman, *supra* note 27, at 513-16.

[60] Lower state and federal courts continue to be divided over whether a forum has constitutional contacts for jurisdiction when a defendant puts a product into the stream of commerce, but does not specifically direct the product to the forum market. *Compare* Lesnick v. Hollingsworth & Vose Co., 35 F.3d 393 (4th Cir. 1994) (holding Massachusetts cigarette filter manufacturer which sent filters to cigarette manufacturers in Kentucky and New Jersey for incorporation into cigarettes eventually sold to plaintiff in Maryland did not have requisite contacts with Maryland and adopting view in Justice O'Connor's opinion in *Asahi* that putting a product into the stream of commerce without more does not satisfy "minimum contacts") *with* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994) (holding minimum contacts established where Japanese fireworks manufacturer placed product in stream of commerce through network of distributors, and adopting Justice Brennan's approach to stream of commerce contacts); State *ex rel.* CSR Ltd. v. MacQueen 441 S.E.2d 658 (W. Va. 1994) (holding minimum contacts satisfied where Australian company was sales agent for its partially owned subsidiary that mined asbestos and introduced its product into American commerce, and accepting Justice Brennan's *Asahi* opinion on stream of commerce). State statutes could provide guidelines for this broad category of cases.

edge the importance of predictable, legislative standards and apply the minimum contacts test of *International Shoe* with deference to a state's expression of interest, as manifest in its statutory jurisdictional reach. *International Shoe* itself involved a Washington statute which both asserted jurisdiction and provided a basis for taxation. The existence of a state statute was precisely the basis of Justice Black's objection in *International Shoe* that the Due Process Clause should not be used to strike down a state or federal enactment on the ground that it does not conform to this Court's idea of natural justice.[61]

State and federal legislation, in the spirit of Order 11 and the Brussels Convention, should be looked to to achieve greater precision and predictability with respect to jurisdiction. *Asahi*'s recasting of the *International Shoe* test should itself be re-evaluated, and the minimum contacts test of *International Shoe* reaffirmed in its original form. Perfect, it is not, but surely viable for another fifty years.

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[61] International Shoe Co. v. Washington, 326 U.S. 310, 324 (1945).