Railroading Personal Jurisdiction

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ABSTRACT

On June 27, 2023, the United States Supreme Court in Mallory v. Norfolk Southern Railway Co. held that a Pennsylvania state court could legitimately assert personal jurisdiction over a nonresident corporation based on a consent statute that required out-of-state corporations to consent to personal jurisdiction as a condition for registering to do business in the state. The Court's plurality decision determined that the state's application of its statute to assert jurisdiction over Norfolk Southern Railway Co. did not violate the Due Process Clause of the Fourteenth Amendment. For a conservative Court, this was an unlikely victory for an injured plaintiff that was ironically based on robust adherence to stare decisis. The four fractured decisions in Mallory, in which all nine Justices joined in part, concurred, or dissented, represents the Court's disturbing trend to fail to articulate a coherent doctrine of personal jurisdiction. The Mallory plurality opinion conflates the muddled doctrine of consent jurisdiction using it in support an expansive consent theory of all-purpose general jurisdiction, which the Court has eschewed in recent cases. Moreover, the Court, which has taken to disregarding precedent in constitutional cases, nonetheless relied on a 1917 Pennsylvania precedent as authority for the plurality opinion upholding the Pennsylvania statute against Norfolk Southern Railway. The Mallory opinions further signal a curious return to state sovereignty theories of personal jurisdiction, sounding in Pennoyer-era jurisprudence. Moreover, Justice Alito's concurring opinion encourages the introduction of a Dormant Commerce Clause argument into personal jurisdiction jurisprudence when no one argued this to the Court. The dissent

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observes that the Mallory plurality opinion represents the beginnings of an attack on and rethinking of the Court's canonical International Shoe due process decision. This Article contends that the Court's personal jurisdiction jurisprudence is an incoherent muddle and that the Court is not improving this jurisprudence with each successive personal jurisdiction pronouncement. Collectively, Mallory is a bad decision based on a weak plurality decision. Due process advocates ought to take notice of Mallory's incipient assault on the Court's longstanding International Shoe doctrine and attempted resuscitation of Pennoyer-era jurisdictional theories. Considering these concerns, the Article suggests that the Court should engage in a self-imposed moratorium on further personal jurisdiction pronouncements for the near future.

INTRODUCTION

Nothing honors dubious Supreme Court jurisprudence more than a good origin myth, so the Court's June 27, 2023 decision in *Mallory v. Norfolk Southern Railway Co.*[1] deserves recognition as this Term's version of the swallows' annual return to the mission at Capistrano. As the myth has it, the swallows return to San Juan Capistrano, California every year to find sanctuary from an unpleasant innkeeper who anciently destroyed their nests. The swallows have been doing this since the 1800s.[2] Now, substitute personal jurisdiction for the swallows, the Supreme Court as the sanctuary mission, and *Pennoyer v. Neff* in 1877[3] as the original offender, and this gets you to *Mallory*.

Apart from the weighty constitutional law matters that annually populate the Court's docket and garner most of the Court's and media attention, nothing occupies the Justices' minds so much as problems of personal jurisdiction. Like the swallows returning annually to Capistrano, personal jurisdiction issues flock yearly to the Court's docket, creating (like the swallows) a predictable mess. Procedure scholars turn out *en masse* to watch the spectacle.

This Article discusses the Court's array of opinions in *Mallory v. Norfolk Southern Railway* and argues two central points. First, the Court's several *Mallory* opinions represent a lamentable trend in the Court's twenty-first century personal jurisdiction jurisprudence to issue fractured opinions requiring a roadmap to decipher competing views, and yielding plurality decisions providing questionable, if not confusing, authority. Second, the Court – rather than clarifying doctrine – has instead conflated the concept of consent with general jurisdiction, despite the Court's repeated recent de-emphasis of both general jurisdiction theory and doctrines of express and implied consent. The

[1] 600 U.S. ___, 143 S. Ct. 2028 (June 27, 2023).

[2] *See Swallows on a Mission*, available at https://journeynorth.org/tm/swallow/OnAMission.html (last accessed July 27, 2023).

[3] 95 U.S. 714 (1877).

Article notes the incipient trend, evident in *Mallory*, towards a return to state sovereignty theories of personal jurisdiction that resonate in *Pennoyer*-era jurisprudence. Some Justices' surprising, renewed endorsement of state sovereignty theories signals an effort to revisit the Court's most famous Fourteenth Amendment due process personal jurisdiction precedent, *International Shoe*.[4]

Part I of this Article provides background for the Court's collective *Mallory* decision and sets forth the array of opinions the Court delivered on appeal. This analysis notes the plurality decision's ready adherence to an ancient state law precedent, despite the Court's recent eschewal of the doctrine of *stare decisis* in other constitutional cases. It flags the weakness of the plurality decision resting on consent doctrine, noting that five Justices joined in only two of the seven subsections of the plurality opinion.

Part II argues that the *Mallory* decision represents the Court's trend to issue fractured opinions in personal jurisdiction cases, muddying doctrinal guidance for lower courts that must address personal jurisdiction issues and affording litigants multiple avenues for contesting or supporting jurisdiction. This section surveys the plurality opinion's unhelpful articulation of the concepts of specific, general, and consent jurisdiction. It argues that the *Mallory* plurality decision embraces an expansive consent concept of all-purpose general jurisdiction, theories the Court has de-emphasized in much of its recent jurisprudence. The *Mallory* plurality decision opens the door for all fifty states and territorial jurisdictions to enact Pennsylvania-style corporate registration statutes, thereby subjecting non-resident corporations to greatly expanded liability for all actions, even those without a connection to the state.

Part II takes especial note of Justice Alito's concurring decision that expounds the possibility for a Dormant Commerce Clause approach to evaluating personal jurisdiction problems. In so doing, Justice Alito not only invites future litigants to pursue Dormant Commerce Clause arguments, but in so doing would shift personal jurisdiction jurisprudence from its longstanding due process framework to a paradigm based on federalism and state sovereignty concerns. Fairness advocates who are apprehensive about state authority over non-resident defendants ought to take note, especially because portions of the *Mallory* opinions invite reconsideration of *International Shoe* fairness and foreseeability due process protections.

Consequently, the Article concludes that the Court might be well-advised to engage in a self-imposed moratorium on further decision-making relating to personal jurisdiction for the near future. The Court's constant tinkering with its personal jurisdiction jurisprudence is making things worse, not better. The Court's *Mallory* jurisprudence now threatens to upset the carefully drawn balance courts have achieved between protecting defendants from unfair state assertions of state authority while preserving the rights of plaintiffs to be able to hold defendants accountable for their actions related to their activities and

[4] 95 U.S. 714 (1877).

presence in a forum. In light of *Mallory's* problematic opinions, a respite from further personal jurisdiction pronouncements would be a welcome development.

I. THE PENNSYLVANIA LITIGATION: *MALLORY V. NORFOLK SOUTHERN RAILWAY CO.*

A. Factual Background and Legal Theories[5]

Robert Mallory's appeal asked the Court to determine whether Pennsylvania's corporate registration statute,[6] as the basis for asserting personal jurisdiction over Norfolk Southern, violated the Fourteenth Amendment Due Process Clause and the Court's personal jurisdiction jurisprudence. The Pennsylvania statute requires non-resident corporations to register to do business in the state, thereby subjecting the corporation to the state's personal jurisdiction.[7] The Pennsylvania Supreme Court had determined that the statute violated due process and therefore the railway was not subject to Pennsylvania's personal jurisdiction.[8]

Mallory, a Virginia citizen, worked for Norfolk Southern for almost twenty years in Virginia, Ohio, and Pennsylvania. He sued Norfolk Southern in the Philadelphia Court of Common Pleas under the Federal Employers' Liability Act.[9] He alleged he developed colon cancer from exposure to asbestos and other toxic substances while working for the railroad in Ohio and Virginia. In 1998 Norfolk Southern, based in Virginia, registered to do business in Pennsylvania as a foreign corporation. Norfolk Southern is a Virginia corporation with its principal place of business was then in Virginia, but now is Georgia. The railroad runs about 19,300 miles of track in twenty-two eastern states. It owns 2,278 miles of track and operates eleven railyards and three locomotive repair shops in Pennsylvania.[10]

Mallory contended that the Pennsylvania courts had valid personal jurisdiction over Norfolk Southern based on two statutes. Pennsylvania's modern corporate registration statute, enacted in 1978, provides that a foreign corporation cannot conduct business until registered with the Commonwealth.[11]

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[5] *See* Linda S. Mullenix, *Do Corporate Registration Statutes Constitute Consent to State Personal Jurisdiction in Violation of Fourteenth Amendment Due Process?*, 50 Preview of United States Supreme Court Cases (2022). Portions of this section of the Article have been adapted from the Preview article.

[6] 15 Pa. Cons. Stat. § 411 (a)-(b).

[7] 42 Pa. Const. § 5301(a)(2)(i).

[8] Mallory v. Norfolk Southern Railway Co., 266 A.3d 542, 547 (2021).

[9] Mallory v. Norfolk Southern Railway Co., 2018 WL 3025283, *1 (Pa. Com. Pl. May 30, 2018); 45 U.S.C. §§ 51-60.

[10] Brief for the Petitioner, Mallory v. Norfolk Southern Railway Co., 2022 WL2612372, *5-6 (July 5, 2022); Respondent's Brief, 2022 WL 3925010, *1, 5-6 (Aug. 26, 2022).

[11] 15 Pa. Cons. Stat. § 411 (a)-(b).

The Pennsylvania long-arm statute provides that a relationship between a registered foreign corporation and Pennsylvania "shall constitute sufficient basis of jurisdiction to enable tribunals of this Commonwealth to exercise general personal jurisdiction over such person."[12] In addition, Mallory relied on a 1917 Pennsylvania Supreme Court decision, *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,[13] upholding corporate registration statutes as a basis for legitimate assertions of personal jurisdiction over non-resident corporations.[14]

Norfolk Southern moved to dismiss the lawsuit for a lack of personal jurisdiction.[15] The trial court granted Norfolk Southern' s motion, holding that the railroad's registration was not a sufficient basis to confer personal jurisdiction. The court concluded that the railroad had not voluntarily consented to Pennsylvania's general jurisdiction through the corporate registration and long-arm statutes. The court held the railroad's consent to jurisdiction was involuntary because Pennsylvania's statutory scheme subjected the railroad to a Hobson's choice: either register to do business while concomitantly subjecting to Pennsylvania jurisdiction, or not doing business there.[16] The trial court rejected Mallory's reliance on the *Pennsylvania Fire Ins. Co.* decision, holding that the decision was a relic of the *Pennoyer* era of jurisdictional decisions, and that it pre-dated the Supreme Court's decision in *International Shoe Co. v. Washington*,[17] which implicitly overruled those decisions.[18]

The Pennsylvania Supreme Court affirmed.[19] The court acknowledged that Fourteenth Amendment due process is not violated when a defendant voluntarily consents to state personal jurisdiction. The court concluded, however, that Pennsylvania's foreign corporation registration requirement, to do business in the state, did not constitute voluntary submission to the court's general jurisdiction. Instead, Pennsylvania's statutes compelled and coerced foreign corporations to submit to jurisdiction by legislative command.[20]

Discussing the U.S. Supreme Court's most recent personal jurisdiction decisions, the court concluded that the Supreme Court implicitly had overruled *Pennsylvania Fire.*[21] These decisions dramatically altered the concept of general jurisdiction; Norfolk Southern was not "at home" in Pennsylvania. Therefore, a

[12] 42 Pa. Const. § 5301(a)(2)(i).
[13] 243 U.S. 93 (1917).
[14] *Mallory*, *supra* note 9, at *5.
[15] *Id.*, at *1; *Mallory*, *supra* note 8 at 551.
[16] *Id*., at *4; *Mallory*, *supra* note 8 at 554.
[17] 326 U.S. 310 (1945).
[18] *Mallory*, *supra* note 9, at *5.
[19] *Mallory*, *supra* note 8, at 547.
[20] *Id.*
[21] *Mallory*, *supra* note 8, at 547, citing Daimler AG v. Bauman, 571 U.S. 915 (2014); Goodyear Dunlop Tires Operations S.A. v. Brown, 564 U.S. 915 (2011).

Pennsylvania court could not subject a foreign corporation to general all-purpose jurisdiction based exclusively on the fact that it conducted business in the state.[22]

The court noted that the U.S. Supreme Court has never ruled on whether due process forbids a state's conditioning a foreign corporations' privilege to do business by mandatory registration, thereby submitting the corporation to the state's general jurisdiction.[23] The court considered but rejected Supreme Court historical precedents, including Pennsylvania's 1917 *Philadelphia Fire Ins. Co.* decision holding that a corporation's consent to jurisdiction through registration was constitutionally valid.[24] The Pennsylvania Supreme Court declined to follow these *Pennoyer*-era Supreme Court decisions to resolve questions of general jurisdiction because these decisions did not hold significant precedential weight in federal jurisprudence.[25]

B. The Supreme Court Arguments in Mallory

1. In Support of Corporate Registration Statutes as a Valid Basis for State Assertions of Personal Jurisdiction Consistent with Due Process

Mallory's appeal focused on the question whether in the post-*International Shoe* era, state corporate registration statutes can be consistent with due process confer consent to personal jurisdiction by non-resident defendants who wish to conduct business in the state. Since the mid-nineteenth century, twenty states enacted such statutes. Currently all fifty states and the District of Columbia have corporate registration statutes as a condition of doing business in the state.[26]

The Court had never reviewed whether state corporate registration statutes violated defendants' Fourteenth Amendment due process protections by mandating consent as the result of registering to do business in the state. Both Mallory and Norfolk Southern agreed that a court may establish valid personal jurisdiction by consent. They disagreed whether Pennsylvania's registration statute conferred such voluntary consent as a condition of doing business in the state, consistent with modern views of Fourteenth Amendment due process requirements.

The Supreme Court twice addressed the narrow issue of foreign corporate consent to personal jurisdiction through state statutory provisions that required appointment of an agent for service of process. In 1877, the Court upheld a federal court's assertion of personal jurisdiction over a foreign

[22] *Mallory*, *id.*

[23] *Mallory*, *id.* at 563.

[24] *Mallory*, *id*. at 567 (discussing Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1971); *Ex parte* Schollenberger, 96 U.S. 369 (1877)).

[25] *Mallory*, *supra* note 8 at 567.

[26] Brief for the Petitioner, *supra* note 10, at *8.

insurance company based on a Pennsylvania statute requiring appointment of an agent for service of process as a condition for doing business in the state.[27] And in *Pennsylvania Fire,* the Court upheld Missouri jurisdiction over an Arizona corporation based on the requirement of Missouri's statutory requirement that foreign corporations appoint an agent to accept service of process.[28]

Mallory and Norfolk Southern agreed that state corporate registration statutes fall into four distinct categories.[29] First, some statutes require foreign jurisdictions to submit to the general personal jurisdiction by service of process on officers or agents in the state, which constitutes consent to the court's jurisdiction.[30] Second, some states have registration statutes targeted to specified foreign corporations, such as railroads.[31] Third, some states have registration statutes which provide that all foreign corporations, through registration, give consent to general personal jurisdiction for claims that residence plaintiffs pursue, but not out-of-state plaintiffs.[32] Fourth, some states have registration statutes that require corporations submit to personal jurisdiction for claims that arise out of the corporations' activities in the state.[33] Mallory suggested that each category rested on the same essential premise, that states could condition the privilege of doing business in the state on consent to personal jurisdiction

Mallory argued that "a mountain of historical evidence" supported its argument that consent to jurisdiction through a state registration statute, as a condition of doing business in a state, constitutes voluntary and valid consent for the purposes of the Fourteenth Amendment due process clause.[34] Pennsylvania, Mallory noted, had a consent-by-registration since 1874 and its statute was still constitutional. He noted that the historical record was clear: every state since the nineteenth century has required consent to jurisdiction as a condition for doing business in a state, and federal and state courts routinely have treated these statutes as establishing voluntary, valid consent to jurisdiction.[35]

He suggested that contemporaneous with enactment of the Fourteenth Amendment, every state had enacted statutes requiring foreign corporations to consent to the courts' personal jurisdiction as a condition of doing business in the state. The statutes were commonplace "because they were critical to each jurisdictions' sovereignty."[36] Both before and after Congressional ratification of

[27] *Ex parte Schollenberger*, supra note 24, at 376-77. This was the same year the Court decided *Pennoyer*.

[28] *Pennsylvania Fire*, *supra* note 13.

[29] Brief for the Petitioner, *supra* note 10, at *15-23.

[30] *Id.* at * 16-19.

[31] *Id.* at *19-20.

[32] *Id.* at *20-22.

[33] *Id.* at *22- 23.

[34] *Id.* at *2.

[35] *Id.* at *2, 8.

[36] *Id.* at *2.

the Fourteenth Amendment, the Court applied and upheld registration statutes as consent to jurisdiction in dozens of cases.[37]

Mallory's core argument relied on *Burnham v. Superior Court*,[38] where the Court upheld California's assertion of personal jurisdiction over a non-resident defendant who was transitorily within the state and served with process while there. In *Burnham's* plurality decision, Justice Antonin Scalia held that the long historical pedigree of so-called "tag jurisdiction" served as a valid basis for personal jurisdiction, without the need to satisfy *International Shoe's* minimum contact test; the plurality's decision "was rooted in a proper recognition of *International Shoe's* limits."[39] Mallory contended that the *International Shoe* modern paradigm did not undermine the historical validity of state consent-by-registration statutes as conferring valid person jurisdiction. Neither *International Shoe* nor any of the Court's subsequent personal jurisdiction decisions disturbed actual consent as a basis for personal jurisdiction.[40]

Like *Burnham*, Mallory contended that the long historical pedigree of consent-by-registration statutes supported the constitutionality of the Pennsylvania statute. Relying on the Court's 1917 decision in *Pennsylvania Fire*, Mallory argued that controlling precedent established that consent-by-registration as a condition of doing business in the state was consistent with the Fourteenth Amendment, and there was no good argument for the Court to disregard *stare decisis* and overrule *Pennsylvania Fire*. For a court to overrule a precedent, the decision must be egregiously wrong as a matter of law, which *Pennsylvania Fire* was not.[41]

Finally, Mallory argued that Pennsylvania's statute did not violate the doctrine of unconstitutional conditions because the Court had never applied that doctrine to a waivable procedural right, such as assertions of personal jurisdiction. The doctrine, Mallory argued, has no application in the procedural context of consent-to-jurisdiction statutes. If the Court decided to apply the doctrine, this would destabilize a body of case law where governments have conditioned a benefit on a person forfeiting a waivable procedural right.[42]

2. Corporate Registration Statutes as Violating Modern Due Process Personal Jurisdiction Jurisprudence

In response, Norfolk Southern argued that the Court's decision in *International Shoe* effected a sea change in personal jurisdiction jurisprudence that made registration-jurisdiction obsolete. The railroad contended that Mallory "ignores *International Shoe*, relies on the wrong framing, and misrepresents how

[37] *Id.* at *8.

[38] Burham v. Superior Court of California, 495 U.S. 604 (1990). *See* Brief for the Petitioner, *supra* note 10, at * 9, 11-12.

[39] Brief for the Petitioner, at *34-35.

[40] *Id*. at *36-37

[41] *Id*. at *32-34.

[42] *Id*. at *48-51.

the ratification-era laws applied."[43] Citing the Court's recent decisions in *Daimler and Goodyear*, Norfolk Southern contended that the modern concept of specific jurisdiction provided the centerpiece of modern jurisdiction theory, which ensured that states may assert personal jurisdiction for claims arising from a corporation's activities in a state, whether the corporation was registered or not. "Registration-jurisdiction is thus a relic of a bygone era. It is neither necessary nor doctrinally supportable today."[44] The concept of general jurisdiction played a reduced role, replacing "rickety" concepts of general jurisdiction. Permitting all states to assert general jurisdiction over foreign corporations doing business would gut the Court's protection against encompassing jurisdiction in *Goodyear* and *Daimler*.[45]

The nub of Norfolk Southern's argument was that Pennsylvania's registration-jurisdiction scheme was not based on express or implied consent.[46] The railroad maintained that Pennsylvania's statutory scheme was unique; the corporate registration requirement did not itself mention personal jurisdiction. Instead, the Pennsylvania long-arm statute provided the basis for asserting general jurisdiction, which was separate from consent. All states required companies to register and appoint an agent for service of process. Only Pennsylvania's statute asserted jurisdiction based solely on registration. Upholding Mallory's view would deter corporations from registering. Although some state courts read their registration laws to confer jurisdiction, recently many have backtracked from this conclusion.[47]

Norfolk Southern maintained that Pennsylvania's assertion of general jurisdiction pursuant to its registration statute, based on the mandatory registration requirement, did not involve express consent.[48] Nor could Mallory show implied consent, and "the court will not presume acquiescence in the loss of fundamental rights."[49] Pennsylvania's statutory scheme was a coercive assertion of personal jurisdiction. Registration-jurisdiction was unlike any other form of consent the Court's modern jurisdiction cases recognized; express consent was plainly absent.[50] Furthermore, courts may not imply consent because under Pennsylvania's two step statutory scheme, consent would always exist.

The railroad contended that the original public meaning of registration statutes did not support the plaintiff's argument and that he badly misstated ratification-era law and practice. Reviewing state registration statutes, Norfolk Southern maintained that most laws were limited to claims with a forum connection; the statutes were not intended to allow states to seize authority over

[43] Respondent's Brief, *supra* note 10, at *39.
[44] *Id*. at *2.
[45] *Id*. at *14.
[46] *Id*. at *10-12.
[47] *Id*. at *5.
[48] *Id*. at *11.
[49] *Id.* at *12
[50] *Id*. at *11.

foreign plaintiffs' claims against foreign defendants on foreign causes of action.[51] Additionally, the railroad rejected Mallory's extensive reliance on the *Burnham* decision upholding general tag jurisdiction over individuals, which the railroad claimed was an inapt precedent.[52] Like the competing *Burnham* opinions, Mallory and the railroad presented different versions of the historical pedigree of tag and registration jurisdiction. Norfolk Southern argued that Mallory's historical analysis was mistaken and could not demonstrate the registration-jurisdiction was functionally equivalent to tag jurisdiction over individuals; it was like comparing apples and oranges.[53]

Moreover, Mallory's invocation of the Court's *Pennsylvania Fire* decision as controlling was mistaken; the Court's consent analysis there addressed service of process and not jurisdiction.[54] *Pennoyer*-era consent was limited to claims arising in the state and no part of *Pennsylvania Fire's* reasoning survived *International Shoe*.[55] Nor did any modern decisions suggest that registration jurisdiction remained viable. If necessary, Norfolk Southern argued, the Court should formally overrule *Pennsylvania Fire*.[56] The doctrine of *stare decisis* could support the Court's thinly reasoned conclusion in that case, and no *stare decisis* factors counselled otherwise.[57]

Norfolk Southern urged the Court not to revive registration-jurisdiction because this would have dire consequences and violate principles of federalism. If Pennsylvania through its statutes could assert jurisdiction on any foreign corporation doing business there simply because of its statute, so could any other state. Most states have abandoned registration jurisdiction, "but it would only take a few to badly distort the interstate balance of sovereignty."[58] Registration-jurisdiction, therefore, created serious interstate federalism problems.[59] Moreover, registration-jurisdiction was unfair to defendants because it encouraged plaintiffs to forum shop, imposing practical burdens on corporations to defend in distant forums.[60]

Furthermore, the Pennsylvania statute created an unconstitutional condition on foreign businesses wishing to do business in a state, by forcing them to forfeit constitutional rights.[61] The unconstitutional-conditions doctrine prohibited governments from denying a benefit to a person because he exercised a constitutional right. The doctrine grew out of a context apt to this case: state

[51] *Id*. at *44-45.
[52] *Id*. at *8-9, 22-24.
[53] *Id*. at *23.
[54] *Id*. at *30, 32.
[55] *Id*. at *34.
[56] Id. at *36-37.
[57] *Id*. at *34-35
[58] *Id*. at *3.
[59] *Id*. at *8.
[60] *Id*. at *8.
[61] *Id*. at *24.

conditions on doing business in a state.[62] To do business in the state, Pennsylvania forced companies to choose between forfeiting its constitutional personal jurisdiction protections or breaking the law and giving up its constitutional right to access to the courts. Thus, Pennsylvania's punishment for failing to register was to deny corporations state court access, a condition that the Court already condemned.[63]

C. The Supreme Court Speaks on Corporate Registration Statutes as a Basis for Assertion of Personal Jurisdiction

1. The Fractured Array of Opinions

The Court handed down its decision in *Mallory* on June 27, 2023, three days before the end of the 2022-2023 Term. In a seeming five-four decision, the Court vacated the judgment of the Pennsylvania Supreme Court and remanded the case to Pennsylvania for further proceedings.[64] The description of the *Mallory* decision as a five-four decision, however, over-simplifies and masks a more complex array of opinions among the Justices, confounding easy explication and unpacking. Like other recent and not-so-recent personal jurisdiction decisions,[65] the *Mallory* Court presented a dazzling array of partial opinions.

As the Court informs: "Gorsuch, J. announced the judgment of the Court, delivered the opinion of the Court, with respects to Parts I and III-B, in which Thomas, Alito, Sotomayor, and Jackson, J.J. joined, and an opinion with respect to Parts II, III-A, and IV, in which Thomas, Sotomayor, and Jackson J.J., joined. Jackson, J., filed a concurring opinion. Alito, J., filed an opinion concurring in part and concurring in the judgment. Barrett, J. filed a dissenting opinion, in which Roberts, C.J., and Kagan and Kavanaugh, J.J. joined."[66]

As with many of the Court's fractured personal jurisdiction decisions, the Justices' collection of partial views makes it difficult to ascertain the a plurality decision, and how to locate the plurality decision among all the partial agreements.[67] At any rate, the array of partial opinions requires the reader to

[62] *Id*.

[63] *Id*. at *25-26.

[64] *Mallory*, *supra* note 1, at 2045.

[65] *See* discussion *infra* at notes 118-148.

[66] *Mallory*, *supra* note 1, at 2031.

[67] Marks v. United States, 430 U.S. 188 (1977)("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." This requires lower courts to look at all opinions to determine which is the narrowest compared to others. *See also* U.S. v. Alvarez, 567 U.S. 709 (2012)("A plurality opinion is an appellate opinion without enough judges' votes

create a scorecard among the various segments to map the various viewpoints and make sense of the Justices' on positions on personal jurisdiction jurisprudence. One is reminded of criminal procedurals where the investigating detectives post photos of various suspects, displayed with connecting lines and arrows, to suggest relationships to aid in identifying the solution to the crime.

At any rate, this fractured decision-making concerning personal jurisdiction jurisprudence is not good. It confounds lower courts, attorneys, law professors, law students, and any media that might remotely be interested in the implications of personal jurisdiction for civil justice. It undermines the Court's legitimacy when these fractured decisions illustrate the nine Justices' inability, spanning many years, to coalesce around a unified theory of personal jurisdiction.

2. Justice Gorsuch's Opinion

It is important to identify each opinion segment to track the Justices' agreement embraced by that portion of the Court's decision. Writing for the Court, Justice Gorsuch rejected Norfolk Southern's arguments that due process shielded it from lawsuits because Pennsylvania's corporate jurisdiction statute violated the Due Process Clause. "Nothing in the Due Process Clause requires such an incongruous result."[68] In Part I, Justice Gorsuch reviewed the underlying facts and framed the issue concerning corporate registration statutes as a question of consent, rather than any other jurisdictional paradigm.[69] This narrow consent framework ineluctably guided – if not impelled – the conclusion that the Pennsylvania statute was a valid exercise of Pennsylvania's sovereign authority. Five Justices joined in Part I.[70]

In Part II, Justice Gorsuch justified the Court's conclusion based on history, tradition, and precedent. He announced that the question before the Court was "a very old question," and that the Court had resolved it in the *Pennsylvania Fire Ins. Co.* decision in 1917.[71] Surveying the history of personal jurisdiction jurisprudence both at the founding and the time of the Fourteenth Amendment's adoption, Justice Gorsuch concluded that historically the Court unanimously had held laws like Pennsylvania's comported with due process.[72]

Justice Gorsuch endorsed Mallory's invocation of the *Burnham* decision as a unanimous precedential holding that supported the legitimacy of corporate registration statutes. Reviewing the ancient concept of transitory or tag jurisdiction, Gorsuch noted that the Court's leading *Burnham* decision

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to constitute a majority of the court. The plurality opinion is the opinion that received the greatest number of votes of any of the opinions filed.").

[68] *Mallory*, *supra* note 1, at 2032.

[69] *Id*. at 2032-2033.

[70] The five Justices joining in Part I were Justices Gorsuch, Thomas, Sotomayor, Alito, and Jackson.

[71] *Id*. at 2033.

[72] *Id.* at 2033-34.

upholding these principles was "not so old."[73] Gorsuch further cited Mallory's appendix of statutes governing jurisdiction over out-of-state corporations to consent to in-state suits in exchange for the benefits of doing business there.[74]

Four Justices joined in Part II.[75]

In Part III-A, Justice Gorsuch rehearsed the factual and procedural history of the *Philadelphia Fire* case. He noted that "Writing for a unanimous Court, Justice Holmes has little trouble dispatching the company's due process argument."[76] Under the Court's precedents, there was no doubt that Philadelphia Fire could be sued in Missouri on any suit as a condition of doing business there. A similar rule applied to transitory actions against individuals.[77] Citing seven cases in addition to *Philadelphia Fire*, Justice Gorsuch pointed out that other leading jurists, including Learned Hand and Benjamin Cardozo, "had reached similar conclusions in similar cases in the years leading up to *Philadelphia Fire*.[78]

Four Justices joined in Part III-A.[79]

Part III-B simply affirmed that *Pennsylvania Fire* controlled the outcome in *Mallory*, pointing out that the Court held that lawsuits premised on corporate registration statutes did not deny a defendant of due process of law.[80] Justice Gorsuch suggested that the Pennsylvania Supreme Court recognized the controlling nature of *Pennsylvania Fire*, but nonetheless ruled for Norfolk Southern premised on the conclusion that intervening decisions implicitly overruled *Pennsylvania Fire*. "In following that course, the Pennsylvania Supreme Court clearly erred."[81]

Five Justices joined in Part III-B.[82]

In Part IV-A, Justice Gorsuch addressed two points: Norfolk Southern's request to overrule *Pennsylvania Fire*, and the doctrine of consent. Justice Gorsuch rejected Norfolk Southern invitation to overrule *Pennsylvania Fire* based on the Court's intervening *International Shoe* decision and its due process progeny.[83] Instead, Justice Gorsuch suggested that the two precedents could "sit

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[73] *Id.* at 2034.

[74] *Id*. at 2035.

[75] The four Justices joining in Part II were Justices Gorsuch, Thomas, Sotomayor, and Jackson. Justice Alito did not join this portion of the opinion.

[76] *Mallory*, at 2036.

[77] *Id*. at 2037.

[78] *Id.*

[79] The four Justices joining in Part III-A were Justices Gorsuch, Thomas, Sotomayor, and Jackson. Justice Alito did not join this portion of the opinion.

[80] Mallory, at 2037. Justice Gorsuch noted that "Even Norfolk Southern does not seriously dispute that much." *Id.* at 2037.

[81] *Id*. at 2038.

[82] The five Justices joining in Part III-B were Justices Gorsuch, Thomas, Sotomayor, Alito, and Jackson.

[83] *Mallory*, at 2038.

comfortably side by side."[84] Reviewing *International Shoe* jurisprudence, Justice Gorsuch concluded that all *International Shoe* did was to stake out an additional road to jurisdiction over non-resident corporate defendants.[85]

In rejecting Norfolk Southern's proposal, Justice Gorsuch grounded his view of jurisdictional precedents based on doctrines of consent. The distinction between the two jurisdictional paradigms lay in consent doctrine: in *Pennsylvania Fire* the defendant consented to the court' jurisdiction while in *International Shoe* the defendant did not. Hence, the Court in *International Shoe* announced its test of systematic and continuous business to assert general jurisdiction over a non-consenting defendant. The Court's precedents had recognized that express and implied consent could continue to support personal jurisdiction, and consent could be manifested in several ways through word or deed.[86]

Moreover, *International Shoe* and the Court's subsequent decision in *Shaffer v. Heitner*[87] did not compel the result that all assertions of personal jurisdiction must be measured by Fourteenth Amendment due process as defined in the *International Shoe* case line.[88] Referring again to *Burnham*, Justice Gorsuch noted that the Court had rejected the contention that *International Shoe* implicitly overruled the traditional holding that tag jurisdiction – without more – constituted a valid basis for the assertion of personal jurisdiction.[89]

Four Justice joined in Part IV-A.[90]

In Part IV-B, Justice Gorsuch responded and rejected Norfolk's Southern's fairness counterarguments grounded in *International Shoe*,[91] as well as its federalism arguments.[92] Norfolk Southern contended that the Due Process Clause forbade one state from infringing on another state's sovereignty by "exorbitant" claims of personal jurisdiction. Rejecting this argument, Justice Gorsuch pointed out that to date the Court's personal jurisdiction decisions had never found a due process violation sounding in federalism concerns when one state asserted personal jurisdiction over the corporate resident of another state.[93]

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[84] *Id.*

[85] *Id*. at 2039.

[86] *Id.* at 2039-2040.

[87] 433 U.S. 186, 204 (1977).

[88] *Mallory*, at 2040- 2041.

[89] *Id.*

[90] The four Justices joining in Part IV-A were Justices Gorsuch, Thomas, Sotomayor, and Jackson. Justice Alito did not join this portion of the opinion.

[91] *Id*. at 2040- 2043.

[92] *Id*. 2040-2043.

[93] *Id.* Justice Gorsuch also dismissed Norfolk Southern's claim that it had not submitted to the Pennsylvania court's jurisdiction based on "a raft of meaningless formalities." Justice Gorsuch responded: "Taken seriously, this argument would have us undo not just *Pennsylvania Fire* but a legion of precedents that attach jurisdictional consequences to what some might dismiss as mere formalities." *Id*. at 2044.

Four Justices joined in Part IV-B.[94]

3. The *Mallory* Concurrences

Justice Jackson concurred, centering her concurrence on the doctrine of consent. Noting the precedential value of *Pennsylvania Fire,* Justice Jackson pointed to the Court's ruling in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,*[95] which she found "to be particularly instructive."[96] She suggested that decision, upholding personal jurisdiction over a nonresident defendant, was based on waiver, and that waiver was a critical feature of personal jurisdiction jurisprudence. In turn, a defendant could exercise a waiver by explicitly or implicitly consenting to litigate future disputes in a particular state's courts. In her view there was no question that Norfolk Southern had waived its personal jurisdiction rights by agreeing to register as a foreign corporation in Pennsylvania. Moreover, nothing compelled Norfolk Southern to register and submit itself to the jurisdiction of Pennsylvania courts. In conclusion Justice Jackson perceived no due process with Pennsylvania's registration statute.[97]

No other Justices joined Justice Jackson's concurrence.

Justice Alito filed an opinion that concurred in part and concurred in the judgment.[98] Justice Alito agreed that the Fourteenth Amendment Due Process Clause was not violated when a nonresident corporation with substantial state operations complied with a corporate registration requirement mandating personal jurisdiction to do business in the state. Further, Justice Alito noted that *assuming* the Constitution permitted a state to impose a registration requirement, he could see no reason that resulting lawsuits violated *International Shoe's* standard for "fair play and substantial justice."[99] Justice Alito agreed that *Pennsylvania Fire* foreclosed Norfolk Southern's arguments and that unless that precedent had been overruled, it was binding. Justice Alito was not persuaded that *Pennsylvania Fire* had been overruled expressly or implicitly.[100] Nor did Justice Alito find the *Pennsylvania Fire* holding so egregiously wrong as to require overruling.[101]

Instead, Justice Alito's focused on federalism concerns raised by a state's submission-to-jurisdiction requirement such as mandatory corporate registration statute. He opined that "At this point in the development of our constitutional case law, the most appropriate home for these principles is the so-called Dormant

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[94] The four Justices joining in Part IV-B were Justices Gorsuch, Thomas, Sotomayor, and Jackson. Justice Alito did not join this portion of the opinion.

[95] 456 U.S. 694 (1982).

[96] *Mallory*, at 2045 (Jackson, J., concurring).

[97] *Id*. at 2045-2046.

[98] *Mallory*, at 2047 (Alito, J., concurring)

[99] *Id*.

[100] *Id*. at 2047-2048.

[101] *Id*. at 2049.

Commerce Clause."[102] Noting that Norfolk Southern raised a Commerce Clause argument in the lower courts – but the Pennsylvania Supreme Court did not address this claim – Justice Alito would have vacated the Pennsylvania Supreme Court judgment and remand for further proceedings.[103] Justice Alito's concurrence provided an extensive exegesis on Dormant Commerce Clause jurisprudence, predicated on interstate consequences of corporate registration statutes.

No Justices joined in Justice Alito's concurrence.

4. The *Mallory* Dissent

Four Justices dissented from the Gorsuch opinion: Justices Barrett, Chief Justice Roberts, Kagan, and Kavanaugh. Justice Barrett authored the dissenting opinion.[104] The dissent immediately focused on the core argument that Justice Gorsuch' *Mallory* opinion flew in the face of the 75 years of the Court's precedents from *International Shoe* through its most recent progeny.[105] The nub of Justice Barrett's dissent centered on the Court's mistaken framing of the jurisdictional issue as one of consent.

The danger in the Court's *Mallory* conclusion was that henceforth every corporation doing business in a state could be subjected to general jurisdiction based on implied consent, and not on contacts. This would include all lawsuits, like Mallory's, which had no connection whatsoever with the state. And, by relabeling long-arm statutes states could now manufacture consent to personal jurisdiction.[106]

In first-year law exam fashion, Justice Barrett's opinion rehearsed the doctrine of personal jurisdiction, setting forth concepts of general and specific jurisdiction and the constitutional due process limits on a state's assertion of power.[107] She suggested that Justice Gorsuch' opinion short-circuited the Court's due process jurisprudence by characterizing the case as grounded in consent, rather than contacts-based jurisdiction. Noting that courts recognized express or implied consent because of contract, stipulation, or in-court appearance, the *Mallory* opinion added corporate registration to this list.[108]

Justice Barrett contended that construing the Pennsylvania corporate registration statute as a form of consent rested on shaky grounds. She protested that a corporation that chose to do business in a state, on the Court's analysis,

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[102] *Id.* at 2047, 2052-2055.

[103] *Id*. at 2, 8-15. Justice Alito conceded that no Commerce Clause challenge was before the Court. He noted that he joined Parts I and III-B of Justice Gorsuch opinion. *Id.* at 2055.

[104] Mallory, at 2055 (Barrett J., dissenting, joined by CJ Roberts, Kagan, and Kavanaugh, JJ,).

[105] *Id.*

[106] *Id*.

[107] *Id*. at 2055 -2056.

[108] *Id*. at 2057.

impliedly consented to general jurisdiction and a state could defeat the Due Process Clause by adopting a law that was at odds with the Due Process Clause.[109] While states permissibly could place reasonable conditions on corporations in exchange for doing business in a state, there was nothing reasonable about extracting consent where the corporation had no connection whatso ever.[110] Justice Barrett further suggested that such assertions of personal jurisdiction raised federalism concerns, impinging on state sovereignty.[111]

Justice Barrett attacked the Court's reliance on *Burnham* to support its conclusions. She contended that the *Mallory* plurality decision approving general jurisdiction by registration "flunked" *Burnham's* two tests: it was neither "firmly approved by tradition," or "still favored."[112] The plurality decision failed to explain why tag jurisdiction and registration jurisdiction were essentially the same thing, "and by so blessing one, *Burnham* blessed the other."[113] The plurality decision treated the two as the same, even though more than a century's worth of jurisprudence treated these as distinct.[114]

The dissenters disagreed that *Pennsylvania Fire* controlled the *Mallory* appeal; the Supreme Court decided *Pennsylvania Fire* before the Court's transformative decision in *International Shoe*. In *Shaffer*, the Court indicated that prior decisions that were inconsistent with *International Shoe's* due process standards were overruled. Citing the string of recent Court personal jurisdiction decisions, Justice Barrett pointed out that the *Mallory* plurality decision acted as if none of these decisions relying on and reaffirming *International Shoe* standards ever happened.[115]

Finally, calling attention to the most significant (if not dire) consequence of the *Mallory* plurality decision, Justice Barrett suggested that states might very well take up the plurality's invitation to manipulate jurisdiction by enacting registration states. Such statutes would impose a regime of general jurisdiction and render specific jurisdiction for corporations obsolete. Specific jurisdiction would henceforth be superfluous.[116]

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[109] *Id*. at 2057.

[110] *Id*. at 2058.

[111] *Id.* "Pennsylvania's power grab infringes on more than just the rights of defendants – it upsets the proper role of the States in our federal system." *Id.* at 8.

[112] *Id.* at 2059 , citing Justice Scalia's *Burham* opinion, *supra* note 38, 495 U.S. at 622.

[113] *Mallory*, at 2059 (Barrett, J. dissenting).

[114] *Id*.

[115] *Id*. at 2063. Citing Daimler AG v. Bauman, 571 U.S 117, 138 (2014); Ford Motor Co. v. Montana Eighth Judicial District, 592 U.S. ___ (2021) at __ (slip op., at 4); Bristol-Myers Squibb v. Superior Court, 582 U.S.__ (2017) at 262; Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. ___ (2011) at 919.

[116] *Mallory*, at 2064-2065 (Barrett, J., dissenting):

II. THE SUPREME COURT'S MUDDLED PERSONAL JURISDICTION JURISPRUDENCE

Deconstructing the *Mallory* opinions is no easy task. However, four salient points emerge from a close reading of the various opinions. First, identifying the plurality decision, and the weight to be accorded that decision, is problematic. Moreover, the array of *Mallory* opinions and the complicated landscape of divergent views that it expounds undermines the Court's continuing enterprise to articulate a coherent theory of personal jurisdiction. Second, *Mallory* represents a peculiar resurgence of the theory of all-purpose general jurisdiction over non-resident defendants, a theory that the Court rejected in its more recent jurisprudence. The plurality's grounding its decision in a 1917 precedent displays some Justices' selective and opportunistic application of stare decisis. The Court's endorsement of a broad theory of general jurisdiction may well invite states to aggressively pursue statutory means to compel non-residents to answer to lawsuits in their territory. Third, Justice Alito's extended conversation concerning the Dormant Commerce Clause – a theory not argued to the Court – clearly invites future advocates to advance this theory of personal jurisdiction as well as collateral state sovereignty theories, returning the Court to *Pennoyer* era jurisprudence. And fourth, Justice Barrett's warning, in dissent, of the creeping inroads on *International Shoe* raise the specter of increasing attacks on this venerable due process approach to assertions of personal jurisdiction.

Finally, the practical implications of *Mallory* are noteworthy: otherwise ideologically conservative Justices nonetheless reached a conclusion adverse to the corporate defendant in this appeal, as well as to corporate defendants generally. Liberal Justices, on the contrary, aligned to protect traditional fairness due process concerns for corporate defendants embraced by the Court for eight decades. The conservative Justices' decisions, then, may be best explained by these Justices' more pronounced goal of preserving and upholding state sovereignty principles, than any allegiance or adherence to due process fairness standards.

A. The Problem of Fractured Decisions

Critics of *Daimler* and *Goodyear* may be happy to see them go. *See e.g., Ford Motor*, 592 U.S. at ___ (slip op. at 1)(Alito, J. concurring in judgment); id., at __-__(slip op. 8-9)(Gorsuch J., joined by Thomas, J., Concurring in the judgment): *BNSF,* 581 U.S., at 416 (Sotomayor, J.,, concurring in part and dissenting in part). And make no mistake: They are halfway out the door. If States take up the Court's invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and at least for corporations, specific jurisdiction will be "superfluous." *Daimler*, 571 U.S., at 140; *Goodyear*, 564 U.S. at 925. Because I would not work this sea change, I respectfully dissent."

It is not uncommon for the Court to issue decisions where Justices join with the majority, concur on other grounds, or dissent from majority reasoning. Many of the Court's decisions that report concurrences and dissents, especially in controversial cases, reflect the Justices' differing appreciation of applicable law and principles. What is uncommon, however, is the Court's trend in personal jurisdiction appeals to issue decisions with multiple subparts, causing some Justices to join in part only certain subsections of other Justices' opinions. These fractured decisions make it difficult to parse the Court's holdings and identify plurality decisions. Instead, these fractured decisions require a scorecard to identify and keep track of individual Justice's thinking on personal jurisdiction advanced over several cases.

Rather than illuminating a coherent theory of personal jurisdiction, the Court's fractured decisions instead illuminate the substantial disagreement among the Justices concerning doctrinal first principles governing personal jurisdiction. It is fair to suggest that the Court's repeated issuance of fractured decisions undermines the legitimacy of the Court's personal jurisdiction jurisprudence when many Justices simply decline to sign on to subsections of a plurality decision. At a practical level, the Court's articulation of multiple fractured opinions creates problems for judges and attorneys who must apply these holdings. Instead, the Court's fractured decisions often provide attorneys with argumentative fodder to seek advantage from minority viewpoints. Moreover, the Court's fractured opinions allow judges to cherry-pick jurisdictional principles to suit the jurisdictional outcomes the judge thinks just.

Mallory is the Court's most recent venture in fractured decision making and illustrates the legitimacy issues these opinions present. Of the seven subsections of Justice Gorsuch's opinion for the Court, five Justices signed onto only two of those seven parts.[117] Justice Alito declined to join in five of the seven subsections of Gorsuch's opinion. Thus, Justice Alito joined with four other Justices in agreeing that the *Mallory* case presented an issue of consent,[118] and that the Pennsylvania Supreme Court erred in holding that subsequent personal jurisdiction cases overruled the *Pennsylvania Fire* precedent.[119]

Significantly, Justice Alito declined to join any other parts of Justice Gorsuch's decision. He declined to join in Justice Gorsuch's embrace of the *Burham* argument based on tradition of transitory jurisdiction principles,[120] and he declined to sign on to the notion that the *Pennsylvania Fire* and like precedents supported the conclusion in *Mallory*.[121] He declined to join in Justice Gorsuch's explication that the *Pennsylvania Fire* precedent could sit comfortably side-by-side with *International Shoe* and the due process line of

[117] *See supra* notes 66, 70, 82.
[118] *See supra* notes 68-70.
[119] *See supra* notes 80-81.
[120] *See supra* notes 71-74.
[121] *See supra* notes 76-78.

cases.[122] And finally, Justice Alito refused to join Justice Gorsuch's opinion that federalism concerns had never animated the Court's personal jurisdiction jurisprudence.[123] His unwillingness to sign onto this portion of Gorsuch's opinion made sense because Justice Alito advances such federalism arguments in his concurrence.[124]

Searching for the narrowest opinion joined by five Justices, then, one is led to the conclusion that Justice Gorsuch's plurality opinion stands for the proposition that state corporate registration statues are a matter of consent that *International Shoe* and its progeny have not rendered violative of due process. Other parts of Gorsuch's opinion venture further afield in personal jurisdiction jurisprudence, commenting on the history of transitory jurisdiction, consent, the precedential values of *Burnham* and other cases, which provide attorneys and judges with ample grounds for broader argument in future cases.

The recent issuance of fractured Supreme Court personal jurisdiction may be traced to the Court's 1987 decision in *Asahi Metals Industry Co., Ltd. v. Superior Court of California.*[125] *Asahi* presented the earliest archetypical fractured decision that would reappear thirty years later. *Asahi Metals* concerned whether California could legitimately assert personal jurisdiction over a non-resident foreign Taiwanese corporation in an indemnification action arising out of a personal injury/wrongful death lawsuit.[126]

At the outset of its decision, the report noted: "Justice O'Connor announced the judgment of the Court and delivered the unanimous opinion of the Court with respect to Part I, the opinion of the Court with respect to Part II-B, in which the Chief Justice, Justice Brennan, Justice White, Justice Marshall, Justice Blackmun, Justice Powell, and Justice Stevens join, and an opinion with respect to Parts II-A and III, in which the Chief Justice, Justice Powell, and Justice Scalia join."[127] In order to parse the Court's *Asahi* fractured holdings, one needed a scorecard to tally its divergent views.

The array of fractured *Asahi* opinions failed to command a majority. The only portion of Justice O'Connor's plurality opinion all the Justices could agree was its recitation of facts.[128] Justice O'Connor's plurality opinion endorsed a new stream-of-commerce plus personal jurisdiction theory requiring "purposeful direction" in the defendant's conduct in sending its products into a forum state.[129] Justice O'Connor's stream of commerce plus approach failed to command a fifth vote from the Justices.

Another cohort of Justices believed that the personal jurisdiction issue in *Asahi* was simply resolved by application of *Worldwide Volkswagen*

[122] *See supra* notes 83-89.
[123] *See supra* notes 91-93.
[124] *See supra* notes 102-103.
[125] 480 U.S. 102 (1987).
[126] *Asahi*, *id*. at 105-108.
[127] *Id*. at 105.
[128] *Id.* at 105-108.
[129] *Id*. at 108-113.

standards.[130] With Justice Brennan writing for four Justices, they concurred in the judgment, but declined to join Justice O'Connor new test, instead reaffirming minimum contacts jurisprudence based on principles of due process fairness.[131] In a separate concurrence, Justices Stevens, Blackmun and White wrote that California's assertion of personal jurisdiction over the non-resident defendant was not unreasonable nor unfair, and that alone required reversal; moreover Justice O'Connor's new test misapplied the facts to the case.[132]

Not only was *Asahi* problematic as an untidy exposition of personal jurisdiction principles but it became the first fractured decision to illustrate the practical difficulties that such doctrinal confusion engenders.[133] Commentators in *Asahi's* aftermath documented the array of conflicting lower court decisions that relied for support on the various *Asahi* opinions. Some courts adopted Justice O'Connor plurality opinion with its requirement of purposeful direction as applied to foreign corporate entities whose products entered American markets;[134] other courts extended Justice O'Connor's purposeful direction to domestic American corporations;[135] yet other courts ignored Justice O'Connor's plurality decision all together,[136] instead favoring Justice Brennan's concurrence

[130] *Id*. at 113- 116; *see* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980).

[131] *Asahi*, *supra* note 125, at 116-121 (Brennan J., concurring in part, JJ. White, Marshal and Blackmun joining, concurring in part, and concurring in the judgment).

[132] *Asahi*, *supra* note 125, at 121-22 (J. Stevens, concurring, JJ. White and Blackmun join, concurring in part and concurring in the judgment)("The judgment of the Supreme Court of California should be reversed for the reasons stated in Part II-B of the Court's opinion. While I join in Parts I and II-B, I do not join Part II-A for two reasons.").

[133] *See generally* Angela M. Laughlin, *This Ain't the Texas Two Step Foks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 Cap. U. L. Rev. 681 (2009)(discussion of confusion engendered by *Asahi* decision and conflicting decisions among the lower courts seeking to apply *Asahi*); Sean K. Hornbeck, Comment, *Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 Alb. L. Rev. 1389, 1420 -1426 (1996)(lower courts decision in *Asahi's* aftermath; how to cite an incomprehensible decision).

[134] *See* Fortis Corp. Ins. V. Viken Ship Management, 450 F.3d 214, 220-222 (6th Cir. 2006)(discussing Sith Circuit's adoption of O'Connor purposeful direction test).

[135] *See* Cable/Home Communications Corp. v. Network Productions, Inc., 902 F.2d 829, 858-59 (11th Cir. 1990)(apply purposeful direction test in purely domestic copyright litigation).

[136] *See e.g*., Sproul v. Rob & Charles, Inc., GT Bicycles, Inc., 304 P.3d 18, 33 (N.Mex. App. 2012)(lower court erred in applying Justice O'Connor's purposeful direction test).

emphasizing affirmation of due process fairness concerns, applying the Court's stream-of-commerce analysis adopted in *Worldwide Volkswagen*.[137]

In *Asahi's* aftermath the Court experienced a welcome twenty-four-year hiatus in addressing personal jurisdiction jurisprudence. Then, in 2011, the Court in *J. McIntyre Machinery, Ltd. v. Nicastro*[138] was presented with the opportunity to address the lower courts' conflicting interpretations of *Asahi* and to clarity personal jurisdiction jurisprudence in stream of commerce litigation involving foreign national defendants. *McIntrye* concerned the ability of a New Jersey worker who lost four fingers in a metal shearing machine accident to pursue a products liability lawsuit against the British manufacturer.[139]

Rather than clarifying *Asahi* – and tracking the jurisprudential disagreements evident in the *Asahi* opinions – the *McIntyre* Court served up another set of fractured opinions, with none commanding majority agreement.[140] *McIntyre* did little to clarify the import of the *Asahi* opinions, other than issue a plurality opinion that weakly suggested support for Justice O'Connor's purposeful direction test.[141] Instead, the plurality opinion offered a surprising, new, and lengthy digression on a state sovereignty theory of personal jurisdiction, harkening back to *Pennoyer*-era notion of state authority.[142] In focusing on state authority, the plurality opinion directly challenged and rejected Justice Brennan's affirmation in *Asahi* of fairness and foreseeability as the touchstones for assertion of personal jurisdiction.[143] Justice Breyers' concurrence suggested that the *McIntyre* appeal could be decided by the Court's existing precedents and demurred at the plurality decision announcing a new rule of broad applicability.[144] The dissenting Justices aligned in reaffirming Justice Brennan's *Asahi* opinion.[145]

The Court's *McIntyre* decision not only signaled a return to the Court's interest in personal jurisdiction jurisprudence, but it also heralded the advent of seven more personal jurisdiction decisions in the next decade.[146] Including

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[137] *See* Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1548 n.17 (1993)(collecting cases using *World-Wide Volkswagen* test rather than O'Connor plurality test).

[138] 564 U.S. 873 (2011).

[139] McIntyre, *id.* at 878-879.

[140] *Id*. at 876. ("Kennedy, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C.J., and Scalia and Thomas, J.J. joined. Bryer, J., filed an opinion concurring in the judgment, in which Alito, J., joined. Ginsburg, J. filed a dissenting opinion, in which Sotomayor and Kagan, J.J. joined.").

[141] *Id*. at 885.

[142] *Id.* at 882-885.

[143] *Id.* at 882-885.

[144] *Id.* at 887-893 (Breyer, J., concurring, joined by Alito, J.).

[145] *Id.* at 903-906.

[146] Mallory v. Norfolk Southern Railway Co., *supra* note 1; Ford Motor Co. v. Montana Eighth Judicial Dist., 592 U.S. ___ (2021); Bristol-Myers

Mallory, the Court issued eight personal jurisdictions decisions from 2011 through 2023. While the Court was able to achieve unanimity in a few of these cases,[147] *Asahi* doctrinal disagreements over personal jurisdiction jurisprudence continued to percolate, reaching an apogee in *Mallory*.[148]

The purpose here is not to elucidate every twist and eddy of the Court's personal jurisdiction jurisprudence by parsing through its fragmented opinions, seeking to align personal jurisdiction thinking over several cases. Rather, it is to suggest that one ought not to need a roadmap to ascertain a set of coherent personal jurisdiction principles that apply across cases. This seems especially compelling when the fractured decisions reveal serious fault lines in the Justices' views on personal jurisdiction, as manifested in *Mallory*. In this, the Court's fractured decisions fail to afford legitimacy to a coherent doctrine of personal jurisdiction principles.

B. General, Specific, and Consent Jurisdiction

Justice Gorsuch's *Mallory* plurality decision, upholding Pennsylvania's corporate registration statute as a legitimate exercise of consent jurisdiction, embraced and endorsed a sweeping all-purpose general jurisdiction theory. In upholding Pennsylvania's right to subject any non-resident corporate defendant to its jurisdiction without any connection to the state, the plurality defaulted to the theory of general jurisdiction and conflated mandatory, coercive consent with submission to a court's general jurisdiction. This sweeping decision ought to raise red flags about expansive state exertions of personal jurisdiction over non-resident defendants, unfettered by post-*International Shoe* due process fairness protections.

The plurality's conclusion and holding is significant because the Court in the last decade has taken pains to assert that exercises of general all-purpose jurisdiction are extremely limited and historically rare. "Since *International Shoe*, 'specific jurisdiction has become the modern centerpiece of modern jurisdiction theory, while general jurisdiction has played a reduced role."[149] In

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Squibb Co. v. Superior Court, 582 U.S. 255 (2017); BNSF Railway Co. v. Tyrell, 581 U.S. ___, 137 S. Ct. 1549 (2017); Walden v. Fiore, 571 U.S. 277 (2014); Daimler AG, *supra* note 21; Goodyear Dunlop, *supra* note 21.

[147] *See e.g.*, *Goodyear Dunlop*, at 917; *Walden*, at 278.

[148] *See e.g.*, *Ford Motor Co.*, *supra* note 146 at 1021 ("Kagan, J. delivered the opinion of the Court, in which Roberts, C.J. and Breyer, Sotomayor, and Kavanaugh, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Gorsuch, J. filed an opinion concurring in the judgment, in which Thomas J., joined. Barrett, J., took no part in consideration or decision of the cases").

[149] *Daimler*, *supra* note 21, at 128:

> *International Shoe's* momentous departure from *Pennoyer's* rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-

this regard, the Court's embrace of a general jurisdiction theory in *Mallory* is striking and incongruent with the Court's recent careful delineation of jurisdictional principles. The plurality's approval of a new consent-based general jurisdiction theory jeopardizes the operations of all corporate and business entities that conduct businesses across state lines, which may now find themselves statutorily subject to expansive all-purpose general jurisdiction without any connections or affiliations with a forum state, and absent *International Shoe* due process protections.

In its post-2011 decisions, the Court repeatedly clarified the concepts of general and specific jurisdiction.[150] In *Goodyear Dunlop Tires,* Justice Ginsburg, writing for the Court, recast the well-known principle from *International Shoe* that to be subject to a court's general jurisdiction, a corporation's affiliations with a forum state needed to be so "continuous and systematic"[151] as to render them essentially "at home" in the forum state,[152] without defining what constituted being "at home."[153] All-purpose general jurisdiction applied to instances where continuous corporate activities within a state were so substantial and of such a nature as to justify a lawsuit on causing of actions arising from dealings entirely distinct from those activities.[154]

In contrast to all-purpose general jurisdiction, Justice Ginsburg described specific jurisdiction as embracing circumstances involving a single or occasional acts occurring or having an impact within the forum state.[155] Stream of commerce arguments might bolster an affiliation that was germane to specific jurisdiction, but would not in itself warrant a determination that a court had general jurisdiction over a non-resident defendant whose products entered the forum state.[156] Considering these concepts of general and specific jurisdiction, in Justice Ginsburg's view virtually all the Court's personal jurisdiction decisions rested on application of specific jurisdiction theories. She noted that

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> in-suit occurred in the forum or the defendant purposefully availed itself of the forum. Our subsequent decisions have continued to bear out the prediction that "specific jurisdiction will continue to come into sharper relief and form a considerably more significant part of the scene."

[150] *Goodyear Dunlop*, *supra* note 21, at 919-920, 923-925; *Bristol-Myers Squibb*, *supra* note 146, at 262-264; *Walden*, *supra* note 146 at 283-84; *Ford Motor Co*., *supra* note 146, at 1024-1025; *Mallory*, *supra* note 1 at 2039-2040.

[151] *Goodyear Dunlop*, *id*. at 919.

[152] *Id*. at 924.

[153] *Id.* (referencing law review article by Prof. Leah Brilmayer as identifying domicile, place of incorporation, or principal place of business as paradigm bases for the exercise of general jurisdiction.). *See also* Daimler, *supra* note 21, at 121, 126-27, 138 (Ginsburg, J.: defendant Daimler not "at home" in California; therefore, not subject to court's general jurisdiction).

[154] *Daimler*, *supra* note 21, at 138.

[155] *Goodyear Dunlop*, *supra* note 21, at 924; *Daimler*, *supra* note 21 at 126-127.

[156] *Goodyear Dunlop*, *id*. at 927.

specific jurisdiction "had been cut loose from *Pennoyer's* sway, but we have declined to stretch general jurisdiction beyond limits traditionally recognized."[157]

Justice Ginsburg noted that since *International Shoe*, the Court had upheld an assertion of general jurisdiction in only two cases: *Perkins v. Benguet Consol. Mining Co*.[158] and *Helicopteros Nacionales S.A. v. Hall.*[159] *Mallory* may now be added to this rogue's gallery of general jurisdiction precedents. Significantly, in her *Mallory* concurrence, Justice Jackson's embraced the *Perkins v. Benguet* precedent as support and justification for joining the plurality decision's anchoring its consent conclusion in the doctrine of general jurisdiction.[160]

The *Mallory* plurality framed its analysis and based its decision on the concept of consent, thereby adding mandatory corporate registration statutes as a form of consent providing a basis for assertion of general all-purpose jurisdiction. The Court's doctrine of consent jurisdiction has a complex history. The *McIntyre* plurality opinion recognized and rested on the state's authority to exercise jurisdiction based on explicit consent conferring general jurisdiction and citing various examples: presence in the state when a lawsuit commences, service of process in the state, citizenship or domicile, and incorporation of a business's principal place of business. Each of these examples revealed a course of conduct from which the plurality contended it was proper to infer an intention to benefit from and therefore have an intention to submit to the forum state's laws.[161] But Norfolk Southern's submission to Pennsylvania's corporate registration statute was unlike any of *McIntyre's* recognized categories of consent.

Notably, the *McIntyre* dissenters rejected the plurality's reliance on consent theory, noting that *International Shoe* and subsequent decisions "ha[d] made plain that legal fictions, notably 'presence' and 'implied consent' should be discarded, or they conceal the actual bases on which jurisdiction rests."[162] Citing numerous precedents, Justice Ginsburg indicated that the plurality's notion that consent constituted the animating concept for exertion of jurisdiction

[157] *Daimler*, *supra* note 21, at 132-133.

[158] *See supra* note 95. Justice Ginsburg noted that *Perkins* remained the textbook case of general jurisdiction appropriately exercised over a foreign corporation that had not consented to suit in the forum. *Goodyear Dunlop*, *supra* note 21, at 928.

[159] 466 U.S. 408 (1984). *See Daimler, supra* note 21, at 129 "Our post-*International Shoe* opinions on general jurisdiction, are few.").

[160] *See supra* notes 95-97.

[161] *McIntyre*, *supra* note 138, at 880-81.

[162] *McIntyre*, *id*. at 900-01 (Ginsburg, J., dissenting).

that had no controlling support from Court decisions; "invocation of a fictitious consent, the Court repeatedly has said, is unnecessary and unhelpful."[163]

In her *Mallory* dissenting opinion, Justice Barrett identified three traditional bases of consent jurisdiction: contract, stipulation, and in-court appearance. She suggested that the Court's plurality decision short-circuited existing personal jurisdiction jurisprudence by characterizing the case as one about consent, rather than contacts-based jurisdiction. Justice Barrett suggested that the Court now added corporate registration to the list of consent-based jurisdiction.[164] Characterizing the plurality's consent theory as clever, Justice Barrett objected that it fell apart on inspection. Pennsylvania's statute gave notice that general jurisdiction was the price of doing business in the state, and on the Court's reasoning, corporations that chose to do business in the state impliedly consented to general jurisdiction. "The result: A State could defeat the Due Process Clause by adopting a law at odds with the Due Process Clause."[165] Citing the United States' amicus brief, she concurred that "[i]nvoking the label 'consent' rather than 'general jurisdiction' does not render Pennsylvania's long-arm statute constitutional."[166]

C. The Invitation to the Dormant Commerce Clause

Perhaps the most interesting segment of the *Mallory* opinions is Justice Alito's concurrence, in which he seized the opportunity to expound on a jurisdictional theory grounded in the Dormant Commerce Clause as a potential line of attack against the Pennsylvania corporate registration statute and other similar state statutory schemes mandating general jurisdiction.[167] Justice Alito concurred in the plurality judgment and agreed with that the Fourteenth Amendment Due Process Clause was not violated when a non-resident corporation was held to account in a forum state as a consequence of having to register to do business there.[168] He further indicated that he would not overrule the *Pennsylvania Fire* precedent based on post-*International Shoe* due process jurisprudence.[169]

However, Justice Alito pivoted from the facts and legal arguments presented in the *Mallory* appeal to raise a question not before the Court: whether the Constitution permitted any state to impose a submission-to-jurisdiction requirement.[170] Expanding on the Dormant Commerce Clause theory, Alito

[163] *Id*. at 901. This position suggest that had she been on the Court, Justice Ginsburg would not have signed onto Justice Gorsuch's plurality decision in *Mallory.*

[164] *See supra* note 108 (Barrett, J. dissenting)

[165] Mallory, note 1, at 2057 (Barrette, J., dissenting).

[166] *Id.*

[167] *See supra* notes 98-103.

[168] *Mallory*, *supra* note 1, at 2047-48 (Alito, J. concurring).

[169] *Id*. at 2048-49.

[170] *Id.* at 2047, 2049-2055.

suggested that the Dormant Commerce Clause might prohibit such statutes as violative of federalism concerns. Norfolk Southern had raised a Dormant Commerce Clause argument to the Pennsylvania Supreme Court, which had not ruled on that theory.[171] On appeal to the Court, Norfolk Southern raised a Commerce Clause argument in its brief, contending that corporate registration statutes such as Pennsylvania's harmed interstate federalism. Noting that Mallory's response to federalism concerns were that they were irrelevant, Norfolk Southern opined that adopting Mallory's thinking "would open new fronts of litigation, including case-specific Commerce Clause challenges to such corporate registration schemes."[172]

The Dormant Commerce Clause argument in personal jurisdiction jurisprudence, ironically, was largely dormant for more than a century until Norfolk Southern and Justice Alito decided to resuscitate this theory in *Mallory*.[173] Significantly, judicial opinions applying Dormant Commerce Clause limitations on state assertions of person jurisdiction occurred in the early twentieth-century, when *Pennoyer*-era state sovereignty jurisprudence held sway, and before the due process revolution initiated by *International Shoe*.[174]

The Dormant Commerce Clause theory renders unconstitutional any state laws that discourage non-residents from engaging in commerce in a particular state. It is a theory completely independent of any personal jurisdiction limitations imposed by the Fourteenth Amendment Due Process Clause and the *International Shoe* due process jurisprudence. Under the Dormant Commerce Clause, a state may not protect local in-state economic actors from out-of-state competitors by imposing extra costs or burdens on the out-of-state actors. State statutes that impose such costs or burdens can violate the Dormant Commerce

[171] *Id.,* citing Mallory v. Norfolk Southern, *supra* note 8, 266 A.3d 542, 559-60, nn.9, 11 (2021).

[172] Respondent's Brief, *supra* note 10 at *18, citing also Brief of Scholars on Corporate Registration and Jurisdiction, at 22-24. Norfolk Southern issued a cautionary warning that if the Court's approval of Mallory's position prevailed, this would invite future Commerce Clause litigation: "The Court would thus have to dust off and modernize fact-specific *Pennoyer*-era cases on when a forum's connections are too attenuated to allow jurisdiction over a business engaged in interstate commerce. E.g., *Davis v. Farmers' Co-op Equity Co.,* 262 U.S. 312, 317 (1923). Litigating these issues will also requires routine jurisdictional discovery, creating delay and expense." *Id.*

[173] *See generally* John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 Iowa L. Rev. 121 (2016)(arguing in favor of resuscitated application of Dormant Commerce Clause imitations on states' assertion of personal jurisdiction).

[174] Preis, *id.* at 122, citing Denver & Rio Grande W.R.R. Co. v. Terte, 284 U.S. 284, 287 (1932); Michigan Central R.R. Co. v. Mix, 278 U.S. 492, 495 (1929); Davis v. Farmers' Co-Op Equity Co., 262 U.S. 312, 315 (1923); Panstwowe Zaklady Graviozne v. Auto Ins. Co., 36 F.2d 504, 506 (S.D.N.Y. 1928).

Clause by being facially discriminatory or facially neutral with discriminatory effects.[175]

If a court were to determine that a state statute discriminated against interstate commerce, the court must additionally determine whether the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory purposes."[176] If the state can show that the statute advances a legitimate local purpose, then the statute is constitutional; if not, the statute is void. Satisfying the "legitimate local purpose" is a very high hurdle that most litigants fail to carry; in almost all instances litigants are unable to show an available non-discriminatory alternative.[177]

Pursuant to the Dormant Commerce Clause jurisprudence a mandatory state corporate registration statute that subjected a non-resident corporation to all-purpose general jurisdiction as a condition of doing business in the state would be unconstitutional where the defendant lacked any connections to the state, because the statute impermissibly discriminated against interstate commerce and imposed an impermissible burden on interstate commerce.[178] Such registration laws would be unconstitutional because they would discourage out-of-state companies from doing business in a state, and would provide protection and competitive advantage to in-state companies.[179]

Introducing his discussion of the Dormant Commerce Clause theory of personal jurisdiction, Justice Alito notes that the Court's 1877 *Pennoyer* decision -- which he characterizes as the first decision recognizing Fourteenth Amendment due process protections from civil suit – also proclaimed that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[180] His ensuing analysis elaborates on *Pennoyer*-era state sovereignty limitations of exertions of personal jurisdiction.[181] He determines that the Court's Fourteenth Amendment due process personal jurisdiction jurisprudence has never adequately addressed the federalism concerns embedded in these cases. Having so concluded, Justice Alito announces that "The federalism concerns that this case presents fall more naturally within the scope of the Commerce Clause."[182]

Rehearsing the contours of the Dormant Commerce Clause argument, Justice Alito points out that the Supreme Court and other courts have long

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[175] Preis, *supra* note 173, at 134.

[176] *Id*. at 137.

[177] *Id.*

[178] *Id*. at 123, 125, 138. (" . . . jurisdiction-via-registration statutes cannot pass muster, at least when they are used to assert jurisdiction over a non-domiciled defendant who is injured out of state. . . Jurisdiction in these cases is discriminatory and, second, if it is, then discrimination justified by a legitimate state interest cannot be served in a non-discriminatory manner.").

[179] *Id*. at 125.

[180] *Mallory*, *supra* note 1, at 2050 (Alito, J. concurring).

[181] *Id*. at 2050-2051.

[182] *Id*. at 2051.

examined questions of personal jurisdiction over out-of-state companies through evaluation of interstate commerce concerns, citing *Pennoyer*-era authority.[183] He concludes that "Although we have since refined our Commerce Clause framework, the structural constitutional principles underlying these decision remained unchanged, and the Clause remains a vital constraint on States' power over out-of-state corporations."[184]

Applying the principles of Dormant Commerce Clause jurisprudence, Justice Alito determined that there was reason to believe that the Pennsylvania corporate registration statute was unconstitutional. He noted that the statute discriminated against out-of-state businesses and imposed a significant burden on interstate commerce by requiring a foreign corporation to defend itself with reference to all transactions including those with no forum connection.[185] He suggested that he was hard-pressed to find any legitimate local state interest in requiring an out-of-state company having to defend against a lawsuit by an out-of-state plaintiff on claims completely unconnected to the forum state.[186] Having extensively developed the Dormant Commerce Clause argument against Pennsylvania's corporate registration statute, Justice Alito suggested that Norfolk Southern might renew this argument on remand to the Pennsylvania Supreme Court.[187]

There are three important takeaways from Justice Alito's concurring opinion. First, Justice Alito significantly does not wish to align himself with the plurality's suggestion that the Court's *Pennsylvania Fire* decision can be reconciled with *International Shoe* due process jurisprudence. Second, Justice Alito clearly invites future Dormant Commerce Clause arguments to be mounted in personal jurisdiction litigation; his goal appears to induce courts to recalibrate personal jurisdiction as a matter of state sovereignty, and to unmoor it from Fourteenth Amendment due process. His embrace of the Dormant Commerce Clause argument resonates in *Pennoyer*-era state sovereignty jurisprudence with a concomitant delegitimization of the Court's due process jurisprudence. Third, the practicing bar has taken note of Justice Alito's blatant invitation to advocating future Dormant Commerce Clause attacks against assertions of personal jurisdiction.[188]

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[183] *Id.* at 2051-2053.

[184] *Id*. at 2053.

[185] *Id*. at 2053-54.

[186] *Id.* at 2054.

[187] *Id*. at 2047.

[188] *See, e.g*., Shay Dvoretzky, Geoffrey M. Wyatt, Jorden M. Schwartz, and Asher S. Trangle, Insights, *SCOTUS Rejects Personal Jurisdiction Challenge to Consent-by-Registration but Leaves Door Open to Dormant Commerce Clause Challenge*, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates (July 24, 2023), available at skadden.com/insights/publications/2023/07/scotus-rejects-personal-jurisdiction-challenge-to-consent-by-registration-but-leaves-door-open-to-dormant-commerce-clause-challenge (last accessed Aug. 12, 2023); Insights,

D. The Incipient Attack on International Shoe

One interpretation of *Mallory* would be to view it as a personal jurisdiction unicorn representing an oddball category of jurisdictional problems falling outside the Court's longstanding *International Shoe* due process paradigm. As such, *Mallory* – much like the Court's *Burnham* decision – would fall into relative obscurity in the Court's personal jurisdiction jurisprudence. To countenance such a view, however, would be to miss an important nascent trend among some advocates and Justices to recenter personal jurisdiction away from Fourteenth Amendment due process principles and to refocus jurisdiction concerns on state territorial sovereignty. *Mallory* contains within its opinions a veiled (and perhaps not so veiled) threat to the Court' venerable *International Shoe* due process precedent.

There are at least three clues that some advocates and Justices would welcome a rethinking of the *International Shoe*.[189] First, Norfolk Southern alerted the Court that Mallory was inviting the Court to overrule *International Shoe,* without explicitly asking the Court to do so. As a litigant, Norfolk Southern was first to realize that the Mallory appeal represented an attack on *International Shoe*. Norfolk Southern noted that Mallory's arguments relied heavily on *Pennoyer*-era cases and ignored the impact of *International Shoe* on that older jurisprudence in order to convince the courts to uphold Pennsylvania's jurisdiction.[190] Thus, Norfolk Southern contended that Mallory's arguments were a backdoor effort to revive *Pennoyer*-era rules that *International Shoe* had rejected; Mallory was inviting the Court to restore *Pennoyer*, which "would warp all the surrounding doctrine."[191] Frustrated with Mallory's surreptitious argumentation, Norfolk Southern declared that "If Mallory wants to overturn *International Shoe*, he should say so. He has not made that request, here or below."[192]

U.S. Supreme Court Allows Personal Jurisdiction Based on Corporate Registration, Jones Day (June 2023), available at jonesday.com/insights.2023/06/is-supreme-court-allows personal-jurisdiction-based-on-corporate-registration (last accessed on Aug. 12, 2023); Richard A. Dean, Let the Dormant Commerce Clause Challenge to Consent Statutes Go Forth, Drug & Device Law Blog (July 7, 2023), available at tuckerellis.com/publications/let-the-dormant-commerce-clause-challenge-to-consent-statues-go-forth (last accessed Aug. 12, 2023).

[189] A possible fourth clue is Justice Gorsuch's plurality discussion attempting to reconcile his plurality decision as not inconsistent with *International Shoe*. *See supra* notes 84-85.

[190] Respondent's Brief, *supra* note 10, at *39.

[191] *Id.*

[192] *Id.* Suggesting that Mallory wanted to have its *Pennoyer* cake and eat it too, Norfolk Southern argued that in absence of clearly asking the Court to overrule *International Shoe* "He is thus stuck with *Shaffer's* clear command:

Second, Justice Alito's concurring opinion, while not explicitly calling for overruling *International Shoe*, clearly suggested that the Court's Fourteenth Amendment due process personal jurisdiction jurisprudence ought to give way to *Pennoyer*-era state sovereignty territorial principles. In taking this stance, Justice Alito then detailed an elaborate jurisprudential roadmap for future advocates to advance Dormant Commerce Clause arguments to restore the supremacy of state sovereignty principles in jurisdictional concerns.

Third, *Mallory's* dissenting Justices clearly understood that Gorsuch's plurality decision, coupled with Justice Alito's paean to federalism and the Dormant Commerce Clause, signaled an implicit attack on *International Shoe* and the Court's carefully elaborated principles of general and specific jurisdiction pursuant to that decision.[193]Focusing on the plurality's reliance on the doctrine of implied consent to uphold that Pennsylvania corporate registration statute, Justice Barrett concluded that "such an approach does not formally overrule our traditional contacts based approach to jurisdiction, but it might as well."[194]

In her concluding paragraph, Justice Barrett notes that Justices Alito, Gorsuch, and Thomas in *Ford Motor* already have signaled their discontent with the Court's *Daimler* and *Goodyear* decisions that cabined the concept of general jurisdiction; she points out that those recent decisions based on *International Shoe* principles "are halfway out the door."[195] This cohort of recent personal jurisdiction jurisprudence gives primacy to the concept of specific jurisdiction and severely limits state exercises of general jurisdiction. The *Mallory* decision rebukes this trend, restoring primacy to states to exercise all-purpose general jurisdiction over corporations, unconstrained by due process fairness principles. Justice Barrett thus sees at least three votes for a reappraisal of *International Shoe* jurisprudence, which if coupled with *Mallory's* other plurality Justices would create a majority for recasting of personal jurisdiction jurisprudence. She concludes: "If States take up the Court's invitation to manipulate registration, *Daimler* and *Goodyear* will be obsolete, and, at least for corporations, specific jurisdiction will be 'superfluous.'"[196]

The proposition that *Mallory* heralds a nascent attack on *International Shoe* is not particularly far-fetched. The Court's personal jurisdiction jurisprudence has always, in pendulum fashion, vacillated between state sovereignty theories and Fourteenth Amendment due process principles that

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Earlier cases 'inconsistent" with *International Shoe* 'are overruled.' 433 U.S. at 212 & n. 39. That includes the decisions he relies on here." *Id.*

[193] Mallory, *supra* note 1, at 2055 (Barrett, J. dissenting).

[194] *Id. See also, id.* at 2064: "By now it should be clear that the plurality's primary approach to this case is to look past personal jurisdiction precedent."

[195] *Id*. at 2064-2065 (Critics of *Daimler* and *Goodyear* may be happy to see them go). *See* Ford Motor Co., *supra* note 115, at 1038 (JJ. Gorsuch and Thomas, concurring in the judgment, "Maybe, too, *International Shoe* just doesn't work quite as well as it once did.")

[196] Mallory, *supra* note 1, at 2065.

limit state authority over non-resident defendants. *Pennoyer v. Neff* represented the Court's most robust nineteenth-century articulation of a state sovereignty theory; it has been little appreciated that the *Pennoyer* territorial approach to jurisdictional questions held sway for most of the early twentieth century. This is neglect of *Pennoyer*-era territorial jurisprudence is no doubt the consequence of the Court's 1945 *International Shoe* decision, which shifted the prevailing jurisdiction paradigm to the Fourteenth Amendment due process fairness as governing jurisdictional problems.[197]

1. Federalism and Territorial State Sovereignty Theories of Personal Jurisdiction

As is well-known and documented, for thirty-five years after the Court's announcement of *International Shoe* lower courts articulated an elaborate due process minimum contacts jurisprudence. But competing state sovereignty concerns never fully disappeared from the Court's purview and resurfaced in the Court's 1980 *World-Wide Volkswagen* decision.[198] In this respect, *World-Wide Volkswagen* might be understood as the Court's first reconsideration of the extent to which its *International Shoe* due process fairness concerns dominated jurisdictional inquiries.

In discussing the Court's evolving jurisprudence, the Court stated that the concept of minimum contacts performed "two related, but distinguishable functions. It protects that defendant against the burdens of litigating in a distant state or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereign in a federal system."[199] Setting forth five factors to govern jurisdictional assessments, the *Volkswagen* Court identified at least three factors relating to the state's interest in adjudicating the dispute.[200]

For the first time since its *International Shoe* decision, the Court returned to a surprising full-bodied appreciation of a federalism construct for personal jurisdiction, emphasizing that the reasonableness of asserting jurisdiction over defendants must be assessed "in the context of our federal system of government:"[201]

> . . . [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a "free trade unit" in which the States are

[197] It is questionable whether *International Shoe* implicitly overruled *Pennoyer*.

[198] *See supra* note 130; 444 U.S. 286 (1980).

[199] *Id*. at 291.

[200] *Id.* at 294.

[201] *Id.* at 293.

> debarred from actin as separable units . . . But the Framers also intended that the States retain many of the essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State in in turn, implied a limitation on the sovereignty of all its sister States – a limitation express or implicit in both the scheme of the Constitution and the Fourteenth Amendment.[202]

The Court again returned to a discussion of the role of state sovereignty in its *McIntyre* plurality decision, casting personal jurisdiction "in the first instance a question of authority rather than fairness."[203] Attacking Justice Brennan's *Asahi* concurrence, the *McIntyre* plurality suggested that Justice Brennan's advocacy for a jurisdictional rule based on general notions of fairness and foreseeability was "inconsistent with the premises of lawful judicial power."[204] The core question was whether a defendant followed a course of conduct directed at society or the economy of a given sovereign so that the sovereign had the power to subject the defendant to judgment concerning that conduct. Personal jurisdiction restricted judicial power not as a matter of sovereignty, but as a matter of individual liberty; "[b]ut whether a judicial judgment is lawful depends on whether the sovereign has authority to render it."[205]

Moreover, Justice Kagan's opinion for the Court in its 2021 *Ford Motor Co.* decision is further evidence that the Court currently has returned to an appreciation of federalism and state sovereignty issues embedded in personal jurisdiction analysis; Justice Kagan takes pains to note that personal jurisdictional rules derive from and reflect two sets of values: treating defendants fairly and "protecting interstate federalism."[206] Her analysis canvasses the ways in which the Court's decisions have considered states' interests in the exercise of personal jurisdiction in relation to one another, citing *World-Wide Volkswagen*, seeking to ensure that states with little interest in a lawsuit do not encroach on states more affected by a controversy.

2. Justice Brennan and the Fourteenth Amendment Due Process Individual Liberty Paradigm for Assertions of Personal Jurisdiction

It is fair to suggest that the state sovereignty branch of personal jurisdiction jurisprudence receded dramatically into the background post-*International Shoe*, but the Court never entirely repudiated this approach problems of personal jurisdiction. It is abundantly clear, however, that

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[202] *Id.* (internal citation omitted).

[203] *McIntyre*, *supra* note 138, at 883.

[204] *Id.*

[205] *Id*. at 884.

[206] Ford Motor Co., *supra* note 115, at 1025, citing *World-Wide Volkswagen*.

International Shoe jurisprudence, focused on Fourteenth Amendment due process fair protections, has dominated jurisdictional jurisprudence for approximately eighty years. Justice William J. Brennan has been its most prolific expositor and defender who, in a series of decisions, repeatedly contended that the north star of personal jurisdiction jurisprudence was derived from the Due Process Clause, protection of individual liberty, and *International Shoe* principles.[207]

In the Court's seminal 1977 *Shaffer v. Heitner* decision extending *International Shoe* minimum contacts jurisprudence to all cases *in personam* and *quasi in rem*, Justice Brennan concurred in the Court's decision, writing that he "fully agreed that the minimum contacts analysis developed in *International Shoe Co. v. Washington* represents a far more sensible construct for the exercise of state-court jurisdiction than the patchwork of legal and factual fictions that has been generated from the decision in *Pennoyer v. Neff*."[208] He suggested that nothing persuaded him that it was unfair for Delaware to subject non-resident corporate fiduciaries to be answerable to a shareholder derivative suit, which conclusion should not be affected by Delaware's failure statutorily to express interest in controlling corporate fiduciaries.[209]

Justice Brennan further expressed his views on the role of consent in personal jurisdiction analysis. He indicated that he would not regard it as controlling or even especially meaningful that Delaware failed to extract from the corporate officers and directors their consent to be sued. He opined: "Once we have rejected the jurisdictional framework created in *Pennoyer v. Neff*, I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute, expressed or implied."[210]

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[207] *See e.g.*, Hanson v. Denckla, 357 U.S. 235, 259 (1958)((Black, Burton, and Douglas, JJ., dissenting, arguing that holding the non-resident defendant would not offend traditional notions of fair play and substantial justice as mandated by *International Shoe*; nothing approached that degree of unfairness.); Kulko v. Superior Court of California, 436 U.S. 84, 102(1978)(JJ. Brennan, White and Powell, JJ., dissenting, arguing that maintenance of lawsuit over non-resident, non-domiciliary parent visiting forum state did not offend *International Shoe's* standard of traditional notions of fair play and substantial justice; appellant's connection with the forum state was not too attenuated under reasonableness standards and fairness implicit in the due process clause to require him to defend himself in California).

[208] *Shaffer*, *supra* note 47, at 219-220 (Brennan, J., concurring in part and dissenting in part).

[209] *Id*. at 226.

[210] *Id*. at 227. Justice Brennan further indicated: "Admittedly, when one consents to suit in a forum, his expectation is enhanced that he may be haled into that State's courts. To this extent, I agree that consent may have bearing on the fairness of accepting jurisdiction. But whatever is the degree of personal expectation that is necessary to warrant jurisdiction should not depend on the formality of establishing a consent law." *Id*. at 227, note 6.

Justice Brennan expounded his most fulsome articulation of Fourteenth Amendment due process requirements for assertion of personal jurisdiction in his 1980 dissent in *World-Wide Volkswagen*.[211] Here he dissented from the majority's conclusion that the Oklahoma court could not assert valid personal jurisdiction over the non-resident auto distributor for the court's failure to find the minimum contacts required by *International Shoe*. Instead, Justice Brennan declared the majority interpreted *International Shoe* and its progeny too narrowly, and in his view, "the standards articulated by those cases may already be obsolete as constitutional boundaries."[212]

In *World-Wide Volkswagen* Justice Brennan expanded the *International Shoe* due process understanding of personal jurisdiction to center on considerations of fairness and foreseeability. He indicated that a state could assert personal jurisdiction considering the forum state's interest in the litigation, whether the litigation and the defendant were connected to the forum, and the burden of defending was not unreasonable.[213] Justice Brennan would spend the remainder of his career defending and elaborating on his construct of *International Shoe* due process requirements. For example, Justice Brennan demurred from supporting Justice O'Connor's plurality opinion in *Asahi*, instead writing separately to uphold the Court's *World-Wide Volkswagen* standards for assertions of personal jurisdiction predicated on minimum contacts jurisprudence.[214]

Four years after *World-wide Volkswagen,* Justice Brennan provocatively instigated the Court's first foray into the conversation concerning the distinction between general and specific jurisdiction. Dissenting in *Helicopteros Nacionales, de Colombia S.A*., Justice Brennan chastised the majority opinion for mistakenly deciding the case based on principles of general jurisdiction and declining to hold the defendant corporation answerable to a Texas lawsuit.[215] Noting that *International Shoe* provided the touchstone of jurisdictional analysis under the Due Process Clause, he suggested that Helicol's contacts with the Texas forum did not offend traditional notions of fair play and substantial justice as a function of specific jurisdiction connecting the defendant's activities with the plaintiffs' injuries and the forum state.

The majority erred in its conclusion by failing to apply a test of specific jurisdiction; that is, one that considered contacts that were related to, or gave rise to, the underlying cause of action.[216] In Justice Brennan's view, it was eminently fair and reasonable to subject a defendant to a lawsuit in which the defendant

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[211] *World-Wide Volkswagen*, *supra* note 130, at 299-313 (Brennan, J., dissenting).

[212] *Id*. at 299.

[213] *Id*. at 302.

[214] *Asahi Metals*, *supra* note 125, at 116-121 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part and concurring in the judgment)

[215] *Helicopteros Nacionales, supra* note 159, at 419-420 (1984)(J. Brennan, dissenting).

[216] *Id*. at 420, 425.

had significant contacts directly related to the underlying cause of action.[217] Justice Brennan would become the Court's leading proponent of specific jurisdiction, citing it with approval that same Term in the Court's decision in *Keeton v. Hustler Magazine,*[218] and again in his decision for the Court the following year in *Burger King Corp. v. Rudzewicz*.[219]

In *Keeton*, Justice Brennan found himself still arguing with the Court's majority *World-Wide Volkswagen* opinion. He contended that competing state sovereignty theories of personal jurisdiction expressed in *Volkswagen* were misplaced; that "the Due Process Clause [was] the only source of the personal jurisdiction requirement and the Clause itself [made] no mention of federalism concerns."[220] One year later Justice Brennan doubled down on his view of the source of personal jurisdiction protection, stating that "The Due Process Clause protects an individual's liberty interest in not being subjected to binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' *International Shoe Co. v. Washington*." He further noted that "Although this protection operates to restrict state power, it 'must be seen as ultimately a function of individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'"[221]

The apogee of Justice Brennan's defense of the Fourteenth Amendment Due Process personal jurisdiction paradigm occurred in his epic jurisprudential battle with Justice Scalia in the Court's 1990 decision in *Burham v. Superior Court of California*[222] – the decision in which Mallory found support for its position concerning the legitimacy of Pennsylvania's assertion of personal jurisdiction based on consent.

In *Burham* – another fractured personal jurisdiction decision yielding a plurality decision authored by Justice Scalia – Justice Brennan concurred in the Court's judgment but wrote separately to object to Justice's Scalia' approach to upholding transient tag jurisdiction based "solely on historical pedigree."[223] In Brennan's view, Scalia's approach based on recourse to ancient jurisdictional tradition and precedents was foreclosed by the Court's decisions in *International Shoe* and *Shaffer v. Heiter*. Citing *International Shoe,* he again reiterated that assertions of personal jurisdiction did not violate the Due Process Clause if it

[217] *Id.* at 425-426.

[218] Keeton v. Hustler Magazine, 465 U.S. 770, 781 (1984)(Brennan, J., concurring in the judgment).

[219] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 note 15 (1985). Justice Brennan also noted, in *Burger King*, that litigants could expressly or impliedly waive their right to challenge person jurisdiction by consenting in advance to a particular forum, through a contractual forum selection clause. *Id.* at 472, note 14.

[220] *Keeton*, *supra* note 218, at 781. (Brennan, J. concurring).

[221] *Burger King, supra* note 219, at 470, note 13.

[222] *See supra* note 38, *Burnham*, 495 U.S. 604 (1990).

[223] *Burnham*, *id*. at 629 (Brennan, Marshall, Blackmun, and O'Connor, JJ., concurring in the judgment).

was consistent with traditional notions of fair play and substantial justice; in *Shaffer*, the Court had declared that all assertions of state-court jurisdiction must be evaluated according to *International Shoe* (and its progeny) standards).[224] The remainder of Justice Brennan's concurrence constituted a lengthy lecture on the prevailing Fourteenth Amendment Due process paradigm and why Justice Scalia's approach isolating transient jurisdiction, was misplaced in a post-*International Shoe* landscape.

It is fair to suggest that some Justices have continued to argue with Justice Brennan's due process jurisprudence, even after his death. Twenty-four years after *Asahi* and fourteen years after Justice Brennan's death, the *McIntyre* plurality opinion singled out Justice Brennan's concurring *Asahi* opinion for especial repudiation. The plurality noted Justice Brennan's due process standard in *Asahi* was rejected by Justice O'Connor, but even more compelling was the fact that courts since *Asahi* had determined that Justice Brennan's advocacy of a rule based on general notions of fairness and foreseeability was inconsistent with the premises of lawful judicial power. Thus, "the Court's precedents [made] clear that it is the defendant's actions, not his expectations, which empower a State's courts to subject him to judgment."[225] Scalia's plurality opinion in *Burnham*, the *McIntyre* Justices argued, illustrated that personal jurisdiction in the first instance was a question of authority, rather than fairness.[226]

Justice Ruth Bader Ginsburg, a *McIntyre* dissenter and well-aware of the nascent attack against *International Shoe* due process standards, joined the debate aligning herself with Justice Brennan in *Goodyear Dunlop* and *Daimler AG*.[227] Noting that *Pennoyer* articulated a state sovereignty theory of jurisdiction, she opined that "In time, however, that strict territorial approach yielded to a less rigid understanding, spurred by 'changes in technology of transportation and communication, and the tremendous growth of interstate business activity."[228] She declared that the canonical opinion concerning assertions of personal jurisdiction remained *International Shoe*. Adopting Justice Brennan's *World-Wide Volkswagen* standards, she indicated that the central jurisdiction inquiry centered on the relationship between the defendant, the forum, and the litigation, "rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest."[229]

3. *Mallory* and the Competing Personal Jurisdiction Paradigms: Waiver as an Outlier Jurisdictional Paradigm

Understanding the Court's 2023 *Mallory* decision within the Court's two major competing personal jurisdiction paradigms proves an uneasy fit. The

[224] *Id*. at 631-632.
[225] *McIntyre*, *supra* note 138, at 883.
[226] *Id*. at 884.
[227] *See supra* notes150-160.
[228] *Daimler*, *id.* at 126.
[229] *Id*. at 126-27.

Mallory plurality decision certainly does not fall within Justice Brennan's Fourteenth Amendment Due Process paradigm; indeed, Justice Brennan must be turning over in his grave, given his *Burham* opinion rejecting Justice Scalia's traditional approach to transient jurisdiction and Brennan's insistence that all assertions of personal jurisdiction be assessed against International Shoe requirements after *Shafer*. But it is less clear that Justice Gorsuch's plurality opinion pays homage to the Court's sovereignty approach to jurisdictional question or is grounded in an appreciation of federalism and state authority.

Mallory belongs to that small category of jurisdictional waiver problems – recognized by Justice Barrett in her dissent[230] – that fall outside the two usual jurisdictional paradigms. These cases of express or implied consent to a forum authority include contract, stipulation, and in-court appearance.[231] *Mallory*, Justice Barrett notes, would add a fourth exceptional case to this waiver category.[232] But the *Mallory* plurality, upholding Pennsylvania's right to assert jurisdiction over Norfolk Southern based on consent, provides a weak consent justification in support of all-purpose general jurisdiction.

The *Mallory* plurality decision gives short shrift to the argument that Pennsylvania's statute was coercive and not subject to ordinary contract defenses. Judicial approval of contractual forum selection clauses, which courts routinely uphold, involves consideration of the private party negotiations and the relative knowledge and bargaining power of the contracting parties. Moreover, the Court's decisions approving contractual forum selection clauses hold that contractual forum consent may be overcome by valid contractual defenses such as unconscionability, coercion, and duress.[233] The *Mallory* plurality's approval of the Pennsylvania corporate registration statute afforded no such considerations.

CONCLUSION

The Court's array of *Mallory* opinions is unfortunate and bad lawmaking. The fractured decisions are difficult to parse and the proliferation of subsections in multiple opinions undermines the Court's legitimacy. The Court remains irreconcilably divided on the fundamental question of personal jurisdiction, a problem the Court has reconsidered for nearly 150 years. The Court's plurality decision commanded the agreement of five Justices for only two subparts of the plurality decision. The plurality decision rests on a weak consent theory. The plurality decision creates a new, all-purpose general jurisdiction by consent, when the Court's most recent personal jurisdiction jurisprudence has severely curtailed exercises of general jurisdiction and express and implied consent. The plurality decision relies on a *Pennoyer*-era precedent, hypocritically invoking

[230] *Mallory*, *supra* note 1, at 2057 (Barrett J., dissenting).

[231] *Id.*

[232] *Id.*

[233] *See e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991)(forum selection clauses could be examined for fundamental fairness); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972).

stare decisis while some Justices eschew longstanding precedents in other major constitutional cases. Justice Alito's concurrence blatantly sets forth and invites future Dormant Commerce Clause arguments for personal jurisdiction argumentation when no litigants asked the Court to do so. We assuredly will now see a proliferation of Dormant Commerce Clause personal jurisdiction decisions emanating from the courts. Most important, *Mallory's* array of decisions suggest a shift among some Justices to a return of *Pennoyer*-era personal jurisdiction state sovereignty theory, with a reconsideration or repudiation of the Court's canonical *International Shoe* Due Process precedent.

This Article began by invoking Capistrano's returning swallows, so it may be appropriate to end with another avian metaphor: that of the canary in the coal in mine. While the *Mallory* decision may well be a personal jurisdiction outlier that falls into benign neglect, a careful parsing of its various opinions should give some pause for concern. *Mallory* may be the canary in the coal mine signaling future inroads, if not frontal attacks, on *International Shoe* due process personal jurisdiction jurisprudence. And, reading the tea leaves of fragmented opinions, one may discern an incipient effort to resuscitate *Pennoyer*-era state sovereignty theories as prevailing authority for limitations on state assertions of jurisdictional power. As preposterous as such reversals of such longstanding constitutional doctrines might seem, we live in a judicial era of opportunistic applications of precedents and stare decisis.

The Gorsuch and Alito *Mallory* opinions red flag these themes. The plurality's reliance on the 1917 *Pennsylvania Fire* precedent represents an unscrupulous recourse to stare decisis at the same time Justices on this Court have demonstrated willingness to ignore inconvenient but nonetheless binding precedents in other constitutional appeals. The plurality's embrace of a sweeping "consent" theory of general jurisdiction based on a coercive statutory scheme should alarm all potential defendants, individuals, and corporate entities alike. The plurality's explicit disregard of *International Shoe* due process liberty, fairness, and foreseeability standards should concern all citizens and jurists alike.

Justice Alito's blatant invitation to future litigants to pursue Dormant Commerce Clause arguments in support of federalism principles and state sovereignty theories of personal jurisdiction signals that we may anticipate a new line of personal jurisdiction jurisprudence based on federalism concerns. Because litigants have not advanced Dormant Commerce Clause arguments in more than one hundred years of personal jurisdiction jurisprudence, one can only hope that the Court will not now be seduced into evaluating personal jurisdiction appeals with reference to this alternative doctrinal quagmire. The Dormant Commerce Clause argument represents a state sovereignty theory that has been percolating through the Court's post-2011 decisions and some Justices seem to be signaling receptivity to a return to *Pennoyer*-era personal jurisdiction jurisprudence, which is where Dormant Commerce Clause arguments will take the Court.

Those who believe that the Court's possible revisitation and repudiation of *International Shoe* is unthinkable would do well to remember that the Court has shown itself not averse to overturning canonical procedure decisions. In *Bell*

Atlantic Corp. v. Twombly,[234] the Court did just that: it overturned the Court's reigning fifty-year notice pleading standard in *Conley v. Gibson.*[235] Notably, the Court cited as justification for this reversal the longstanding criticism of *Conley's* "no set of facts" language, and courts' difficulties in applying it. Expressing its distaste for the *Conley* decision, the Court concluded that "We could go on, but there is no need to pile up further citations to show that *Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough."[236] What applied to the *Twombly* Court's appreciation of *Conley* carries even greater import in the personal jurisdiction arena, where the Court's failure for almost 150 years to articulate a cohesive theory of personal jurisdiction likewise has been questioned, criticized, and explained away for a longer period than notice pleading's troubled past.

These forecasts are not overly alarmist or improbable, as Justice Barrett has recognized in her dissent. She has done the very hard work of keeping a scorecard of her colleagues' subpart opinions generated in its recent spate of fractured decisions. She had capably identified the drift of some of her colleagues' views in their appreciation of personal jurisdiction jurisprudence. She has perceptively noted, in her concluding paragraph, that Justice Alito and his fellow travelers would like to undo *International Shoe,* a seemingly unthinkable occurrence.[237] Her careful reading of her distaff colleagues has caused her to believe this attack on *International Shoe* is in the offing, and we ought to take better notice lest the Court next subvert and undermine nearly eighty years of due process protections.

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[234] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). *See also* Ashcroft v. Iqbal, 556 U.S. 662 (2009)(reaffirming *Twombly*).

[235] Conley v. Gibson, 355 U.S. 41 (1957).

[236] Bell Atlantic, *supra* note 234, at 562.

[237] *See* Mallory, *supra* note 1, at 2063 (Barrett, J., dissenting):

> Over and over we have reminded litigants that *International Shoe* is "canonical," "seminal," "pathmaking," and even "momentous," – to give just a few examples. Ford Motor Co., 592 U.S., at ___, 141 S.Ct., at 1023-1024; Bristol-Myers, 582 U.S. at 262, 137 S.Ct. 1773; Daimler, 571 U.S. at 128, 134 S. Ct. 746; Goodyear, 564 U.S. at 919, 131 S.Ct. 2846. Yet the Court acts as if none of this ever happened.