

Personal Jurisdiction — General Jurisdiction — Consent-by-Registration Statutes — International Shoe and Its Progeny — Mallory v. Norfolk Southern Railway Co.

The “springboard for our modern personal jurisdiction jurisprudence,”¹ *International Shoe Co. v. Washington*² was “‘canonical,’ ‘seminal,’ ‘pathmarking,’ and even ‘momentous’”³ — not to mention “transformative.”⁴ *International Shoe* held that a state court’s assertion of personal jurisdiction comports with the Fourteenth Amendment’s Due Process Clause⁵ when the defendant has “minimum contacts” with the forum “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁶ That requirement “ushered in” a new doctrinal framework.⁷ But did *International Shoe*, as Tocqueville said of the French Revolution, “tear open a gulf” between an *ancien régime* and a new order?⁸ Or did it leave the old house intact, using its “materials for the construction” of a new edifice?⁹ Last Term, in *Mallory v. Norfolk Southern Railway Co.*,¹⁰ the latter view narrowly prevailed. The Supreme Court upheld against due process challenge a state consent-by-registration statute, which required that corporations registered to do business in state also consent to general jurisdiction.¹¹ In resolving a split between state high courts,¹² the Court found the issue controlled by *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*,¹³ a pre-*International Shoe* case.

Beyond blessing consent-by-registration statutes, *Mallory* reveals that the Court is divided between two readings of *International Shoe*: whether it dropped a guillotine on the traditional heads of personal jurisdiction or merely added to the *antiqua domus*. The fundamental disagreement underlying these readings explains the *Mallory* opinions’ disparate treatments of old chestnuts from the personal jurisdiction

¹ *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1561 (2017) (Sotomayor, J., concurring in part and dissenting in part).

² 326 U.S. 310 (1945).

³ *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2063 (2023) (Barrett, J., dissenting) (quoting *Ford Motor Co. v. Mont. 8th Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021); *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1779 (2017); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011); *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014)).

⁴ *Mallory*, 143 S. Ct. at 2063 (quoting *BNSF Ry.*, 137 S. Ct. at 1557).

⁵ U.S. CONST. amend. XIV, § 1.

⁶ *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

⁷ *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 903 (2011) (Ginsburg, J., dissenting).

⁸ ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION*, at i (John Bonner trans., New York, Harper & Bros. 1856).

⁹ *Id.*

¹⁰ 143 S. Ct. 2028.

¹¹ *Id.* at 2032, 2037.

¹² Compare *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 547 (Pa. 2021) (striking statute down), with *Cooper Tire & Rubber Co. v. McCall*, 863 S.E.2d 81, 83 (Ga. 2021) (upholding statute).

¹³ 243 U.S. 93 (1917).

canon.¹⁴ And the latter reading’s narrow victory suggests the Court’s greater appetite for traditional answers to unresolved questions.

Robert Mallory worked for Norfolk Southern Railway Co. in Bruester, Ohio, and Roanoke, Virginia, for almost twenty years.¹⁵ As a carman, Mallory sprayed boxcar pipes with asbestos foam, was exposed to asbestos when ripping out train-car interiors, and handled asbestos and other carcinogens in the paint shop.¹⁶ In June 2016, Mallory was diagnosed with colon cancer.¹⁷ Alleging that his exposure to carcinogens while working for Norfolk Southern caused his cancer, Mallory sued Norfolk Southern under the Federal Employers’ Liability Act¹⁸ (FELA) for negligently failing to provide a safe workplace.¹⁹ Mallory resided in Roanoke, Virginia; Norfolk Southern was a corporation incorporated in Virginia with its principal place of business in Norfolk, Virginia; and Mallory’s exposure to asbestos occurred in Virginia and Ohio.²⁰ Nevertheless, Mallory brought his action in Pennsylvania.²¹

Norfolk Southern moved to dismiss for lack of personal jurisdiction.²² It argued that it was not “at home” in Pennsylvania (as necessary for general jurisdiction), that its conduct in Pennsylvania had not given rise to Mallory’s suit (as necessary for specific jurisdiction), and that it had never consented to suit in Pennsylvania.²³ Noting the two thousand miles of track, eleven rail yards, and three locomotive repair shops that Norfolk Southern operated in Pennsylvania, Mallory countered that it was required to register as a foreign corporation there.²⁴ Pennsylvania law treated that registration as consent for Pennsylvania courts to exercise general personal jurisdiction over Norfolk Southern.²⁵

The trial court granted Norfolk Southern’s motion to dismiss.²⁶ It found no specific jurisdiction in Pennsylvania because the suit concerned Norfolk Southern’s conduct in Ohio and Virginia.²⁷ The trial court reasoned that a state could exercise general jurisdiction over a nonconsenting corporation *only* where it was incorporated or maintained its principal place of business; Norfolk Southern did neither in

¹⁴ *E.g.*, *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Burnham v. Superior Ct.*, 495 U.S. 604 (1990).

¹⁵ Complaint ¶¶ 9–11, *Mallory v. Norfolk S. Ry. Co.*, No. 1709001961, (Pa. Ct. C.P. Sept. 18, 2017), 2017 WL 10398613.

¹⁶ *Id.* ¶¶ 9–11.

¹⁷ *Id.* ¶ 13; *Mallory*, 143 S. Ct. at 2032.

¹⁸ 45 U.S.C. §§ 51–60. FELA “creates a workers’ compensation scheme permitting railroad employees to recover damages for their employers’ negligence.” *Mallory*, 143 S. Ct. at 2032.

¹⁹ *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 551 (Pa. 2021).

²⁰ *Id.*

²¹ *Id.* Mallory lived in Pennsylvania for a time after leaving Norfolk Southern and before returning to Virginia. *Mallory*, 143 S. Ct. at 2032.

²² *Mallory*, 266 A.3d at 551.

²³ *Id.*

²⁴ *Mallory*, 143 S. Ct. at 2033; *see also* 15 PA. CONS. STAT. § 411(a) (2023).

²⁵ *See* 42 PA. CONS. STAT. § 5301(a)(2)(i), (a)(3)(i), (b) (2023).

²⁶ *Mallory*, 266 A.3d at 552.

²⁷ *Id.*

Pennsylvania.²⁸ Finally, the consent-by-registration statute presented a “Hobson’s choice” between consenting to general jurisdiction or not doing business in Pennsylvania, violating Norfolk Southern’s due process rights.²⁹ Mallory timely appealed.³⁰

The Supreme Court of Pennsylvania affirmed.³¹ Writing for the court, Chief Justice Baer³² held Pennsylvania’s consent-by-registration statutory scheme unconstitutional.³³ The court noted that Pennsylvania’s scheme was unique in expressly conditioning foreign corporate registration on general jurisdiction.³⁴ To assert general jurisdiction over Norfolk Southern would offend both federalism and the general jurisdiction framework furnished by *Daimler AG v. Bauman*³⁵ and *International Shoe*.³⁶ The court rejected on-point cases, pointing to language that discounted reliance on cases predating *International Shoe*.³⁷ Acknowledging that personal jurisdiction can be waived and that Pennsylvania’s scheme provides notice that corporate registration constitutes consent to general jurisdiction, the court nevertheless found Norfolk Southern’s consent involuntary.³⁸ And if every state had a regime like Pennsylvania’s, “every national corporation [would be] subject to the general jurisdiction of every state,” an unacceptable result.³⁹

The Supreme Court reversed and remanded.⁴⁰ Writing for the Court in some sections and for a group of four Justices in others, Justice Gorsuch⁴¹ held that Pennsylvania’s consent-by-registration statutory scheme did not violate due process.⁴² The majority reasoned that *Pennsylvania Fire*’s analogous facts controlled.⁴³ In that case, an Arizona company (Gold Issue Mining) had sued a Pennsylvania

²⁸ *Id.* at 552–53.

²⁹ *Id.* at 554.

³⁰ *Id.* at 552, 555. The Pennsylvania high court has exclusive appellate jurisdiction over cases holding state statutes unconstitutional. See 42 PA. CONS. STAT. § 722(7) (2023).

³¹ *Mallory*, 266 A.3d at 571.

³² Chief Justice Baer was joined by Justices Saylor, Todd, Donohue, Dougherty, Wecht, and Mundy. Justice Mundy also briefly concurred. *Id.* at 571–72 (Mundy, J., concurring).

³³ *Id.* at 567–68 (majority opinion).

³⁴ *Id.* at 564 & n.17 (citing Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1366 (2015)).

³⁵ 571 U.S. 117 (2014); see *id.* at 136–39 (holding that corporations are subject to general jurisdiction in states where they are incorporated or maintain their principal place of business).

³⁶ *Mallory*, 266 A.3d at 566–67.

³⁷ See *id.* at 567 (citing, inter alia, *Daimler*, 571 U.S. at 138 n.18; *Shaffer v. Heitner*, 433 U.S. 186, 212 & n.39 (1977)).

³⁸ See *id.* at 568–69 (explaining that Norfolk Southern’s consent was “compelled submission . . . by legislative command,” *id.* at 569).

³⁹ *Id.* at 570.

⁴⁰ *Mallory*, 143 S. Ct. at 2037.

⁴¹ Justice Gorsuch was joined by Justices Thomas, Alito, Sotomayor, and Jackson in Parts I and III-B. Accordingly, these sections commanded a majority of the Court. In Parts II, III-A, and IV, Justice Gorsuch wrote for a four-Justice group that excluded Justice Alito.

⁴² *Mallory*, 143 S. Ct. at 2032, 2037. The Court also remanded the case to consider whether the scheme violates the dormant commerce clause doctrine. *Id.* at 2033 n.3.

⁴³ *Id.* at 2037.

company (Pennsylvania Fire) over a Colorado insurance contract in Missouri state court.⁴⁴ Pennsylvania Fire had long complied with Missouri’s consent-by-registration regime that required foreign insurance companies to accept service in Missouri as a condition of doing business there.⁴⁵ In a unanimous opinion, the Court upheld that scheme, reasoning that due process does not bar a state from conditioning corporate privileges on consent to general jurisdiction.⁴⁶ Here, because Norfolk Southern had complied with Pennsylvania’s consent-by-registration scheme, *Pennsylvania Fire* dictated the outcome in favor of Mallory.⁴⁷

Writing for himself and three other Justices, Justice Gorsuch traced how consent-by-registration statutes fit into the history of personal jurisdiction.⁴⁸ Justice Gorsuch then elaborated on the group’s view that *International Shoe* had not overruled *Pennsylvania Fire*. To him, the “two precedents sit comfortably side by side.”⁴⁹ The minimum-contacts test created in *International Shoe* did not supersede the traditional regime of consent, domicile, and service-based jurisdiction. Instead, *International Shoe* announced “an additional road” to jurisdiction over *nonconsenting* defendants without meddling with *Pennsylvania Fire*’s rule for *consenting* defendants.⁵⁰ In general, *International Shoe* expanded rather than contracted the jurisdictional reach of state courts.⁵¹

Justice Gorsuch further explained that Pennsylvania’s assertion of jurisdiction over Norfolk Southern did not offend traditional notions of fair play and substantial justice anyway. Because of its “extensive operations” and advertisements in Pennsylvania, Norfolk Southern could reasonably anticipate being haled into court there.⁵² Federalism concerns could not save Norfolk Southern because it had legitimately consented to suit given that, as a sophisticated party, it “appreciated the jurisdictional consequences” of its actions.⁵³

⁴⁴ *Id.* at 2035–36 (opinion of Gorsuch, J.) (citing *Gold Issue Mining & Milling Co. v. Pa. Fire Ins. Co.*, 184 S.W. 999, 1000 (Mo. 1916), *aff’d*, 243 U.S. 93 (1917)).

⁴⁵ *Id.* at 2036 (citing *Pennsylvania Fire*, 184 S.W. at 1003).

⁴⁶ *Id.* (citing *Pennsylvania Fire*, 243 U.S. at 95).

⁴⁷ *Id.* at 2037–38 (majority opinion). The majority clarified that no prior case had “implicitly overruled” *Pennsylvania Fire*. *Id.* at 2038 (quoting *Mallory v. Norfolk S. Ry. Co.*, 266 A.3d 542, 559, 567 (Pa. 2021)). The Court further instructed lower courts to “leav[e] to this Court the prerogative of overruling its own decisions.” *Id.* (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

⁴⁸ *See id.* at 2033–35 (opinion of Gorsuch, J.) (citing, inter alia, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 539, at 450–51 (Boston, Hilliard, Gray & Co. 1834)).

⁴⁹ *Id.* at 2038.

⁵⁰ *Id.* at 2039 (emphasis omitted).

⁵¹ *See id.* at 2040.

⁵² *Id.* at 2043 (quoting *Mallory*, 266 A.3d at 560).

⁵³ *Id.* And, as Justice Gorsuch noted, personal jurisdiction doctrine is rife with “technicalities” that can constitute consent to a court’s jurisdiction. *Id.* at 2044 (citing, inter alia, Brief of Professor Stephen E. Sachs in Support of Neither Party at 10, *Mallory*, 143 S. Ct. 2028 (No. 21-1168)).

Justice Jackson concurred.⁵⁴ She stressed that the personal jurisdiction requirement “is an individual, waivable right.”⁵⁵ In her view, Norfolk Southern voluntarily waived its personal jurisdiction rights; Pennsylvania did not compel it to submit to general jurisdiction.⁵⁶ And because criminal defendants can waive individual rights, it would be anomalous to put personal jurisdiction “on a pedestal.”⁵⁷

Justice Alito concurred in part and concurred in the judgment.⁵⁸ He agreed that *Pennsylvania Fire* controlled the case and that Pennsylvania’s assertion of jurisdiction over Norfolk Southern here did not violate its right to due process under the *International Shoe* standard.⁵⁹ But Justice Alito expressed concern about the Due Process Clause becoming a “refuge” for principles such as interstate federalism that “would otherwise be homeless.”⁶⁰ Instead, under the dormant commerce clause doctrine, there was a “good prospect” that Pennsylvania’s scheme intolerably discriminated against and burdened interstate commerce.⁶¹

Justice Barrett dissented.⁶² In her view, the majority effectively overruled the Supreme Court’s “traditional contacts-based approach to jurisdiction.”⁶³ She would have held Pennsylvania’s consent-by-registration statute unconstitutional because, under the modern personal jurisdiction framework, corporations are subject to general jurisdiction only in states where they are incorporated or maintain their principal place of business.⁶⁴ Justice Barrett also doubted that registering to do business in Pennsylvania constituted genuine consent to jurisdiction.⁶⁵ Further, given the Due Process Clause’s interstate federalism interest, Pennsylvania’s statute infringed on other states’ prerogatives to adjudicate cases involving their own citizens and laws.⁶⁶ Overall, the implied consent on which Pennsylvania’s statute was based was one of the legal fictions that “*International Shoe* swept away.”⁶⁷ To the dissenters,

⁵⁴ *Id.* at 2045 (Jackson, J., concurring).

⁵⁵ *Id.* (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

⁵⁶ *Id.* at 2046.

⁵⁷ *Id.* (citing *Brady v. United States*, 397 U.S. 742, 748 (1970) (rights to trial and against self-incrimination); *Barker v. Wingo*, 407 U.S. 514, 529, 536 (1972) (right to speedy trial)).

⁵⁸ *Id.* at 2047 (Alito, J., concurring in part and concurring in the judgment). Justice Alito would have vacated the judgment below and remanded. *Id.*

⁵⁹ *Id.* at 2047–49.

⁶⁰ *Id.* at 2050. See generally *id.* at 2049–51.

⁶¹ *Id.* at 2053; see also *id.* n.7 (citing John F. Preis, *The Dormant Commerce Clause as a Limit on Personal Jurisdiction*, 102 IOWA L. REV. 121, 138–40 (2016)).

⁶² *Id.* at 2055 (Barrett, J., dissenting). Justice Barrett was joined by Chief Justice Roberts and Justices Kagan and Kavanaugh.

⁶³ *Id.*

⁶⁴ *Id.* at 2056.

⁶⁵ *Id.* at 2057–58.

⁶⁶ *Id.* at 2058 (citing *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1856) (noting “those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others”)).

⁶⁷ *Id.* at 2062 (citing, inter alia, *Ford Motor Co. v. Mont. 8th Jud. Dist. Ct.*, 141 S. Ct. 1017, 1037–38 (2021) (Gorsuch, J., concurring in the judgment)).

the Court ignored its “transformative decision” there, with which *Pennsylvania Fire* is inconsistent.⁶⁸ Regardless, *Pennsylvania Fire* likely would not control because it concerned *express* consent to jurisdiction while Pennsylvania’s law illegitimately *infers* it.⁶⁹

Mallory blesses state statutes that condition foreign corporations’ privileges of transacting in-state business on their consenting to general jurisdiction. But *Mallory* also reveals entrenched theoretical disagreement between two camps of Justices concerning the effect of *International Shoe* and its progeny on personal jurisdiction.⁷⁰ To one camp, *International Shoe* perfected a revolution that wholly “replace[d]” all that came before.⁷¹ To the other, which prevailed in *Mallory*, *International Shoe*’s revolutionary character is much overstated.⁷² This gulf not only explains the fractured opinions in *Mallory* about whether *Pennsylvania Fire* controlled, but it also colors the opinions’ disparate treatments of old chestnuts from the personal jurisdiction canon, such as *Shaffer v. Heitner*⁷³ and *Burnham v. Superior Court*.⁷⁴ And *Mallory*’s competing stories about *International Shoe* suggest fault lines for fissures yet to come: after *Mallory*, cases from the pre-*International Shoe ancien régime* appear freed from the doctrinal dustbin. Those cases may offer traditional answers to unresolved personal jurisdiction questions.

To Justice Gorsuch’s camp, *International Shoe* built a new edifice on an old house. “[W]hat really happened in *International Shoe*” is that the Supreme Court authorized “additional road[s]” to jurisdiction over corporations based on their activities in the forum state, even if they were not domiciled, had not consented to suit, and had not been served there.⁷⁵ As *International Shoe* was “expanding” personal jurisdiction in specified circumstances, it was not “contracting” it anywhere else.⁷⁶ As Justice Gorsuch noted, even *Shaffer* — which abandoned a traditional basis of jurisdiction (a subtype of quasi in rem) for its inconsistency with *International Shoe*⁷⁷ — acknowledged that *International Shoe*

⁶⁸ *Id.* at 2063 (quoting *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017)).

⁶⁹ *Id.* at 2064.

⁷⁰ For a critical view, see Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1253 (2017) (casting doubt on *International Shoe*’s reasoning); *Ford Motor Co.*, 141 S. Ct. at 1038–39 (Gorsuch, J., concurring) (wondering if *International Shoe* should endure); *id.* at 1032 (Alito, J., concurring in the judgment) (agreeing “there are grounds for questioning . . . *International Shoe*”).

⁷¹ *Mallory*, 143 S. Ct. at 2062 (Barrett, J., dissenting) (quoting *Burnham v. Superior Ct.*, 495 U.S. 604, 618 (1990) (plurality opinion)).

⁷² See *id.* at 2038 (opinion of Gorsuch, J.) (“The two precedents sit comfortably side by side.”). But see *Ford Motor Co.*, 141 S. Ct. at 1037 (Gorsuch, J., concurring in the judgment) (“In many ways, *International Shoe* sought to start over.”); *id.* at 1037–38 (“In place of nearly everything that had come before, the Court sought to build a new test . . .”).

⁷³ 433 U.S. 186 (1977).

⁷⁴ 495 U.S. 604 (1990).

⁷⁵ *Mallory*, 143 S. Ct. at 2039 (opinion of Gorsuch, J.).

⁷⁶ *Id.* at 2040 (citing *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014) (noting that *International Shoe* “unleashed a rapid expansion of tribunals’ ability to hear claims . . .”).

⁷⁷ See *Shaffer*, 433 U.S. at 212.

amplified state courts' personal jurisdiction over nonresident defendants.⁷⁸ Thus, on Justice Gorsuch's read, *International Shoe* announced a "novel" form of personal jurisdiction that did not supplant any "traditional ones" such as consent by registration.⁷⁹ In other words, it overruled nothing. And the progeny of *International Shoe* that developed the at-home test for general jurisdiction left consent alone, addressing only foreign corporations that "ha[d] not consented" to jurisdiction.⁸⁰

But to Justice Barrett's camp, all of personal jurisdiction consists of a series of footnotes to *International Shoe*.⁸¹ Having "settle[d] long-continued and hard-fought contentions,"⁸² *International Shoe* and its progeny have inspired close readings, triggering the criticism that the Court reads their words like statutes.⁸³ The *Mallory* dissent possibly went further in viewing *International Shoe* as a personal jurisdiction constitution that "swept away" all that came before.⁸⁴ *International Shoe* and its progeny thus constitute a fundamental charter for personal jurisdiction with which even the traditional grounds of personal jurisdiction, such as personal service, must comply.⁸⁵ No wonder that the dissent discounted *Pennsylvania Fire*, since *International Shoe* "overruled" prior cases "inconsistent" with itself, and cases predating it "should not attract heavy reliance today."⁸⁶ To the dissenters, personal jurisdiction begins and ends with *International Shoe* and its progeny.⁸⁷

Shaffer is a tricky case for both camps, but especially for Justice Gorsuch's. In *Shaffer*, the Court held that assertions of jurisdiction in rem (over property) needed to meet *International Shoe*'s minimum-contacts standard, which had previously applied only to assertions of

⁷⁸ *Mallory*, 143 S. Ct. at 2040 (opinion of Gorsuch, J.) (citing *Shaffer*, 433 U.S. at 204).

⁷⁹ *Id.* (quoting *Burnham*, 495 U.S. at 619 (plurality opinion)).

⁸⁰ *Id.* at 2039 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011) (emphasis added)).

⁸¹ Cf. ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 39 (David Ray Griffin & Donald W. Sherburne eds., Free Press 1978) (1929) ("[T]he European philosophical tradition . . . consists of a series of footnotes to Plato.").

⁸² *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950)) (referring to the Administrative Procedure Act).

⁸³ See *Ford Motor Co. v. Mont.* 8th Jud. Dist., 141 S. Ct. 1017, 1026 (2019) (distinguishing between suits that "arise out of" and those that "relate to" a defendant's contacts with a forum); *id.* at 1033 (Alito, J., concurring in the judgment) (accusing the Court of "pars[ing]" *International Shoe* as if it were the "language of a statute" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979))); *id.* at 1034 (Gorsuch, J., concurring in the judgment) (same).

⁸⁴ *Mallory*, 143 S. Ct. at 2062 (Barrett, J., dissenting) (citing, inter alia, *Ford Motor Co.*, 141 S. Ct. at 1037–38 (Gorsuch, J., concurring in the judgment)).

⁸⁵ See *id.* at 2059.

⁸⁶ *Id.* at 2063 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 n.39 (1977); *Daimler AG v. Bauman*, 571 U.S. 117, 138 n.18 (2014)).

⁸⁷ Cf. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 903 (2009) (Scalia, J., dissenting) ("Turn it over, and turn it over, for all is therein." (quoting 8 THE BABYLONIAN TALMUD: SEDER NEZIKIN, TRACTATE ABOTH 76–77 (Isidore Epstein ed. & trans., 1935))).

jurisdiction in personam (over the person).⁸⁸ In particular, the Court held that quasi in rem actions would not satisfy the minimum-contacts test when the underlying property was unrelated to the plaintiff’s claim (sometimes called “Type II” actions).⁸⁹ The quasi in rem action was a traditional basis of personal jurisdiction, but it did not survive *International Shoe*.⁹⁰ The Court concluded that “state-court [personal] jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny” and, in a footnote, purported to overrule prior cases that were inconsistent with those standards.⁹¹

On its face, *Shaffer*’s pronouncement seemed to undercut Justice Gorsuch’s theory in *Mallory*. Justice Gorsuch responded to this language by focusing on *Shaffer*’s comment that *International Shoe* “increase[d] the ability of the state courts to obtain personal jurisdiction over nonresident defendants.”⁹² To him, *Pennsylvania Fire* is not inconsistent with *International Shoe*, and to conclude that *International Shoe* “discarded every traditional method for securing personal jurisdiction” is to misread *Shaffer*.⁹³ For her part, Justice Barrett seized on that language, insisting that the Court had “previously abandoned even ‘ancient’ bases of jurisdiction” that were inconsistent with *International Shoe*.⁹⁴

But *Burnham* is much more challenging for Justice Barrett’s side of the gulf. In *Burnham*, the plaintiff physically served her estranged husband with divorce papers in California, invoking jurisdiction based on personal service (or “tag”).⁹⁵ In a fractured yet unanimous decision, the Supreme Court upheld the California court’s jurisdiction.⁹⁶

To Justice Gorsuch’s camp, *Burnham* stood for the proposition that the minimum-contacts test supplemented, rather than supplanted, the foregoing regime of personal jurisdiction. Justice Scalia’s plurality opinion upheld tag jurisdiction “because it is one of the continuing traditions of our legal system”⁹⁷ and therefore “unquestionably”⁹⁸ satisfies the demands of due process. To Justice Gorsuch, then, *International Shoe* “provided a ‘novel’ way to secure personal jurisdiction that did nothing

⁸⁸ *Shaffer*, 433 U.S. at 205, 212.

⁸⁹ *Id.* at 208–09; see also *id.* at 199 n.17 (referring to the “two types” of quasi in rem jurisdiction: where the property is related (Type I) or unrelated (Type II) to the plaintiff’s cause of action).

⁹⁰ *Id.* at 211 (noting the “long history of jurisdiction based solely on . . . property in a State”).

⁹¹ *Id.* at 212 n.39.

⁹² *Mallory*, 143 S. Ct. at 2040 (opinion of Gorsuch, J.) (quoting *Shaffer*, 433 U.S. at 204).

⁹³ *Id.* at 2041 (citing *Burnham v. Superior Ct.*, 495 U.S. 604, 620–22 (1990) (opinion of Scalia, J.)).

⁹⁴ *Id.* at 2063 (Barrett, J., dissenting) (quoting *Shaffer*, 433 U.S. at 212).

⁹⁵ *Burnham*, 495 U.S. at 608 (plurality opinion).

⁹⁶ *Id.* at 619 (plurality opinion); *id.* at 628 (White, J., concurring in part and concurring in the judgment); *id.* at 639 (Brennan, J., concurring in the judgment); *id.* at 640 (Stevens, J., concurring in the judgment).

⁹⁷ *Id.* at 619 (plurality opinion).

⁹⁸ *Id.* at 622 (opinion of Scalia, J.).

to displace other ‘traditional ones,’”⁹⁹ so *Mallory*’s blessing of traditional consent-by-registration statutes here is the same as *Burnham*’s blessing of tag jurisdiction there.¹⁰⁰

Justice Barrett would take *Burnham*’s reasoning more literally and read its holding more narrowly. *Burnham* had described tag jurisdiction as “firmly approved by tradition” and “still favored” among the states.¹⁰¹ Where Justice Gorsuch read those descriptions as atmospheric make-weights,¹⁰² Justice Barrett read them as filtering the case’s analysis through an *International Shoe* sieve, creating a full-blown two-pronged test for determining if traditional bases of jurisdiction comply with traditional notions of fair play and substantial justice.¹⁰³ Tag jurisdiction met both prongs, so the *Burnham* plurality held it comported with due process, but Pennsylvania’s consent-by-registration statute met neither.¹⁰⁴ On this view, *Burnham* followed *Shaffer* in perfecting the personal jurisdiction revolution, sparing only those rare forms of older jurisdiction that somehow comport with *International Shoe*.

The narrow victory of Justice Gorsuch’s view suggests that the Supreme Court may look to cases from the pre-*International Shoe ancien régime* to answer unresolved personal jurisdiction questions. If a straightforward application of *Pennsylvania Fire* can control *Mallory*’s outcome, then the Court might dig up other fossils in future cases. One such area concerns the limits imposed by the Fifth Amendment¹⁰⁵ on the territorial jurisdiction of the federal courts. The Court has never answered whether the Fifth Amendment personal jurisdiction test requires that defendants have “minimum contacts” with the United States in exactly the same way as the Fourteenth Amendment requires that they do with state fora.¹⁰⁶ This question arises when federal statutes create extraterritorial causes of action and authorize personal jurisdiction without reference to the long-arm statutes of state courts.¹⁰⁷ The courts of appeals have tended to gut the applicability of these federal statutes by limiting the territorial reach of federal courts, and so far the Court has declined to hear those cases.¹⁰⁸

⁹⁹ *Mallory*, 143 S. Ct. at 2040 (opinion of Gorsuch, J.) (quoting *Burnham*, 495 U.S. at 619 (plurality opinion)).

¹⁰⁰ *See id.* (“What held true there must hold true here.”).

¹⁰¹ *Id.* at 2059 (Barrett, J., dissenting) (quoting *Burnham*, 495 U.S. at 622 (opinion of Scalia, J.)).

¹⁰² *Id.* at 2041 (opinion of Gorsuch, J.) (citing *Burnham*, 495 U.S. at 620–22 (opinion of Scalia, J.)).

¹⁰³ *Id.* at 2059 (Barrett, J., dissenting) (citing *Burnham*, 495 U.S. at 622 (opinion of Scalia, J.)).

¹⁰⁴ *Id.* at 2059–61.

¹⁰⁵ U.S. CONST. amend. V.

¹⁰⁶ *See Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1783–84 (2017).

¹⁰⁷ *See, e.g., Death on the High Seas Act*, 46 U.S.C. §§ 30301–30308; *Anti-Terrorism Act of 1987*, 22 U.S.C. §§ 5201–5203.

¹⁰⁸ *See, e.g., Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 335 (2d Cir. 2016), *cert. denied sub nom. Sokolow v. Palestine Liberation Org.*, 138 S. Ct. 1438 (2018); *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (en banc), *cert. denied*, 143 S. Ct. 1021 (2023).

But if the Court takes up this question after *Mallory*, its answer might differ. Now that Justice Gorsuch’s view has prevailed in *Mallory*, the Court might find that the pre-*International Shoe* cases *Picquet v. Swan*¹⁰⁹ and *Toland v. Sprague*¹¹⁰ control. As one scholar and a handful of federal judges have noted, those cases suggest that the personal jurisdiction of the federal courts runs as far as Congress would have it go.¹¹¹ That holding would sever the twin Due Process Clauses from each other and let Americans injured abroad hale into federal court even those tortfeasors lacking minimum contacts with the United States.¹¹² Then the salient question would be whether Congress authorized worldwide personal jurisdiction in a given statute, subject to a clear statement rule.¹¹³

The immediate implication of *Mallory*’s holding is significant: states do not violate due process by conditioning corporate registration on consent to general jurisdiction.¹¹⁴ And the possible return of the dormant commerce clause to personal jurisdiction doctrine is noteworthy.¹¹⁵ Yet *Mallory*’s most salient contribution is its clarification of how a slim majority of the Court understands *International Shoe*: as providing grist for the “construction” of a supplemental doctrinal edifice rather than “tearing open a gulf” between traditional notions of jurisdiction and a new regime.¹¹⁶ The opinions’ competing readings of canonical personal jurisdiction cases reveal this fundamental disagreement on the Court. And by upholding *Pennsylvania Fire* and the legitimacy of traditional bases of jurisdiction, the Court signals a possible return to cases from the *ancien régime* when answering unresolved personal jurisdiction questions in the future.

Relying on *Mallory*’s Fourteenth Amendment holding, the Second Circuit recently held that the Promoting Security and Justice for Victims of Terrorism Act’s implied-consent provisions violate the Fifth Amendment. See *Waldman v. Palestine Liberation Org.*, No. 15-3135-cv, 2023 WL 5808859 (2d Cir. Sept. 8, 2023) (per curiam); *Fuld v. Palestine Liberation Org.*, No. 22-76-cv, 2023 WL 5808926 (2d Cir. Sept. 8, 2023).

¹⁰⁹ 19 F. Cas. 609 (Story, Circuit J., C.C.D. Mass. 1828) (No. 11,134); see *id.* at 613 (“[A] subject of England, or France, or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts.”).

¹¹⁰ 37 U.S. (12 Pet.) 300 (1838); see *id.* at 328 (describing *Picquet* as “having great force”).

¹¹¹ See generally Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703 (2020) (arguing that the Fifth Amendment did not cabin the territorial reach of the federal courts); see also *Douglass*, 46 F.4th at 249 (Elrod, J., dissenting); *id.* at 284 (Oldham, J., dissenting); *Lewis v. Mutond*, 62 F.4th 587, 598 (D.C. Cir. 2023) (Rao, J., concurring).

¹¹² See Recent Case, *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226 (5th Cir. 2022) (*en banc*), 136 HARV. L. REV. 2176, 2183 (2023).

¹¹³ See *id.* at 2181–82 (discussing that clear statement rule); Sachs, *supra* note 111, at 1744–46 (arguing that the federal rules authorize worldwide service and thus personal jurisdiction).

¹¹⁴ Whether a state’s corporate-registration statute requires consent to general jurisdiction will probably be, in the first instance, a statutory interpretation question for state courts.

¹¹⁵ See Stephen E. Sachs, “Dormant Commerce” and Corporate Powers, REASON: VOLOKH CONSPIRACY (June 28, 2023, 5:56 PM), <https://reason.com/volokh/2023/06/28/dormant-commerce-and-corporate-powers> [<https://perma.cc/Z4MB-3JPS>].

¹¹⁶ TOCQUEVILLE, *supra* note 8, at i.