The modern law of personal jurisdiction owes its existence, and most of its structure and detail, to Chief Justice Stone's magisterial opinion in *International Shoe v. Washington*. It does not, however, owe its legal rules to this opinion, because Chief Justice Stone set out systematically to discredit most of the rules that had previously restricted the exercise of personal jurisdiction. In this effort, he succeeded beyond his wildest dreams—or, perhaps more accurately, his worst nightmares. The law of personal jurisdiction, and of such related fields as venue and choice of law, has been swept clear of nearly all rules, at least those that can be applied in a more or less determinate fashion, yielding all-or-nothing results. Rules in this sense have been in a steady retreat since the decision in *International Shoe*, and not just with respect to the constitutional issues addressed in that case. State statutes on the exercise of personal jurisdiction have generally been interpreted to reach to the constitutional limits, or at least to approach them. Venue rules often are so generous in identifying a proper forum that they provide only a preliminary to the case-by-case application of transfer statutes and the judge-made doctrine of forum non conveniens.

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1 326 US 310 (1945).
And choice of law, at least at the constitutional level and in states that have abandoned the first Restatement of Conflict of Laws, has abandoned all but the most lenient restrictions on a state’s ability to choose its own law to govern a case.

Not all of these developments followed International Shoe. Some preceded it, such as the decisions on conflict of laws. But none are so well known or so clearly changed our understanding of the limits on state power over civil litigation. Before International Shoe, the law of personal jurisdiction was governed by the venerable decision in Pennoyer v Neff, which established as constitutional doctrine the theory of territorial sovereignty articulated by Justice Story in his treatise on the Conflict of Laws. The decision takes as its premise the principle “that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.” Accordingly, the location of the defendant or the defendant’s property within the forum state at the time of service of process became crucial to the exercise of personal jurisdiction. This principle was subject to several exceptions, whose scope and importance increased over the decades of the late nineteenth and early twentieth centuries. Yet these exceptions remain confined within the strict territorial theory of Pennoyer v Neff, until International Shoe replaced this network of detailed exceptions with a single overriding principle: that a state court can exercise personal jurisdiction over a defendant if he has “certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” This principle eventually displaced the entire conceptual structure of the strict territorial theory, and with it, most of the legal rules derived from that theory.

Some may deplore these consequences of International Shoe, while others may applaud them. Few deny that they have occurred. The only dispute, as a descriptive matter, is over how many remnants are left of the old formal territorial theory, such as the rule that service on an individual inside the forum state is always suffi-

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2 95 US 714 (1877).
3 See id at 722 (citing Joseph Story, Commentaries on the Conflict of Laws (Little, Brown, 2d ed 1841)).
4 Pennoyer, 95 US at 722.
5 326 US at 316.
cient to confer personal jurisdiction. These exceptions stand like isolated ruins, revealing how completely the old rules have been devastated and how little reconstruction has occurred. This consequence should come as no surprise. The opinion in *International Shoe* is one of the enduring monuments of Legal Realism and this is, we are told, “a negative philosophy fit to do negative work.” Only the Uniform Commercial Code has a comparable pedigree as a product of Legal Realism and a comparable influence on existing law. Its provisions in Article 2 are derived directly from the realist teachings of Karl Llewellyn and these, too, have had a destructive influence on legal rules, but not nearly so apparent and so complete as *International Shoe*.

What is surprising is that both of these contributions of Legal Realism have been attributed to the constructive rather than the skeptical branch of this movement in legal thought. The constructive phase of Legal Realism inclined toward empirical studies of law and reformist projects, like the Uniform Commercial Code, designed to bring the “law on the books” into closer harmony with the “law in action.” In its skeptical aspects, Legal Realism has been identified as the predecessor of Critical Legal Studies: as a thoroughgoing conceptual critique of the foundations of all legal rules. Yet it is difficult, in all the controversy that Legal Realism generated when it came on the scene, to find a more effective and more thorough job of “trashing” legal rules than has been accomplished by *International Shoe*. What’s more, this triumph of deconstruction was initiated by a pillar of the establishment, Harlan Fiske Stone, a former dean of the Columbia University School of Law, former Attorney General, Justice, and then Chief Justice of the Supreme Court. Moreover, the scholars who recognized the critical implications of the opinion, to be sure some decades later,

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8 The realists’ agenda for empirical studies quickly split off from their agenda for reform and never fulfilled their ambitious goals for an empirical form of legal science. See Henry Schlegel, *American Legal Realism and Empirical Social Science* 8–11 (North Carolina, 1995). Perhaps for this reason, another great reformist project, the Federal Rules of Civil Procedure, has never been regarded as a product of Legal Realism. The principal drafter of the rules, Charles H. Clark, was a realist, but his work on the rules began just as his empirical studies of procedure abruptly left off. Id at 113–14.
were hardly precursors of CLS: Philip Kurland and Geoffrey Hazard, both at the University of Chicago Law School at the time of publication of their articles, and Arthur T. von Mehren and Donald T. Trautman, both of the Harvard Law School. None of these authors sought to deconstruct the law of personal jurisdiction. On the contrary, they sought to build a general theory on the foundations of *International Shoe*. But what they built was not a theory of rules. At most, it was a call for particularized rules to be developed either through legislation or through case law. Neither of these developments has come to fruition.

This article offers one reason why not: Legal Realism made the criticism of legal rules far easier than the task of formulating and defending them, resulting in a systematic bias of modern jurisdictional analysis toward open-ended standards applied on the facts of each case. This conceptual bias has then been exploited by in-state interest groups—not the least of which has been the plaintiff’s bar—to expand the reach of state long-arm statutes so that virtually no restraints remain on the exercise of personal jurisdiction. Experience has now shown the need for some such restraints, and although the nature of these restraints remains a matter of dispute, the form that they take should not be slanted against legal rules. The roots of this bias lie in the realist origins of *International Shoe*.

I. Realist Origins

In the intellectual world from which *International Shoe* emerged, personal jurisdiction was not an issue that fell plainly within the boundaries of civil procedure, which was a narrower subject than we now understand it to be. Civil procedure gave far more prominence to pleading, the forms of action, and the separation of law and equity than is done today, leaving personal jurisdic-

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12 Hazard, 1965 Supreme Court Review at 283 (cited in note 10).

tion as an optional subject, covered in some casebooks and not others. A revealing, if atypical, compromise between these two approaches is found in a casebook published three years after *International Shoe*, which confined the treatment of the case to a single short note on service of process on corporations, concluding with this disclaimer: “These matters are left for development in such courses as Business Associations, Constitutional Law, and Conflicts of Laws.” As this example illustrates, the treatment of personal jurisdiction could be assimilated to the issue of service of process, which more closely resembled the narrow and technical issues common to courses in civil procedure.

The tendency to leave *International Shoe* for more specialized treatment survived the introduction of the modern civil procedure casebook with the publication of the first edition of Field and Kaplan in 1953. That pathbreaking casebook placed the decision in a section on “Jurisdiction over Corporations,” an aspect of the case that continues to be emphasized to this day. And indeed, the opinion itself invited this treatment, since the only two secondary sources that it cited were concerned specifically with this issue.

This issue, however, touched a nerve in the field of conflict of laws, where the intellectual roots of the decision are most clearly apparent.

Fictions of corporate consent and presence came under attack early in the twentieth century in choice-of-law theory. Criticism of these fictions was so widespread that it was accepted even by

17 Richard H. Field and Benjamin Kaplan, *Materials for a Basic Course on Civil Procedure* (Foundation, 1953). The “temporary edition” of this casebook was published in 1952. Id at viii.
18 Id at 795–817.
the First Restatement in its analysis of personal jurisdiction over corporations. Consent under the First Restatement had to be "a real consent, not a fictitious one." And instead of relying upon the fiction of corporate presence, the First Restatement relied upon incorporation in the forum state or "doing business" in the forum state as the crucial determinant of jurisdiction. In the latter circumstance, jurisdiction was limited to claims arising out of the corporation's business inside the state. These positions, not surprisingly, were entirely in accord with those expressed by the reporter of the First Restatement, Joseph Beale, who published his Treatise on the Conflict of Laws a year after the First Restatement appeared. In this comprehensive three-volume treatise, he took pains to reject the fiction of presumed consent: "It is surely unfortunate to deal with a question of jurisdiction on the basis of a fiction." The concept of "doing business within the state" was his substitute for this fiction, as well as for the fiction of corporate presence.

Despite such cautious disclaimers, Beale's work in the First Restatement and his treatise became a favorite target of the Legal Realists and, in particular, of Walter Wheeler Cook, who devoted an entire book, The Logical and Legal Bases of the Conflict of Laws, to the criticism of what he called "current dogma in the Conflict of Laws." The tone of Cook's critique is best captured by his tongue-in-cheek apology for not offering affirmative proposals, quoting an author who said that "often in our carefully cultivated garden of thought some rank weed grows with such vigor as to stunt the growth of the neighboring useful vegetables." The "useful vegetables" presumably include the doctrine of personal jurisdiction that we have today. Yet for all his invective, Cook

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22 Id § 90, Comment a. Consent could be "by acts as well as words," id, and also encompassed appointment of an agent for service of process. Id § 91, Comment a.
23 Id §§ 87, 89, 92–93. Jurisdiction could also be asserted over a corporation, to the same extent as over a natural person, if the corporation entered a general appearance in a case or filed a claim as a plaintiff. Id §§ 82, 83, 88.
25 Id at 388.
26 Id at 388–89.
barely touches on Beale's treatment of personal jurisdiction over corporations, commenting only on Beale's insistence that a corporation, like an individual, must have a domicile in the state of its incorporation.\textsuperscript{28} Given Beale's own admonitions against the fictions of corporate consent and presence, there was little on these narrower issues for him to criticize.

Instead, Cook left this task to Felix Cohen, whose article "Transcendental Nonsense and the Functional Approach"\textsuperscript{29} was cited in the course of Cook's discussion of corporate domicile.\textsuperscript{30} Beale did not come in for specific criticism, or even citation, by Cohen, but it is plain enough that he fell under the general indictment of "classical jurists" whose age had passed. As Cohen said, "The 'Restatement of Law' of the American Law Institute is the last long-drawn-out gasp of a dying tradition."\textsuperscript{31} In a passing comment, Cohen also indicated that he found the concept of "doing business" fully as objectionable as the concept of corporate presence. Discussing an opinion by Justice Brandeis that equated corporate presence with "doing business," he conceded that "it would be cap-tious to criticize courts for delivering their opinions in the language of transcendental nonsense."\textsuperscript{32} It was precisely such criticism that Chief Justice Stone embraced in \textit{International Shoe}, or at least sought to escape in fashioning his own standards for the exercise of personal jurisdiction over corporations.

Stone did so by scrupulously avoiding any use of "doing business" in his opinion. This omission is all the more striking because the phrase appeared in both parties' briefs and in the opinions of the lower courts.\textsuperscript{33} Stone substituted instead the standard of "minimum contacts" for which the opinion in \textit{International Shoe} is known. In an elliptical reference to the concept of "doing business" he said, "The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to

\textsuperscript{28} Id at 207-08. For a similarly muted criticism of the sections on jurisdiction, despite overall hostility to the Restatement as a whole, see Ernest G. Lorenzen and Raymond J. Heilman, \textit{The Restatement of the Conflict of Laws}, 83 U Pa L Rev 555, 566–68 (1935).

\textsuperscript{29} 35 Colum L Rev 809, 809–12 (1935).

\textsuperscript{30} Cook at 209 n 30 (cited in note 27).

\textsuperscript{31} Id at 833.

\textsuperscript{32} Id at 812.

\textsuperscript{33} See 326 US at 312, 314; Brief of the Appellant at 14–20; Brief of the Appellee at 32–41.
procure through its agents in another state, is a little more or a little less.\textsuperscript{34} The suggestions disavowed in this sentence were contained in two decisions of the Supreme Court, cited at the end of the quoted sentence, which relied on the concept of “doing business” to determine the existence of jurisdiction over corporations.\textsuperscript{35} This was the same as the approach taken in the First Restatement, which devoted a separate section to defining the concept of “doing business.”\textsuperscript{36} The examples of what does, and what does not, constitute “doing business” that followed this section cannot be reconciled with the result in \textit{International Shoe}. For instance, the First Restatement excluded from the definition of “doing business” activities such as manufacturing automobiles in one state and supplying them to an independent franchise in the forum state, and more surprisingly, entering into (but not performing) a construction contract in the forum state.\textsuperscript{37}

Stone himself was hardly a dogmatic Legal Realist, let alone an adherent of the provocative arguments of realists like Cook and Cohen. He is better characterized as a legal progressive from an earlier generation.\textsuperscript{38} By the same token, however, Stone was no friend of the First Restatement and its formal territorial approach to choice of law and personal jurisdiction. In two famous opinions concerned with constitutional limitations on state choice of law, he rejected the entire approach represented by Beale and the First Restatement.\textsuperscript{39} This should have led the parties in \textit{International Shoe} to search for other sources of support for their views, but the lawyers for International Shoe unwisely cited Beale’s treatise in support of their arguments that jurisdiction was lacking.\textsuperscript{40} Stone

\begin{footnotes}
\footnotenumbers
\footnotetext{34} Id at 319.
\footnotetext{35} \textit{St. Louis S.W. Ry. v Alexander}, 227 US 218, 228 (1913) (finding personal jurisdiction based on “transaction of business”); \textit{International Harvester v Kentucky}, 234 US 576, 587 (1914) (finding personal jurisdiction based on “doing business” that was “something more than mere solicitation”). The argument in the briefs in \textit{International Shoe} closely followed these precedents. See note 32.

\footnotetext{36} Restatement of the Conflict of Laws § 167; see also id § 92 (applying this concept to corporations).

\footnotetext{37} Id § 167, Illustrations 3, 4, 5.

\footnotetext{38} Horwitz, \textit{The Transformation of American Law} at 182 (cited in note 9).


\footnotetext{40} Brief of Appellants at 18–19, 26.
\end{footnotes}
conspicuously failed to cite it himself in his opinion, apparently not wanting to dignify the authority that he rejected.

Of course, Stone did not cite any Legal Realists in his opinion either. Yet he was certainly aware of Cook’s writings on the conflict of laws and he shared with Cook close associations with Columbia Law School. Indeed, while he was dean at Columbia, Stone had arranged for Cook’s appointment to the faculty in 1919, and then somewhat to his chagrin, undertook to mediate the conflicts that Cook instigated, along with the other Legal Realists on the faculty, over issues of appointments and curriculum. Stone went so far, in a letter of recommendation written after his deanship, to commend Cook as “almost, if not quite a genius,” although one who “threw away the golden opportunity” presented by his appointment at Columbia. Both aspects of this observation are confirmed by Stone’s decision, as dean, to make Cook the highest paid law professor in America. He was, to all appearances, a faculty member whose brilliance justified the dean in defending him and whose personality made it necessary. Cook began his work on conflicts of laws just after he and Stone both left Columbia: Cook to become a faculty member at Yale and Stone to enter private practice briefly before becoming Attorney General.

Stone remained in regular correspondence with Cook during his tenure on the Supreme Court, until Cook’s death in 1943, two years before the decision in International Shoe. In a eulogy to his former colleague, Stone singled out for particular praise Cook’s contributions to the conflict of laws. Stone found these “so fundamental that they form the basis for the cleavage between what might be called two schools of thought in conflicts, one of which follows the late Professor Beale; the other Professor Cook.” Only a few months earlier, Cook had sent Stone a copy of his recently

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41 Alpheus Mason, *Harlan Fiske Stone: Pillar of the Law* 128–30 (Viking, 1956). The disputes were tied up with Stone’s own disagreement with the president of Columbia, Nicholas Murray Butler. Id at 131–35; Schlegel, *American Legal Realism* at 15–16 (cited in note 8).

42 Id at 129–30, quoting a letter to Charles P. Howland (Dec 9, 1927).


44 Cook at x (cited in note 27). Cook started writing his articles on conflicts of laws in 1923. Id.

45 Papers of Harlan Fiske Stone, Library of Congress, Box 10, General Correspondence, Folder on Cook, Walter Wheeler 1928–43.
published book, *The Logical and Legal Bases of the Conflict of Laws*, and Stone had responded, "I have already dipped into it and found much in it which will be profitable to me in the solution of conflict of laws cases." 46 Two months later, he again thanked Cook for his book and added, "You have made a real contribution in leading us away, more than I would have supposed possible, from the artificial sort of reasoning which seems to have enveloped the conflict of laws." 47 These exchanges were entirely typical of their correspondence, concerned as much with decisions of the Supreme Court as with academic developments. 48 And in one case, early in Stone’s career on the Court, he explicitly asked Cook for advice about how it should be decided. The case, *Second Russian Insurance Co. v Miller*, 49 concerned the effect of Russian law on a German corporation doing business in the United States and resulted in an opinion by Stone, for a unanimous Court. Cook’s response to Stone’s letter came too late to affect the decision, but it is consistent with the approach taken in Stone’s opinion, refusing to give extraterritorial effect to Russian law. 50 Be that as it may, this exchange of letters reveals the deference that Stone was willing to give to Cook’s views.

Like Cook, Cohen also had ties to Columbia, although these all developed after Stone’s tenure as dean. Cohen received a fellowship to study at the Columbia Law School while he finished his doctoral dissertation in philosophy at Harvard and then went on to attend law school there, graduating in 1931.51 Cohen’s “Transcendental Nonsense” was published in the *Columbia Law Review*, where he had also served as a student editor. Stone naturally preserved his own ties to Columbia after his deanship, selecting his

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46 Id letter from Stone to Cook, March 16, 1943.
47 Id letter from Stone to Cook, June 28, 1943.
48 E.g., id letter from Stone to Cook, Feb 2, 1933 (on *Bradford v Elec. Light Co. v Clapper*, 286 US 145 (1932)); letter from Stone to Cook, March 16, 1934 (on *Yarborough v Yarborough*, 290 US 202 (1933)).
49 268 US 552 (1925).
50 Papers of Harlan Fiske Stone, Letter from Stone to Cook, May 27, 1925; letter from Cook to Stone, June 1, 1925 (cited in note 45). The decision in *Second Russian Insurance* was handed down also on June 1.
law clerks from among students recommended by his successor as dean and another member of the faculty. He also served as a trustee of the law review, and in the nature of the process of selecting law clerks, generally chose editors-in-chief of the law review as his clerks, some of whom undoubtedly knew of Cohen or his article. The article itself was widely cited in the law review literature and even created something of a controversy, eliciting criticism that Cohen himself felt bound to reply to personally. It is also apparent that either Stone, or his law clerks, kept up with pieces in the Columbia Law Review, since the only law review literature cited in the opinion in International Shoe (but not in the briefs) is a student note from that journal.

None of this evidence establishes that Stone actually referred to the work of Cook and Cohen in preparing his opinion in International Shoe. In fact, the file in Stone’s papers on International Shoe shows only an exchange with Justice Black on the use of the phrase “traditional notions of fair play and substantial justice,” which was subsequently made famous by the opinion. In his concurring opinion, Black criticized the use of this phrase as an indefensible return to “natural justice” as a restriction on state power under the Due Process Clause, part of his campaign to purge any vestige of natural law from interpretation of the Constitution. In response, Stone altered the original draft of his opinion by explicitly attributing the phrase to the opinion in Milliken v Meyer, decided only five years earlier, and to the views of Justice Holmes. Justice

52 Mason, Harlan Fiske Stone at 646 (cited in note 41).
53 For instance, Herbert Wechsler, who was a contemporary of Cohen’s at Columbia, and Harold Levanthal, the editor-in-chief of the Columbia Law Review when Transcendental Nonsense was published.
54 For a discussion of the controversy, neglect, and subsequent revival of the article, see Jeremy Waldron, “Transcendental Nonsense” and System in the Law, 100 Colum L Rev 16, 17–18 n 13 (2000). For the central role of this article in defining Legal Realism, see Laura Kalman, Legal Realism at Yale 1927–1960 3–5 (North Carolina, 1986).
57 311 US 457, 463 (1940).
58 See Holmes, J.” was added in the final version of the opinion to the citation of McDonald v Mabee, 243 US 90 (1917). Papers of Harlan Fiske Stone, Box 72, 1945 Term, International Shoe Co. v State of Washington, No. 107, Memorandum for the Court by Chief Justice Stone, Nov 27, 1945 (cited in note 45); Draft opinion of Nov 24, 1945, p. 5. Stone also deleted a “compare” citation to Pennoyer v Neff, 95 US 714 (1877). Id.
Black responded, in turn, by adding a few sentences to his opinion seeking to distinguish these sources of authority.\textsuperscript{59}

Stone's reluctance to retreat from "traditional notions of fair play and substantial justice" has proved to be prophetic. Just as much as "minimum contacts," it is the phrase for which his opinion is best known. It also reveals his sympathy with the Legal Realists and with their critique of the formal territorial theories of Beale and the First Restatement. It was, however, a selective sympathy, one that only heightens the uncertainty created by his opinion, which is in many ways a synthesis, preserving the results in as many earlier cases as possible.\textsuperscript{60} Yet it is at the same time a deconstruction, rejecting the formal territorial theory that was invoked in many of the prior decisions themselves. Both of these tasks could simultaneously be conducted only at a very high level of abstraction, which explains the tendency of the opinion to reply upon phrases like "traditional notions of fair play and substantial justice." Only language that is this open-ended could allow realist criticism to be disguised as a magisterial summary of existing law. Nevertheless in writing an opinion that tried to satisfy everyone, Stone offered guidance to no one.\textsuperscript{61} The reception and consequences of \textit{International Shoe} bear this out.

\section*{II. The Reception of \textit{International Shoe}}

The immediate reaction to \textit{International Shoe} was surprisingly subdued. It was regarded, as noted earlier, as a case concerned almost exclusively with the exercise of personal jurisdiction


\textsuperscript{60} Even \textit{Pennoyer v Neff}, 95 US 714 (1877), is distinguished, with the bland statement that there is no jurisdiction over a defendant "with which the state has no contacts, ties, or relations." 326 US at 319. This statement is followed by a "cf." citation to \textit{Pennoyer} and to case holding that a corporation was not doing business in the forum state, despite advertising and solicitation there. \textit{Minnesota Commercial Men's Ass'n v Benn}, 261 US 140 (1923). Neither case, of course, fits the description of one in which the defendant had "no contacts, ties, or relations" with the forum state.

\textsuperscript{61} Nor did he not succeed in satisfying Justice Black, who filed a separate opinion making public his objections to the standard of "traditional notions of fair play and substantial justice" and expressing his willingness to dismiss the appeal as insubstantial. 326 US at 322–26. See note 56. In a deconstructive vein himself, Justice Black offered no alternative justification for this conclusion.
over corporations. Casebooks and treatises on conflicts of laws discussed the case under this heading, as did the law review literature. In only a few of these sources, and mainly in the writings of Herbert Goodrich, then a judge on the Third Circuit, were the general implications of the case first discerned. Perhaps Goodrich was especially attuned to the way in which *International Shoe* undermined the First Restatement because he was an advisor and co-reporter (on one chapter) along with Beale. His premonitions were soon vindicated by the younger generation of scholars who wrote the articles that made the case the foundation for the modern law of personal jurisdiction.

These authors—Kurland, Hazard, and von Mehren and Trautman—correctly saw that *International Shoe* called for the replacement of the old formal territorial theory of jurisdiction, although they did not themselves offer much in the way of a replacement. The most promising alternatives were offered by von Mehren and Trautman, who drew the distinction between general and specific jurisdiction: between cases in which the defendant's contacts with the forum are so substantial that they support jurisdiction over any claim against the defendant, whether or not it arose in the forum, and cases in which the defendant's contacts permit jurisdiction only over claims related to those contacts themselves. In this latter category, they also distinguished between cases in which an out-of-state defendant initiated interstate activity resulting in contacts in the forum and cases in which an in-state plaintiff did so; only interstate activity initiated by the defendant was sufficient for jurisdiction. These authors also argued for the development of still

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65 Von Mehren and Trautman, 79 Harv L Rev at 1136–63, 1168 (cited in note 11). The comparative perspective was more fully developed in their casebook. Arthur Taylor von
more concrete rules of personal jurisdiction, relying in part on a comparative analysis of rules from other legal systems. Yet almost two decades later, von Mehren could not go any further than offering five broadly framed factors for determining personal jurisdiction, and more recently, he has recognized the continued uneasiness evoked by the realist revolution in American choice of law, with its parochial refusal to consider the approaches of other legal systems.

As the influence of *International Shoe* has grown, eventually to embrace all assertions of personal jurisdiction, interpretation of the decision has become at once more abstract and more doctrinaire. Two divergent strands in the opinion, in particular, have come to dominate academic analysis of its consequences. The first is the invocation of "traditional notions of fair play and substantial justice" as the test for jurisdiction under the Due Process Clause. Those who emphasize this strand in the opinion usually criticize any decision that invokes territorial reasons as a ground for denying jurisdiction. The major targets for such criticism are *Hanson v Denckla* and *World-Wide Volkswagen v Woodson*, both decisions denying personal jurisdiction because the defendant had not "purposely avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." In both of these cases, as von Mehren and Trautman had foreseen, it was the plaintiff (or someone other than the defendant) who initiated the interstate activity that created contacts with the forum state. Critics of these decisions argue, instead, that any examination of the defendant's contacts with the forum state must be subordinated to an overall inquiry into the fairness of continu-

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66 Id at 1175–76.


70 444 US 286 (1980).

71 *Hanson*, 357 US at 253; *World-Wide Volkswagen*, 444 US at 297. For these critics, it only added insult to injury to find *International Shoe* cited to support the quoted phrase.
ing the litigation there.\textsuperscript{72} This approach, similar to the doctrine of forum non conveniens in the law of venue, abandons any pretense of devising concrete rules of personal jurisdiction. It substitutes instead a case-by-case examination of fairness, achieving a degree of uniformity in decisions only by imposing a heavy burden on the defendant to demonstrate the unfairness of proceeding in the forum chosen by the plaintiff.\textsuperscript{73}

The Supreme Court has come closest to adopting this approach in \textit{Asahi Metal Industry Co. v Superior Court},\textsuperscript{74} but paradoxically only because the Justices could not agree on the extent of the defendant's contacts with the forum state. In opinions that otherwise did not command a majority, eight Justices reached agreement only on the issue of unfairness, holding that a Japanese corporation could not be required to defend an indemnity claim brought by a Taiwanese corporation in a California court.\textsuperscript{75} Ironically for the fairness approach, this decision did not expand jurisdiction but contracted it, leading one advocate of the fairness approach to condemn the Court's narrow view of convenience in litigation.\textsuperscript{76} This criticism, although understandable, has a self-defeating quality to it. Having invited a "chancellor's foot" analysis in terms of overall fairness, advocates of such an approach can hardly complain that chancellor's shoe is too small.

The second strand of interpretation, unlike the first, takes the standard of "minimum contacts" at face value, emphasizing territorial limitations on state power. This approach relies precisely on those cases that the fairness approach finds most problematic. Thus, it emphasizes the passages in \textit{Hanson v Denckla} and \textit{World-
Wide Volkswagen that appeal to the territorial allocation of power among the states. The restrictions on personal jurisdiction, the Court said, "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." This approach, however, has trouble explaining how these territorial limitations are connected to the Due Process Clause, which the Court invokes to restrain state power. Unlike the fairness approach, which is closely connected to the right to be heard in litigation, the territorial approach has no obvious basis in constitutional requirements for adequate procedures. This dilemma has proved to be so severe that it led Justice White to take inconsistent positions on behalf of the Court, both asserting and denying that there is a relationship between the individual rights protected by the Due Process Clause and the principles of interstate federalism that allocate power among the states.

Whether or not this dilemma can be avoided by looking to other parts of the Constitution, such as the Full Faith and Credit Clause, it leaves advocates of the territorial approach with a still further question: What precisely constitutes a "contact" with the forum state? This term, which invokes the metaphor of "touching," does not constitute an obvious improvement over the fiction of corporate presence. The usual solution to this problem ties the relevant contacts to the nature of the plaintiff's claim on the merits. But this solution just displaces the problem of determining appropriate contacts to the issue of choice of law. Plaintiffs often seek a particular forum in order to obtain the benefit of that forum's law, a tendency that is especially strong in tort cases that arise overseas.

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77 Hanson, 357 US at 251. For a similar passage in World-Wide Volkswagen, see 444 US at 293.

78 World-Wide Volkswagen, 444 US at 293 ("The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."); Insurance Corp. of Ireland, Ltd. v Compagnie des Bauxites de Guinee, 456 US 694, 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."). A footnote following the latter quotation seeks to reconcile it with the former. Id n 10.


80 E.g., Piper Aircraft v Reyno, 454 US 235 (1981); see Peter Hay, The Interrelation of Jurisdiction and Choice-of-Law in United States Conflicts Law, 28 Intl & Comp L Q 161 (1979);
The power of the forum state to apply its own law, however, depends upon defendant’s contacts, as well as the plaintiff’s contacts and other aspects of the case, with the forum state.\(^8\)

This renewed appeal to contacts is all the more problematic because the standards for choice of law are, if anything, even more indeterminate than the standards for personal jurisdiction. Invoking choice of law to resolve questions of personal jurisdiction amounts to jumping from the frying pan into the fire.

Nevertheless, the territorial approach to interpreting *International Shoe*, like the fairness approach, does have something to be said for it. The decision rejected the formal territorial theory of jurisdiction found in the First Restatement. Where the fairness interpretation emphasizes the rejection of a territorial theory—one based on presence inside the forum state—the territorial approach emphasizes the rejection of a formal theory—one based on more or less definite rules. *International Shoe* rejected both features of the First Restatement, and so any interpretation that rejects one of them can claim some support from the decision.

The Restatement (Second) of Conflict of Laws took this eclectic approach one step further. In an obvious compromise, the Second Restatement accepted the grounds of jurisdiction already recognized in the First Restatement and added “relationships to the state which make the exercise of judicial jurisdiction reasonable” as a further ground of jurisdiction.\(^8\)

This compromise, like the opinion in *International Shoe* itself, preserved most of the decisions under the formal territorial theory, but added the flexibility of an open-ended standard of reasonableness. As a descriptive matter, it might have accurately reflected the role of minimum contacts in adding to the jurisdiction of state courts. Yet even this minimal descriptive role became outmoded when *Shaffer v Heitner*\(^8\) made “traditional notions of fair play and substantial justice” a test that “can be as readily offended by the perpetuation of ancient forms that are not longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional her-

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82 Restatement (Second) of the Conflict of Laws § 27(k) (1970).

Old rules, it seems, can be just as inconsistent with tradition as new ones. As a conceptual matter, however, the Second Restatement failed to resolve any of the inconsistencies between the old theory and the new.

In this respect, as in choice of law generally, the Second Restatement sought to submerge disagreement in an overall balancing test that embraced all the factors that might conceivably bear on the choice of one state over another, either as the forum for litigating a case or as the source of the law to be applied. Disagreement over this entire range of issues was fueled by the same realist arguments that animated the attack on the formal territorial theory of jurisdiction. Indeed, all of the attacks on Beale and the First Restatement were inseparable parts of the same intellectual movement, resulting in surprisingly similar results both in choice of law and in personal jurisdiction. The power of state courts, and the states themselves, over these issues was increased, with a corresponding erosion in the constitutional restrictions on state power. The standards used to resolve these issues became increasingly abstract and increasingly depended on all the facts of each case. And any consensus over what to put in place of the old strict territorial theory entirely disappeared, or more precisely, never materialized. All the theorists could agree on was what they rejected.

If these intellectual developments are clear enough, so is the mechanism by which they influenced the law. In the aftermath of International Shoe, several states enacted "long-arm statutes" that took advantage of the expanded jurisdiction recently made available to their courts. Illinois was the first to enact a comprehensive statute expanding personal jurisdiction over all defendants, both corporate and individual, and other states rapidly followed suit. Most of these statutes have sought to extend personal jurisdiction to the constitutional limits or, at least, close to them. This result is usually achieved by judicial interpretation, but the long-arm stat-

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84 Id at 212.
85 Restatement (Second) of the Conflict of Laws § 6 (1970).
86 For a candid, if deliberately overstated, description, see Perry Dane, Conflict of Laws, in Dennis Patterson, ed, A Companion to Philosophy of Law and Legal Theory (Blackwell, 1996) ("choice of law has sometimes resembled the law's psychiatric ward").
utes in a number of states, following the example of Rhode Island, explicitly provide that they reach to the constitutional limits.88

The explanation for these developments also is apparent: long-arm statutes work to the benefit of in-state plaintiffs at the expense of out-of-state defendants. A state legislature systematically, if not exclusively, favors the interests of resident individuals and firms. On most issues, out-of-state litigants have nowhere near the same influence over its deliberations as in-state interests. And, of course, in-state attorneys benefit from litigation inside the state, regardless of which party they represent. What can be said of state legislatures is likely also to apply to state courts. If a long-arm statute does not already explicitly reach to the constitutional limits, a state court is likely to interpret it to do so in light of the legislature’s purpose of expanding jurisdiction. It is especially likely to do so if the case is brought by an in-state plaintiff, who would otherwise be forced to litigate in a distant forum against an out-of-state defendant. Nor are these difficulties reduced if the plaintiff chooses to sue in federal court, whose rules generally follow the standards for personal jurisdiction of the state in which it sits, or failing that, applies even broader standards of jurisdiction that depend upon the defendant’s contacts with the entire United States.89

The same dynamics in the legislative and judicial process also explain the continued erosion of venue rules as a limitation on the plaintiff’s choice of forum. Many venue statutes provide that the plaintiff’s residence is a permissible venue and others list a multiplicity of factors, any one of which the plaintiff can invoke to find a permissible venue.90 The general federal venue statute is representative of the decline of venue as a significant restriction upon the plaintiff’s choice of forum, allowing venue in any district “in which a substantial part of the events or omissions giving rise to the claim occurred,” and for a corporate defendant, in any district “in which it is subject to personal jurisdiction at the time the action is commenced.”91 And even these provisions do not exhaust the range of

89 FRCP 4(k).
90 Friedenthal, Kane, and Miller, Civil Procedure at 80 (cited in note 88).
91 28 USC § 1391(a)–(c) (1994).
permissible venues, either in the general venue statute or in a multitude of special venue statutes. As a consequence, venue now has become, like personal jurisdiction, less a matter of rules than of case-by-case determinations made on motions to transfer or to dismiss for forum non conveniens.\textsuperscript{92} These latter devices, moreover, are used preferentially against out-of-state plaintiffs, precisely the parties with the least influence on the state legislative and judicial process.\textsuperscript{93}

The Legal Realists, for all their realism about the effects of legal rules, seem to have been surprisingly naive about the interest groups that would have the greatest influence on state legislatures and courts. Or, perhaps they were resigned to it. In that other great achievement of Legal Realism, the Uniform Commercial Code, the drafters were acutely aware of the compromises that they had to make in order to get their proposals enacted. As Grant Gilmore, the principal draftsman of Article 9, has candidly acknowledged, Karl Llewellyn got his way with Article 2 only because the New York banks got their way with Article 9, and with most of the rest of the UCC.\textsuperscript{94} In exchange, Llewellyn embedded the standard of "commercial reasonableness" deeply throughout Article 2.\textsuperscript{95}

The standard of "commercial reasonableness" in the UCC bears a surprising resemblance to the standard of "traditional notions of fair play and substantial justice" in \textit{International Shoe}. Both are framed in the most abstract terms; both make a reference to existing practices, either in commerce or in litigation; and both have failed to fulfill their promise of generating more concrete legal rules. Although the dynamics of legislative enactment of the UCC and of long-arm statutes are different, the underlying appeal of abstract standards of reasonableness is the same. As Bob Scott has pointed out, the abstract standards in Article 2 command wide-

\textsuperscript{93} See id at 252.
spread agreement among the academics who draft and revise the UCC, but they do not generate criticism from particular interest groups that would be harmed by more specific rules and that have, in any event, obtained the rules they need elsewhere in the code. Long-arm statutes also satisfy both the academics and in-state interest groups, but by the more radical step of dispensing with rules in their entirety. All of this has been more easily accomplished because it has been done under the imprimatur of the Supreme Court in *International Shoe*.

### III. The Future of Personal Jurisdiction

Legal Realism has been rightly criticized for its “rule skepticism,” in the sense of a denial of the existence of legal rules. Such criticism can easily be extended to the conceptual skepticism of Cohen’s arguments in “Transcendental Nonsense.” If concepts such as “corporate presence” and “doing business” can be attacked as metaphors, so can the terms, such as “minimum contacts,” in which general legal standards are framed. Taken to its logical conclusion, no law would be left standing. Yet even without going so far, Legal Realism has engendered “rule skepticism” in a more prosaic sense, evident in the field of personal jurisdiction. It slanted the development of the law against legal rules that can be applied in a more or less determinate fashion.

Having absorbed the lessons of Legal Realism, it is now time to recognize their limitations, as the growing uneasiness over *International Shoe* reveals. This opinion was a fine first step in the reexamination of jurisdictional theories, but it was never intended to be the last step. What it provided as a constitutional ceiling on state power now has become the floor as well, determining how that power is actually exercised. The standard of “traditional notions of fair play and substantial justice” makes far more sense as

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96 Id at 170–74.


a second-order principle, governing the formulation of more concrete rules, than it does as a first-order rule of decision itself. In the latter form, it imposes all of the costs of case-by-case adjudication without conferring any benefits in the form of predictable outcomes. The "rule skepticism" of Legal Realism has caused these defects to be ignored, in the apparent hope of having judges strike exactly the right balance of fairness between plaintiffs and defendants in every case.

Three ways out of the current impasse are possible. First, we can return to a regime of rules that, at least in some respects, resembles the First Restatement. Second, we can go in the opposite direction and extend *International Shoe* to abandon all restrictions on the plaintiff's choice of forum. Or third, we can seek to devise a system of rules intermediate in generality between the First Restatement and *International Shoe*. It is this last alternative that has been explored most thoroughly by scholars of conflicts of laws, drawing on two complementary sources that have not, so far, informed the law of personal jurisdiction: an analysis of the reciprocity between sovereigns in restraining the exercise of jurisdiction by their courts and a comparative analysis of the standards for exercising jurisdiction in different legal systems. There is no guarantee that this alternative will work out, but if it proves to be feasible, it will only be because it leaves the legacy of Legal Realism behind.

The first of these alternatives, a return to rules like those of the First Restatement, has been foreclosed by both legal and nonlegal developments. The criticism of the Legal Realists and conflicts scholars who followed in their wake has thoroughly discredited the First Restatement. As Brainerd Currie observed, "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another."99 In choice of law, the First Restatement has only slightly more authority than *Lochner v New York* in constitutional law. To the extent that judges, lawyers, and academics rely upon it, they try not to admit that they have done so. The negative arguments of Legal Realism, skeptical though they were, were most effective against the narrow, and seemingly arbitrary, concepts that underlie the First Restatement. Thus, as noted earlier, the concept of "do-

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ing business” under the First Restatement allowed personal jurisdiction over corporations based on performance of contracts in the forum state, but not based on formation of contracts. The rationale for this distinction no doubt had its roots deep in the old limits on state power to regulate foreign corporations engaged in interstate commerce. States could, on the one hand, exclude foreign corporations from engaging in purely intrastate business, but they could not prevent them from engaging in interstate commerce within the forum state. Doing business within the forum state sufficient for personal jurisdiction fell between these extremes. The doctrinal pedigree of such narrow concepts was impeccable, but they were outmoded almost as soon as the First Restatement was formulated. The increase in the volume and variety of interstate commerce had, even before International Shoe, led to decisions extending jurisdiction based on fictitious consent, by individuals as well as corporations. And after International Shoe, the Supreme Court has repeatedly noted these developments and the resulting increase in interstate litigation and an attendant decrease in the cost of travel and communication necessary to defend against it. All of these observations are still more forceful today, as more commerce is done internationally and by electronic means such as the Internet. The artificial concepts of the First Restatement, shaped for a world that was even then past or passing, would not fit the patterns to come in commerce and litigation. Nor would they fit the expanded power of government to regulate such activities, both at the national level and at the state level. The New Deal accomplished this expansion by freeing government regulation at both levels from constitutional restrictions, a legal development evident in International Shoe itself, in its holding that Washington could impose an unemployment tax based on the activities of corporate salesmen inside the state. Going back on these changes in the economy and in the legal system would require an upheaval

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100 See, e.g., International Harvester v Kentucky, 234 US 579, 588 (1914).
101 E.g., Hess v Pawloski, 274 US 352, 357 (1927).
fully as profound and sweeping—and far more improbable—than the New Deal.

The second alternative to *International Shoe* would be to abandon all restraints on personal jurisdiction. This was Justice Black’s position expressed in his separate opinion criticizing the majority’s reliance upon “traditional notions of fair play and substantial justice.” This position has the virtue of simplicity, at least at the level of constitutional law. It eliminates the need for an extended inquiry on the facts of each case into the defendant’s contacts with the forum. It does not accomplish much, however, if it just displaces this inquiry to a nonconstitutional level of analysis, as in the doctrine of forum non conveniens. The latter doctrine preserves, and in some respects limits, the amount of judicial discretion in determining the proper forum. But conversely, if the doctrine of forum non conveniens were also abolished, hardly any restraints would remain on the plaintiff’s choice of forum.

Achieving doctrinal simplification by these means would come at too great a price. In fact, it would repeat the mistake that plagued the reception of *International Shoe* in state long-arm statutes: It would neglect the inherent political advantage of in-state plaintiffs, and particularly in-state lawyers, in expanding jurisdiction at the expense of out-of-state defendants. Even the doctrine of forum non conveniens, although it requires a case-by-case analysis of the fairness of conducting litigation in the forum, seldom is invoked to deprive an in-state plaintiff of the forum where she has chosen to litigate. Strategic manipulation by plaintiffs and their attorneys in choosing the forum for litigation cannot just be neglected. It has to be restrained by some means, and as the experience with state long-arm statutes reveals, it is not likely to be addressed at the state level. The need for federal law is apparent, and in default of action by Congress, rules developed under the Due Process Clause are the only likely means of restraint.

The third alternative raises the question of precisely what those rules should be. If a return to the First Restatement is impossible and if some rules still are necessary, then the crucial question is the shape that those rules should take. The most promising candidates are rules of intermediate generality: not as rigid as those of

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the First Restatement and not as open-ended as the abstract standards of *International Shoe*. Such rules, moreover, would correspond to the widespread sense that the decisions applying the test of minimum contacts are all broadly consistent with another. If so, it should be possible to state more specifically the form that such consistency takes. Few authors have tried to do so. This effort, it should be emphasized, would be entirely consistent with the structure and ambitions of *International Shoe* itself. As the scholars who first recognized the significance of the decision observed, it promised to foster the development of other, more concrete rules of decision. Recent developments, both theoretical and practical, provide reason to believe that such rules might still be formulated.

In the scholarship on choice of law, a turn toward game theory has suggested that solutions can be found to the competition between states and nations to apply their own law to a controversy. This question, of course, is closely related to the question of personal jurisdiction, since a court is more likely to apply its own law than the law of any competing sovereign. Choice of forum often determines choice of law. Instead of insisting upon a competition that no state can consistently win, and in which all may lose, presumptive rules can be devised to allocate cases in a way that fosters interjurisdictional cooperation. Just to take one example that has given rise to recurrent problems, a personal injury plaintiff who sues the manufacturer of a defective product (and has a completely adequate remedy against this defendant) often asserts claims against manufacturers of components, distributors, or retailers from outside the forum state, or if the plaintiff does not sue them, the manufacturer of the product does. A solution to this recurrent problem, whether to deny jurisdiction as the American decisions indicate or to assert jurisdiction as the European decisions allow, should be devised by a rule, not by a redetermination of minimum contacts, fairness, and convenience in each case.


106 These are the facts, respectively, of *Asahi Metal Industry Co. v Superior Court*, 480 US 102, 114 (1987), and *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 299 (1980).

The need for a cooperative approach to personal jurisdiction has become all the more pressing because of the expansion of international commerce and litigation. Just as these developments at the national level justified the abandonment of the First Restatement, at the international level they justify a reexamination of the need for concrete rules that foster international cooperation. Choosing between national legal systems creates greater risks of forum shopping purely for favorable law or to impose costs upon the defendant than choosing among American states with relatively homogeneous laws and legal cultures. As an English judge has said, "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."108

The immediate prospects for achieving international agreement upon multilateral treaties are not great, as evidenced by the disputes surrounding the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.109 This proposed convention is modeled on the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,110 which applies among members of the European Union. In its current draft, the proposed convention identifies three separate categories of cases: those in which jurisdiction is permitted and the resulting judgment is entitled to recognition in all signatory states; those in which jurisdiction is prohibited and the resulting judgment is void in all signatory states; and a middle category of cases in which jurisdiction is permitted but recognition of the resulting judgment is not required outside the forum state.111 In the first category are familiar forms of jurisdiction, as in tort cases, in the country where a tort or injury occurs, or in contract cases, where goods or services are provided or supplied.112 It is the

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110 Sept 27, 1968, 1990 O J (C 189) 2 (consolidated). The convention applies to the twelve states that were members of the European Community (now the European Union) before January 1, 1995.

111 Silberman and Lowenfeld, 75 Ind L J at 638-41 (cited in note 107).

112 Preliminary Draft, arts 6, 10 (cited in note 109).
second and third categories that have given rise to most of the disputes over drafting and agreement to the convention.

These disputes have embraced a variety of issues, some of them curiously reminiscent of the conceptual scheme rejected in *International Shoe*. Thus, "doing business" as a basis for general jurisdiction on claims unrelated to the defendant’s activities in the forum state has been relegated to the second, prohibited category;\(^\text{113}\) and "tag jurisdiction" for human rights claims under international law has been placed in the third, optional category. Some of these disputes might be attributed to the European preference for rules of personal jurisdiction and choice of law, although in the particular disputes just mentioned, the United States seems to have taken the side favored by the concepts of the First Restatement. Even if disputes such as these have forestalled agreement for the moment, it does not follow that attempts at international coordination by this means, or by others, should be given up. These efforts would inevitably require a departure from *International Shoe*, which has not been imitated in other countries. European nations, in particular, have been unsympathetic to abstract standards for personal jurisdiction (and for choice of law as well), although the concrete rules that they have adopted have not always narrowed the jurisdiction of their courts.\(^\text{114}\)

The compromises inherent in achieving greater international uniformity would also facilitate the acceptance of those inherent in devising concrete legal rules. If they were accepted and proved to be workable in international cases, they would provide a comparative model for interstate cases as well. All such rules must necessarily be too broad in some cases and too narrow in others. Unlike an abstract standard of justice, they do not hold out the promise of exact application in every case, only to cause disappointment when they are actually applied. A look at foreign sources might remind us of the wisdom of the observation of Justice Holmes, speaking of a specific legal rule, "If it is right as to the run of cases a possible exception here and there would not make the law bad."\(^\text{115}\)


\(^{114}\) Clermont, 85 Cornell L Rev at 91–95 (cited in note 98).

IV. Conclusion

The opinion in *International Shoe* deserves praise in sweeping away the formal territorial theory of the First Restatement. As a first step in devising new standards for personal jurisdiction, it is one of the great achievements of Legal Realism. As a last step, or so I have argued, it has been a great disappointment. The force of the realist critique of the rules of the First Restatement has blinded us to the desirability of rules in general, leaving the analysis of personal jurisdiction at a sterile level of abstraction. Rules precisely tailored to solve all the problems of personal litigation may be impossible to formulate. But even if it is too much to hope that law in this field can be reduced to rules, it is too little to expect that it must remain subject only to the most abstract standards. Over fifty years after *International Shoe*, it is time to move beyond "traditional notions of fair play and substantial justice" and to articulate more concrete legal rules for personal jurisdiction. Even if these rules prove not to be wholly satisfactory—and what legal rules are?—it is time to discard the skepticism that the Legal Realists cast upon this enterprise.