The Battle for the Soul of International Shoe

Eric H Schepard, Northwestern University
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Why the Author of International Shoe Would Condemn the Nicastro Plurality For Hijacking His Legacy of Judicial Restraint

by

Eric Schepard

Abstract

In 2011, Justice Kennedy’s plurality opinion in *J. McIntyre Machinery, Ltd. v. Nicastro* repeatedly cited *International Shoe v. Washington*, a 1945 decision that transformed the law of personal jurisdiction. Kennedy believed that *International Shoe* broadly supported his position that a state may hear a suit arising from a within-state workplace injury to its citizen only if the foreign (out-of-state) corporate defendant specifically markets its products to that state.

This article reexamines the jurisprudence of *International Shoe*’s author, Chief Justice Harlan Fiske Stone, to argue that Kennedy hijacked *International Shoe*’s half-buried legacy of judicial restraint. Scholars have suggested that Stone hoped that *International Shoe* would allow federal judges virtually unlimited discretion to decide personal jurisdiction cases. But Stone believed that the “reasonableness” and “minimum contacts” standard that he introduced in *International Shoe reduced* the discretion of federal judges by signaling that they should defer, even if they disagreed, with any well-justified exertion of state authority. And Stone specifically concluded in the 1930s that plaintiff’s preferred forum reasonably applied its own law to suits arising from within-forum workplace injuries—particularly when plaintiff lived in the forum—regardless of the foreign corporate defendant’s choice of law. In other words, shortly before *International Shoe*, Stone essentially rejected Kennedy’s position in *Nicastro*. 
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Introduction: The Soul of International Shoe

Every fall International Shoe v. Washington compels another generation of first-year law students to grapple with a seemingly unanswerable question: did a foreign (or out-of-state) corporation maintain the minimum contacts with that state necessary to render “fair” or “reasonable” the state’s jurisdiction over a civil suit against the corporation? Scholars believe that International Shoe embraced standards such as “reasonableness,” “fairness,” and “minimum contacts” to advance the legal realists’ desire to “trash legal rules” and thus allow federal judges virtually unlimited discretion in individual cases. That ambiguity, International Shoe’s critics likewise contend, justifies both the liberal and conservative position in the seemingly unresolvable “stream of commerce” cases—which have attempted to answer whether a state may exercise jurisdiction over a foreign corporation responsible for a purportedly faulty product(s) that injured the plaintiff after entering the state via the action of others. Indeed, Justice Kennedy’s 2011 plurality opinion for four conservatives in the most recent stream of commerce case, J. McIntyre Machinery, Ltd. v. Nicastro, asserted that International Shoe broadly supported his formalistic position that a state may hear a suit arising from a within-state workplace injury to its citizen only if the foreign corporate defendant “submits” to the state’s jurisdiction.3

This article reexamines the jurisprudence of International Shoe’s overlooked author, Chief Justice Harlan Fiske Stone, to argue that the conservative justices in the stream of commerce cases, and particularly Nicastro, have distorted Stone’s legacy and the legacy of International Shoe. Stone believed that the neutral sounding rights, rules,
and concepts that his formalist predecessors invoked encouraged them to impose their political beliefs on the states by allowing them to ignore the local officials’ justification for their actions. Instead of granting federal judges unlimited discretion, Stone maintained that the reasonableness standard would signal to federal judges that they should defer, even if they disagreed, with any well-justified exertion of state authority, and thus return wide discretion to local officials. And Stone specifically concluded in the 1930s that plaintiff’s preferred forum reasonably applied its own law to plaintiff’s suit arising from a within-forum workplace injury—particularly when plaintiff lived in the forum—regardless of formalistic, extra-textual “rights” that federal judges used to mandate the application of the foreign corporate defendant’s preferred law. In other words, shortly before Stone wrote International Shoe in 1945, he essentially rejected Justice Kennedy’s position in Nicastro.

Justice Kennedy and his allies exploit the apparent ambiguity of International Shoe to justify what Stone would have recognized as a most pernicious form of formalist judicial activism. Hopefully this article will prompt a judge, scholar, or even a puzzled first (or second)-year law student to help resurrect International Shoe’s “half-buried” legacy of judicial restraint.4

Parts I and II provide essential background information. Part I highlights the changing role of International Shoe while surveying the Court’s expansion and contraction of state authority over jurisdiction from Pennoyer v. Neff to Nicastro. Part II details how critics who fault International Shoe’s purported endorsement of an ad hoc jurisprudence for the Court’s inability to resolve the stream of commerce debate derive

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support from scholars who detail legal realism’s influence on *International Shoe*. Yet Part II argues that those scholars neglect Stone’s career-long commitment to judicial restraint.

The next two parts examine Stone’s jurisprudence. Part III describes Stone’s belief that reasonableness review forces federal judges to examine the local officials’ justification for their actions and thus better restricts the federal judge’s discretion than formalism. Part IV shows how Stone applied reasonableness review in three seminal conflict-of-law opinions, which cumulatively support the inference that Stone would have upheld state jurisdiction in *Nicastro*.

The last two parts examine the relevance of Stone’s jurisprudence to the legacy of *International Shoe*, including *Nicastro*. Part V explains how a comprehensive understanding of Stone’s jurisprudence illustrates that conservative justices have cited *International Shoe* selectively and out-of-context. It further imagines Stone’s tacit response to Justice Black’s famous concurrence accusing *International Shoe* of allowing future judges excessive discretion. Part VI explains why Stone would condemn Justice Kennedy’s *Nicastro* opinion, and, more generally, the “purposeful availment” approach to personal jurisdiction, as a most pernicious form of judicial activism via formalism.

**I. (Almost) Everything You Need to Know About the First Section of Your First-Year Civil Procedure Course in Nine Pages**

Understanding how conservative justices have distorted the legacy of *International Shoe* requires a brief history of the case and its descendants. *Pennoyer v. Neff* spawned the notion, perhaps unintentionally, that the Due Process Clause allows a state to exercise jurisdiction in a civil suit over only those defendants, including corporate defendants, located in the state when the suit commenced or who consented to that state’s
jurisdiction.\(^5\) The Due Process Clause, which ensures only that a state follow proper procedures before punishing a litigant, does not explicitly limit a state’s jurisdiction over foreigners,\(^6\) but *Pennoyer* cited principles of sovereignty and international law that a later case referred to as “self evident” to justify its rule.\(^7\)

Between *Pennoyer* and *International Shoe*, however, the Court carved out categorical exceptions to the *Pennoyer* rule that expanded a state’s power to hear suits against foreign defendants without abandoning outright *Pennoyer*’s principle that a state could exercise jurisdiction only over defendants “present” or “consenting” to its jurisdiction when the lawsuit commenced.\(^8\) For example, the Court ruled that an out-of-stater could “implicitly consent” to a state’s jurisdiction by committing a tort while driving his or her car through the state.\(^9\) Meanwhile, a state could hear a suit against a foreign corporation when significant corporate activities within the state established its implicit presence there.\(^10\) The Court determined that a corporation did not conduct business in a state in which the corporation merely solicited business, but it did conduct business in a state in which it solicited business plus conducted other activities—like

\(^5\) 95 U.S. 714, 724-33 (1877); 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, 35-39 (1990) (arguing that *Pennoyer* is susceptible to multiple interpretations). *Pennoyer* recognized that a state could force a non-resident who entered into within-state contracts, partnerships, or associations to appoint an in-state agent to receive process. 95 U.S. at 735.

\(^6\) U.S. CONST. amend. XIV § 1.


\(^8\) Borchers, *supra* note 5, at 52-53.


maintaining an office. Unsurprisingly, the Court struggled to define or apply the concepts of “implied consent,” “corporate presence,” and “doing business,” which scholars pre-
International Shoe savaged for producing unpredictable and contradictory results.

Yet this jurisdictional framework persisted when Washington State ordered International Shoe, incorporated in Delaware and headquartered in Missouri, to contribute to Washington’s unemployment fund after a corporate salesman applied for unemployment compensation in Washington during the Great Depression. International Shoe’s salesmen solicited orders in Washington, but headquarters approved all sales, accepted all payment, and extended all credit. In other words, International Shoe likely allowed its salesmen in Washington (and every other state) to solicit business, and nothing more, in order to prevent Washington from exercising jurisdiction over a suit to compel the corporation to pay taxes.

International Shoe concluded that Washington could compel International Shoe’s contribution to its unemployment fund and exercise jurisdiction over the suit against the company. Chief Justice Stone could have upheld jurisdiction by finding that International Shoe so regularly solicited business in Washington that it needed no other activity to establish its jurisdictional “presence” there. But Stone chose a difference

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11 See, e.g., Int’l Harvester Co., 234 U.S. at 587; Frene v. Louisville Cement Co., 134 F.2d 511, 515 (D.C. Cir. 1943); Cameron & Johnson, supra note 10, at 800.
12 See Cameron & Johnson, supra note 10, at 783-84 & nn.40-41.
13 International Shoe, 326 U.S. at 311-14; Cameron & Johnson, supra note 10, at 786-88 & n. 72. According to Cameron & Johnson, the record provides no other explanation for Washington’s order to compel.
14 Cameron & Johnson, supra note 10, at 790.
15 See id. at 800-04.
16 326 U.S. at 311; Cameron & Johnson, supra note 10, at 816.
jurisprudential path. He abandoned the categories of “corporate presence” and “implied consent” without explicitly overruling *Pennoyer*.\(^{17}\)

Stone asserted that the Court’s previous attempts to determine corporate presence merely “symboliz[ed]” the factors that the Court actually examined to determine the propriety of a state’s exercise of jurisdiction.\(^{18}\) In language that would later befuddle generations of law students, Stone declared that the Court would henceforth examine whether the defendant corporation had established “certain minimum contacts [with a state] such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”\(^{19}\) Stone elaborated that the Court would assess the defendant’s contacts with the forum and estimate the inconvenience of litigation there to determine whether the forum reasonably exercised jurisdiction within the context of the federal system.\(^{20}\) Stone emphasized that the Court could not reduce the new test to a “mechanical or quantitative” formula.\(^{21}\)

Justice Black’s concurrence correctly observed that Stone dramatically expanded the meaning of the terms “fair play” and “substantial justice,” which previous cases had referenced to support only the limited proposition that the Due Process Clause demanded that each litigant receive notice and an opportunity to be heard.\(^{22}\) Now, Black warned, future courts could easily manipulate Stone’s ill-defined concepts of “fairness” or “reasonableness” to usurp state power based on their own concepts of natural justice.\(^{23}\)

Black would have ruled that the Constitution allows a state to tax and hear suits against

\(^{17}\) Cameron & Johnson, *supra* note 10, at 806-08.
\(^{18}\) *International Shoe*, 326 U.S. at 316-17.
\(^{19}\) Id. at 316.
\(^{20}\) Id. at 317.
\(^{21}\) Id.
\(^{22}\) Id. at 324 (Black, J., concurring); see Cameron & Johnson, *supra* note 10, at 809-13 (detailing the mysterious origins of the fair play/substantial justice/minimum contacts standard).
\(^{23}\) Id. at 325-26.
any corporation that conducts activities affecting persons and businesses within that state.24

Yet the conflict between the two opinions submerged Black’s and Stone’s joint desire to expand the jurisdictional reach of the states beyond the Pennoyer framework. Indeed, in 1957 Black cited International Shoe in McGee v. International Life Insurance Co.25 seemingly to maximize a state’s jurisdictional discretion over foreign defendants. McGee upheld California’s jurisdiction over an insurance dispute between a California plaintiff and a Texas insurance company with a sole California contact—the insurance contract with the California plaintiff that the company had assumed from an Arizona corporation.26 Black opined that International Shoe had contributed to a long-term expansion of a state’s jurisdiction over out-of-state corporations.27 Now, he implied, that power extended to any dispute that “manifest[ly] interest[ed]” the state.28

But in Hanson v. Denckla, decided in 1958, a majority of the Court began to cite International Shoe to limit a state’s jurisdictional discretion. The Court in Hanson ruled five to four that Florida could not hear a suit by the Florida beneficiaries of a trust established by Donner, a deceased Florida resident, against the Delaware trustee whom she had named before moving from Delaware to Florida.29 The Court reasoned that

International Shoe’s “minimum contacts” standard demanded that the foreign corporate

24 Id. at 324-25.
25 355 U.S. 220, 222 (1957); Robert J. Condlin, “Defendant Veto” or “Totality of the Circumstances”? It’s Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again, 54 Cath. U. L. Rev. 53, 61-62 (2004) (“McGee’s sweeping language, particularly its statement about the ‘fundamental transformation of our national economy,’ makes it a favorite of those who think state boundaries should play little or no role in defining the contours of long-arm jurisdiction”); Charles W. “Rocky” Rhodes, Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World, 64 Fla. L. Rev. 387, 400 (2012) (“Over the next dozen years [after International Shoe], the Court interpreted constitutional jurisdictional limits as establishing minimal restraints on the reach of state courts.”).
26 McGee, 355 U.S. at 221-22.
27 Id. at 222.
28 Id. at 223.
defendant must “purposefully avail” itself of the forum state’s laws, which had not
happened in this case—regardless of the corporation’s ongoing relationship with Donner
in Florida—because Donner unilaterally moved there.\(^{30}\) *Hanson* thus recognized a
prohibition against state jurisdiction over nonresident defendants that did not
“purposefully avail” or affirmatively choose to seek the forum’s benefits regardless of the
state’s interest in the dispute or the extent to which the forum inconvenienced the
defendant.\(^ {31}\) The degree to which the purposeful availment standard would limit state
discretion, however, remained unclear.

The Court finally tried to answer that question in the early 1980s, when the
battleground over *International Shoe*’s legacy shifted most prominently to cases
addressing the “stream of commerce” conflict.\(^ {32}\) Three times, at least four members of
the Court struggled to justify a formal rule that allows a state to hear suits against only
those foreign corporate defendants that target the purportedly faulty product to that state’s
market. Meanwhile, another faction has argued that a state can hear suits against a
foreign corporate defendant that could have foreseen its product causing an injury in the
forum state as long as the burden of litigating in that forum, the importance of the issue to
the state, and other factors render jurisdiction reasonable.\(^ {33}\)

\(^{30}\) *Id.* at 251-53.

\(^{31}\) Rhodes, *supra* note 25, at 402.

\(^{32}\) An examination of Stone’s jurisprudence and judicial philosophy can best clarify how he likely would
have intended for *International Shoe* to apply to the stream of commerce cases, which, thanks to *Nicastro*,
have once again virtually monopolized the scholarly debate regarding personal jurisdiction. In the author’s
view, a reexamination of Stone’s jurisprudence reveals less specific answers to some of the other seminal
jurisdiction cases, see, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Keeton v. Hustler Magazine*, 465 U.S.
U.S. 604 (1990); and thus they have been omitted for the sake of brevity and narrative coherence.

\(^{33}\) For a thorough recap of these developments, see Condlin, *supra* note 25, at 72-108.
The “purposeful availment” approach appeared to emerge victorious in *World-Wide Volkswagen Corp. v. Woodson.* In *World Wide* the Court denied Oklahoma jurisdiction over a New York family’s suit against an independent East Coast automobile retailer and independent wholesale distributor. Both companies had contracted with a manufacturer and importer that advertised, supplied, and serviced the automobiles nationwide, but the distributor and retailer themselves had no known contacts in Oklahoma except for a car that the retailer sold to the plaintiffs that exploded as they drove there. Most revealingly, the Court in *World-Wide* first tried to explain why the Due Process Clause mandated a purposeful availment standard that, the Court acknowledged, could relocate a suit from the forum with the strongest interest in the suit and/or of greatest convenience to the parties. Emphasizing that *International Shoe* required the Court to account for the context of the federal system when assessing “minimum contacts,” “fairness,” and “reasonableness,” the Court explained that principles of federalism prevented states from “reach[ing] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” And those principles allowed a state to hear suits only against defendants who purposefully directed activity at it because, according to the Court, only those defendants could predict that their actions would render them liable to the state’s jurisdiction.

The two sides then stalemated in *Asahi Metal Industry Corp. v. Superior Court of California,* which highlights the shifting and ultimately futile attempt by purposeful

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34 444 U.S. 286 (1980).
35 *Id.* at 288-89.
36 *Id.*
37 *Id.* at 294-97.
38 *Id.* at 292.
39 *Id.* at 297.
availment’s advocates to justify their usurpation of state discretion. *Asahi* began in California when a California plaintiff settled a suit against a Taiwanese manufacturer of a tube that allegedly contributed to a fatal motorcycle accident.\(^{41}\) With the plaintiff removed, the Court unanimously denied California jurisdiction over the Taiwanese company’s indemnity suit against its Japanese component manufacturer, which knew that the Taiwanese company sold the tubes throughout the United States.\(^{42}\)

By the time the Court decided *Asahi* it had already rejected its own reasoning in *World-Wide Volkswagen* that the Due Process Clause protected the power of the states in a federal system for the more textually grounded proposition that it protected only an individual litigant’s right to fair procedures.\(^{43}\) Nevertheless, three other justices joined Justice O’Connor’s opinion denying California jurisdiction because the Japanese manufacturer did not purposefully direct activities to the California market without explaining why minimum contacts, fairness, or reasonableness demanded purposeful action.\(^{44}\) Four others joined Justice Brennan’s opinion that the Japanese company’s knowledge that its product could cause injury in California established the required minimum contacts, but once the California plaintiff had settled, and thus deprived California of an important interest in the suit, the unique burdens imposed on the foreign litigants rendered jurisdiction unreasonable.\(^{45}\)

\(^{41}\) *Id.* at 105-06.

\(^{42}\) *Id.* at 105, 107.

\(^{43}\) *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (“The restriction on state sovereign power described in *World-Wide Volkswagen Corp* .... must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause .... [T]he Clause ... makes no mention of federalism concerns.”).

\(^{44}\) *Asahi*, 480 U.S. at 111-13.

\(^{45}\) *Id.* at 116-21 (Brennan, J., concurring in part and concurring in the judgment). A third concurrence, by Justice Stevens, suggested that the Court could not and perhaps should not try to distinguish between “mere awareness” and “purposeful availment.” *Id.* at 121-22.
The battle for *International Shoe’s* legacy in the stream of commerce cases simmered for over 20 years until *Nicastro*. Nicastro injured his hand in New Jersey while using a metal-shearing machine manufactured in England by McIntyre, an English corporation that sold the machines in the United States through an independent distributor. The distributor sold as many as four machines in New Jersey, but McIntyre itself never advertised or sent employees there despite attending trade shows in other states. The plurality opinion of Justice Kennedy, joined by Justices Scalia, Thomas, and Chief Justice Roberts, decided that New Jersey lacked jurisdiction because McIntyre did not sell the machine or advertise in the state. The plurality tethered *International Shoe’s* fundamental fairness standard to “traditional practice,” which, in the plurality’s view, allowed a state to exercise jurisdiction over only those defendants who intend to submit to a sovereign by targeting specifically its market. The plurality concluded that the defendant’s liberty interest in avoiding jurisdiction to which it had not consented trumped New Jersey’s “strong” interest in adjudicating the policy implications of a suit by a New Jersey worker injured by a machine in New Jersey. The plurality never addressed the reasonableness of New Jersey’s decision to exercise jurisdiction.

Justice Breyer’s concurrence, joined by Justice Alito, refused to apply rigidly a rule allowing states to hear only suits against those businesses that specifically target it. Justice Breyer concluded that the Court’s precedents doomed New Jersey’s assertion of jurisdiction because the distributor did not regularly sell McIntyre machinery in New

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46 131 S. Ct. at 2786.
47 *Id.*
48 *Id.* at 2785, 2790.
49 *Id.* at 2787-88.
50 *Id.* at 2790-91.
51 *Id.* at 2791-93 (Breyer, J., concurring).
Jersey and McIntyre did not specifically target the state. Breyer’s concurrence, like the plurality opinion, expressed concern that a state might force small businesses to litigate in exceedingly inconvenient forums if it could hear suits against any foreign business that knew that its product might cause an injury in that state. Yet Justice Breyer apparently forgot that *International Shoe*—which he did not cite—and the foreseeability standard included a reasonableness component designed specifically to prevent such an abuse of state powers.

Finally, Justice Ginsburg’s dissent argued that McIntyre’s desire to market and sell its product anywhere in the United States rendered jurisdiction reasonable anywhere the product caused an injury. She noted that the plurality’s reliance on “purposeful availment” masked their resurrection of the concepts of presence and implied consent that *International Shoe* abandoned.

Thus, the justices have variously invoked *International Shoe*’s apparent multiple standards to justify dichotomous conclusions regarding the boundaries of state authority in the seemingly irresolvable stream of commerce cases. According to the prevailing accounts of *International Shoe*’s intellectual history, the opinion’s primary purpose—to expand the discretion of the federal judge—could naturally be expected to produce such contradictory results.

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52 Id. at 2792.
53 Id. at 2793-94.
54 Id. at 2800-01 (Ginsburg, J., dissenting).
55 Id. at 2798-99.
II. Blame it on the Legal Realists

The two prevailing accounts of *International Shoe*’s intellectual history, one by Professor Logan Everett Sawyer, the other by Professor George Rutherglen, broadly agreed that Chief Justice Stone abandoned the Pennoyer framework in *International Shoe* to promote the legal realist’s purported goal of allowing federal judges the maximum flexibility to do justice in individual cases. But they and likeminded critics of *International Shoe* largely sidestepped the central irony of *International Shoe*’s origins—Stone, whether a realist or not, devoted much of his career to preventing unelected federal judges from imposing their own notions of fairness on local officials.

Professor Rutherglen asserted that *International Shoe* displays the triumph and consequences of extreme legal realism. In his telling, legal realism—which initially merely encouraged judges to account, empirically if possible, for the actual affects of their decisions—evolved “rule skeptics” who essentially rejected the pretense that rules can or should prevent judges from deciding cases based on their own notions of fairness. And in Professor Rutherglen’s view, Stone’s opinion in *International Shoe* essentially enacted the skeptic’s preferred jurisdictional jurisprudence: “[i]t is difficult . . .”, he wrote “to find a more effective and more thorough job of ‘trashing’ legal rules than

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56 Sawyer, supra note 7. Professor Sawyer’s most recent article, *Constitutional Principle, Partisan Calculation, and the Beveridge Child Labor Bill*, 31 LAW & HIST. REV. 325 (2013), mentions that he is now an assistant professor at the University of Georgia School of Law.


58 Sawyer, supra note 7, at 62, 84, 92; Rutherglen, supra note 57, at 347-50.

59 Rutherglen, supra note 57, at 349. See also Alan K. Chen, “Meet the New Boss” 73 DENV. U. L. REV. 1253, 1256 (1996) (“Some [legal realists] sought to question the fundamental dividing line between law and politics.”); Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH L. REV. 249, 266 (1993) (“On the other hand, extreme legal realists claim that judges simply create positive law and are never really bound by principle, nor should they be, and that their presumed separate role in a constitutional system largely is a charade.”).
has been accomplished by *International Shoe*. What’s more, this triumph of deconstruction was initiated by the pillar of the establishment, Harlan Fiske Stone . . .”\(^{60}\)

Professor Rutherglen’s relatively brief examination of Stone’s jurisprudence mentioned that Stone did not adhere dogmatically to the beliefs of the legal realists with whom he maintained a relationship and from whom he at times sought advice.\(^{61}\) Nevertheless, Professor Rutherglen agreed with other critics of *International Shoe* that Stone’s replacement of the formalist *Pennoyer* framework with multiple open-ended standards increased judicial discretion over issues of personal jurisdiction\(^{62}\) without accounting for the expense and unpredictability of such an ad-hoc adjudicatory method.\(^{63}\)

Professor Sawyer argued—in a less critical fashion—that Stone intended *International Shoe* to expand judicial flexibility and similarly focused his own relatively brief examination of Stone’s jurisprudence on Stone’s purported advocacy of legal realism and sociological jurisprudence.\(^{64}\) Professor Sawyer noted that Stone favored a “rule of reason” that purportedly maximized judicial flexibility.\(^{65}\) Professor Sawyer cited a 1936 speech, *The Common Law*, in which Stone advocated for legal realism when Stone mentioned that the recent development in the common law had been plagued by (T)he outgrowths of a legal philosophy which was too little concerned with realities, which thought of law more as an end than as a means to an end, and assigned to the judicial lawmaking function a superficial and mechanical role, very largely unrelated to the social data to which the law must be attuned if it is to fulfill its purpose. Pursued to its logical end, such a philosophy could lead only to sterility and decay.\(^{66}\)

\(^{60}\) Rutherglen, *supra* note 57, at 349.  
\(^{61}\) *Id.* at 354-56.  
\(^{62}\) *Id.* at 363, 369.  
\(^{64}\) Sawyer, *supra* note 7, at 87-88  
\(^{65}\) *Id.* at 88.  
Professor Sawyer's and Rutherglen's analyses bolstered the critics who blamed *International Shoe* for the irresolvable conflicts of the personal jurisdiction doctrine, including in the stream of commerce cases. In the critics’ view, *International Shoe*’s abandonment of the old formalistic rules for (several) vague standards, including minimum contacts, fairness, and reasonableness, invited judges to decide jurisdiction cases according to their ideological preferences. Time, they claimed, has validated Justice Black’s prophecy that future courts would manipulate the concepts of “fairness” or “reasonableness” to usurp state power based on their own concepts of natural justice.

But Stone’s judicial career reveals an unlikely candidate to conceive a doctrine that would allow federal judges to do as they pleased. Conservative Republican Calvin

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67 Jay Conison, *What Does Due Process Have To Do With Jurisdiction*, 46 Rutgers L. Rev. 1071, 1202 (1994) (“The trouble with reasonableness in connection with jurisdiction is that there exists no tradition or practice to give it a meaning useful in deciding cases”); Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev. 257, 350 (1990) (“Within [International Shoe] is not one standard, but several.”); Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 Mo. L. Rev. 753, 763 (2003) (“One can hardly believe that the Court can create a brand-new test for a major area of the law and then backtrack on it three times in the next four pages. Either this is truly sloppy writing or the Court never intended for ‘minimum contacts’ to be a precise legal test.”).

68 See, e.g., McFarland, supra note 67, at 767 (The minimum contacts test certainly does not guarantee ‘fair’ decisions. Instead, it guarantees that each case will turn on what one judge thinks fair.”); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 Yale L. J. 189, 189 (1998) (“Ambiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it has served as a cornerstone of the Supreme Court's personal jurisdiction doctrine. At its inception in 1945, Justice Black called the minimum contacts test ‘vague,’ ‘uncertain,’ and ‘confusing.’ Supreme Court cases in the intervening years have amplified that ambiguity. More than forty years after Justice Black's comments, federal appellate judges echo his criticism, complaining that the test is composed of ‘gestalt factors’ and describing its application as ‘more an art than a science.’ In short, the minimum contacts test's criteria are confused, its purposes perplexing, and its results often unpredictable.”); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 Tex. L. Rev. 689, 699 (1987) (“If, therefore, *International Shoe*’s triumph was its recognition that the regulatory interest of the state sometimes justified assertions of extraterritorial jurisdiction, then its failure was the absence of any attempt to articulate those extraterritorial boundaries.”).

69 See, e.g. 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, 985 (1995) (arguing that *Asahi*’s purported endorsement of a jurisprudence allowing judges to overturn “unfair” state assertions of jurisdiction “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.”); Weintroub, supra note 63, at 531 (“...[A]s Justice Black protested against in his separate opinion in *International Shoe*, the Supreme Court has added layer upon layer of complexity to the due process test for personal jurisdiction.”).
Coolidge appointed Stone to the Court in 1925, after Stone’s extended stint as Dean of Columbia Law School and briefer stints as a partner at a Wall Street firm and as Coolidge’s Attorney General. 70 Most observers predicted that Stone would support the Court’s pro-business wing 71 and, in fact, Stone maintained some if not many of the economic and political predilections of the conservative Republican who appointed him to the Court. 72 But throughout the 1920s and 1930s, Stone joined frequently with liberal Justices Oliver Wendell Holmes, Louis Brandeis, and Holmes’s replacement, Benjamin Cardozo, to oppose Court decisions that limited Congress’s national regulatory powers or that used the Due Process Clause to limit the powers of state officials. 73 And when the conservative “Four Horsemen” forged a majority with one or both of the more moderate justices to strike down New Deal legislation and other government regulations of the economy, Stone himself wrote several celebrated dissents castigating his colleagues for imposing their views on questions best left to the political process. 74

President Roosevelt’s 1937 attempt to pack the Court with likeminded justices failed, but natural attrition soon allowed him to appoint justices, like Black and Douglas, who joined Stone in opinions protecting the New Deal and state regulation of the economy from federal judicial interference. 75 Though Stone was one of the most celebrated justices of his day, his contemporaries Justices Holmes, Brandies, Cardozo,

71 Id. at 91-92.
72 ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 305 (1956) (“Stone’s Republican convictions were strong. His social and economic views were in general accord with those of his right-wing colleagues.”), 544 (noting Stone’s disapproval of the New Deal), 555 (noting Stone’s personal distaste for the minimum wage); WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 91-92 (2007) (noting Stone’s opposition to the minimum wage); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 2, 193 (2010) (describing Stone’s disapproval of the New Deal); Schepard, supra note 70, at 115-18 & accompanying footnotes).
73 Schepard, supra note 70, at 92.
74 Id. at 92, 104-09.
75 Id. at 92, 127.
Black, Douglas, Frankfurter, and Jackson have overshadowed his legacy until very recently.\footnote{Id. at 87-89.}

Professors Rutherglen and Sawyer referenced this history without fully accounting for its relationship to \textit{International Shoe}. Professor Rutherglen mentioned briefly that the second component of \textit{International Shoe}’s holding—that the Due Process Clause allowed Washington State to require International Shoe’s payment to the state’s unemployment fund—promoted the New Dealer’s goal of releasing states from constitutional constraints.\footnote{Rutherglen, \textit{supra} note 57, at 369.} And Professor Sawyer elaborated that \textit{International Shoe}’s rejection of formalism for flexible standards that allow judges to account for the affects of a legal doctrine closely tracked the reasoning of the landmark constitutional opinions of the era.\footnote{Sawyer, \textit{supra} note 7, at 89-94.} Yet Professor Sawyer does not specify that those opinions universally \textit{expanded} Congress’s national powers and \textit{rejected} substantive due process limitations on the states. Accordingly, neither explains why a justice who voted to reduce the judiciary’s powers under the Due Process Clause would champion a doctrine—legal realism—that, at least in its most extreme form, essentially unleashed those powers. A thorough look into Stone’s conception of reasonableness review helps resolve the paradox.

**III. The Rule of Reason: Respecting the Opinion of Those Closest to the Problem**

Stone’s experiences in the 1920s and 1930s taught him that most judicial attempts to formulate rules that precisely applied the broad and flexible standards of the Constitution to unique and complex situations, while designed to appear apolitical, merely masked the imposition of the judge’s (usually laissez faire) policy preferences on
the people’s representatives. But in Stone’s view, the Constitution’s lack of precise answers did not allow the judge unlimited discretion; instead, the judge had to canvass the facts and conditions that prompted the local official’s actions and defer to the official’s well-justified judgment, particularly if that judgment complied with the practices of other democratic states and nations. Stone more scrupulously reviewed state action that affected minorities, the political process, and/or the Bill of Rights, but he believed that the interests of foreign corporations did not merit any special judicial protection.

One of Stone’s earliest dissents, in a case that struck down price-fixing regulations under the Due Process Clause, first clarified the connection he perceived between formalistic reasoning and judicial activism. In Ribnik v. McBride, decided a few years after Stone’s appointment, the Court invalidated a state employment commissioner’s rejection of a license application from an employment agent whom the commissioner believed had proposed excessive fees. Justice Sutherland’s majority opinion declared that the Due Process Clause generally protected the freedom to contract, which allowed price-fixing regulations of only those businesses “affected with a public interest.” Sutherland explained that affected businesses, while impossible to categorize precisely, allowed the public such access as to justify the legal fiction that the owner had in effect devoted his business to the public use. Employment agencies were not so affected, Sutherland concluded, because they resembled other private businesses or

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79 See MAISON, supra note 72, at 234-36.
80 277 U.S. 350, 354 (1928).
81 Id. at 354, 355-56.
82 Id. at 355-56
agents—for example, real estate, merchandise, or ticket brokers—that the Court had never deemed to be affected with a public interest.83

To Stone, Sutherland’s opinion highlighted the most pernicious aspects of formalistic reasoning. Sutherland applied an invented, ambiguous categorical formula—businesses affected with a public interest—to protect a purportedly self-evident, extra-textual constitutional right—the freedom to contract—that restricted state regulatory authority. Most importantly, the formulaic reasoning allowed Sutherland to simply analogize between employment agents and other private businesses without considering all of the factors that prompted the state to enact the regulation.

Stone’s dissent emphasized the activism of Sutherland’s opinion. He commented that only the Court could define the phrase “affected with a public interest,” which did not appear in the Constitution.84 Accordingly, he wrote “…we should not, when the matter is not clear, oppose our notion of the seriousness of the problem or the necessity of the legislation to that of local tribunals.”85 Stone further noted that state action deserved the same presumption of constitutionality that the Court had applied for generations to Congressional acts.86 Stone thoroughly reviewed evidence of the exploitative fees charged by employment agencies, which, he noted, many states had adopted price-fixing regulations to address.87 He then concluded “[t]here may be reasonable differences of opinion as to the wisdom of the solution here attempted…But a choice between them involves a step from the judicial to the legislative field.”88

83 Id. at 355-57.
84 Id. at 360 (Stone, J., dissenting).
85 Id. at 363 (emphasis added).
86 Id.
87 Id. at 363-72.
88 Id. at 375 (emphasis added).
formalism of his conservative colleagues not solely or perhaps even predominantly for its failure to adapt to new circumstances, but for the discretion it granted to them to usurp the power of state legislatures.

Several years later, Stone twice proffered guidelines for a more deferential interpretive method, first in his dissent in Morehead v. Tipaldo,\(^89\) perhaps the climax of the Court’s pre-1937 dispute over the states’ power to regulate wages and prices, and again in a celebrated speech at Harvard.\(^90\) The Court in Morehead concluded that a New York minimum wage law for women conflicted with settled precedent protecting the freedom to contract under the Due Process Clause.\(^91\) Stone’s dissent famously accused the majority of allowing its “economic predilections” to decide the case.\(^92\) Stone proclaimed that the language of the Due Process Clause allowed “any law which reasonable men may think an appropriate means for dealing with any of those matters of public concern with which it is the business of government to deal.”\(^93\) And for Stone, the widespread regulation of wages among the states and other nations—including Great Britain and its commonwealth—to address economic maladjustments essentially precluded a judicial declaration of its unreasonableness.\(^94\) The practices of other democracies, therefore, informed the reasonableness of a regulatory practice in this one.

\(^{89}\) 298 U.S. 587 (1936).
\(^{91}\) Morehead, 298 U.S. at 602.
\(^{92}\) Id. at 633. President Roosevelt used “economic predilections” and other phrases from Stone’s dissents in a fireside chat supporting the court-packing plan. Mason, supra note 72, at 444.
\(^{93}\) Morehead, 298 U.S. at 631-32.
\(^{94}\) Id. at 633 (“The fact that at one time or another Congress and the legislatures of seventeen states, and the legislative bodies of twenty-one foreign countries, including Great Britain and its four commonwealths, have found that wage regulation is an appropriate corrective for serious social and economic maladjustments growing out of inequality in bargaining power, precludes, for me, any assumption that it is a remedy beyond the bounds of reason.”).
In a follow-up letter discussing *Tipaldo* with Irving Brant, a prominent Court observer, Stone emphasized that reasonableness review required federal judges to subvert their own political inclinations, particularly regarding policy issues beyond their expertise. He explained his “fulminations” in *Tipaldo* did not reflect his own skepticism of price fixing schemes and other infringements on the free market. But, he maintained, “[j]udicial labors would be intolerable…if …they placed on me the responsibility of choice of economic theories about which reasonable men may differ, and the choice of which with changing experience might be very different at one time than at another.”

Stone’s address at Harvard—the same address Professor Sawyer cited to demonstrate Stone’s fealty to legal realism—meanwhile, emphasized that reasonableness afforded more discretion to legislators and local officials than to the federal judge. Stone certainly believed that interpretation of federal statutes must permit federal judges, like legislators, the flexibility to assess the utility of the rules they apply. Yet Stone remarked that the reasonableness review implicitly required by the Constitution’s most open-ended commands, “do not prescribe formulas to which governmental action must conform. There is little in the spirit and tradition of the common law to induce us to

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95 *SHESOL, supra* note 72, at 235.
97 See *supra* note 66, and accompanying text.
98 Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 20 (1937) (“We are coming to realize more completely that law is not an end, but a means to an end the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law; that that end is to be attained through the reasonable accommodation of law to changing economic and social needs, weighing them against the need of continuity of our legal system and the earlier experience out of which its precedents have grown; that within the limits lying between the command of statutes on the one hand and the restraints of precedents and doctrines, by common consent regarded as binding, on the other, the judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another. Within this area he performs essentially the function of the legislator, and in a real sense makes law.”).
attempt to reduce the constitutional standard of reasonableness to a detailed formulation of definite propositions.”

Instead, to determine whether governmental action complied with such imprecise standards, a judge had to consider fully the facts that motivated the official’s actions. As Stone put it, he “must open his eyes to all those conditions and circumstances within the range of judicial knowledge, in the light of which reasonableness is to be measured.” And then, most importantly, the judge owed the greatest respect to the views of the official most responsible for addressing the problem. Stone declared, “[the judge’s review] is aided, too, by the fact that the matter ultimately to be ruled upon is the reasonableness of official action, to which . . . has always attached the presumption of regularity where the action is based on official ascertainment of facts and conditions.”

Stone believed that the judge owed as much deference to the official’s response to those conditions as the judge did to the presumed innocence of a criminal defendant; the judge must uphold the law unless its unconstitutionality is proved “beyond the reasonable doubts of objective-minded men.”

Thus, in Stone’s view, formalistic rules actually impeded the best way of maintaining judicial neutrality—a thorough and deferential consideration of the local official’s justification for his action. As Herbert Wechsler, one of Stone’s former law clerks, put it shortly after Stone’s death, “consideration of all the relevant facts, not resort to abstract and ill-defined concepts, in Stone’s view, served as the best ‘check upon

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99 Stone, supra note 98, at 24 (emphasis added).
100 Id. at 24.
101 Id.
102 Id. at 25.

Stone’s largely faithful adherence to the tenants of reasonableness review, even when assessing state action with which he disagreed, helped distinguish him as perhaps the Court’s most genuine practitioner of judicial restraint. Schepard, *supra* note 70, at 115-18.

This devotion to judicial restraint would have instinctively compelled Stone to allow the state to decide any matter in which it had a substantial interest, including, of course, a suit regarding a workplace injury to the state’s residents. But Stone did not believe all state action warranted such humility. In *United States v. Carolene Products*, perhaps the most seminal of Stone’s many seminal opinions, he essentially ended judicial review of economic legislation under the Due Process Clause, yet his famous footnote four declared that legislation affecting the Bill of Rights, the political process, and discrete and/or insular minorities may not warrant such lenient scrutiny.

Stone’s personal jurisdiction decisions never explicitly addressed whether the extra protection from state action that footnote four afforded the politically powerless could, in theory, apply to foreign corporations. Yet in the most analogous area of law to personal jurisdiction that is available—conflicts of law—Stone afforded state adjudicatory bodies virtually the same leeway to regulate foreign corporations that his substantive due process opinions had afforded state legislatures and officials to regulate within-state businesses.

**IV. Deference to Local Authorities in Justice Stone’s Conflict of Law Opinions**

Personal jurisdiction closely resembles its close doctrinal cousin, conflicts of law, which decides the law that the forum should apply to claims involving events in multiple
states.\textsuperscript{109} Both address the extent to which a state may subject a litigant to rules that he or she could not directly influence at the ballot box. Nonetheless, Stone’s conflicts decisions characteristically eschewed categorical reasoning, and, accordingly, prohibited federal judges from dictating to the plaintiff’s preferred forum the law to apply to the suit. Indeed, they demonstrate that Stone found reasonable, and thus constitutional, a state’s assertion of jurisdiction over plaintiff’s suit arising from a within-forum workplace injury—particularly when plaintiff lived in the forum.

When Stone joined the Court, the vested rights theory, which then dominated conflicts law, declared that certain first principles determined the correct law for a judge to apply to every conflict.\textsuperscript{110} The laws of the state where the parties agreed, for example, would always govern a contract dispute, and the state where the tort occurred would govern a tort suit.\textsuperscript{111} As one scholar put it, “The vested rights [approach] in the early twentieth century . . . tried to connect the controversy to the most appropriate jurisdiction using highly mechanical, territorial criteria.”\textsuperscript{112}

\textsuperscript{109} Hayward D. Reynolds, The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion, 18 HASTINGS CONST. L.Q. 819, 830 (1991) (noting the “inextricable relationship” between conflict of law and jurisdiction issues); Stein, supra note 68, at 753 (“Choice of law and choice of jurisdiction are not significantly different issues. Both seek to determine whether the forum can act as sovereign in one respect or another.”). However, as Justice Brennan explained in Burger King, choice of law analysis focuses on all elements of a transaction whereas personal-jurisdiction analysis focuses at the threshold on defendant’s purposeful connection to the forum. 471 U.S. at 481-82.

\textsuperscript{110} John A. Gorfinkel, Conflict of Laws-A Survey of Past and Contemporary Theory, 16 HASTINGS L.J. 21, 37 (1965) (“Under [the vested rights] view the forum did not seek a rule of law to govern the case; it sought a jurisdiction whose rule, regardless of its content, governed the case. In this framework choice-of-law rules enjoyed the status of Euclidean axioms before the development of non-Euclidean geometry, and became unquestioned basic truths to be applied automatically in any given situation.”); Id. at 37 (“Some of the decisions applying full faith and credit in the past, and most of the views of dissenting justices in cases where full faith and credit was not given, have proceeded on the assumption, express or implied, that some unarticulated "first principle" required the forum to apply the law of a particular state to the determination of the case.").

\textsuperscript{111} Id. at 23 (“All the forum had to do was find the place of the tort or the place of the making of the contract or whatever place it was told to find, and once that place had been located the law of that place controlled the effect and consequences of the act in issue.”).

Until the 1930s, the Court’s incorporation of vested rights into the Due Process and Full Faith and Credit Clauses justified decisions overturning the conflicts decisions of forum state courts. For example, in *New York Life Insurance Co. v. Dodge*, New York law permitted a New York company effectively to cancel the life-insurance policy of a Missouri insured who died without repaying a loan to the company, while Missouri law required the company to pay at least some benefits. The Court ruled that the Due Process Clause required that New York and not Missouri law govern the dispute because, while the insured had signed the insurance contract in Missouri, the company received and signed the loan application, and thus made the agreement, in New York.

No constitutional provision, including the Due Process Clause, explicitly justified the vested rights approach. But as Justice Holmes (surprisingly, given his usual resistance to rules not mentioned explicitly in the Constitution’s text) remarked in *Mutual Life Insurance Co. of New York v. Liebing*, “the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act.” The Court’s implementation

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113 See Elliot E. Cheatham, *Stone on Conflict of Laws*, 46 COLUM. L. REV. 719, 720-21 (1946) (noting that the Court seemingly adopted the vested rights approach in two cases in the decade prior to Stone’s appointment); Gorfinkel, *supra* note 110, at 23 (“During the first half of the present century conflict of laws theory was dominated by the doctrine that the law of the place where an event occurred determined the rights and obligations arising out of that event, and any forum in which an action was brought was bound to apply that law....In some instances this obligation to recognize the law of another state was said to be governed by conflict of laws rules; in other instances the obligation was elevated to a constitutional command under the due process and full faith and credit clauses.”); Reynolds, *supra* note 109, at 830 (“Particularly relevant to the radical change in jurisdiction wrought by *International Shoe* is the change in due process as applied to choice of law decisions by state courts. Prior to the revolutionary change in due process, the Court, under the authority of the Due Process Clause and the formalist approach championed by Professor Beale, had virtually required state courts to adhere to established rules of choice of law.”).
114 246 U.S. 357, 365-68 (1918).
115 Id. at 368-73.
117 259 U.S. 209, 214 (1922).
of vested rights did not necessarily favor corporate defendants, but since the location of an agreement or a tort could be interpreted differently, the rules proved unreliable, unpredictable, and easily manipulated by judges and/or sophisticated litigants. Indeed, despite virtually identical facts to *Dodge*, *Liebing* concluded that minute differences in contractual language dictated a different result. In *Liebing* the Court held that the parties contracted in Missouri and not New York because the insurance contract declared that the company “will...loan amounts,” which, according to the Court, meant that the company agreed to the loan when the insured signed the insurance contract in Missouri. In contrast, the insurance contract in *Dodge* declared that loans “can be obtained,” which according to the Court, allowed the company the discretion to agree to the loan itself in New York.

The vested rights approach to these cases, of course, epitomized the type of jurisprudence that Stone disfavored—formalistic rules ostensibly designed to protect predictably extra-textual rights that actually allowed federal judges greater potential to interfere with the decisions of state officials. Stone’s reasoning in three seminal cases particularly illuminate his rejection of formalistic reasoning over the appropriate law to apply to workplace injury suits.

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118 *See id.* 213-14 (finding on facts similar to *Dodge* that Missouri *was* the place of contract); Stern *supra* note 116, at 1540 (“Nonetheless, the vested rights theory cannot be explained away as a manifestation of laissez-faire politics.”).

119 *See* William L. Reynolds, *Legal Process and Choice of Law*, 56 Md. L. Rev. 1371, 1377-78 (1997) (“Although Bealean logic [the vested rights approach] produced reasonable decisions in most cases, often enough the result defied common sense. In other words, judges had to decide real cases, and occasionally they did not like the result Professor Beale had mandated in his Restatement. Judges began to look for ways to avoid the rules in order to do justice. The courts, in short, began to cheat. Judicial deceit became so common that it acquired a name; the judges, it was said, were employing “escape devices.”), Stern, *supra* note 116 at 1546 (...“determining where a particular legal relationship was created was in many cases a highly artificial inquiry. Minute differences of contract language could lead to opposite determinations of the proper location of a contract.”).

120 259 U.S. at 213-14.

121 *Id.*
First, in *Bradford Electric Light Co. v. Clapper*, the opinion of Justice Brandeis, who usually questioned formalistic reasoning, overturned the New Hampshire district court’s application of its own workers compensation law to a suit brought in New Hampshire on behalf of a Vermont employee against his Vermont employer for a work-related death that occurred in New Hampshire. Vermont’s law covered workers hired within the state and injured without, but the company had also agreed to coverage under the New Hampshire law, which, unlike the Vermont law, permitted the employee to elect to sue for damages as at common law. Brandeis’s opinion reasoned—consistently with the vested rights approach—that Vermont law governed because the employee only temporarily worked in New Hampshire under a contract signed in Vermont by two Vermont parties.

Stone’s concurrence proposed essentially to review state-court conflicts decisions for reasonableness. His narrow interpretation of the Full Faith and Credit Clause would have required that states only recognize foreign state laws that apply to persons and events within the foreign state. In this case, he believed that the forum the plaintiff favored, New Hampshire, could choose the law to apply, especially since its interests in the litigation at least equaled those of Vermont. He concurred only on the assumption that the New Hampshire state courts would have chosen to apply Vermont law.

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122 286 U.S. 145 (1932); see Stern, supra note 116, at 1565 n. 204 (“Justice Stone's long-standing skepticism of vested rights theories of choice of law was evident in his refusal to join Justice Brandeis's opinions for the majority in *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933), and *Bradford...*”).
123 *Bradford*, 286 U.S. at 151-52. It should be noted that Brandeis believed that any other ruling would undermine a state’s power, in this case Vermont’s, to affectuate a statute. *See id.* at 159.
124 *Id.* at 152-53.
125 *Id.* at 158.
126 *Id.* at 163-65 (Stone, J., concurring).
127 *Id.*
128 *Id.* at 163.
decided in 1935, revealed that Stone cared most about the interests of the state and the convenience of the forum to the plaintiff—and not the defendant’s preferences—when he assessed the reasonableness of state-court conflict decisions in injury suits against employers.\footnote{294 U.S. 532 (1935).} Stone’s unanimous opinion ruled that both the Due Process and Full Faith and Credit Clauses allowed the California Commission to apply its own law to a workers compensation claim filed in California by a California employee against his California employer for injuries sustained during seasonal work in Alaska.\footnote{Id. at 537-39.} Alaskan law, which the employment contract stipulated would apply, required Alaskan courts to hear and apply its law to suits by employees injured during employment there.\footnote{Id. at 538, 544-45.} California, conversely, required its courts to hear all workers compensation claims for out-of-state injuries to a Californian who agreed to an employment contract in California, regardless of the law to which the parties agreed.\footnote{Id.}

Stone first determined that the Due Process Clause allowed the California Commission to apply its own employment-compensation laws to out-of-state injuries sustained during employment under agreements made within California.\footnote{Id. at 540-42.} And the only challenge under the Due Process Clause that remained—to the reasonableness of that regulation in this case—failed because both the injured employee and the essential witnesses could not afford to return to Alaska for the litigation.\footnote{Id. at 542.} Applying California law in the California court, Stone concluded, would rationally promote California’s
legitimate interest in preventing its residents from becoming public charges.\textsuperscript{135}

Stone then determined that the Full Faith and Credit Clause also allowed California to apply its own law to the dispute.\textsuperscript{136} Stone held that the federal courts could force a forum to apply another state’s law only if the other state’s interest in the dispute surpassed that of the forum’s.\textsuperscript{137} And in Stone’s view, Alaska’s interest was not necessarily superior because of the same factors that demonstrated the reasonableness of California’s regulation of the contract under the Due Process Clause.\textsuperscript{138} Thus, Stone deferred once again to the forum’s decision to hear and apply its choice of law to a personal injury suit after accounting for the state’s interests and the practical realities of litigation—including, most prominently, the burdens it would impose on the plaintiff and witnesses.

Finally, in his 1939 opinion for a unanimous Court in \textit{Pacific Employers Co. v. Industrial Accident Commission of California},\textsuperscript{139} Stone seemingly relinquished even the minimal power he had delegated to federal judges in \textit{Alaska Packers} to choose the most important state interests when assessing the appropriate law to apply to a dispute. \textit{Pacific Employers} involved facts similar to \textit{Bradford} and almost entirely reversed from \textit{Alaska Packers}—the California Industrial Accident Commission sought to apply its own law to a workers compensation claim filed in California by a Massachusetts employee against his Massachusetts employer for injuries sustained during temporary work in California.\textsuperscript{140} Massachusetts law, which the employment contract stipulated would apply, covered all

\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 544.
\textsuperscript{137} \textit{Id.} at 547.
\textsuperscript{138} \textit{Id.} at 549-50.
\textsuperscript{139} 306 U.S. 493 (1939).
\textsuperscript{140} \textit{Id.} at 497-98.
workplace injuries to citizens that occurred out-of-state.\textsuperscript{141} The California workers compensation law, on the other hand, covered all workers injured there regardless of the law to which the parties stipulated.\textsuperscript{142}

Stone held that California could apply its own law because Massachusetts’s interest in protecting the welfare of its citizens injured abroad—while substantial—could not support an interpretation of the Full Faith and Credit clause that “…over[ode] the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it.”\textsuperscript{143} In language that should resonate 70 years later, Stone declared that “[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.”\textsuperscript{144}

Stone’s apparent reversal from \textit{Alaska Packers}—which implied that the interests of the site of injury need not necessarily predominate over all others—highlights Stone’s consistent deference to the choice of Plaintiff’s preferred forum to apply its law to disputes addressing injuries that could affect its interests.\textsuperscript{145} The extra-constitutional rights of the defendants—vested or otherwise—did not affect his consideration of the reasonableness of the state’s decision. Perhaps most revealingly, in \textit{Alaska Packers} and \textit{Pacific Employers} (and implicitly in \textit{Clapper}), Stone allowed states to subject businesses to laws that the businesses had specifically contracted to avoid.

Likewise, \textit{Pacific Employers} is also noteworthy for not mentioning the extra protection that Stone’s 1937 opinion in \textit{Carolene Products} afforded the politically

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\textsuperscript{141} \textit{Id.} at 497-500.  \\
\textsuperscript{142} \textit{Id.} at 498-99.  \\
\textsuperscript{143} \textit{Id.} at 503.  \\
\textsuperscript{144} \textit{Id.} (emphasis added).  \\
\textsuperscript{145} Cheatham, \textit{supra} note 113, at 722.
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powerless. Stone simply assumed that California could regulate reasonably a Massachusetts corporation subjected to California laws, even though the corporation could not directly influence those laws at the ballot box.

In a private letter to Stone, Justice Frankfurter recognized that *Pacific Employers* had essentially freed forum states to decide conflicts without interference from federal judges.

I am very glad the issue that is presented by *Pacific Employers* has arisen in all its clarity because that has enabled you to lay bare the problem with luminous analysis of the important issues of local social policy that are involved and which, as you so effectively make clear, should remain within the autonomous disposition of the individual states.147

In addition, scholars at the time noted that Stone granted the states large leeway to assert control over issues that affected them.148 As one of them put it, while Stone’s opinions recognized the Court’s ultimate duty to resolve conflicts, they often “call[ed] for self-restraint by himself and his brethren.”149 Indeed, together they crystallize Stone’s inferred position in *Nicastro*—federal judges should virtually always allow states to hear litigation concerning within-state injuries, particularly to its citizens, when it provides the most convenient forum for the plaintiff.

More recent scholars have observed that the New Deal Court’s substantive due process, conflicts, and personal jurisdiction decisions together dramatically restricted the

146 See David P. Currie, *The Constitution in the Supreme Court: The Preferred-Position Debate, 1941-1946*, 37 Cath. U. L. Rev. 39, 64 (1987) (“...the full faith and credit clause of article IV was designed to protect unrepresented out of state interests.... In light of his heightened concern for the politically powerless in *Carolene Products*, it seems surprising that Stone's signal contribution to this field was to replace the traditional strict scrutiny of state choice of law decisions with a deferential analysis that permitted any interested state to resolve conflicts in its own favor.”).

147 Letter from Felix Frankfurter to Harlan Fiske Stone (Mar. 17, 1939), in Stone Papers, supra note 96, at Box 64.

148 See Cheatham, supra note 113, at 719-20; Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1225 (1946) (“The workmen's compensation cases have left great latitude to the states in choice of law.”).

149 Cheatham, supra note 113, at 719-20.
federal judiciary’s power over the states.\textsuperscript{150} The justice who guided the Court’s substantive due process and choice-of-law jurisprudence down a path of judicial restraint almost certainly intended essentially the same destination for personal jurisdiction.\textsuperscript{151}

\textbf{V: Reexamining \textit{International Shoe}, and Imagining Justice Stone’s Response to Justice Black}

As already noted, \textit{International Shoe}’s critics observe that Stone could have expressed his preference for judicial restraint more emphatically.\textsuperscript{152} Stone’s judicial temperament, and that of his Court, likely explains his failure to do so.

After President Roosevelt appointed Stone as Chief Justice in 1941, his Court, which now included the famously combative New Deal Justices Frankfurter, Black, and Douglas often bitterly divided over the cases that emerged from World War II, including, most famously, the Japanese internment cases.\textsuperscript{153} Stone wrote \textit{International Shoe} in

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\textsuperscript{150}Stephen Gardbaum, \textit{New Deal Constitutionalism and the Unshackling of the States}, 64 U. CHI. L. REV. 483, 561 (1997) (“In an analogous fashion to its restructuring of the personal jurisdiction of state courts, the Court in this period also substantially reduced the constitutional restrictions on the ability of state courts to apply domestic substantive law in cases with multi-state implications.”); Reynolds, \textit{supra} note 109, at 819, 830 (noting the “conservative formalist” similarities between the court’s pre-New Deal substantive due process and choice of law decisions); Goldstein, \textit{supra} note 69, at 976-77 (noting the similarities in the three fields).
\textsuperscript{151}It should be noted that at least two scholars have contended that Stone became more conservative after he became Chief Justice. \textit{Roger K. Newman, Hugo Black: A Biography} 333 (1994) (noting that Stone’s “energies and mental sharpness were noticeably lessening” and that he “was rapidly becoming more conservative” by 1945); \textit{C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values 1937-1947} 261 (1948) (“The late Justice Stone ended his judicial career well to the right of the Court on which he had once been noted for dissents from the left.”). And indeed, his seminal 1945 opinion interpreting the Dormant Commerce Clause seemed to authorize greater judicial oversite of state regulations burdening foreign corporations than an opinion he wrote in 1938 as an associate justice. \textit{Compare South Carolina State Highway Dep’t v. Barnwell Bros.}, 303 U.S. 177 (1938) \textit{with Southern Pac. Co. v. State of Ariz. ex rel. Sullivan}, 325 U.S. 761 (1945). But Stone’s Dormant Commerce Clause evolution demonstrates only that long-standing precedent compelled him to scrutinize disputes between the states and national governments, and not that he had to scrutinize more closely disputes between states and foreign corporations.
\textsuperscript{152}See \textit{supra} notes 67-69, and accompanying text.
\textsuperscript{153}See \textit{generally} Noah Feldman, \textit{Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices} (2010); Schepard, \textit{supra} note 70, at 93, 121-23.
\textsuperscript{153}Ibid. at 93.
December 1945, when he was 73, as some noticed his energy and mental acuity declining and shortly before he died of a massive cerebral hemorrhage.

Moreover, unlike Justice Black (who, in Stone’s view, at times flagrantly disregarded judicial technique) Stone tried to reinterpret or reframe outdated doctrines and precedents instead of disregarding them. Stone “worked slowly but doggedly to the elimination of ancient but dubious dogma,” in part to ensure that each step in their elimination would harness as much support as possible from the other justices. By deliberately invalidating decades old precedents like Pennoyer, Stone believed that the Court would avoid unintended or perverse consequences. Accordingly Stone’s conflicts-of-law opinions had vanquished the vested rights approach over several cases and two unanimous opinions.

*International Shoe* reflects Stone’s judicial sensibilities and perhaps his declining ability to articulate them. Before *International Shoe*, the Court’s vocabulary regarding personal jurisdiction had not included terms like reasonableness and minimum contacts, and thus Stone used the best available precedents. He cited *Milliken v. Meyer*, Justice Douglas’s opinion that notice reasonably calculated to alert a defendant absent from the state of a within-state lawsuit satisfies the “traditional notions of fair play and substantial justice” implicit in the due process clause. He additionally cited *McDonald v. Mabee*,

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155 ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 333 (1994) (noting that Stone’s “energies and mental sharpness were noticeably lessening” by 1945).
156 Schepard, *supra* note 70, at 93.
157 *MASON, supra* note 72, at 469-70.
158 *Id.* at 508.
159 *Id.* at 469.
160 See * supra* part IV.
161 311 U.S. 457, 463 (1940).
162 240 U.S. 90, 91, 92 (1917).
an opinion by Justice Holmes addressing service of process from which Justice Douglas
derived that standard.163 Stone may have clumsily incorporated those precedents, but he
procured near unanimity for eliminating the “mere solicitation” standard that the
International Shoe Company hoped to exploit to avoid Washington’s assertion of
jurisdiction and for adopting the reasonableness language he had so frequently used to
signify deference.

None of the other justices joined Justice Black’s more radical, more precise, and
of course, more divisive approach, because it could not adapt to unforeseen
circumstances. Most prominently, as Justice Breyer explained in his Nicastro
concurrence, rapidly expanding distributional capabilities can conceivably subject
parochial businesses to suits in far-flung locales.164 As a result, Stone foresaw the
likelihood that Black’s rejection of the importance of the defendant’s interest would
prove unsustainable—just as the Pennoyer rules accentuating the defendant’s interests
had proved unsustainable—and thus unable to curb judicial discretion. Perhaps William
L. Reynolds best summarized Stone’s tacit response to Black when Reynolds responded
to proposals to revive a rules-based conflicts jurisprudence: “. . . rules really do not cabin
discretion; they merely hide its exercise. . . . [T]he requirement of reasoned elaboration of
opinions itself significantly limits judicial discretion and produces the only real
predictability possible in a fallible, multi-variate world.”165

But Stone embraced nuance, not uncertainty. As one scholar has argued, judicial
and scholarly emphasis on the ambiguities and vagueness of the “minimum
contacts/fairness” test has obscured International Shoe’s two more important features: 1)

164 See supra note 53, and accompanying text.
165 Reynolds, supra note 119, at 1405-06.
its abandonment of the “sovereignty” considerations that had previously dominated jurisdictional analysis and 2) its declaration that only truly irrational state action threatens the Constitution.\textsuperscript{166} A Court that implemented reasonableness review of personal jurisdiction cases as Stone intended would largely address the purported unpredictability of the minimum contacts test.\textsuperscript{167} For as Dean Kathleen Sullivan has explained “[i]f the standard is rationality, the government is supposed to win….”\textsuperscript{168}

VI: Justice Stone’s Nicastro Dissent

Several scholars have already correctly concluded that Justice Kennedy’s Nicastro opinion revived the formalist jurisprudence of Pennoyer that International Shoe rejected.\textsuperscript{169} Stone would have likely perceived that the conservatives who insist on a requirement that corporations freely choose or purposefully avail themselves of a jurisdiction’s market practice an insidious form of judicial activism—a way of analyzing the personal jurisdiction cases that typical students may not have heard during their first-year civil procedure course.

\textsuperscript{166} Borchers, supra note 4, at 580-82 (“The real legacy of International Shoe ought to be more than the replacement of the implied consent with the minimum contacts metaphor. International Shoe’s real, but still half-buried, legacy is that jurisdiction is a practical inquiry, and only irrational state action or procedures that will deny a fair hearing threaten the Constitution.”).

\textsuperscript{167} See Walter W. Heiser, A “Minimum Interest” Approach to Personal Jurisdiction, 35 WAKE FOREST L. REV. 915, 958 (2000); John Vail, Six Questions in Light of J. McIntyre Machinery, LTD. v. Nicastro, 63 S.C. L. REV. 517, 519 (2012); Weintraub, supra note 63, at 545 (“In suits by United States plaintiffs against United States defendants, the best way to stem the flood of litigation over personal jurisdiction is to regard due process as requiring only that the forum have some rational basis for wishing to decide the case—either because the plaintiff resides in the forum state or because the defendant acted or caused consequences there, or both.”).


\textsuperscript{169} Patrick J. Borchers, J. McIntyire Machinery, Goodyer, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245, 1246 (2011) (“...[T]he plurality opinion in [Nicastro] attempted to roll back the clock by a century or more and re-ground personal jurisdiction in a dubious sovereignty theory that the Court had apparently rejected several times before.”); Rhodes, supra note 25, at 434 (“[Justice Kennedy’s and Justice Breyer’s] opinions both return to a formalism that characterized the Pennoyer era, attempting to characterize jurisdiction based on conformance with talismanic rules or past doctrine.”); Adam N. Steinman, The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, LTD. v. Nicastro, 63 S.C. L. REV. 481, 497 (2012) (“This focus on ‘submission to a State’s powers’ calls to mind the anachronistic view of jurisdiction that the Court rejected nearly seven decades ago in International Shoe.”).
Despite the conservative justices’ failure to justify a “consent” standard, its most persuasive scholarly defenders argued that it protects democratic values by ensuring that corporations without direct political power over a state’s laws can determine whether the risks of subjugation to those laws merits the rewards of accessing the state’s market.\textsuperscript{170} And indeed, the facts of \textit{World-Wide Volkswagen} itself, where the actions of others that the corporation could not control subjected it to the jurisdiction of a market that it at most tangentially intended to serve, perhaps best justified a standard that can account for a defendant’s intent to serve a particular market.\textsuperscript{171}

But Stone would likely argue that judges can never determine what actions demonstrate corporate consent to a state’s jurisdiction, just as they could never determine the corporate actions that would render the corporation “affected with a public interest.” He might recognize that one could easily conclude that a corporation “consents” to a state’s jurisdiction when it affirmatively chooses to sell in that jurisdiction and whenever it releases products into a stream of commerce knowing that they might injure someone there.\textsuperscript{172} He would even more easily conclude, as Justice Ginsburg’s \textit{Nicastro} dissent makes clear, that a corporation consents to jurisdiction in a market to which it wants an

\textsuperscript{170} Lea Brilmayer, \textit{Rights, Fairness, and Choice of Law}, 98 \textsc{Yale} \textsc{L.J.} 1277, 1307 (1989) (‘‘Since nondomiciliaries lack the opportunity to participate in electoral processes, some sort of purposeful action towards the territory by the individual is necessary to justify the exertion of state authority. Absent such a volitional act, there would be no way at all to influence the legal norms that governed one’s behavior.’’).

\textsuperscript{171} See Stein, supra note 68, at 748-49 (‘‘...[A] merchant in state \textit{A} who sells a defective product to a customer who unforeseeably takes the product into state \textit{B} and is injured there. It is unfair to the merchant to subject her to jurisdiction in \textit{B} because her connection with \textit{B} was solely a product of the plaintiff’s actions. She did not know that her sale would have interstate consequences, and there was nothing she could have done to avoid those consequences. The plaintiff, therefore, should bear the interstate costs of the litigation.’’).

intermediary to sell its goods, regardless whether it advertises in the market or directly contacts businesses there.\textsuperscript{173}

Instead, Stone would have likely realized that foreign corporations can adequately assert their views in virtually any jurisdiction.\textsuperscript{174} After all, even the dealer and distributor in \textit{World Wide Volkswagen}, which chose the products they sold, but not their ultimate destinations, can influence within-state officials. Particularly after \textit{Citizens United},\textsuperscript{175} they and/or their corporate affiliates and allies can contribute to the campaigns of national and state legislatures and state judges,\textsuperscript{176} who, in any event, will surely consider the impact of their rulings on the local economy.

In the end, however tyrannical state regulation of “unconsenting” corporations appears—even in hard cases like \textit{World Wide Volkswagen}—Stone would have argued that a standard that accounts for corporate consent allows unelected judges too much discretion to prevent local officials from addressing their most important economic and safety concerns. Justice Kennedy’s opinion in \textit{Nicastro} confirmed Stone’s fears.

First, as already explained, Kennedy incorporated into the Due Process Clause an abstract, undefinable, purportedly self-evident yet textually groundless personal liberty—

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\textsuperscript{173} 131 S. Ct. at 2802.
\textsuperscript{174} \textit{See} Benjamin Spencer, \textit{Jurisdiction to Adjudicate, A Revised Analysis}, 73 U. CHI. L. REV. 617, 662 (2006) (“as businesses and individuals learn that the state does not restrain itself from entering and enforcing judgments against nonresidents in circumstances where it lacks a legitimate interest, they will decide that it is not worth having property, offices, or other assets located in that state.”).
\end{flushleft}
to jurisdiction only in those states to which a defendant “consents.” Kennedy protects that right by adopting a purportedly predictable and objective formula—“consent” occurs only when the corporation directly sells or advertises its product in that state. Yet corporations can manipulate that formula as easily as the old vested rights, or “mere solicitation” tests that allowed them to avoid a state’s jurisdiction by carefully performing specific actions in only certain locations.

More importantly, of course, Justice Kennedy (and Justice Breyer) neglected the considerations necessary to assess the reasonableness of the local court’s actions. Stone would mention, as he did in his dissent in *Tipaldo*, that the compatibility of New Jersey’s opinion with the practices of other democratic nations—for example, the European Union permits jurisdiction wherever the harmful act occurs, including the place of injury—demonstrates the reasonableness of its judgment. He would argue, as he did in *Alaska Packers*, that Justice Kennedy failed to account for the practical realities of litigation, including the potential that plaintiff’s and witness’s inability to travel to England might unjustly force New Jersey taxpayers to pay for plaintiff’s health care. And he would observe that a Court that simply “estimated the inconveniences,” as *International Shoe* required, could protect most purportedly defenseless parochial corporations from suits in remote jurisdictions. Indeed, even those members of the Court who rejected the “purposeful availment” approach to jurisdiction in *Asahi* nonetheless

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177 It should be noted that the vested rights theory, though textually groundless, does not necessarily support or even relate to a “consent” based conflicts or jurisdictional jurisprudence. See Brilmeyer, *supra* note 170, at 1307 (“Because it focused on particular territorial connecting factors divorced from consideration of political rights, the vested rights approach sometimes called for application of the law of a state with which the complaining party had no voluntary connection.”).

178 See *Nicastro*, 131 S. Ct. at 2803 (Ginsburg, J., dissenting) (noting that the European Union would have recognized New Jersey’s jurisdiction over J. McIntyre Machinery).

179 294 U.S. at 542.

180 326 U.S. at 317.
spared a Japanese component manufacturer from litigating in California when the initial settlement with the California plaintiff negated California’s interest in the suit.\textsuperscript{182}

Finally, Stone would castigate both Justice Kennedy and Justice Breyer for disrespecting the New Jersey court’s strong justification for exercising jurisdiction, particularly as globalization increasingly permits corporations to distribute goods worldwide through intermediaries.\textsuperscript{183} As Stone declared in \textit{Pacific Employers}: “\textit{Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power}” than the bodily safety and economic protection of employees injured within it.\textsuperscript{184}

Of course, Stone would recognize one redeeming characteristic of Breyer’s opinion—the alliance he forged with Justice Alito likely denied Kennedy’s opinion a precedent-setting fifth vote. Thus, as the Fifth Circuit recently recognized, the stream of commerce dilemma remains unresolved\textsuperscript{185} and will likely engulf yet another generation of jurists, scholars, and students. Hopefully this article will help them recognize that, in this case at least, the judges who adhere to concepts like “fairness” and “reasonableness” actually respect local autonomy more than the judges who complain, often vociferously, about unchecked judicial activism. Likewise, hopefully it will help them appreciate that a victory for Justice Kennedy’s position would revive not only the formalism of a bygone era, but the judicial arrogance of that era as well.

\textsuperscript{182} \textit{See supra} notes 40-45 and accompanying text.
\textsuperscript{183} \textit{See Nicastro}, 131 S. Ct. at 2800 (Ginsburg, J., dissenting) (noting how the case illustrates common marketing arrangements in today’s commercial world).
\textsuperscript{184} 306 U.S. at 503.
\textsuperscript{185} Ainsworth v. Moffett Eng’g, 716 F.3d 174, 177-79 (5th Cir. 2013).