Jurisdiction, Jurisprudence and Legal Change: Sociological Jurisprudence and the Road to International Shoe

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INTRODUCTION

*International Shoe Co. v. Washington*¹ was a watershed in the law of personal jurisdiction and remains the basis of much of today's personal jurisdiction doctrine.² It allowed state courts to exercise jurisdiction over a foreign corporation so long as that corporation had “minimum contacts” with the forum state. By doing so, *International Shoe* made the first significant addition to the bases of personal jurisdiction in the sixty-eight years since *Pennoyer v. Neff*³ constitutionalized personal jurisdiction doctrine.

The standard explanation for this turning point is that *International Shoe* resulted directly from the inability of the *Pennoyer* doctrine to adjust to the twentieth century expansion of corporate business.⁴ The *Pennoyer*

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¹ 326 U.S. 310 (1945).
³ 95 U.S. 714 (1877).
⁴ Philip Kurland was the first to advance this standard explanation. See Philip B. Kurland, The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts, 25 U. CHI. L. REV. 569 (1958). This view is also widely held today. Contemporary casebooks support this view. See, e.g., JOHN J. COUND ET AL., CIVIL PROCEDURE, CASES AND MATERIALS 74 (7th ed. 1997) (“The [personal jurisdiction cases before *International Shoe*] became cluttered with refined and often senseless distinctions that sought to measure the quality of the defendant’s activities within the state but paid little or no attention to the burden imposed on the corporation of asserting jurisdiction over it or the overall desirability of litigating in the particular forum.”). So too does recent scholarship and the United States Supreme Court. See, e.g., Burnham v. Superior Court, 495 U.S. 604, 617 (1990) (claiming that it was “changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, [that] led to [the] inevitable relaxation of the strict limits on state jurisdiction” in *International Shoe* (internal quotations omitted.); Hanson v. Denckla, 357 U.S 235, 250-51 (1958) (“As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these
system, it is argued, took too limited a view of the permissible bases of jurisdiction, and, while these limited bases of jurisdiction were sufficient for the nineteenth century, they were unable to adjust to the twentieth century advances in communication and transportation. The Pennoyer system, insists the standard explanation, was therefore forced to resort to strained fictions to justify jurisdiction over foreign corporations doing business in a state. As this form of doing business became more common in the middle of the twentieth century, the fictive nature of the Pennoyer system became obvious and in International Shoe, the Supreme Court at last recognized the necessity of substituting a more appropriate doctrine. In short, the standard explanation claims International Shoe simply adjusted constitutional doctrine to the practical demands of society.

This standard explanation, however, has significant weaknesses. First, judges and commentators recognized that the Pennoyer system was built on legal fictions as early as 1918, but the standard explanation fails to account for the thirty years between that recognition and International Shoe. Second, the standard explanation also fails to explain why the Pennoyer system effectively addressed the corporate expansion of the nineteenth century, but was overwhelmed by the corporate expansion of the twentieth century. Interstate business, driven by the rise of large corporations, had been growing continuously in America since the 1880s. Finally, it is unclear why the changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff, to the flexible standard of International Shoe v. Washington.

5 See Kurland, supra note 4, at 570-73. The Pennoyer system allowed state courts to exercise jurisdiction only if the party to the litigation was physically present in the jurisdiction, owed allegiance to the jurisdiction, or consented to jurisdiction. Id.

6 Id. at 573 ("The rapid development of transportation and communication in this country demanded a revision of [the principles] incorporated by Field into the Due Process Clause: [these principles] which were appropriate for the age of the 'horse and buggy' or even for the age of the 'iron horse' could not serve the age of the airplane, the radio, and the telephone.").

7 Id. ("By 1945, even the Supreme Court of the United States recognized the necessity for the substitution of appropriate doctrine for the fictive rules which had developed under the aegis of Pennoyer v. Neff.").

8 Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 151 (1915); GERARD C. HENDERSON, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW 87-88 (1918); William F. Cahill, Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory, 30 HARV. L. REV. 676 (1917); Austin W. Scott, Jurisdiction over Nonresidents Doing Business Within a State, 32 HARV. L. REV. 871, 889 (1919).

9 Charles McCurdy, American Law and the Marketing Structure of the Large Corporation 1875-1890, 38 J. ECON. HIST. 631, 631 (1978). See also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 511-531 (1973). Not only was there an expansion of interstate corporate business, but it was also recognized at the time. See, e.g., Conn. Mut. Life Ins. Co. v. Spatley, 172 U.S. 602, 619 (1899) ("A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires
authority of state courts to exercise jurisdiction over mid-twentieth century corporations could only be addressed fairly by a balancing test when properly designed formal rules could serve the same goals.

These weaknesses indicate that the standard explanation cannot be a complete one. As a result, scholars have begun to look elsewhere for the causes of International Shoe. This new work focuses on ideology and points out that International Shoe was decided against the intellectual background of the New Deal, the rise of a social welfare philosophy, and legal realism.\textsuperscript{11} The emergence of these ideologies, it is argued, was a necessary condition of International Shoe.

While scholars espousing ideological explanations have noted the correlation between the intellectual trends of the New Deal and International Shoe, they have not demonstrated the strength of this connection. Some merely assert that ideology caused International Shoe,\textsuperscript{12} while others point to only very general similarities between International Shoe and the ideology of the age.\textsuperscript{13} This Article attempts to strengthen the ideological expla-
nation by examining closely the intellectual context of International Shoe. That examination reveals that the decision did not result simply from the expansion of interstate business or the inherent weakness of the Pennoyer system. Instead, International Shoe was caused primarily by the emergence of a new conception of the law and the role of the judge. It was only because judges saw the law through the lenses of sociological jurisprudence and legal realism that judges believed International Shoe was necessary to address interstate corporate activity.

Sociological jurisprudence was first defined in 1911 in a law review article by Roscoe Pound.14 It rebelled against the formal jurisprudence that had dominated the nation’s legal community since the Civil War.15 While formal jurisprudence used deductive logic to reason from assumed principles to holdings in specific cases, sociological jurisprudence advocated the use of the social sciences to develop legal rules and argued for more flexible legal rules to allow individual judges freedom to do justice in individual cases.

By the 1930s, advocates16 of this new jurisprudence had begun to change the methodology of the Supreme Court. Jurists such as Justices Holmes, Brandeis, Cardozo, and Stone began to discard formal jurisprudence and to explicitly consider and balance the social interests at stake in their decisions.17 By 1945, every Justice on the Court agreed with at least some of sociological jurisprudence’s critique of formalism. This Article claims that because these Justices agreed with these critiques, they found the rigid Pennoyer system of personal jurisdiction, based on assumed principles rather than empirical evidence, intolerable. It was also because they agreed with this critique that International Shoe took the shape that it did.

To demonstrate this argument, Part I of this Article describes formal jurisprudence and shows that it was the basis of personal jurisdiction doctrine before 1945. Part II describes sociological jurisprudence and argues that it was the impetus for the dissatisfaction with the Pennoyer system. Part III shows the connections between sociological jurisprudence, academic criticism of the Court’s personal jurisdiction doctrine, and the opinion in International Shoe. Part IV demonstrates that the change in International Shoe was part of a larger change that cut across much of the Supreme Court’s constitutional doctrines and cannot be explained solely by increases


16 These advocates included Justices Oliver Wendell Holmes, Louis D. Brandeis, Benjamin N. Cardozo, and Harlan F. Stone.

in interstate business.

I. FORMAL JURISPRUDENCE AND THE PENNOYER SYSTEM

To see that International Shoe was a result of an ideological change, one must first understand formal jurisprudence and see how it was responsible for the Pennoyer system. Formal jurisprudence was a particular way of thinking about the law and the role of the judge. It used deductive logic to reason from abstract principles to holdings in particular cases, and it was responsible for the jurisdiction rules constitutionalized in Pennoyer v. Neff. It was also used to expand Pennoyer's limited bases of jurisdiction to cases for which Pennoyer did not seem to provide. Judges used formal jurisprudence to justify jurisdiction over motorists from foreign states, and over individuals and corporations who did business within a foreign state.

A. Pennoyer v. Neff and Formal Jurisprudence

Formal jurisprudence was the predominant mode of judicial discourse from the Civil War until the 1930s. Criticized as "mechanical jurisprudence," formal jurisprudence, also called "conceptualism," began legal analysis by assuming an abstract concept or rule of law. It then used logical deduction to move from an abstract concept to the holding in the particular case. It ignored the actual effects of judicial decisions and assumed jurisprudence, like Euclidean geometry, was a self-contained system based on a small number of universal truths. The formalist conception of law is exemplified in the preface to Dean Christopher Columbus Langdell's 1871 casebook on contract law:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed. . . . If these doctrines could be classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from the number.

Langdell conceived of law and judging as beginning with abstract principles that could be applied to specific cases simply through logical deduc-

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20 Roscoe Pound, Mechanical Jurisprudence, 8 COLUM. L. REV. 605 (1908).
22 CHRISTOPHER LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii (1871).
tion, rather than through an analysis of the policy effects of the decision. Characteristic of formal jurisprudence was the use of means-ends analysis, which was used not to consider the actual effects of a law, but to determine the law's purpose. Formal jurists considered this purpose to be the law's nature and by knowing the true nature of the law, they could then determine its validity without considering its effects.

Clear examples of formal jurisprudence are Lochner-era Commerce Clause cases. The Supreme Court decided these cases by making conceptual distinctions between types of activities, instead of considering the actual effects of the statute. In *United States v. E.C. Knight Co.*, decided in 1895, the Court held that the commerce power did not allow Congress to break up a monopoly that controlled ninety-eight percent of the nation's sugar refining capacity. The Court justified this result by distinguishing commerce, which Congress could regulate, from manufacturing, which it could not. The Court argued that:

No distinction is more popular to the common mind... than that between manufacture and commerce. Manufacture is transformation, [but] the functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce... [Thus] contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its form, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result... [and are therefore beyond the reach of the commerce power].

Later, in *Carter v. Carter Coal Co.*, Justice Sutherland made clear that formal jurisprudence did not include an analysis of actual effects, but instead depended on conceptual distinctions. That case concerned the regulation of wages in the coal industry, and the Court again struck down the regulation because the activity had only an indirect effect on commerce, and was thus beyond congressional power. Justice Sutherland wrote:

The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed... It is quite true that rules of law are sometimes qualified by considerations of degree... But the matter of degree has no bearing upon the question here...

In addition to the Commerce Clause doctrine, formal jurisprudence

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23 See Grey, *supra* note 18, at 4 (describing Langdell's belief that the interests of justice and the convenience of the parties were "irrelevant" to an evaluation of the mail-box rule).
24 156 U.S. 1 (1895).
25 *Id.* at 3.
26 *Id.* at 21.
28 *Id.* at 307.
was responsible for the Supreme Court's personal jurisdiction doctrine. Pennoyer v. Neff defined this doctrine and, like the Lochner-era commerce cases, was decided with formal jurisprudence. In Pennoyer, the plaintiff sued to quiet title to land in Oregon and claimed ownership by virtue of a patent from the United States. The defendant claimed to have purchased the land at a sheriff's auction that took place pursuant to a state court judgment against the plaintiff. The Court was asked to decide whether the state court judgment was valid against the plaintiff, who was neither a resident of Oregon nor served personally with process. The Court held that the exercise of jurisdiction was invalid and violated due process.

Writing for the Court, Justice Field explained the limits to the power of the state as a classically formalist jurist. First, he deduced the general rule from "two well established principles of public law respecting the jurisdiction of an independent State over persons and property." The first principle was that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." The second was that "no State can exercise direct jurisdiction and authority over persons or property without its territory." These principles were based on standard rules of international law and applied to the states of the union because Justice Field believed states had given up only part of their sovereignty. From these assumptions, Justice Field deduced the "elementary principle [that] the laws of one state have no operation outside its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions."

Justice Field recognized the difficulty with this scheme and avoided it with conceptual distinctions. He admitted that "the exercise of the jurisdiction which every state is admitted to possess over persons and property within its own territory will often affect persons and property without it." However, when this effect was indirect it did not violate first principles, and thus "no objection can be justly taken." The distinction between direct and indirect effects focused only on how the effect was brought about, not its result. It was a purely conceptual difference. Thus, Justice Field laid

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29 95 U.S. 714 (1877).
30 Id. at 719-20.
31 Id.
32 Id. at 736.
33 Id. at 722.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
down the rule that state courts can exercise *in personam* jurisdiction only when the parties are physically within the state or had consented to jurisdiction. State courts could exercise *in rem* jurisdiction only over property physically within the state.

After Justice Field determined this categorical rule, he used deductive logic to apply it to the parties in *Pennoyer*. He found no *in rem* jurisdiction because the court had not attached the property prior to the proceeding, therefore the property could not be the basis for jurisdiction.\(^{39}\) He also found no valid *in personam* jurisdiction because Neff was neither present in nor a citizen of Oregon: "[p]rocess from the tribunal of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceeding against them."\(^{40}\)

Justice Field did not only use formal jurisprudence to create categorical rules for the exercise of personal jurisdiction. He also argued that the Due Process Clause ensured these limitations on the power of the states:

> Whatever difficulty may be experienced in giving to [the Due Process Clause] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.\(^{41}\)

Thus, not only did Justice Field derive a formal rule from first principles, he used the Due Process Clause to write that rule into the Constitution.

With this doctrine constitutionalized, it became the framework for all jurisdictional questions, which resulted in certain theoretical problems. The *Pennoyer* doctrine could be easily applied to most cases concerning natural persons, and it generally gave just results. In some situations, however, it was unclear how the doctrine could be fairly applied. Because this doctrine limited the personal jurisdiction of state courts to cases in which either the party was served within the state or consented to the state’s jurisdiction, foreign individuals and corporations that acted within a state could theoretically avoid responsibility for damages because they satisfied neither condition. Foreign corporations, as purely legal entities, were never clearly present within a state at all. Natural persons could avoid physical presence either by acting within the state through an agent, as occurred with natural persons carrying on an interstate business, or by leaving the state before they could be served, as occurred with motorists driving through a state. Neither group was likely to consent to jurisdiction if they could avoid it.

Despite these difficulties with the *Pennoyer* system, jurisdiction over

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\(^{39}\) *Id.* at 727.

\(^{40}\) *Id.*

\(^{41}\) *Id.* at 733.
some of these cases was clearly necessary, and the Supreme Court was able to justify it. Importantly, the Court was able to do so without using a flexible standard like the one used in *International Shoe*. Before 1945, the Supreme Court incorporated these difficult cases into the *Pennoyer* system by using the same formal reasoning that created *Pennoyer*. During this period the Court generally justified jurisdiction by finding that the party had either implicitly consented to the jurisdiction of the state or was constructively present within the state. To illustrate how formal jurisprudence extended the *Pennoyer* doctrine, one must examine how it justified jurisdiction over non-resident motorists.

**B. Expansion of *Pennoyer* 1877-1945—Natural Persons**

In the 1920s, the Supreme Court addressed statutes that extended the jurisdiction of state courts over motorists who were neither residents nor present in the state when process was served. The specific aim of these statutes was to bring within the power of the state courts motorists who entered the state, allegedly committed a tort, and then left the state again before service of process could occur. Under *Pennoyer*, courts could not uphold service of process under these statutes on the basis of the presence of the defendant or his property—both had usually left the state by the time an action was filed. Courts instead looked to the other basis of jurisdiction explained in *Pennoyer*—the consent of the party to jurisdiction.

The Supreme Court took a critical step in the evolution of this doctrine by granting states the power to force non-resident motorists to consent to jurisdiction, but used formal jurisprudence. In *Hendrick v. Maryland*, the Supreme Court used a purely conceptual distinction to hold that regulation of highways was not a burden on interstate commerce. It used means-ends analysis to determine the purpose of the statute. When the Court found the statute was "[p]rimarily for the enforcement of good order and the protection of those within its own jurisdiction," it determined the statute was "but an exercise of the police power uniformly recognized as belonging to the States . . . ." Because the statute was within the police power of the states, it was conceptually distinct from the power to regulate commerce, and thus "[d]id not constitute a direct and material burden on interstate commerce." Therefore, the Court upheld its validity, allowing states to compel non-resident motorists to consent to jurisdiction.

Over the next decade, the Court supported states as they further extended their power over non-resident motorists, and the Court continued to base its holdings on the conceptual difference between the police power

42 235 U.S. 610 (1914).
43 *Id.* at 622.
44 *Id.*

and the power over interstate commerce. In *Kane v. New Jersey*, the Court held that because states could regulate the use of automobiles on their highways, they could make consent to the jurisdiction of the state a prerequisite for the use of their highways. The Court upheld a New Jersey statute, which required that motorists driving in New Jersey get a license from the state and appoint the Secretary of State of New Jersey as an agent for service of process. The Court believed “that the Legislature of New Jersey was [reasonable] in believing that ability to establish, by legal proceedings within the State, any financial liability of nonresident [automobile] owners, was essential to public safety.” Because this regulation was aimed at public safety, it was a police power regulation, and thus New Jersey could use that power to exclude from its highways motorists who would not appoint an agent to receive process and thus consent to jurisdiction. In 1927, in *Hess v. Pawloski*, the Supreme Court allowed Massachusetts to do away with the requirement of actual consent and allowed Massachusetts to assume consent to service of process anytime a motorist used the roads of the state. The Court ruled that:

[Kane v. New Jersey] recognizes power of the State to exclude a non-resident until the formal appointment [of an agent for service of process] is made. And, having the power to so exclude, the State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. The difference between formal and implied appointment is not substantial so far as concerns the application of the due process clause . . . .

Not only was this rule justified by the deductive logic and assumed principles of formal jurisprudence, it also led to a rigid categorical rule: any motorist who drove within a state could be subject to the jurisdiction of that state, regardless of his actual consent.

Just as the Supreme Court used formal jurisprudence to expand the *Pennoyer* system to justify jurisdiction over non-resident motorists, the Court also used it to justify jurisdiction over foreign individuals doing business within a state. In doing so, the Court faced a problem similar to that it faced with non-resident motorists: the *Pennoyer* system did not obviously justify jurisdiction over foreign individuals doing business within a state because they were neither physically present nor likely to give actual consent to jurisdiction. The Court, however, after initial difficulty, was able to use formal jurisprudence to justify jurisdiction in these cases as well.

The Court first directly addressed the problem of foreign individuals doing business within a state in *Flexner v. Farson* in 1918. There, an in-

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45 242 U.S. 160 (1916).
46 Id. at 167.
47 274 U.S. 352 (1927).
48 Id. at 356-57 (citations omitted).
individual residing in Illinois had been conducting business within Kentucky through an agent in that state. Pursuant to a Kentucky statute, the plaintiff served process on the defendant's former agent, who was present in Kentucky. The defendant argued that he was not subject to the jurisdiction of Kentucky because he was not present in the state and had not consented to jurisdiction. The plaintiff, however, argued that the defendant had implicitly consented to Kentucky’s jurisdiction by doing business in the state. The Court rejected the plaintiff’s argument and invalidated the statute. Justice Holmes, usually an opponent of formal jurisprudence, held that because Kentucky had no power to exclude natural persons, it could not make doing business in the state contingent on consent to jurisdiction. Justice Holmes argued that:

the consent that is said to be implied [when finding jurisdiction by consent over corporations] is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. . . . [Since the state had no power to exclude the defendants . . . the analogy failed, and . . . the Kentucky judgment was void.

Because the defendant had not consented and was not present in the state, he did not fit within any of the Pennoyer categories, and so was not within the state’s jurisdiction.

This holding provides a fine example of formal jurisprudence. First, the holding accepted the categorical rules of Pennoyer. Second, it depended upon the conceptual distinction between police power and power over interstate commerce, and between natural and corporate personality. Finally, the holding failed to examine the effect of these distinctions. Even though it seems that the results of a foreign corporation and foreign individual doing business within a state, and state regulation thereof, would be practically identical, the opinion failed to address this point.

Although Flexner v. Farson initially prevented states from exercising jurisdiction over foreign individuals doing business within a state, later Supreme Court opinions remedied this weakness while remaining within the boundaries of formalist jurisprudence and the Pennoyer system. In 1934, in Doherty & Co. v. Goodman, the Court allowed a state court to exercise jurisdiction over a non-resident doing business in the state and limited Flexner to its facts. Justice McReynolds wrote the opinion and borrowed the formal jurisprudence of the non-resident motorist cases to justify the holding. The Court held that the statute granting jurisdiction over non-residents doing business within the state was constitutional because it

50 Id. at 292.
51 Id. at 293.
52 Id.
54 Id. at 628.
was an exercise of the police power. Justice McReynolds wrote:

The power of the States to impose terms upon non-residents, as to activities within their borders, recently has been much discussed. Under these opinions it is established doctrine that a state may rightly direct that non-residents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process. ... [This] statute goes no farther than the principle approved by those opinions permits.

While the opinion does not clearly define "the principle approved by those opinions," Justice McReynolds likely meant jurisdiction by implied consent. Appellees' brief argued that the police power of a state allowed it to regulate business done through an agent because "[t]his is a method of doing business which is attended with particular attributes inimical to the economic and social welfare of the community ..." Therefore, conceptually, it was the exercise of the police power. They then argued that "Appellant implicitly assented to the jurisdiction of the State ... by sending an agent into the State ..." Furthermore, Justice McReynolds quoted from the state court opinion upholding the statute: "[w]hen a non-resident defendant establishes an office or agency for the transaction of business in ... this state ... he thereby voluntarily appoints his own agent ... as one upon whom substituted service ... may be made."

It seems, therefore, that the Court accepted the principle that when an action falls within the police power of the state, the state may exclude the activity and allow it only under the condition of consent to the jurisdiction of the state. Thus, in Doherty, the Court was able to use formal jurisprudence to justify the expansion of personal jurisdiction to foreign individuals doing business in a state. It did so by using the categorical rules of Pennoyer and then justifying jurisdiction without addressing the actual results of the rule.

C. Expansion of Pennoyer 1877-1945—Corporations

Formal jurisprudence not only justified expanding jurisdiction over natural persons, it also justified expanding the Pennoyer doctrine to allow jurisdiction over foreign corporations doing business within a state. In doing so the Supreme Court faced problems similar to those it faced with non-resident motorists and foreign individuals doing business within a state. The Pennoyer system did not clearly justify jurisdiction over interstate cor-

55 Id. For caselaw discussion of personal jurisdiction over non-resident motorists, see supra text accompanying notes 42-48.
56 Doherty, 294 U.S. at 628.
57 Id.
58 Appellees' Brief at 5, Doherty (No. 469).
59 Id.
60 Doherty, 294 U.S. at 627.
61 Id. at 625-28.
porations because those corporations were unlikely to consent to jurisdiction and had no actual physical presence. The problem was more acute because Supreme Court precedent indicated that corporations lacked even legal existence outside their state of incorporation. Thus, even if a foreign corporation operated within a state, it still was not present within that state. Nevertheless, formal jurisprudence was able to justify jurisdiction over foreign corporations.

To justify jurisdiction over foreign corporations doing business within a state while remaining within the Pennoyer system, the Supreme Court developed two theories. The first theory followed the reasoning of the cases concerning non-resident motorists and foreign individuals. The Court reasoned that because states could exclude foreign corporations, they could make consent to jurisdiction a requirement of doing business within their borders. The Court explained this theory in 1855 in *Lafayette Insurance Co. v. French*,

A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. This consent may be accompanied by such conditions as Ohio may think fit to impose. . . . Now, when this corporation sent its agent into Ohio . . . the corporation must be taken to assent to the conditions upon which alone such business could be there transacted by them; that condition being, that an agent, to make contracts, should also be the agent of the corporation to receive service of process in suits on such contracts . . . .

Using this justification of implied consent, the Supreme Court developed a categorical rule: if a foreign corporation did business within a state, it had constructively consented to jurisdiction in that state.

This theory, however, had a significant weakness. As the Court expanded the reach of the Dormant Commerce Clause, it expanded the circumstances in which a state's claim of jurisdiction would burden interstate commerce, and thus be unconstitutional. To correct this weakness, the Court developed an additional theory to justify the categorical rule of doing business. In 1914, in *International Harvester Co. v. Kentucky*, the Supreme Court held that a state court could assert personal jurisdiction over a foreign corporation actively engaged exclusively in interstate commerce when it was "present" within the state.

This new theory departed in a significant way from formal jurispru-

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62 Bank of Augusta v. Earle, 38 U.S. 519, 588 (1839) ("It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.").

63 59 U.S. 404 (1855).

64 Id. at 407-08 (citation omitted).

65 See Kalo, supra note 11, at 1180.

dence. It contradicted the assumption that a corporation had no presence outside its state of incorporation, and did so by looking to the effects a corporation caused. As the New Jersey Supreme Court explained in 1855:

The rule [that a corporation only exists within the state whose laws created it] rests upon a highly artificial reason, and, however, technically just, is confined at this day in its application within exceedingly narrow limits . . . [A corporation] has . . . existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised . . . For all practical purposes, its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it.67

Unsurprisingly, this theory was popular among the sociological jurists on the bench and in academia during the 1910s.68 Justice Brandeis, for example, based the holding in *Philadelphia & Reading Railway Co. v. McKibbin* on this theory: "A foreign corporation is amenable to process . . . if it is doing business within the State in such a manner and to such extent as to warrant the inference that it is present there."69

This presence theory nonetheless retained much of formal jurisprudence. Although its notion of corporate presence was based on the effects of corporate activity, it still remained within the conceptual framework of the formalistic Pennoyer system. While the consent theory was based on a conceptual distinction between the police power and the power over interstate commerce, the presence theory simply reexamined the concept of presence. Because it found that the category of presence necessary for jurisdiction included the kind of presence that a corporation exhibited, it found that states could exercise jurisdiction over corporations. Although there was an examination of what a corporation actually did, those effects were important only to determine if the corporation fit within the concept of presence, not to determine if jurisdiction was effective or just.

The presence theory, therefore, helped courts justify the categorical "doing business" rule. The Supreme Court used both the presence and consent justifications to allow state courts jurisdiction over foreign corporations whenever the corporations were "doing business" within the state. By 1914, the theoretical basis of the "doing business" test was no longer important. As the Court said in 1914, in *International Harvester*: "It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the State."70 Instead of examining the justification for jurisdiction, litigation focused solely on the factual question of whether the corporation was "doing business" in the state.71

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68 See discussion infra notes 89-112 and accompanying text.
70 *Int'l Harvester*, 234 U.S. at 583.
71 See, e.g., *McKibbin*, 243 U.S. at 265; Frene v. Louisville Cement Co., 134 F.2d 511, 512 (D.C.)
Therefore, as with non-resident motorists and foreign individuals, the Supreme Court used formal jurisprudence to expand the Pennoyer doctrine to include this form of "non-traditional" jurisdiction. The consent theory of jurisdiction over corporations, like the consent theory concerning non-resident motorists, was based on the police power of the state, its ability to exclude corporations, and thus the state's ability to coerce consent to its jurisdiction. The presence theory focused solely on whether corporations fit within the concept of "presence" necessary to jurisdiction in the Pennoyer scheme.

D. Personal Jurisdiction and Formalist Jurisprudence

Not only did the Supreme Court use formal jurisprudence to justify jurisdiction, but the rules it created were characteristic of formalism. The jurisdictional rules were categorical and made no reference to the underlying justifications for the rules. The 1942 Restatement of Judgments summarized this system. First, the Restatement categorized groups not by their activities or the effects they caused, but by their legal status, as individuals, domestic corporations, or foreign corporations. Within these categories the Restatement defined the situations in which the courts could constitutionally exercise jurisdiction. None of these categories depended on the effects of the activities. For example:

These bases of jurisdiction of a State over an individual defendant include: presence within the state (see §15); domicile in the State (see §16); citizenship (see §17); consent (see §18); appearance in the action (see §§19, 20); the carrying on of business within the State (see §22); the doing of acts or the ownership of things within the State (see § 23).

Within each of these categories, the Restatement defined the situations in which jurisdiction was valid, without reference to the purposes of the rules.

The doctrine of personal jurisdiction in the years before International Shoe was thus a set of rigid categorical rules created by formal jurisprudence. The Court began in 1877, in Pennoyer, from a conception of jurisdiction that required either physical presence or consent, but, by using formal reasoning, expanded the reach of state courts while remaining within that framework. It justified state jurisdiction over natural persons by finding that the state police power allowed states to admit those persons only if they consented to jurisdiction. The Court was also able to justify jurisdiction over foreign corporations "doing business" within a state, while still remaining within the Pennoyer framework.

Cir. 1943).

72 RESTATEMENT OF THE LAW OF JUDGMENTS (1942).
73 Id. §§ 5-33.
74 Id. § 14.
II. SOCIOLOGICAL JURISPRUDENCE AND THE CHALLENGES TO PENNOYER

While the Supreme Court was able to expand the Pennoyer doctrine with formal jurisprudence, its work came under sharp criticism from legal scholars after 1910. Initially, all of these academics were affiliated with Harvard Law School—Gerard Henderson, William Cahill, and Austin Scott. They argued the system was inconsistent and based on fictions, and promoted new justifications for jurisdiction over foreign corporations and non-resident individuals. By the 1920s and 1930s, commentators nationwide had joined in the criticism.

The source of this criticism can be found in its Harvard Law School origins. This criticism was ideologically and temporally related to a new school of jurisprudence announced by Roscoe Pound, Professor of Law at Harvard. This new school of jurisprudence was called sociological jurisprudence, and the close connection between it and the academic criticism of the Pennoyer system indicates that sociological jurisprudence was responsible for the criticism. That criticism in turn is closely related to the new conception of jurisdiction that emerged in International Shoe. This connection suggests that sociological jurisprudence, not the expansion of interstate corporations, was the critical foundation for International Shoe.

A. Sociological Jurisprudence and Roscoe Pound

Sociological jurisprudence emerged in the late nineteenth century as a reaction to formal jurisprudence. It was defined as a school of jurisprudence in 1911 and 1912 in a two-part article by Roscoe Pound entitled, The Scope and Purpose of Sociological Jurisprudence. This article made clear that sociological jurisprudence opposed formal jurisprudence. Sociological ju-

75 See Henderson, supra note 9, at 7; Cahill, supra note 9, at 692-96; Scott, supra note 9, at 889.

76 See Maurice S. Culp, Constitutional Problems Arising from Service of Process on Foreign Corporations, 19 MINN. L. REV. 375, 378 (1935); E. Merrick Dodd Jr., Jurisdiction in Personal Actions, 23 U. ILL. L. REV. 427, 428 (1929) (Dodd was also a graduate of Harvard, LL.B. 1913, and a Professor there when the article was published); Paul E. Farrier, Jurisdiction over Foreign Corporations, 17 MINN. L. REV. 270, 277 (1933); Maxwell E. Fead, Jurisdiction over Foreign Corporations, 24 MICH. L. REV. 633, 635 (1926); Joseph F. Francis, The Domicil of a Corporation, 38 YALE L.J. 335, 340 (1929); Eleanon Isaacs, An Analysis of Doing Business, 25 COLUM. L. REV. 1018, 1022 (1925) (Isaacs received his S.J.D. from Harvard in 1927); George E. Osborne, Arising out of Business Done in the State, 7 MINN. L. REV. 380, 381 (1923) (Osborne received his LL.M. from Harvard in 1919, and his S.J.D. in 1920); Jay Leo Rothschild, Jurisdiction of Foreign Corporations In Personam, 17 VA. L. REV. 129, 130 (1930); Harry J. Pasternak, Note, Jurisdiction over Nonresidents, 13 CORNELL L.Q. 606, 607-08 (1928); Jesse Andrews Raymond, Note, Jurisdiction over a Foreign Corporation Doing Business Within the State, 9 TEX. L. REV. 410, 421 (1930); N.B.S., Comment, Expanding Principles of Jurisdiction, 30 MICH. L. REV. 947, 949-50 (1932); Note, What Constitutes Doing Business by a Foreign Corporation for Purposes of Jurisdiction, 29 COLUM. L. REV. 187, 188 (1929) [hereinafter Note, What Constitutes].

risprudence, he claimed, opposed:

[The] jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles and the criticism of premises with reference to the ends to be subserved is neglected. In the pursuit of principles there is a tendency to forget that law is a practical matter. The desire for formal perfection seizes upon jurists. Justice in concrete cases ceases to be their aim. Instead, they aim at thorough development of the logical content of established principles through rigid deduction, seeking thereby a certainty with shall permit judicial decisions to be predicted in detail with absolute assurance.\(^{78}\)

In short, sociological jurisprudence was opposed to the formal jurisprudence that built the *Pennoyer* system.

To replace formal jurisprudence, sociological jurisprudence encouraged flexible standards over categorical rules and consideration of social policy instead of abstract principles and rigid deduction. Pound claimed sociological jurisprudence aimed to “enable and compel law-making, and also interpretation and application of legal rules, to take more account, and more intelligent account of the social facts upon which law must proceed and to which it is to be applied.”\(^{79}\) He also wrote that:

[T]he sociological jurists stand for what has been called equitable application of law; that is, they conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.\(^{80}\)

### B. Sociological Jurisprudence Challenges *Pennoyer*

Sociological jurisprudence promotes social policy as a justification for flexible standards, which mirrors the changes to the *Pennoyer* system supported by the Harvard academics and wrought by *International Shoe*. The academic criticism of the *Pennoyer* system began soon after Pound announced the arrival of sociological jurisprudence in 1911. The academic criticism of *Pennoyer* was also initially centered in the Harvard Law School, where Pound was a professor and later dean.\(^{81}\) Finally, this criticism did not question the reach of the *Pennoyer* system, but only its formalistic justification. These connections indicate that this criticism was caused primarily by sociological jurisprudence, not the expansion of interstate corporations.

The first person to criticize the *Pennoyer* system was Learned Hand,

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\(^{80}\) Id. at 515.

then a federal district court judge. Hand, who graduated from the Harvard Law School in 1896, was a strong supporter of sociological jurisprudence's critique of formalism, as shown by his friendships and his writings. Hand was friendly with Oliver Wendell Holmes and respected him greatly. In fact, as Gerald Gunther wrote: "For Hand, Holmes was an unblemished idol on the bench . . . " Hand was also a close friend of Felix Frankfurter for over fifty years and received consistent praise from other judicial pioneers of sociological jurisprudence, including Louis Brandeis and Benjamin Cardozo. Hand's sympathy for some of the tenets of sociological jurisprudence can also be seen in his non-judicial writings. In 1908, he published *Due Process of Law and the Eight Hour Day* in the *Harvard Law Review*. Like Pound's attack one year later in his article *Liberty of Contract*, Hand's article directly attacked the *Lochner* decision and Lochner-style formalism. Pound wrote that "Hand's essay was not only a cutting critique of the legal justifications for the Court's [*Lochner* decision,] but also a sharp economic and political commentary."

It is therefore unsurprising that Hand's criticism of *Pennoyer* and Pound's general criticism of formal jurisprudence were very similar. Hand's first criticism of *Pennoyer* appeared in 1915, when he decided *Smolik v. Philadelphia & Reading Coal*. There, he argued for a new basis for jurisdiction over a foreign corporation that avoided the formalist justifications of the *Pennoyer* system. He argued that the *Pennoyer* categories of consent or presence could not justify jurisdiction over foreign corporations. A court could justify jurisdiction, he argued, only by examining notions of justice:

> When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court for purposes of justice, treats it as if it had.

He claimed that the basis for the "doing business" test was the desire for justice: "The court, in the interests of justice, imputes [the power of the state to exercise jurisdiction] to the voluntary act of doing business within the foreign state, quite independent of any intent."

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84 *Id.* at 390.
85 *Id.* at 346.
88 Gunther, *supra* note 83, at 118.
90 *Id.* at 151.
91 *Id.*
Academics soon followed Hand’s criticism of the Pennoyer system. The first academic to directly apply the sociological jurisprudence of Roscoe Pound was William F. Cahill. Cahill was closely connected to Harvard and sociological jurisprudence. He received his LL.B. from the Harvard Law School in 1916, and he must have been familiar with Pound and his ideas. Like Hand, Cahill criticized not the reach of the Pennoyer system, but its justification, and the way he did so mirrored the general prescriptions of sociological jurisprudence. In a 1917 article, Jurisdiction over Foreign Corporations and Individuals Who Carry on Business within the Territory, published in the Harvard Law Review, Cahill criticized the abstract basis of the Pennoyer doctrine’s justification for jurisdiction over foreign corporations and non-residents doing business in a state. He argued that the consent theory was untenable and that the presence theory offered a better theoretical basis for jurisdiction. As discussed above, the presence theory, while still formalist because it justified jurisdiction only with the assumed principles of the Pennoyer system, also began the move towards sociological jurisprudence because it defined corporate presence by how the corporation affected society. Cahill’s criticism went beyond support of the presence theory. He was concerned with other conceptual distinctions in the Pennoyer scheme. He criticized the distinction made in Flexner v. Farson between non-resident individuals and foreign corporations doing business in the state. Based on a belief that the two groups were functionally identical, he argued that state courts should have jurisdiction over both foreign corporations and non-residents who do sufficient business to be “present” in the state. Cahill also criticized the consent theory on the basis that there was no evidence of actual consent.

Gerard C. Henderson was the next academic to criticize the Pennoyer system, and he too was closely connected to Roscoe Pound. Henderson received his LL.B. from Harvard Law School in 1916, the year Pound was selected as dean. While there, Henderson was awarded the Adison Brown Prize for his work entitled, The Position of Foreign Corporations in Ameri-

92 Harvard Law School, supra note 82, at 160.
93 Cahill, supra note 9.
94 Id. at 689-96.
95 Id. at 694-96.
96 Id. at 676 (“Jurisdiction over foreign corporations may appear to the casual observer to involve a generically different question from jurisdiction over non-resident individuals. But a moment’s reflection will make clear that for practical purposes they are merely different phases of the less obvious but fundamentally more important problem of jurisdiction over foreign groups engaged in business within a state.”).
97 Id. at 707.
98 Id. at 689-90 (“The basis of the consent theory is found in the power of the state to exclude absolutely corporations . . . . If the state may exclude the corporation altogether, it may admit it to do business within the state on the condition that it consent to the jurisdiction of the state’s courts. . . . It may make such an offer to the corporation which the latter can accept. . . . [A] fundamental difficulty is, however, that the state ordinarily gives not the slightest evidence of a bargaining mind.”).
Henderson's book was clearly influenced by the ideas of sociological jurisprudence. He dedicated it to Justice Louis Brandeis, an ally of sociological jurisprudence, and wrote in his introduction:

The theory that a system of law is evolved in the brain of a jurist by the application of pure reason to philosophic first principles no longer needs to be combated. It is now recognized that most rules of law represent a rough compromise between those economic and social needs of the present which are able to make themselves felt ...

Henderson, along with Hand and Cahill, agreed with Pound’s prescriptions for the law.

Henderson’s work sharply criticized the jurisdictional theory of the Supreme Court, and it did so in a way congenial to the prescriptions of sociological jurisprudence. Henderson argued that the consent theory was “founded on a fundamental theoretical misconception,” and was “clearly ... no longer sustained by the authorities ...” This criticism went beyond Learned Hand’s argument in Smolik v. Philadelphia & Reading Coal. Henderson disliked Hand’s suggestion that courts, for the purposes of justice, should treat corporations as if they had consented. Instead, he argued, the theory of consent should be cast off completely and replaced with considerations of fairness and justice: “Whether process served on a member of the corporate group can be the foundation of a judgment against the [corporation in fact] turns on whether the active group ... is sufficiently within the jurisdiction so that it can fairly be made to stand suit there ...” He also argued that judges should be guided by a flexible standard that took direct notice of these policy considerations:

These [considerations of fairness] can be, of course, only rough criteria, as is inevitable in any portion of the law which has historical roots. A certain degree of arbitrariness is perhaps a necessity; policy is too vague a thing to be made the sole guide. Yet the standards of decision should at least have some relation to the underlying considerations of policy. Austin Scott followed Henderson in criticism of the Pennoyer system; he too was connected to sociological jurisprudence. Scott became an Assistant Professor at Harvard on the same day in 1910 that Pound became the Story Professor of Law. Scott’s critique appeared in a 1919 article in the

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99 HENDERSON, supra note 9.
100 Id. at v.
101 See infra note 153.
102 HENDERSON, supra note 9, at 7.
103 Id. at 100.
104 Id. at 95.
106 HENDERSON, supra note 9, at 171.
107 Id.
108 SUTHERLAND, supra note 81, at 235.
Harvard Law Review entitled Jurisdiction over Nonresidents Doing Business Within a State.\textsuperscript{109} He criticized the distinction made by the Court in Flexner v. Farson\textsuperscript{110} between jurisdiction over foreign corporations and non-residents doing business in the state. He also advocated extending Learned Hand's argument to overturn Flexner, or at least to limit it to its facts:

\[\text{[If, according to Judge Hand's theory [in Smolik v. Philadelphia & Reading Coal] a corporation is bound by conditions imposed by the state, not because it has consented to be bound, but because voluntarily doing business within the state it is just and proper to hold that it is bound by the reasonable regulations of that business by the state, there is no good reason why an individual should not likewise be bound.}\textsuperscript{111}\]

In the years that followed, academics continued to challenge the justification of the Pennoyer system. Although some academics aimed to merely refine its categorical rules,\textsuperscript{112} others argued for a new justification. They continued to apply the insights of sociological jurisprudence to jurisdictional theory, criticizing the categorical rules of the Pennoyer system and its refusal to look to the effects of those rules.

In 1929, Professor E. Merrick Dodd, a graduate of the Harvard Law School\textsuperscript{113} and a recently hired Harvard law professor,\textsuperscript{114} wrote Jurisdiction in Personal Actions.\textsuperscript{115} He attacked both the presence and consent theories of jurisdiction as based on fictions.\textsuperscript{116} He then argued for a standard that openly considered the policies behind a finding of jurisdiction: "One thing, however, is plain. Granted that what are needed are rules of a fairly definite character and that policy alone will not suffice, any such rules must be firmly based upon considerations of policy."\textsuperscript{117} Paul Farrier made a similar argument in 1933. He wrote:

\begin{footnotesize}
\textsuperscript{109} Scott, \textit{ supra} note 9, at 889.
\textsuperscript{110} 248 U.S. 289 (1919).
\textsuperscript{111} Scott, \textit{ supra} note 9, at 889.
\textsuperscript{112} See, e.g., Isaacs, \textit{ supra} note 76 (arguing that courts have failed to distinguish the varying degrees of doing business which are necessary for a foreign corporation to be subject to the state's jurisdiction, taxation, or statutes of "qualification.").
\textsuperscript{113} Professor Dodd received his LL.B. in 1913. See \textit{HARVARD LAW SCHOOL}, \textit{ supra} note 82, at 137.
\textsuperscript{114} Professor Dodd was appointed to the faculty in 1928. See \textit{SUTHERLAND}, \textit{ supra} note 81, at 291.
\textsuperscript{116} \textit{Id.} at 436-37 ("[W]hatever lip service courts may give to the physical power theory, they have in fact reached in a number of cases results which are inconsistent with it."); \textit{Id.} at 436 ("[T]he consent [theory] is a mere legal fiction.").
\textsuperscript{117} \textit{Id.} at 437. The policies Professor Dodd had in mind are convenience to the parties, whether the court can decide the case accurately, and whether the court will have power to enforce its decision. \textit{Id.} at 441; \textit{see also} Raymond, \textit{ supra} note 76, at 422 ("[T]he absence of any definite rule [for what constitutes "doing business"] is not deplorable, but rather, fortunate. The question of jurisdiction over foreign corporations . . . is being decided within certain broad boundaries, by a judicious use of judicial discretion, not uninfluenced by the reasonableness of its exercise in each particular case.").
\end{footnotesize}
[If] it should be recognized that the question is one which is insoluble on the lines of fixed formulas and judicial recognition were given of the factors (i.e. necessity [of serving the corporation] and inconvenience [to the corporation to defend in the forum]) . . . the problem would be clarified, and jurisdiction of foreign corporations would then rest upon sound principles rather than fictions and misleading theory.\(^\text{118}\)

Jay Rothschild applied the insights of sociological jurisprudence by looking to effects. He attempted to define “doing business” and claimed that “the entire doctrine of ‘doing business’ within a state is necessitated by the requirement that we shall protect local residents without unduly prejudicing foreign corporations.”\(^\text{119}\) Joseph Francis attacked the idea that a corporation had a domicile from a more radical, legal realist perspective. He argued that “[t]he final step in freeing the court from the outworn dogmas of ‘domicil’ and ‘presence’ is to declare that neither of these conceptions has been or can be intelligently applied to a corporation.”\(^\text{120}\) These academics and others,\(^\text{121}\) clearly aimed to replace categorical rules, such as the “doing business” test, with a standard based on reasonableness and fairness. This desire mirrored the aim of sociological jurisprudence to “conceive of the legal rule as a general guide to the judge.”\(^\text{122}\)

By the late 1920s, even law school Notes agreed with the arguments of these academics. A 1932 Note in the *Virginia Law Review* stated that “it would seem that under the theory of Judge Hand it is in accord both with logic and justice that non-resident partnerships and individuals be held to the jurisdiction of the courts on this basis.”\(^\text{123}\) A Note in the *Cornell Law Quarterly* in 1928 argued that “[t]he dictum of Mr. Justice Hand would seem to be the only theory upon which the nonresident person may logically be subjected to service through his agent doing business in the state . . .”.\(^\text{124}\) A *Columbia Law Review* 1929 Note, cited in *International Shoe*, argued that “[m]uch of the existing confusion has been caused by the failure of the courts to consider the primary reason for permitting suit against a foreign corporation. . . . Jurisdiction, it would seem then, ought to be entertained only in cases where it is reasonable and just that they should be amenable.”\(^\text{125}\)

By 1942, the mistrust of formal jurisprudence was so common that even the *Restatement of Judgments*, whose reporters were Austin W. Scott and Warren A. Seavy of Harvard Law School, admitted that its complex,
formal rules were based on considerations of fairness. The *Restatement* recognized that “[t]he fundamental requirement as to the jurisdiction of a State over a person is that there should be such a relationship between the state and the person that it is reasonable for the State to exercise control over him through its courts.” It mentioned specifically that the basis of a State’s power over foreign individuals doing business in the state was not consent, but the reasonable exercise of the state’s police power.

The power of a State and of its courts over a non-resident who does business within the State is not necessarily based upon his consent. It is immaterial whether he consents or not. The power is based upon the principle that a State ought, as a matter of justice and fairness, to be permitted to control the doing of business within its borders to the extent of making the person doing business answerable in its courts with respect to claims arising out of the business.

The *Restatement* admitted that its formal rules for state jurisdiction over foreign corporations were based on the same principle:

The doing of business in a State is of itself a sufficient ground for subjecting it to the power of the State and of the courts of the State. It is quite unnecessary to attempt to find that the corporation is present within the State or that the corporation has consented to the exercise of jurisdiction over it. The relation between the corporation and the State in which it does business is such that it is reasonable for the State to exercise control over the corporation so as to make it answerable in the courts of the State.

And, it admitted that the power of a state over non-resident motorists was not consent, but the police power of the state directly: “It is not unreasonable for a state to exercise through its courts jurisdiction over non-residents who do acts within the state which are of a sort dangerous to life or property.”

Thus, by 1942 most academics believed that the exercise of jurisdiction should be justified by reasonableness. Their emphasis on the actual effects of the doctrine, instead of abstract concepts of power and consent, is exactly the change advocated by sociological jurisprudence and it was advocated by men who personally knew, studied under, and worked with Roscoe Pound. It seems likely, therefore, that the academics advocating a new justification for personal jurisdiction over foreign corporations were motivated by the emerging ideas in jurisprudence. Sociological jurisprudence and the call for a new justification for jurisdiction over corporations

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126 The remaining members of the committee were: Howard F. Burns from Cleveland, Ohio; Herbert F. Goodrich, 3d Circuit Judge; Charles Howard from Baltimore, Maryland; Albert B. Maris, 3d Circuit Judge; Edson R. Sunderland, University of Michigan; and William Draper Lewis.

127 *RESTATEMENT OF JUDGMENTS* §14 (1942).

128 *Id.* § 22.

129 *Id.* § 30.

130 *Id.* § 23.
were ideologically similar. Both movements advocated justifying legal norms not with abstract concepts but with reference to actual effects. Both these movements also advocated flexible standards over categorical rules.

These movements were also connected temporally. Pound published *The Scope and Purpose of Sociological Jurisprudence*\(^{131}\) in two issues in 1911 and 1912, while the advocates of change in personal jurisdiction marked their emergence with Learned Hand's opinion in *Smolik v. Philadelphia & Reading Coal*\(^ {132}\) in 1915. As sociological jurisprudence gained general academic acceptance during the 1920s and 1930s, so did the movement for change in personal jurisdiction doctrine, with its basic premises being accepted in the *Restatement of Judgments* in 1942.

### III. SOCIOLOGICAL JURISPRUDENCE AND *INTERNATIONAL SHOE*

The inference that sociological jurisprudence caused *International Shoe* is strengthened by examining the *International Shoe* opinion itself. Without understanding the ideological background of *International Shoe*, it is difficult to explain why it adopted a new basis of jurisdiction. Neither the briefs nor the record mention "minimum contacts," and the court could have reached a similar holding by applying existing doctrine. Examining the opinion in the context of the academic debate about jurisdiction, however, clearly indicates the influence of sociological jurisprudence. Not only does the opinion adopt much of the reasoning of the academy, it also directly cites those men who first advocated the application of sociological jurisprudence to personal jurisdiction doctrine. *International Shoe* was also written soon after President Roosevelt appointed a Supreme Court supportive of sociological jurisprudence, and Justice Douglas's conference notes indicate that the Supreme Court was predominately concerned with the justification of personal jurisdiction, not its reach.

The opinion in *International Shoe* mirrored the arguments made by the academic critics of the *Pennoyer* system. First, a unanimous Court, in an opinion by Harlan Fiske Stone rejected the formal reasoning that led to the creation of the rigid rules represented in the *Restatement of Judgments*. The Court\(^ {133}\) followed Learned Hand in rejecting both the corporate presence and consent justifications of jurisdiction:

*To say that the corporation is so far "present" there as to satisfy due process requirements . . . is to beg the question to be decided. For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem*

\(^{131}\) *See supra* note 14.


to be sufficient to satisfy the demands of due process.\textsuperscript{134}

Justice Stone then directly adopted the criticism of the consent theory pioneered by Learned Hand and Gerard Henderson:

True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. [citations omitted]. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction.\textsuperscript{135}

Instead of these bases for jurisdiction, Justice Stone justified jurisdiction with reference to the reasonableness and fairness of its exercise. This new basis reflected the prescriptions of the sociological jurists who criticized the Pennoyer system. It considered the effects of the ruling by weighing the inconvenience to the corporation against the demands of justice and used a flexible standard of reasonableness rather than a categorical rule:

[The demands of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An “estimate of the inconveniences” which would result to the corporation from a trial away from its “home” or principle place of business is relevant in this connection.\textsuperscript{136}

Stone emphasized the use of a flexible standard:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.\textsuperscript{137}

In applying the standard to Washington State’s exercise of jurisdiction, Justice Stone again emphasized its flexibility and policy considerations. He wrote:

It is evident that these operations [of the International Shoe corporation] establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there.\textsuperscript{138}

Justice Stone’s opinion illustrated the changes advocated generally by sociological jurists, and specifically by the personal jurisdiction academic literature that they inspired. Justice Stone swept away the formalistic justi-

\textsuperscript{134} Id. at 316-17.
\textsuperscript{135} Id. at 318-19 (citing, inter alia, Smolik, 222 F. at 151 and HENDERSON, supra note 9, at 94-95).
\textsuperscript{136} Id. at 317.
\textsuperscript{137} Id. at 319.
\textsuperscript{138} Id. at 320.
fications of the “doing business” rule and replaced them with a flexible standard aimed to maximize fairness and justice. His opinion echoed Pound’s characterization of sociological jurists who “conceive of the legal rule as a general guide to the judge, leading him toward the just result, but insist that within wide limits he should be free to deal with the individual case so as to meet the demands of justice . . . and accord with the general reason of ordinary men.”139 It also echoed Professor Dodd’s desire to “restate our rules with regard to jurisdiction in some form which would accord with the results actually reached by the courts without thus indulging in fictions.”140

The opinion also rested this new norm not on abstract conceptions, but on the effects of jurisdictional doctrine. It is based on the reasonableness of the exercise and included an “estimate of inconveniences.” This change again echoed Pound’s characterization of sociological jurists as desiring to “compel . . . interpretation and application of legal rules, to take more account . . . of the social facts upon which the law must proceed.”141 The citations to Learned Hand’s opinions and Gerard Henderson’s book indicate the opinion’s agreement with the academic criticism of the Pennoyer system.

Justice Stone’s opinion was not, however, the only opinion in the case which supported jurisdiction. Both Justice Black, in a separate concurrence, and the Washington Supreme Court found jurisdiction valid. Both of these opinions emphasize the connection between Justice Stone’s majority opinion and sociological jurisprudence because they show that formal jurisprudence could have justified jurisdiction over the International Shoe Company. In other words, it was not necessary to create a new basis of jurisdiction to reach the same result. The old doctrine could have justified jurisdiction. The Washington Supreme Court, in fact, held jurisdiction valid under the Pennoyer system,142 while Justice Black’s concurrence used formal jurisprudence to advocate a new categorical rule. Because the Supreme Court could have extended the jurisdiction of state courts using rationales more similar to the Pennoyer system, it is unlikely that International Shoe was merely an attempt to extend the jurisdiction of the state courts.

Justice Black built his opinion on the formal jurisprudence that created the Pennoyer system, even though he assumed more liberal principles. He also disagreed with the formal jurisprudence that created the categorical “doing business” rule, railing against the “conceptualistic contention that Washington could not levy a tax or bring suit against the corporation be-

139 Pound, Sociological Jurisprudence II, supra note 14, at 515.
140 Dodd, supra note 114, at 437.
cause it did not honor that State with its mystical 'presence.'”

However, he argued strongly for replacing that categorical rule based on an assumed principle with another that equally avoided consideration of effects. He rejected the flexible standard of the majority, arguing:

There is a strong emotional appeal in the words "fair play," "justice," and "reasonableness." But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards... [I cannot] stretch the meaning of due process so far as to authorize this court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be "convenient" for the corporation to be sued somewhere else.

Justice Black then argued for a categorical rule he believed was justified by the language of the Constitution: "I believe that the Federal Constitution leaves to each State, without any 'ifs' or 'buts,' a power to... open the doors of its courts for it citizens to sue corporations whose agents do business in those states." This rule, as Justice Black pointed out, would have granted the states more power over corporations than the rule the majority used.

Evidence from the conference discussion of International Shoe indicates that the Justices were primarily concerned with the justification of the Pennoyer system, not its practical shortcomings. The certiorari memo to Justice Douglas and his conference notes indicated that the Court knew it was expanding the reach of state court jurisdiction. The certiorari memo argued that "[t]he definition of 'doing business' goes a little beyond the holding of this court." The conference discussion, however, focused on the justification of the Pennoyer system. Justice Douglas's conference notes begin by echoing the title of Roscoe Pound's famous 1908 article, Mechanical Jurisprudence, which sharply criticized formalist jurisprudence. Justice Douglas called the case a "[f]ine example of mechanical jurisprudence," and complained that "most of what we have written is the same." Justice Douglas also recorded that "[p]hysical presence is not the test though our cases say it." Justice Douglas indicated that Chief Justice Stone, who clearly took the lead in the conference discussion, also disliked the old test and preferred to look directly to the question of fairness: "Law

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143 Int'l Shoe, 326 U.S. at 323.
144 Id. at 325.
145 Id. at 324.
147 Pound, supra note 20.
148 Douglas, supra note 146.
149 Id.
said mere solicitation is not enough [for a state court to have jurisdiction over a foreign corporation]—C.J. [Stone] says it is not a good test—if employer wishes to claim benefit of business it carries on in the state, nothing arbitrary in making it amenable to suit. These notes clearly indicate that the Court was primarily concerned with the formalist justifications of the personal jurisdiction doctrine.

IV. SOCIOLOGICAL JURISPRUDENCE AND THE NEW DEAL COURT

Further evidence indicates that the change in personal jurisdiction wrought by International Shoe resulted from larger currents in jurisprudence. International Shoe occurred less than six years after President Roosevelt’s appointments accounted for a majority on the Supreme Court. When the Supreme Court handed down International Shoe in 1945, all but one member of the court owed his position to FDR. These new Justices not only shared FDR’s political philosophy, but most of them also supported the basic tenets of sociological jurisprudence. Furthermore, these Justices changed many other legal doctrines in the same way they changed the personal jurisdiction doctrine. The similarities are especially evident in the Supreme Court’s due process doctrine in the late 1930s and its Commerce Clause holdings in the early 1940s. These changes likely had the same cause: the rise of sociological jurisprudence—not increasing interstate business.

The Supreme Court in 1945 was strikingly different in its feelings about formal jurisprudence than the Court had been just ten years earlier. While the 1935 Court did have some proponents of sociological jurisprudence, including Benjamin Cardozo, Louis Brandeis, and Harlan Fisk Stone, they were opposed by the Four Horsemen, Justices Van Devanter, Sutherland, Butler, and McReynolds, all hard core formalists. The Four Horsemen all graduated from law school before 1890, when formalism dominated the profession, and never left that conception of the law behind

150 Id.
151 Frank Murphy, sworn in on February 5, 1940, was President Roosevelt’s fifth appointment. See William F. Swindler, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY, 1932-1968 358 (1970).
154 See infra notes 159-63 and accompanying text.
them. President Hoover's appointments, Chief Justice Charles Evans Hughes and Justice Owen Roberts, were more moderate politically, and not as committed to the public/private distinction critical to laissez faire constitutionalism, but remained formalists rather than advocates of sociological jurisprudence.\footnote{\ref{fn:157}}

In contrast, the Supreme Court that handed down International Shoe in 1945 distrusted formalist reasoning and supported the anti-formalism of sociological jurisprudence and legal realism. The 1945 Court was made of a different generation of justices, justices who had been exposed to and had accepted the critique of formal jurisprudence advocated by Pound and others. For men with this mindset, the Pennoyer system would have needed reform whether or not interstate business was increasing. To them, the conceptual reasoning of the Pennoyer system would have appeared unconvincing.

It was no accident that President Roosevelt appointed anti-formalists. Although he was likely more concerned with their political views than their jurisprudential ones, by appointing men who believed that the New Deal was constitutional, he also selected men with a common distaste for the formalism that had frustrated it. Furthermore, FDR did take into account the jurisprudence of his appointees:

After his catastrophic struggle for judicial reform, President Roosevelt, influenced by Attorney General Frank Murphy's reasoning, began to make federal court appointments from universities. Murphy argued that legal interpretation should be entrusted to men who have a philosophy based on history and on a theory of public welfare rather than to those who looked only at the text of the law.\footnote{\ref{fn:158}}

Harlan Fiske Stone, the author of International Shoe, had been elevated from his position as Associate Justice to Chief Justice by Roosevelt in 1941. Although early in his career Justice Stone was identified as an opponent of sociological jurisprudence,\footnote{\ref{fn:159}} he soon thereafter accepted it, writing in 1923: "[I]n declaring law the judge must envisage the social utility of the rule he creates."\footnote{\ref{fn:160}} In a speech on the common law in 1937, Justice Stone claimed that many of the recent failures of the common law were:

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  \item Justice Van Devanter graduated from Cincinnati Law School in 1881. OXFORD COMPANION TO THE SUPREME COURT 894 (Kermit Hall ed., 1992). Justice Butler graduated from Carleton College and passed the bar in 1888. \textit{Id.} at 111. Justice Sutherland studied at the University of Michigan Law School and passed the bar in 1883. \textit{Id.} at 848-49. Justice McReynolds graduated from the University of Virginia in 1884. \textit{Id.} at 542.
  \item Justice Hughes graduated from Columbia Law School, and was admitted to the bar in 1884. \textit{Id.} at 415. Justice Roberts received his law degree from the University of Pennsylvania in 1898. \textit{Id.} at 737.
  \item Legal Orthodoxy, NEW REPUBLIC, June 23, 1917, at 227 (reviewing HARLAN F. STONE, LAW AND ITS ADMINISTRATION (1915)).
  \item WHITE, supra note 155, at 218; Harlan F. Stone, Some Aspects of the Problem of Law Simplification, 23 COLUM. L. REV. 319, 334 (1923).
\end{itemize}
The outgrowths of a legal philosophy which was too little concerned with realities, which thought of law more as an end than as a means to an end, and assigned to the judicial law-making function a superficial and mechanical role, very largely unrelated to the social data to which the law must be attuned if it is to fulfill its purpose. Pursued to its logical end, such a philosophy could lead only to sterility and decay.\footnote{Harlan Fiske Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 19 (1937).}

Justice Stone’s position here sounds precisely like the position of the sociological jurists. In fact, William Swindler wrote that “[s]ince his first coming onto the bench Stone has been at work seeking to extend to constitutional law in general the ‘rule of reason.’”\footnote{SWINDLER, supra note 151, at 125.} G.E. White noted that “[Stone] moved from the conceptivist jurisprudence Holmes had attacked in Lochner v. New York to a position not unlike that of Holmes, and finally to one that went beyond Holmes in the degree of creativity and political compromise it tolerated in courts.”\footnote{WHITE, supra note 155, at 219.}

Some of the men who made up Chief Justice Stone’s court in 1945 were even stronger proponents of sociological jurisprudence than he. Felix Frankfurter was one of its primary academic proponents while a professor at Harvard from 1914 to 1939.\footnote{SUTHERLAND, supra note 81, at 240 (1967).} For the first part of his tenure there he and Pound were friends and allies.\footnote{See LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 58 (1986).} His teaching utilized sociological approaches\footnote{HELEN THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 15 (1960).} and much of his academic work rested on the study of empirical evidence.\footnote{See, e.g., FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927); see also FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).} Frankfurter was a friend of both Louis Brandeis and Oliver Wendell Holmes and greatly admired their jurisprudence.\footnote{THOMAS, supra note 165, at 368-69.} In fact, he wrote five articles for the Harvard Law Review praising Holmes between 1915 and 1935\footnote{Felix Frankfurter, Early Writings of O.W. Holmes Jr., 44 Harv. L. Rev. 717 (1930); Felix Frankfurter, Mr. Justice Holmes, 48 Harv. L. Rev. 1279 (1935); Felix Frankfurter, Mr. Justice Holmes and the Constitution, 41 Harv. L. Rev. 121 (1927); Felix Frankfurter, The Constitutional Opinions of Justice Holmes, 29 Harv. L. Rev. 683 (1915); Felix Frankfurter, Twenty Years of Mr. Justice Holmes Constitutional Opinions, 36 Harv. L. Rev. 909 (1923).} and praised him specifically because he “recalls to us [that] the framers intentionally did not bound [the Constitution] with outlines sharp and contemporary, but flexible and prophetic.”\footnote{Id. at 162.} He also praised him for ensuring that “[f]ederal power over commerce beyond state lines has not been paralyzed by sterile abstractions.”\footnote{Id. at 162.} In a speech given with Learned Hand, Frankfurter said that “[a] judge is [not] the impersonal voice who utters what the past has decreed for the settlement of a present
controversy—something found in dead books or taken out of the sky . . . . The Justices of the Supreme Court are in fact arbiters of social policy."172 When appointed to the Court he was among the first to use balancing tests, a direct example of the desire for more flexible rules by proponents of sociological jurisprudence.173

William O. Douglas went beyond Frankfurter and the anti-formalism of sociological jurisprudence and accepted the more radical critique of legal realism.174 Laura Kalman wrote that “[p]erhaps no realist was more devoted to the integration of jurisprudence with a heretofore unstudied fact situation than William O. Douglas, whose many articles endorsing a ‘functional approach’ to the law of business associations and bankruptcy were replete with condemnations of conceptualism and celebrations of functionalism.”175

Justices Reed, Murphy, and Rutledge are less well known, but their backgrounds and opinions indicate that they were friendly to sociological jurisprudence’s critique of formalism. Justice Rutledge was selected largely on the recommendation of Felix Frankfurter,176 and his jurisprudential views “were essentially pragmatic.”177 Justice Murphy was the man who recommended to President Roosevelt that he make federal court appointments from universities.178 Justice Reed had been responsible for fighting for the constitutionality of the first New Deal as Solicitor General.179

These Justices’ backgrounds indicate their anti-formalism, as does their work on the Court. At the same time that the Supreme Court moved away from the formalism of the Pennoyer system, it was also making similar changes in many other legal doctrines. This was especially true of the Court’s due process doctrine in the 1930s. It seems probable that, because these changes occurred in a variety of different legal doctrines and at a similar time, they had the same cause. This similar cause was the rise of sociological jurisprudence.

The doctrinal change in International Shoe closely paralleled changes in the Court’s substantive due process doctrine. In 1934, in Nebbia v. New York,180 the Supreme Court replaced a formally reasoned set of categorical rules with a flexible standard justified not by abstract concepts, but by the real effect of the doctrine. The paradigm of the formal reasoning and cate-

172 Learned Hand & Felix Frankfurter, How Far is a Judge Free in Rendering a Decision? (CBS radio broadcast, May 14, 1933).
173 See Aleinikoff, supra note 17.
175 KALMAN, supra note 165, at 9.
176 SWINDLER, supra note 151, at 135.
177 FRIEDMAN & ISRAEL, supra note 158, at 1318.
178 Id. at 1316.
179 Id. at 1182-83.
gorical rule was the infamous *Lochner v. New York.* There the court argued that the statute might be unconstitutional because """"[t]he general right to make a contract in relation to his business is part of the liberty of contract protected by the Fourteenth Amendment."""" That is, because the definition of 'liberty' in the Fourteenth Amendment included the 'liberty of contract,' and included it for no reason that could be proved by empirical data, this statute possibly violated that amendment. The opinion continued:

The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. [One of these circumstances,] however, [is the exercise of state police] powers [relating] to the safety, health, morals and general welfare of the public... [Thus the] question necessarily arises: Is this [statute] a fair, reasonable, and appropriate exercise of the [police power?] \(^{182}\)

The validity of the statute, in other words, depended entirely upon the Court's conception of the police power. The Court used means-ends analysis to determine the purpose of the statute, and then held that:

[A] law like the one before us involves neither the safety, the morals, nor the welfare of the public, [and] there is, in our judgement, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health. . . . [Therefore the] act is . . . an illegal interference with the rights of individuals. \(^{183}\)

This formal reasoning can be seen throughout the Court's substantive due process cases, back even to the 1877 term when Justice Field wrote *Pennoyer v. Neff* and *Munn v. Illinois.* \(^{184}\) The Supreme Court altered the formalist due process doctrine in *Nebbia v. New York* \(^{185}\) for many of the same reasons that it altered *Pennoyer* with *International Shoe.* The Court in *Munn,* using the formal jurisprudence of *Pennoyer* and *Lochner,* as well as the same definitions of "liberty" as *Lochner,* argued that liberty of contract only allowed the legislature to regulate private property when it used its police power, and thus could regulate only those businesses "affected with the public interest." \(^{186}\) After *Munn,* therefore, whether a business could be regulated depended on whether it could be described as "affected with the public interest." \(^{187}\) There was no consideration of the actual effects of the regulation, just a discussion of whether it fit the description.

The Court in *Nebbia* rejected this formal system and replaced it with a balancing test that considered the actual effects of the regulation. First, the

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181 198 U.S. 45 (1905).
182 *Id.* at 53.
183 *Id.* at 57-61.
184 94 U.S. 113 (1877).
185 291 U.S. 502 (1934).
186 *Munn,* 94 U.S. at 125 (quoting Lord Chief Justice Hale in *De Portibus Maris,* 1 Harg. Law Tracts 78).
187 *Id.*
court rejected the *Munn* model of the Due Process Clause that was based on categories of activities the legislature could control. Specifically, it rejected the idea that prices could not be regulated in the public interest:

> [I]f, as must be conceded, [an] industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? . . . The due process clause makes no mention of sales or of prices . . . [but] the thought seems nevertheless to have persisted that there is something peculiarly sacro-sanct about the price one may charge for what he makes or sells . . . .

[Instead, it] is clear that there is no closed class or category of businesses affected with the [public interest].

The Court then found a new basis for its due process doctrine: justice and reasonableness. It stated that "[t]he phrase 'affected with a public interest' can, in the nature of things, mean no more than an industry, for adequate reason, is subject to control for the public good." It then set out a flexible standard with which to determine whether a legislative action comported with due process: "[i]f the laws passed are seen to have a reasonable relation to proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ." This change to a balancing test was not simply a change in the rigor with which courts would examine legislative intent, but in what factors they considered. Under *Munn*, the Supreme Court used means-ends analysis to determine the nature of a business and then determined if that business fit within a category that allowed regulation. *Nebbia* replaced the categorical analysis with a means-ends analysis that searched for the actual effects of the legislation.

This evolution corresponds almost exactly to the evolution of personal jurisdiction between *Pennoyer* and *International Shoe*. *International Shoe* replaced a formal rule, based on abstract conceptions, with a balancing test, based on the actual effects of the regulation. This evolution can also be seen in the Court's procedural due process doctrine in the late 1930s.

In *Palko v. Connecticut*, decided in 1937, Justice Cardozo, praised by Harlan Fiske Stone as a preeminent sociological jurist, described the basis for the Court's application of the Due Process Clause to state criminal procedure. The States would have to adopt only those criminal procedures that were "the very essence of a scheme of ordered liberty [and based upon]..."
'principle[s] of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.' These procedures were not to be chosen from some abstract conception of justice, however, but were to be chosen based on how they actually affected the process. For example,

[the right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance [but] [f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also [of] the immunity from compulsory self-incrimination. This too might be lost and justice still be [done.]

The Court used means-ends analysis, not to determine the essential quality of the procedure used, but to consider the effects of that procedure and used those effects as the standard for determining the validity of the statute.

In this context, Justice Black's total incorporation position can be seen to mirror his formalist position in his concurrence in International Shoe. In International Shoe, Justice Black distrusted the "elastic standards" of "fair play, justice, and reasonableness" that the majority used to measure the constitutionality of state court jurisdiction, voicing his preference for a clear formal rule: "[T]he Federal Constitution leaves to each State, without any 'ifs' or 'buts,' a power to . . . open the doors of its courts for it citizens to sue corporations whose agents do business in those states." In Palko, Justice Black rejected, as illegitimate, a balancing test meant to determine what rights are necessary for "fundamental fairness." In an argument analogous to his concurrence in International Shoe, Justice Black instead argued for the formal rule of total incorporation.

A final example of the effect of anti-formalism on Supreme Court doctrine during this period is the Court's Commerce Clause rulings. The scope of the Commerce Clause was determined before the 1930s in a classically formalistic manner. The Court used means-ends analysis to determine the purpose of regulations and that purpose in turn defined the basic nature of a regulation. Once the basic nature of a regulation was determined it was a

193 Palko, 302 U.S. at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
194 Id.
195 Id. at 327.
197 See supra notes 24-28 and accompanying text.
simple matter to determine whether it was in fact a regulation of commerce and valid, or a police regulation and invalid. The classic example is, as discussed above, *United States v. E.C. Knight Co.*,\(^{198}\) where a regulation of a near sugar refining monopoly was seen not as a regulation of commerce, but manufacturing.\(^{199}\)

Just as *International Shoe* replaced the formal jurisprudence of *Pennoyer*, so too did *United States v. Darby*\(^ {200}\) in 1941 and *Wickard v. Filburn*\(^ {201}\) in 1942 replace *E.C. Knight*. Justice Jackson's holding in *Wickard v. Filburn* shows clearly the changes that were occurring throughout the Court's constitutional doctrine:

> The Court's recognition of the relevance of economic effects in the application of [its] Commerce Clause [doctrine] has made the mechanical application of the legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production" nor can considerations of economic effects be foreclosed by calling them "indirect" . . . . [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.\(^ {202}\)

This change reflects exactly the same criticisms of and alterations to the formal jurisprudence seen in the evolution of personal jurisdiction doctrine in *International Shoe*. Reminiscent of Pound's famous criticism of formal jurisprudence, *Mechanical Jurisprudence*,\(^ {203}\) and Justice Douglas' *International Shoe* conference notes, Justice Jackson criticized the "mechanical application of legal formulas"\(^ {204}\) because it ignored important effects of doctrine. He based his new standard on those effects and then replaced the formal direct/indirect test with a flexible standard that depended not on a categorical analysis, but on actual effects. He held that Congress might regulate a matter if it "exerts a substantial economic effect on interstate commerce."\(^ {205}\)

Changes in Due Process and Commerce Clause doctrines, and in many other constitutional doctrines, mirror the changes that occurred in the Court's personal jurisdiction doctrine in *International Shoe*. These changes were connected both temporally and ideologically, strongly indicating that they had similar causes.

The rise of sociological jurisprudence seems to provide that common basis for the changes. While, undoubtedly, the political feelings and policy

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\(^{198}\) 156 U.S. 1 (1895).

\(^{199}\) Id. at 2.

\(^{200}\) 312 U.S. 100 (1941).

\(^{201}\) 317 U.S. 111 (1942).

\(^{202}\) Id. at 123-25.


\(^{204}\) *Wickard*, 317 U.S. at 123.

\(^{205}\) Id. at 126.
beliefs of the justices during this period influenced their decisions, they are unlikely to completely explain these doctrinal changes. Even if these changes indicate a changed political outlook, the theoretical consistency they exhibit offers another possible explanation. This jurisprudential explanation for the changes in doctrine is also strengthened by the fact that a political outlook can manifest itself just as easily in changed formal rules and different conclusions derived from formal reasoning, as it can in a changed system of decision-making. In short, the New Deal justices could have accomplished their political objectives without making the large changes in both the way they designed the doctrinal tests and the way they reasoned within those tests. Thus, the new style of thinking that entered constitutional doctrine beginning in the 1930s seems most likely to have come from factors internal to the judicial process instead of external causes.

CONCLUSION

The changes in personal jurisdiction doctrine wrought by International Shoe did not result directly from increases in interstate business or deficiencies in the Pennoyer framework. Without changes in judicial ideology, the Supreme Court would have responded to corporate expansion just as it had in the past—by refining the formalist Pennoyer scheme. Instead, the justices on the Court in 1945 responded to corporate expansion with International Shoe because sociological jurisprudence defined their view of how the law should work. This ideological explanation for International Shoe is supported by significant evidence from International Shoe itself, from academic literature, and from the broader legal context. Justice Black’s concurrence indicates that the balancing test of International Shoe was not the only reasonable response to corporate expansion. Justice Douglas’s conference notes indicate that in deciding International Shoe, the Supreme Court was concerned less with the reach of the Pennoyer system than with its basis in “mechanical jurisprudence.” Furthermore, in International Shoe the Supreme Court applied the general proposals of the sociological jurists to personal jurisdiction doctrine: the Court focused on the actual effects of decisions, not assumed first principles; it referenced justice and fairness, not abstract concepts of “presence” and “consent”; it used a flexible standard, not a rigid categorical rule; and it encouraged judges to focus on justice in individual cases. Academic commentary on personal jurisdiction doctrine also connects International Shoe and sociological jurisprudence. This criticism originated with academics connected with Roscoe Pound and sociological jurisprudence, reflected the ideology of sociological jurisprudence, and arose soon after the academic community began to accept sociological
jurisprudence. It also prefigured Chief Justice Stone’s arguments in International Shoe; the opinion, in fact, cited academic literature and case law clearly inspired by sociological jurisprudence. Finally, the larger legal context also indicates that jurisprudential change was a necessary condition of International Shoe. Doctrinal changes analogous to those wrought by International Shoe occurred in a variety of constitutional law doctrines and within a decade of International Shoe. These changes were too broad to have been caused solely by increases in interstate business.

These new assumptions about the proper role of the law also explain International Shoe’s timing better than the standard explanation. International Shoe was decided sixty years after the beginnings of corporate expansion, but only six years after President Roosevelt made his fifth appointment to the Supreme Court. The ideological explanation also better accounts for the twenty-five year lapse between widespread acceptance of the fictive nature of the consent theory and the Supreme Court’s response. Pennoyer’s fictions would not have significantly concerned formal jurists, and those judges certainly would have been unwilling to abandon Pennoyer for notions of “fair play and substantial justice.”

While this argument emphasizes ideology, it recognizes that intellectual trends are not created in a vacuum, but are generated, at least in part, by changing environments. Nevertheless, intellectual trends remain important in explaining doctrinal change. When we ignore the contemporary intellectual context and look only at the temporal relationship of society’s demands and doctrinal change, we risk mistaking correlation for causation. By examining ideas, we ensure that we have identified not correlation, but cause.

This Article applies intellectual history to prevent us from mistaking correlation for causation in our explanations of International Shoe. International Shoe’s connection with sociological jurisprudence indicates that the story of International Shoe is more complex than a mere increase in interstate business. Any complete explanation of the causes of International Shoe must account for the ideas of sociological jurisprudence—it had a profound influence on International Shoe and the development of personal jurisdiction doctrine.

This conclusion suggests that the assumption that judges respond directly to the demands of society, that law mirrors society, is too simplistic. The law’s ability to respond to the demands of society is constrained by assumptions about the proper role of the judge. These assumptions not only

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207 See, e.g., CUSHMAN, supra note 155, at 5-6 (demonstrating that neither the court packing plan, nor the election of 1936 caused the constitutional revolution of the New Deal court by “approaching [the changes in constitutional jurisprudence] as a chapter in the history of ideas rather than as an episode in the history of politics”).
profoundly influenced *International Shoe* and the development of personal jurisdiction doctrine, but also profoundly influence the law we create today.