

MAKING SENSE OF SOVEREIGNTY: A HISTORICAL UNDERSTANDING OF PERSONAL JURISDICTION FROM *PENNOYER* TO *NICASTRO*

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Abstract—How can we make sense of sovereignty’s role in Supreme Court personal jurisdiction doctrine? The Supreme Court has once again raised this question with its plurality decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, which endorsed a personal jurisdiction doctrine based on sovereign authority of forum states. Scholarly reaction to *Nicastro* has largely been negative, as scholars argue both that, descriptively, sovereignty considerations have long not played a role in personal jurisdiction, and that, normatively, such considerations ought not play a role in personal jurisdiction. This Note concerns only the former contention, that sovereignty’s role in personal jurisdiction largely faded after the Supreme Court’s landmark decision in *International Shoe Co. v. Washington*. Contrary to recent scholarly opinion, the Court’s personal jurisdiction doctrine has, from *Pennoyer* to *Nicastro*, always embraced a robust consideration of states’ sovereign authority. Indeed, even *International Shoe*, when considered in appropriate historical context, shows the Court’s continued, albeit narrowed, respect for sovereign authority. Thus, this Note argues that in order to clear up recent scholarly confusion concerning sovereignty’s role in personal jurisdiction, we must first understand that *Nicastro* represents a continuation, rather than an unexpected revival, of sovereignty considerations bearing on personal jurisdiction determinations.

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INTRODUCTION

With its recent decision in *J. McIntyre Machinery, Ltd. v. Nicastro*, a plurality of the Supreme Court set afire the legal community with broad proclamations of a sovereign-authority-based¹ approach to personal jurisdiction.² The criticisms of that decision and its focus on sovereignty range from impracticability³ to incomprehensibility.⁴ The main thrust of these arguments is that sovereignty has no place in personal jurisdiction, and that the Court said as much in its landmark *International Shoe Co. v. Washington* decision.⁵ Accordingly, critics of Justice Kennedy’s plurality

¹ State sovereignty refers generally to “[t]he right of a state to self-government” or “the supreme authority exercised by each state.” *State Sovereignty*, BLACK’S LAW DICTIONARY (10th ed. 2014).

² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) (stating that “whether a judicial judgment is lawful depends on whether the sovereign has authority to render it”).

³ Henry S. Noyes, *The Persistent Problem of Purposeful Availment*, 45 CONN. L. REV. 41, 66, 68–70 (2012).

⁴ Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1263 (2011); see also Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 760 (2012).

⁵ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); see also Mona A. Lee, Comment, *Burger King’s Bifurcated Test for Personal Jurisdiction: The Reasonableness Inquiry Impedes Judicial Economy and Threatens a Defendant’s Due Process Rights*, 66 TEMP. L. REV. 945, 963 (1993).

in *Nicastro* cite it as an attempt to assert antiquated notions of sovereignty that died out with *International Shoe*.⁶

The *International Shoe* Court's statement that personal jurisdiction should not be divorced from "traditional notions of fair play and substantial justice"⁷ is not a rejection of sovereign-authority concerns in personal jurisdiction doctrine. This Note will take up a descriptive exploration of sovereignty concerns in the Supreme Court's doctrine from *Pennoyer v. Neff*⁸ to *Nicastro*,⁹ and argue that the Court has never abandoned its focus on sovereign authority in the context of personal jurisdiction.

The Court's sovereign-authority-based approach to personal jurisdiction began in *Pennoyer*, where the Court asserted that the Due Process Clause imposed strict territorial limits on the exercise of jurisdiction.¹⁰ That marked the most extreme sovereignty rationale the Court has yet to adopt in its personal jurisdiction decisions.¹¹ However, in the years to come, the Court created exceptions to that absolute doctrine in order to allow states to exercise authority over out-of-state defendants who had availed themselves of the benefits and protections of the state.¹² This is an oft-ignored development in the doctrine, but is important for understanding it as a whole.

The most radical shift in the doctrine comes in *International Shoe*, where the Court liberalized the sovereignty considerations in personal jurisdiction, such that a defendant's minimum contacts with a state give that state the sovereign authority to exercise jurisdiction over that defendant, even when no service of process is given to a representative agent in the state.¹³ Reading *Milliken v. Meyer*,¹⁴ which first established the notion of fair play and substantial justice as a relevant consideration in

⁶ See, e.g., Borchers, *supra* note 4, at 1263 ("[*Nicastro*'s] plurality opinion was nothing short of a bull-headed attempt to ground personal jurisdiction in a sovereignty theory."); Wendy Collins Perdue, *What's "Sovereignty" Got To Do With It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 734, 739–40 (2012).

⁷ 326 U.S. at 316 (quoting *Milliken*, 311 U.S. at 463).

⁸ 95 U.S. 714 (1877).

⁹ 131 S. Ct. 2780 (2011).

¹⁰ 95 U.S. at 722, 733–34.

¹¹ Cf. Nicholas R. Spampata, Note, *King Pennoyer Dethroned: A Policy-Analysis-Influenced Study of the Limits of Pennoyer v. Neff in the Jurisdictional Environment of the Internet*, 85 CORNELL L. REV. 1742, 1746–47 (2000) (describing *Pennoyer* as placing "the minimum floor too high" such that "the federal courts were forced to stretch *Pennoyer*'s sovereignty principle" (citations omitted)).

¹² See *infra* note 38.

¹³ 326 U.S. 310, 316–17 (1945).

¹⁴ 311 U.S. 457, 463 (1940) (citing *McDonald v. Mabee*, 243 U.S. 90 (1917)).

personal jurisdiction,¹⁵ and *International Shoe* together makes clear that even *International Shoe*'s liberal minimum contacts test is still fundamentally a test of whether or not a forum state has the sovereign authority to exercise personal jurisdiction over a defendant.

The Court fought with the boundaries of the minimum contacts test for decades after *International Shoe*, culminating most recently with its decision in *Nicaastro*. After the plurality in *Nicaastro* made broad assertions of sovereignty considerations when considering whether the state could exercise jurisdiction over the defendant,¹⁶ the legal community rained down much criticism.¹⁷ This Note argues that this criticism is misplaced because the history of the Supreme Court's personal jurisdiction doctrine has always focused on sovereign authority.

As a general matter, at least descriptively, the Court is not "bull-headed"¹⁸ or incoherent¹⁹ in applying its personal jurisdiction doctrine. Primarily, it is important to understand the descriptive coherence of the Court's personal jurisdiction doctrine because the exercise of personal jurisdiction is inherently concerned with the legitimate exercise of judicial power over parties to litigation.²⁰ Thus, if the Supreme Court's personal jurisdiction doctrine is inconsistent or incoherent, it calls into question the legitimacy of many judicial proceedings and exercises of power. In fact, the Supreme Court's personal jurisdiction doctrine is descriptively coherent, thus helping to alleviate concerns about the legitimacy of judicial exercises of personal jurisdiction.

Part I details the background of the Supreme Court's personal jurisdiction doctrine and its sovereignty concerns, ending with a discussion of the Court's recent decision in *Nicaastro*. Part II describes some of the criticisms of the Court's sovereignty-based approach to personal jurisdiction in *Nicaastro*, especially those asserting the incoherence of the Court's doctrine throughout history. Part III provides an overarching historical account of the Court's personal jurisdiction doctrine, synthesizing

¹⁵ While both the phrases "fair play" and "substantial justice" appear separately in a previous Supreme Court personal jurisdiction decision, *McDonald*, 243 U.S. at 91–92, the Court did not explicitly consider "traditional notions of fair play and substantial justice . . . [as] implicit in due process" until its decision in *Milliken*, 311 U.S. at 463 (emphasis added). See *infra* note 41.

¹⁶ 131 S. Ct. 2780, 2789 (2011) (plurality opinion) ("[W]hether a judicial judgment is lawful depends on whether the sovereign has authority to render it.").

¹⁷ See Borchers, *supra* note 4, at 1263; Noyes, *supra* note 3, at 66, 68–70; Perdue, *supra* note 6, at 734, 739–40; Stravitz, *supra* note 4, at 760.

¹⁸ Borchers, *supra* note 4, at 1263.

¹⁹ Perdue, *supra* note 6, at 740.

²⁰ See *Nicaastro*, 131 S. Ct. at 2787–88 (plurality opinion) (first citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); and then citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

its decisions from *Pennoyer* to *Nicaastro*, and dispelling the notion that the Court has applied inconsistent rationales for its personal jurisdiction doctrine. Rather, Part III argues, personal jurisdiction has always concerned itself with the sovereign authority of forum states. Further, Part III addresses the scholarly criticisms of the Court's use of sovereignty notions in *Nicaastro* and other cases, arguing that sovereignty is in fact the correct way in which to think about personal jurisdiction, at least descriptively.

I. BACKGROUND

First, this Part explores the introduction of due process into personal jurisdiction and the severe territorial limitations the Court laid down in *Pennoyer*. Second, it traces the exceptions the Court made to that doctrine leading up to *Milliken* and *International Shoe*. Third, this Part explores the progeny of *International Shoe*, and showcases the vein of sovereignty considerations that runs through these cases. Finally, this Part describes in detail the Court's recent *Nicaastro* decision.

A. Sovereignty's Early Beginnings in Personal Jurisdiction

The story of sovereignty in the Supreme Court's personal jurisdiction doctrine begins with its much-disparaged decision in *Pennoyer v. Neff*.²¹ In that case, the Court interpreted the Due Process Clause "as a limitation on the jurisdiction of state courts to enter judgments affecting the rights or interests of nonresident defendants."²² This decision "cemented the physical power doctrine in this country," such that "[w]ithout physical presence, a state was powerless over a civil defendant."²³

Pennoyer began with an attorney, Mitchell, filing an action against a former client, Neff, for less than \$300 in fees.²⁴ Because Neff was not a resident of Oregon, but had property in Oregon, Mitchell utilized an Oregon statute authorizing "constructive service" via publication.²⁵ Because Neff did not appear, default judgment was granted for Mitchell

²¹ 95 U.S. 714 (1877); see, e.g., Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 313 (1956) ("The *Pennoyer* rule is on the way out, having reached the end of its brief usefulness."); Spampata, *supra* note 11, at 1757 (stating that "[t]he primary criticisms of the *Pennoyer* theory is that it reaches 'wrong' results and that it is based on flawed concepts that should have no place in jurisdictional law" (citations omitted)); Adrian M. Tocklin, *Pennoyer v. Neff: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75, 76 (1997) (stating that *Pennoyer* "obliterated generations of law on the right of a sovereign to control property within its territory").

²² Barbara Surtees Goto, *International Shoe Gets the Boot: Burnham v. Superior Court Resurrects the Physical Power Theory*, 24 LOY. L.A. L. REV. 851, 856 (1991).

²³ *Id.*

²⁴ 95 U.S. at 719.

²⁵ *Id.* at 719–20.

and Neff's property was sold at a sheriff's sale.²⁶ Neff later returned to Oregon after Pennoyer had come into possession of the land and challenged the validity of the Oregon state court's judgment, arguing it improperly asserted jurisdiction over him.²⁷

Upholding the lower court's finding that Mitchell's service was invalid, the Court started with the general premise that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."²⁸ Elaborating further on its theory of personal jurisdiction, the Court laid down two principles: first, that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and second, "that no State can exercise direct jurisdiction and authority over persons or property without its territory."²⁹

Thus, the Court stated that in personam jurisdiction required either that the defendant was served while present in the forum, or the defendant voluntarily appeared in the forum.³⁰ The Court further stated that in rem jurisdiction could be attained for out-of-state persons, so long as they had property within the forum state that could be attached at the time of suit.³¹

The Court held that the judgment in the Oregon state court against Neff could not be justified.³² There was no in personam jurisdiction because Neff was not served in state and did not voluntarily appear in the state courts.³³ Further, there was no in rem jurisdiction because Neff's property was not attached at the outset of the litigation.³⁴

This understanding of *Pennoyer* is essential to understanding the Court's overall framework of sovereignty concerns in its personal jurisdiction doctrine. Going forward, the Court certainly did not adhere to its strict focus on territorial limitations when considering personal jurisdiction limitations more generally.³⁵ However, if nothing else, *Pennoyer* represents the Supreme Court's first assertion that due process plays a meaningful limiting role in personal jurisdiction.³⁶

²⁶ *Id.*

²⁷ *Id.* at 721–22.

²⁸ *Id.* at 720.

²⁹ *Id.* at 722.

³⁰ *Id.* at 724–25.

³¹ *Id.* at 723 (stating that "[e]very State owes protection to its own citizens" and thus has "authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens").

³² *Id.* at 734.

³³ *Id.* at 733–34.

³⁴ *Id.* at 734.

³⁵ See *infra* Sections I.B–D.

³⁶ 95 U.S. at 733; see also *Perdue*, *supra* note 6, at 731.

B. Milliken, *International Shoe*, and *McGee*: A Revitalized Sovereignty-Based Approach to Personal Jurisdiction

The sovereignty-based proclamations of *Pennoyer* reigned supreme in personal jurisdiction doctrine for over half a century, though not without complaint.³⁷ After *Pennoyer*, the Court slowly carved out exceptions to its “transient” commitment,³⁸ but did not waiver in its commitment to an authority-based approach to personal jurisdiction. Namely, the Court carved out some exceptions to the absolute territorial limits for corporate out-of-state defendants who had gained the benefits of a state but were not residents of the state. In those circumstances, the Court held that the states had sovereign authority in a functional sense. For example, in *Milliken v. Meyer*, the Court considered whether personal service of process to an in-state resident while that resident was out of the forum state was sufficient for an assertion of personal jurisdiction.³⁹ The Court held that it was, stating that the “the traditional notions of fair play and substantial justice . . . implicit in due process [were] satisfied” because “the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state.”⁴⁰

Milliken is incredibly important in hindsight, because it is the first appearance of the phrase “traditional notions of fair play and substantial justice,”⁴¹ which would go on to become famous in *International Shoe*.⁴² However, the literature on personal jurisdiction neglects *Milliken*.⁴³

³⁷ See Ehrenzweig, *supra* note 21, at 290–91.

³⁸ See *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 588–89 (1914); *St. Louis Sw. Ry. Co. of Tex. v. Alexander*, 227 U.S. 218, 228 (1913); *Commercial Mut. Accident Co. v. Davis*, 213 U.S. 245, 256–57 (1909); *Pa. Lumbermen’s Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 418–19 (1905); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 610 (1899); *St. Clair v. Cox*, 106 U.S. 350, 355, 360 (1882) (denying jurisdiction but stating that because a corporation’s “officers and agents constitute all that is visible of its existence[] and they may be authorized to act for it without as well as within the state,” there is “no sound reason why, to the extent of their agency, they should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions”).

³⁹ 311 U.S. 457, 459 (1940).

⁴⁰ *Id.* at 463.

⁴¹ *Id.* (citing *McDonald v. Mabee*, 243 U.S. 90 (1917)). The Court in *McDonald* used the phrases “fair play” and “substantial justice,” but not in the same formulation that later appeared in *Milliken*. *McDonald*, 243 U.S. at 91–92.

⁴² 326 U.S. 310, 316 (1945) (quoting *Milliken*, 311 U.S. at 463).

⁴³ See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990) (making no mention of *Milliken*); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5 (1989) (making no mention of *Milliken*); Joshua M. Wesneski, Note, *Finding Federalism in Waiver of Personal Jurisdiction: Federalism and Individual Rights in the Second Circuit*, 99 CORNELL L. REV. 225, 228 n.11, 228 n.17 (2013) (mentioning *Milliken* only via its citations to *International Shoe* and to a law review article).

Because of that, it is worth considering the context in which the phrase arose. The Court in *Milliken* found that the exercise of jurisdiction did not offend traditional notions of fair play and substantial justice *because* the state was properly exercising its sovereign authority over the defendant.⁴⁴ The negative implication of that statement is that if the state exercised jurisdiction over the defendant without proper authority to do so, it would offend traditional notions of fair play and substantial justice. Those traditional notions of fair play and substantial justice may help to clarify what exactly the *International Shoe* Court had in mind.

Next came the Court's landmark decision *International Shoe Co. v. Washington*.⁴⁵ International Shoe Company, a manufacturer and seller of footwear, was sued in the Washington state courts.⁴⁶ International Shoe had no office and made no contracts in Washington, but had roughly a dozen salesmen who resided there, took orders there, and then had shoes shipped into Washington.⁴⁷ After being subjected to jurisdiction in the state courts of Washington, International Shoe argued that "its activities within the state were not sufficient to manifest its 'presence' there" and thus the Washington state courts could not assert jurisdiction over it.⁴⁸

Citing its decision in *Milliken*, the Court stated that due process in the context of personal jurisdiction required only that, when the defendant was not present in the forum state, the defendant have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁴⁹ The Court asserted that since corporations do not have "presence" in a state in the same way that an individual may be physically present in a state, "the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it."⁵⁰ Presence of a corporation in a state may be evidenced by activities that are "continuous and systematic . . . [and] give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given."⁵¹

Additionally, the Court noted that single or isolated actions in a state by a corporation do not automatically "confer upon the state authority to

⁴⁴ 311 U.S. at 463–64.

⁴⁵ 326 U.S. 310.

⁴⁶ *Id.* at 312–13.

⁴⁷ *Id.* at 313–14.

⁴⁸ *Id.* at 315.

⁴⁹ *Id.* at 316 (quoting *Milliken*, 311 U.S. at 463).

⁵⁰ *Id.*

⁵¹ *Id.* at 317 (citing, *inter alia*, *St. Clair v. Cox*, 106 U.S. 350, 355 (1882)).

enforce it,” though depending on the nature of such actions they may.⁵² The Court held that Washington’s exercise of jurisdiction was “reasonable and just, according to our traditional conception of fair play and substantial justice,” because International Shoe’s activities in Washington were “systematic and continuous,” were such that it “received the benefits and protection of the laws of the state,” and the suit arose out of those activities.⁵³ That is, in light of *Milliken*, the Court’s reasoning was that Washington could properly exercise jurisdiction, consistent with traditional notions of fair play and substantial justice, because International Shoe’s contacts with Washington gave the state the sovereign authority necessary to exercise jurisdiction.

The Court in *McGee v. International Life Insurance Co.* fully embraced the liberal minimum contacts standard it laid down twelve years prior in *International Shoe*.⁵⁴ McGee had won a judgment against International Life Insurance Company in California, though International Life Insurance Company was located in Texas.⁵⁵ International Life Insurance Company received service via mail at its Texas office.⁵⁶ The Court upheld California’s exercise of jurisdiction over the Texas company because it was “sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.”⁵⁷

McGee is the Court’s most liberal, and surprisingly convenience-focused, application of the minimum contacts test. In support of its holding, the Court cited the facts that the contract between McGee and International Life Insurance Company was administered within California, McGee sent insurance premiums from California to the insurance company, and that McGee was a resident of California.⁵⁸ The Court focused primarily on the potential inconvenience to California citizens and California’s interest “in providing effective means of redress for its residents.”⁵⁹ In *International Shoe*, the Court stated that when determining whether minimum contacts had been satisfied, “[a]n ‘estimate of the inconveniences’ which would result to the corporation from a trial away from its ‘home’ or principal

⁵² *Id.* at 318.

⁵³ *Id.* at 320.

⁵⁴ *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957).

⁵⁵ *Id.* at 221.

⁵⁶ *Id.*

⁵⁷ *Id.* at 223.

⁵⁸ *Id.*

⁵⁹ *Id.*

place of business is relevant.”⁶⁰ That is, the *International Shoe* Court discussed inconvenience only in the context of a forum state exercising personal jurisdiction over a *defendant* who would be pulled away from its home or place of business and forced to litigate in an inconvenient forum.⁶¹ Though that is the only mention of inconvenience considerations in *International Shoe*,⁶² the Court in *McGee* found potential inconveniences to *plaintiffs* to be persuasive enough to sustain minimum contacts with only a single contractual contact in a state.⁶³ Thus, the Court implicitly held that a single contractual relationship with the resident of the state, in conjunction with the state’s interest in ensuring a convenient forum in which its residents may seek redress for wrongs, gives rise to the authority necessary to subject a defendant to jurisdiction.⁶⁴

C. Refocusing on Sovereignty

As evidenced by the preceding discussion of the Court’s decisions in *Milliken*, *International Shoe*, and *McGee*, the Supreme Court abandoned the strict territorial limitations on personal jurisdiction, but retained a more relaxed rationale for personal jurisdiction limitations still rooted in the sovereign authority of potential forum states.⁶⁵ The Court quickly followed up those decisions with an explicit acknowledgment of that rationale in *Hanson v. Denckla*,⁶⁶ and expounded on its reasons for relaxing the sovereignty limits to personal jurisdiction imposed on states.⁶⁷

1. *Hanson v. Denckla*.—Just a year after applying the minimum contacts test in a most liberal fashion in *McGee*, the Court elaborated on its underlying view of personal jurisdiction and the minimum contacts test.⁶⁸ The Court noted that “[a]s technological progress . . . increased the flow of commerce between States,” the personal jurisdiction standard evolved from the “rigid” *Pennoyer* rule to the more “flexible” minimum contacts standard from *International Shoe*.⁶⁹ However, the Court insisted that the restrictions on state courts’ exercise of personal jurisdiction “are more than

⁶⁰ 326 U.S. 310, 317 (1945) (quoting *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *McGee*, 355 U.S. at 223.

⁶⁴ *Id.* at 223–24.

⁶⁵ *See id.*; *Int’l Shoe*, 326 U.S. at 316; *Milliken v. Meyer*, 311 U.S. 457, 462–63 (1940).

⁶⁶ 357 U.S. 235, 250–51 (1958).

⁶⁷ *Id.*

⁶⁸ *Id.* at 251.

⁶⁹ *Id.* at 250–51.

a guarantee of immunity from inconvenient or distant litigation”; rather, “[t]hey are a consequence of territorial limitations on the power of the respective States.”⁷⁰ That is, the Court reasserted that the underlying rationale for its personal jurisdiction doctrine is a focus on the sovereign authority of the courts attempting to exercise their jurisdiction in any particular case.

2. *World-Wide Volkswagen, Bauxites, and Burger King*.—The Court’s continued focus on sovereignty in its personal jurisdiction doctrine is apparent in *World-Wide Volkswagen Corp. v. Woodson*.⁷¹ In that case, the plaintiffs purchased a vehicle from a Volkswagen dealership in New York, and later left New York to move across the country in the car.⁷² As they drove through Oklahoma, the plaintiffs were struck by another vehicle, resulting in a fire that severely injured several of the family members.⁷³ The plaintiffs brought a products liability suit in Oklahoma against World-Wide Volkswagen, the regional distributor of their vehicle.⁷⁴

Seemingly aware that the nature of its personal jurisdiction doctrine was in flux since the relaxation of territorial limitations in *Milliken* and *International Shoe*,⁷⁵ the Court attempted to clarify the doctrine by stating what it thought to be the two functions of the minimum contacts test: (1) to “protect[] the defendant against the burdens of litigating in a distant or inconvenient forum,” and (2) “to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”⁷⁶ Elaborating further on that second point, the Court stated that a focus on sovereign authority in the exercise of personal jurisdiction was necessary to “remain faithful to the principles of interstate federalism embodied in the Constitution,” because the “Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.”⁷⁷

The Court’s sweeping statements about the necessity of sovereignty considerations in personal jurisdiction make its later decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee* particularly

⁷⁰ *Id.* at 251.

⁷¹ 444 U.S. 286 (1980).

⁷² *Id.* at 288.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See *supra* Section I.B.

⁷⁶ *World-Wide Volkswagen*, 444 U.S. at 292.

⁷⁷ *Id.* at 293–94.

striking.⁷⁸ There, the Court stated that “[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”⁷⁹

Recognizing that two years prior in *World-Wide Volkswagen* it had reasserted the importance of sovereignty in the personal jurisdiction sphere, the *Bauxites* Court provided a short explanation of its new statement on individual liberty. The Court asserted that “[t]he restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause.”⁸⁰ That is, the Court did not abandon notions of sovereign authority, but rather expounded on how it should be considered: sovereign authority of the forum is required for personal jurisdiction over a potential defendant,⁸¹ and the determination of whether there is sovereign authority—such that exercising jurisdiction would not offend traditional notions of fair play and substantial justice—depends on the extent to which that potential defendant has put itself in contact with the forum state.⁸²

In *Burger King Corp. v. Rudzewicz*, the Court refined the minimum contacts test so that the exercise of jurisdiction over a defendant is proper if the defendant “purposefully avail[ed]” itself of “the benefits and protections” of the forum’s laws.⁸³ After making that determination, the Court held that it might then look to secondary considerations and determine whether the exercise of jurisdiction comported with “fair play and substantial justice.”⁸⁴ Those secondary considerations include any burden to the defendant, the state’s interest in having the suit litigated in its courts, any inconvenience to the plaintiff, adjudicatory efficiency from the court’s perspective, and the “shared interest of the several States in furthering fundamental substantive social policies.”⁸⁵

In *Burnham v. Superior Court*, the Court began its discussion of personal jurisdiction by asserting once again that it had “long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State’s authority.”⁸⁶ Unlike many cases since

⁷⁸ 456 U.S. 694 (1982).

⁷⁹ *Id.* at 702.

⁸⁰ *Id.* at 702 n.10.

⁸¹ *World-Wide Volkswagen*, 444 U.S. at 292–93.

⁸² *Bauxites*, 456 U.S. at 702 n.10.

⁸³ 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

⁸⁴ *Id.* at 476 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

⁸⁵ *Id.* at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

⁸⁶ 495 U.S. 604, 609 (1990).

Milliken and *International Shoe, Burnham* concerned a defendant who was physically present in the state at the time of service.⁸⁷ Upholding the exercise of jurisdiction, the Court stated, “jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”⁸⁸ These cases show that, though the Court’s personal jurisdiction analysis certainly evolved, the core of sovereign authority was ever present in its analyses.

D. Nicastro: The Capstone of Sovereignty in Contemporary Personal Jurisdiction Doctrine

Thus far in the historical journey through personal jurisdiction decisions in the Supreme Court, one thing is evident: sovereignty never left. This Section now analyzes a key contemporary Supreme Court personal jurisdiction case, *Nicastro*.⁸⁹ Because this plurality decision gave rise to a serious amount of criticism,⁹⁰ an in-depth analysis of the differing opinions in *Nicastro* is necessary.

Nicastro arose from a New Jersey state court products liability suit.⁹¹ The plaintiff in New Jersey was using a metal-shearing machine made by the defendant in England, and seriously injured his hand in the process.⁹² The question before the court was whether the New Jersey state courts could properly exercise personal jurisdiction over J. McIntyre Machinery, even though the company had not shipped its goods to or marketed in New Jersey.⁹³

The defendant manufactured the machine in England, and then a third-party company sold the defendant’s machines throughout the United States.⁹⁴ While the defendant’s employees attended conventions in the United States, along with the third-party distribution company, to market its machines, those conventions were not in New Jersey.⁹⁵ At most, four, but possibly only one, J. McIntyre machine ended up in New Jersey.⁹⁶ Further, “J. McIntyre held both United States and European patents on its

⁸⁷ *Id.* at 610.

⁸⁸ *Id.* at 619.

⁸⁹ 131 S. Ct. 2780 (2011).

⁹⁰ *See infra* Part II.

⁹¹ 131 S. Ct. at 2786 (plurality opinion).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

recycling technology,” and the distributor was given guidance by the defendant on how to advertise and sell the machines.⁹⁷

The New Jersey Supreme Court held that its state courts could properly assert personal jurisdiction over J. McIntyre, consistent with the Due Process Clause, since

the injury occurred in New Jersey; because petitioner knew or reasonably should have known “that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states”; and because petitioner failed to “take some reasonable step to prevent the distribution of its products in [New Jersey].”⁹⁸

The United States Supreme Court began with a general discussion of personal jurisdiction.⁹⁹ The Court reiterated the American personal jurisdiction maxim that a court may only properly exercise personal jurisdiction over a defendant when that defendant has the requisite amount of contacts with the relevant sovereign, “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹⁰⁰ The amount of defendant contacts required to assert jurisdiction, though impossible to quantify uniformly across all contexts, is the amount of contacts required for the defendant to gain the “benefits and protections” of the state’s laws.¹⁰¹ However, the Court noted, “[f]reeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”¹⁰² That is, the plurality forcefully embraced the notion that “fairness,” as it has been used by the Court in its personal jurisdiction doctrine, is inextricably linked to the sovereign authority of the court attempting to assert personal jurisdiction.

The Court stated such purposeful availment could occur in a number of different ways.¹⁰³ For example, a defendant could consent to the state’s jurisdiction, be served within the state’s territorial borders at the time of the suit, reside in the state, be incorporated in the state, or have its primary business presence in the state.¹⁰⁴ In each of those circumstances, the plurality wrote, the defendant’s conduct has properly implied the intent to derive some benefit from the state and, so, the intent to be subject to the

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010)).

⁹⁹ *Id.* at 2787.

¹⁰⁰ *Id.* (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹⁰¹ *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

jurisdiction of the state in adjudicatory proceedings.¹⁰⁵ That is, when a defendant has activities that are connected to a state, “it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant’s activities touching on the State.”¹⁰⁶

The plurality then argued that *Asahi Metal Industry Co. v. Superior Court*¹⁰⁷ was an incorrect application of the Court’s personal jurisdiction doctrine because it applied the Court’s personal jurisdiction doctrine such that general fairness considerations—rather than fairness considerations grounded in sovereign authority—could justify the exercise of personal jurisdiction over a defendant.¹⁰⁸ For example, Justice Brennan’s concurrence argued that personal jurisdiction may be properly exercised when a defendant merely puts something in the “stream of commerce” and *knows* that it is being marketed in the forum state, because the defendant cannot be surprised that a lawsuit was filed there and thus the fairness considerations of personal jurisdiction are met.¹⁰⁹

Justice Brennan was wrong, the *Nicastro* plurality argued, because personal jurisdiction, which is concerned with the legitimate wielding of judicial power, requires more than general fairness.¹¹⁰ Rather, the plurality contended that authority must be the basis of a proper assertion of personal jurisdiction because, otherwise, a defendant that has not purposefully availed itself of the benefits of the forum state’s laws may be subjected to its jurisdiction—even though the forum state lacks any sovereign authorial basis for exercising that power.¹¹¹ If a court’s personal jurisdiction determination was based merely on general fairness considerations, “a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant’s interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.”¹¹² This, the plurality explained, is not the case.¹¹³ Instead, the

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2787–88.

¹⁰⁷ 480 U.S. 102 (1987). *Asahi* concerned “whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes ‘minimum contacts’ between the defendant and the forum State such that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” *Id.* at 105 (citations omitted).

¹⁰⁸ *Nicastro*, 131 S. Ct. at 2788 (plurality opinion).

¹⁰⁹ *Id.* (quoting *Asahi*, 480 U.S. at 117 (Brennan, J., concurring in part and concurring in the judgment)).

¹¹⁰ *Id.* at 2789.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980)).

plurality agreed with Justice O'Connor's plurality opinion in *Asahi*, which stated, "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State."¹¹⁴

The plurality next reasoned that two principles are implicit in its authority-based view of jurisdiction.¹¹⁵ First, courts' personal jurisdiction determinations must be made on an individual basis, such that in each circumstance a court must determine whether the particular sovereign has sufficient sovereign authority over the particular defendant to justify the court exercising personal jurisdiction.¹¹⁶ That is, courts must first ask if "a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."¹¹⁷ Second, the plurality maintained that, though a foreign defendant may be subject to the jurisdiction of the United States in general, that does not necessarily mean that it is subject to the jurisdiction of individual states.¹¹⁸

The plurality next moved on to consider the personal jurisdiction doctrine as applied to the case at hand.¹¹⁹ The plurality stated that there was insufficient proof that J. McIntyre had purposefully directed its actions at New Jersey.¹²⁰ Though J. McIntyre may have intended to deal in the United States, as evidenced by its relationship with a third-party distributor in the United States and attendance at trade fairs in the United States, those actions were insufficient to establish that J. McIntyre had purposefully availed itself of the benefits and protections of New Jersey's laws.¹²¹ That is, J. McIntyre's conduct did not properly imply an intent to benefit from the protection of New Jersey's laws, such that New Jersey had the authority to exercise personal jurisdiction over J. McIntyre consistent with the Due Process Clause and traditional notions of fair play and substantial justice.¹²²

¹¹⁴ *Id.* at 2788 (quoting *Asahi*, 480 U.S. at 112).

¹¹⁵ *Id.* at 2789.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2790.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

II. RECENT CRITICISM OF SOVEREIGNTY IN PERSONAL JURISDICTION

In the wake of *Nicastro*, there has been a slew of criticism of the Supreme Court's contemporary personal jurisdiction doctrine.¹²³ In general, the criticism centers on the relationship of those decisions to the landmark decision in *International Shoe*. This Section will detail some normative criticisms of the Court's doctrine and the confusion they add to the discussion, while Section III.D will respond to those criticisms.

For example, consider Patrick Borchers's criticism of the contemporary Supreme Court.¹²⁴ Borchers criticizes *Nicastro* as "a bull-headed attempt to ground personal jurisdiction in a sovereignty theory."¹²⁵ He argues that the plurality completely missed the most important statement of *International Shoe*, i.e., for a defendant to be subject to personal jurisdiction "he [must] have certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹²⁶

This misunderstanding on the part of the Court is on full display, Borchers argues, when they criticize courts, including the *Asahi* Court, for using general notions of fairness, rather than fairness considerations guided by a sovereignty inquiry, to make personal jurisdiction decisions.¹²⁷ Borchers and Perdue both respond to this concern by asserting that is in fact what the *International Shoe* Court intended: a shift away from sovereignty considerations to general fairness considerations.¹²⁸ Indeed, as Justice Black stated, "it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere."¹²⁹ Thus, by completely rewriting the history of the Court's personal jurisdiction doctrine and invoking a decision based on sovereignty, it would be more

¹²³ See, e.g., Borchers, *supra* note 4, at 1263; Noyes, *supra* note 3, at 41 (arguing that for the second time in 25 years "personal jurisdiction has perplexed the U.S. Supreme Court"); John T. Parry, *Introduction: Due Process, Borders, and the Qualities Of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 841 (2012) (describing the Court's decision in *Nicastro* as "compound[ing] the uncertainty" in its contemporary personal jurisdiction doctrine); Perdue, *supra* note 6, at 729 (stating that "[s]omething about personal jurisdiction seems to bring out the worst in the Supreme Court").

¹²⁴ Borchers, *supra* note 4.

¹²⁵ *Id.* at 1263.

¹²⁶ *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹²⁷ *Id.* at 1263–64 (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion)).

¹²⁸ *Id.* at 1263; Perdue, *supra* note 6, at 735.

¹²⁹ *Int'l Shoe*, 326 U.S. at 323 (1945) (opinion of Black, J.).

legitimate, Borchers argues, to simply overrule *International Shoe* and its successors.¹³⁰

Though particularly illustrative of the kinds of criticisms lobbed at the Supreme Court in recent years, Borchers's article is not alone. For example, Perdue argues that the move away from *Pennoyer*'s "state-based analytic approach" was most importantly a "shift that put the defendant rather than the state at the center of the jurisdictional inquiry," and contrasts that against Justice Kennedy's "strong embrace of the language of sovereignty in *Nicastro*."¹³¹ Further, John Parry argues that the Court's decision in *Nicastro* "compounds the uncertainty" in the Supreme Court's personal jurisdiction doctrine.¹³² These criticisms largely focus on the idea that the Court cannot decide once and for all what the central principle at play in personal jurisdiction is, and what role, if any, sovereignty should play. In the coming Part, this Note argues that sovereignty has always had a central role in the Supreme Court's jurisdiction doctrine, which is clear once we look to the historical development of the doctrine.

III. MAKING SENSE OF SOVEREIGNTY

As a normative matter, it is unclear whether concerns about state sovereignty and authority should drive the Supreme Court's view of personal jurisdiction limits. The resounding answer from the legal community, both recently and in years past, seems to be that it should not.¹³³ However, in searching for a way to understand the normative justifications, or lack thereof, for the Court's insistence on focusing its personal jurisdiction doctrine on sovereignty considerations, it seems that the legal community has added more confusion to the *descriptive* account of the Supreme Court's personal jurisdiction doctrine than is necessary. When considered in light of the Supreme Court's historical approach to personal jurisdiction, it is not at all surprising that sovereignty continues to play a role in personal jurisdiction. Understanding this historical context is essential to parsing the allegedly confounding approach to personal jurisdiction the Court has taken in recent years.

¹³⁰ Borchers, *supra* note 4, at 1264.

¹³¹ Perdue, *supra* note 6, at 734, 740, 742 (stating that "[o]f the three [*Nicastro*] opinions, Justice Kennedy's puts the most apparent reliance on sovereignty and federalism, but it uses them least persuasively").

¹³² Parry, *supra* note 123, at 841.

¹³³ See Stewart Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C. L. REV. 429, 452-53 (1981); Perdue, *supra* note 6, at 743; Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1120-33 (1981) (using a historical analysis of due process to argue that sovereignty and federalism concerns are not properly part of the Due Process Clause limitations on personal jurisdiction).

A. *From Pennoyer to Milliken: The Carving Out of Territorial Limits*

Understanding the shift from *Pennoyer* to *Milliken* is essential to making sense of the role of sovereignty in the Supreme Court's personal jurisdiction doctrine. In the years since the *Pennoyer* decision, the Court has carved out some exceptions for corporate defendants to the principle "that no State can exercise direct jurisdiction and authority over persons or property without its territory."¹³⁴ For example, in *St. Clair v. Cox*, the Court stated that a foreign corporation could be subjected to jurisdiction when an agent representing the corporation was served in Michigan.¹³⁵ The Court further stated that jurisdiction was proper when such corporation had gained the protections afforded by the state's laws, was able to conduct its business within the state effectively, and was able to itself make use of the state's court system.¹³⁶ In such situations, it would only be fair to ensure that corporations could be brought into court for liabilities obtained within the state.¹³⁷

In *Connecticut Mutual Life Insurance Co. v. Spratley*, the Court stated three requirements for exercising jurisdiction over an out-of-state corporation.¹³⁸ First, the Court required that the out-of-state corporation conducted business within the borders of the state where the corporation's agent was served to commence the suit.¹³⁹ Second, the Court required that the out-of-state corporation's business within the borders of the state "was transacted or managed by some agent or officer appointed by or representing the corporation in such State."¹⁴⁰ Third, the Court required that the state or locality had subjected the out-of-state corporate defendant to a law that rendered its ability to do business conditional, either explicitly or implicitly, on the corporation being eligible for suit in the state.¹⁴¹

Further, the Court has also rejected the notion that a state may not properly exercise personal jurisdiction over "corporations carrying on business within the State which is wholly of an interstate commerce character."¹⁴² Thus, in the time between *Pennoyer* and *Milliken*, the Court recognized that the absolute territorial limits imposed by *Pennoyer* would

¹³⁴ *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

¹³⁵ 106 U.S. 350, 359 (1882).

¹³⁶ *Id.* at 355.

¹³⁷ *Id.*

¹³⁸ 172 U.S. 602, 618 (1899) (citing *United States v. Am. Bell Tel. Co.*, 29 F. 17, 35 (S.D. Ohio 1886)).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 588 (1914).

not accurately capture the amount of authority a state may have over an out-of-state corporation. That is, the Court held that a corporation might be considered functionally within a state so long as it is doing business within that state.

Given the Court's development of corporate exceptions to the *Pennoyer* doctrine and its characterization of sovereign authority to exercise jurisdiction as comporting with the requirements of fair play and substantial justice in *Milliken*,¹⁴³ it is not shocking that the Court in *International Shoe* held that certain "minimum contacts" would give a state proper authority to exercise personal jurisdiction over an out-of-state corporation.¹⁴⁴ Indeed, the Court's statement that "the state of [a corporation's] origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it,"¹⁴⁵ is very consistent with its *Pennoyer*-era decisions concerning corporate exceptions to its absolute territorial limits doctrine. The real shift in personal jurisdiction doctrine was not that "traditional notions of fair play and substantial justice"¹⁴⁶ supplanted *Pennoyer*'s reign; rather, the shift was that the Court now allowed jurisdiction to be exercised over out-of-state corporations "even though no consent to be sued or authorization to an agent to accept service of process has been given."¹⁴⁷ That is, the Court broadened the criteria laid down in *Connecticut Mutual Life Insurance* for when a state may properly exercise personal jurisdiction over a corporate defendant, but it left unaltered its holding in *Milliken* that authority over a defendant allows a state to assert personal jurisdiction only if it does not offend "traditional notions of fair play and substantial justice."¹⁴⁸

B. From International Shoe to Nicaastro: Figuring Out the Boundaries of Minimum Contacts

International Shoe's expansion of corporate exceptions to the personal jurisdiction doctrine is consistent with the Court's cumulative recognition that most business is now conducted nationwide by corporations that are foreign to most states in which they actually conduct business.¹⁴⁹ Thus,

¹⁴³ See *supra* Section I.B.

¹⁴⁴ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁴⁷ *Id.* at 317 (citing, *inter alia*, *St. Clair v. Cox*, 106 U.S. 350, 355 (1882)); see also *Redish*, *supra* note 133, at 1116–17.

¹⁴⁸ *Milliken*, 311 U.S. at 463.

¹⁴⁹ See, e.g., *Int'l Shoe*, 326 U.S. at 317–18; see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (stating that "it is an inescapable fact of modern commercial life that a substantial

“some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the State where the business was done, out of which the dispute arises.”¹⁵⁰ That is, while the Court is still concerned with whether a state has authority over a defendant such that it comports with notions of fair play and justice, the way in which that authority may be gained has been liberalized to adjust to modern corporate defendants. Thus, the Court in *International Shoe* needed, arguably, to rid itself of the service of process to a representative agent requirement so that it could fairly bring *International Shoe*, which was doing a great deal of business in Washington with an elaborate scheme to keep its agents out of the state, under the authority of the state. To do so, the Court had to abolish the second principle of *Pennoyer*, i.e., that no state may exercise jurisdiction over a defendant not within its borders.¹⁵¹ By abolishing that requirement, it could fairly bring under the authority of Washington’s state courts a corporate defendant who was availing itself of the benefits of Washington’s laws.

Understood in this way, *International Shoe* truly marks an age of applying the corporate exceptions to modern corporations in a rapidly changing United States economy. In *McGee*, the Court applied what may be its most liberal characterization of what gives a state authority over a corporate defendant.¹⁵² Applying the minimum contacts considerations of *International Shoe*, the Court held that a single contractual obligation within California was significant enough to subject the defendant to California’s authority because the inconvenience to the state’s citizen was so great in that case.¹⁵³ Though a strikingly liberal application of the minimum contacts test, it can be understood by considering the Court’s novel problem: a resident of California would otherwise be forced to litigate a claim in Texas, far away from its home. This was a novel economic concept, and considering that the defendant was deriving at least some benefit from contracting with a California defendant, combined with the plaintiff’s inconvenient situation based on novel economic circumstances, it is at least defensible that California could exercise personal jurisdiction and comport with traditional notions of fair play and substantial justice. Retrospectively, of course, this exercise of personal jurisdiction looks consistent with the Court’s view of how a sovereign can

amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted”).

¹⁵⁰ *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 619 (1899).

¹⁵¹ *See Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

¹⁵² *See* 355 U.S. 220, 223–24 (1957). *See generally supra* Section I.B.

¹⁵³ *McGee*, 355 U.S. at 223–24.

gain sovereign authority over a defendant. That is, by contracting with a California citizen, the defendant had purposefully availed itself of the benefits and protections of California's courts, such that it could properly subject the citizen to suit within California.¹⁵⁴

Given that understanding of *International Shoe* and *McGee*, the Court's proclamation in *Denckla* that restrictions on a state's ability to exercise personal jurisdiction "are a consequence of territorial limitations on the power of the respective States"¹⁵⁵ is much more easily understood. That is, though the Court liberalized the requirements of sovereign authority for the purposes of personal jurisdiction based on the unique economic circumstances states faced with regard to a growing number of out-of-state corporate defendants, it never rejected the notion that sovereignty has been a central component of personal jurisdiction analysis since *Pennoyer*.

One of the more frustrating decisions adding to the confusion concerning sovereignty's role in personal jurisdiction doctrine is *Bauxites*.¹⁵⁶ As discussed above,¹⁵⁷ in that case, the Court stated that "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."¹⁵⁸ Thus, it noted that "[t]he restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause."¹⁵⁹ However, this statement solidified personal jurisdiction's sovereignty core. That is, the Court merely noted that the *reason* we care about the limits of the forum's sovereign authority is to ensure that a forum does not improperly exercise its authority over an individual and thereby violate the individual's liberty interests. In this way, the Court did highlight that the focus of determining whether a state has sovereign authority such that it can exercise jurisdiction over a defendant is on the individual to be subjected to the court's jurisdiction,¹⁶⁰ but did not abandon its historically consistent focus on sovereign authority generally.

This cumulative understanding of *International Shoe*'s innovations also helps to explain the somewhat confusing *Burger King* case. In *Burger*

¹⁵⁴ See *Burger King Corp.*, 471 U.S. at 476.

¹⁵⁵ *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

¹⁵⁶ 456 U.S. 694 (1982).

¹⁵⁷ See *supra* Section I.C.2.

¹⁵⁸ *Bauxites*, 456 U.S. at 702.

¹⁵⁹ *Id.* at 702 n.10.

¹⁶⁰ Cf. Redish, *supra* note 133, at 1116–17.

King, the Court held that, when determining whether a court has the authority to properly exercise jurisdiction over a defendant, the court must first look to whether the defendant had “purposefully avail[ed]” itself of the “benefits and protections” of the forum state’s laws,¹⁶¹ such that it could seek protection of its interests by resorting to the adjudicatory forums of the state, and then to whether traditional notions of “fair play and substantial justice” were satisfied by allowing an assertion of personal jurisdiction.¹⁶² Though this two-step analysis seems confusing at first, it is in fact in line with the Court’s historical approach to personal jurisdiction. As the corporate exceptions to the *Pennoyer* absolute territorial limits doctrine developed, the Court looked first to whether it could expand jurisdictional authority over defendants who were “doing business” within a foreign state.¹⁶³ However, in order to reconcile its developing personal jurisdiction doctrine with emerging economic trends, the Court liberalized its personal jurisdiction doctrine by abolishing the requirement that a representative of the corporation must be served within the state’s boundaries.¹⁶⁴ That is, the Court allowed states to properly exercise personal jurisdiction over an out-of-state defendant, even when a representative of that defendant was not served within the forum state’s borders, so long as the defendant maintained a sufficient amount of contacts to justify the forum’s sovereign authority.¹⁶⁵

The *Burger King* purposeful availment requirement is merely a more concise conception of minimum contacts: when a defendant has maintained contacts with a forum state that allow that defendant to seek the protection and benefits of the forum state’s laws and adjudicatory bodies, the defendant has sufficient minimum contacts with the forum state to establish the state’s sovereign authority over it.¹⁶⁶ Thus, *Burger King*’s two-step analysis follows the natural order of the Court’s personal jurisdiction doctrine: first, what are the corporation’s contacts with the state, and second, are there fairness considerations (e.g., new economic considerations) that could affect the Court’s application of the doctrine.

As the preceding discussion shows, considerations of sovereignty have been at the core of the Supreme Court’s personal jurisdiction doctrine since

¹⁶¹ 471 U.S. 462, 475 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁶² *Id.* at 476 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

¹⁶³ See *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 579, 583 (1914); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 610 (1899); see also *St. Clair v. Cox*, 106 U.S. 350, 359 (1882) (highlighting as relevant whether a corporation has “engaged in business in the State”).

¹⁶⁴ *Int’l Shoe*, 326 U.S. at 316–17.

¹⁶⁵ *Id.*

¹⁶⁶ 471 U.S. at 475–76.

Pennoyer. Though the Court has expanded the circumstances in which it will consider a state to have sovereign authority such that it may exercise personal jurisdiction, the question of whether the forum state has sufficient sovereign authority is still the central focus of the inquiry. Understood in this way, much of the confusion of the Supreme Court's personal jurisdiction doctrine stems from factual applications of the doctrine that are jarring at first glance. However, as the historical analysis shows, emerging economic trends have largely driven the changes in personal jurisdiction and, because they have been so frequent in the last one hundred years, often result in novel and difficult-to-understand applications of the long-standing sovereignty concerns.

C. *Using a Historical Approach to Understanding Nicastro*

This historical understanding of the Supreme Court's personal jurisdiction doctrine and its focus on sovereignty helps to explain the purportedly perplexing opinions in *Nicastro*. The plurality opinion in *Nicastro* correctly reaffirmed that sovereign authority was the main focus of the Court's personal jurisdiction analysis.¹⁶⁷ Further, the plurality correctly dismissed the idea that personal jurisdiction may be based solely on general notions of fairness, untethered to sovereign authority considerations.¹⁶⁸ Accordingly, given the Court's historical insistence that a defendant have *some* contacts with a state in order to justify that state's exercise of authority over the defendant via personal jurisdiction,¹⁶⁹ the Court correctly held that New Jersey could not exercise its authority over J. McIntyre when it had zero contacts with the state that could support a finding that the corporation "purposefully availed itself of the New Jersey market."¹⁷⁰ Indeed, even the most extreme application of the Court's liberalized personal jurisdiction doctrine required the defendant have at least one contractual connection with the forum state, such that the defendant could avail itself of the benefits and protections of the forum state.¹⁷¹ Thus, it would have been improper for the Court in *Nicastro* to consider general notions of fairness, e.g., inconvenience to the plaintiff, when the defendant had not established any contacts with New Jersey that

¹⁶⁷ See 131 S. Ct. 2780, 2787–88 (2011) (plurality opinion) (first citing *Int'l Shoe*, 326 U.S. at 319; and then citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁶⁸ See *id.* at 2789.

¹⁶⁹ See, e.g., *Int'l Shoe*, 326 U.S. at 319.

¹⁷⁰ See *Nicastro*, 131 S. Ct. at 2790–91 (plurality opinion).

¹⁷¹ *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957).

could plausibly be construed as the defendant availing itself of the benefits and protections of New Jersey's laws.¹⁷²

This explanation of *Nicastro* is simple in light of the Supreme Court's personal jurisdiction doctrinal development. First, consider the proposition that sovereign authority is at the center of assertions of personal jurisdiction. From *Pennoyer* to *International Shoe* and beyond, the only thing that changed about the Supreme Court's use of sovereignty was how that concept could be fairly applied to corporate defendants in a rapidly changing economy. That led to an extension of the absolute territorial limits in cases like *St. Clair* and *International Harvester*, in which the Court held that a state could exercise authority over out-of-state corporate defendants. Ultimately it led to the abolition of the requirement that service be presented to a corporate defendant's representative agent within the forum state. While the Court had held that a single contact could in some circumstances justify sovereign authority such that a state could exercise personal jurisdiction over a defendant,¹⁷³ it did not extend that to defendants, like *Nicastro*, that had no contacts with a state. Thus, the Court's reliance on the sovereign authority in *Nicastro* is made clearer when considered in light of this historical analysis.

Second, consider the plurality's proposition that personal jurisdiction is not based on general notions of fairness, divorced from sovereignty considerations.¹⁷⁴ General notions of fairness were originally interjected in the Supreme Court's personal jurisdiction analysis in cases like *St. Clair* in order to ensure fairness to a sovereign from which a defendant was gaining benefits.¹⁷⁵ That is, fairness was interjected into the personal jurisdiction analysis only as a measure of the state's sovereign control over an out-of-state corporate defendant. It is true that the Court has considered general notions of fairness from the plaintiff's perspective when making a personal jurisdiction determination, but in those instances the Court first found that the defendant had maintained some contact with the forum state such that there was a plausible basis for the forum state's sovereign authority.¹⁷⁶ In light of that historical development, Justice Kennedy's argument that personal jurisdiction ought not be based on fairness considerations alone is

¹⁷² *Nicastro*, 131 S. Ct. at 2790 (plurality opinion).

¹⁷³ *McGee*, 355 U.S. at 223.

¹⁷⁴ *Nicastro*, 131 S. Ct. at 2789 (plurality opinion).

¹⁷⁵ See 106 U.S. 350, 355 (1882).

¹⁷⁶ See, e.g., *McGee*, 355 U.S. at 223–24.

much better understood to mean that fairness considerations are second to the overarching importance of sovereign authority.¹⁷⁷

D. Response to Scholarly Criticism

The preceding historical, descriptive discussion of the development of personal jurisdiction as inextricably linked to notions of sovereign authority also alleviates some of the concerns presented by legal scholars.¹⁷⁸ For example, Borchers argues that *International Shoe* was meant to base personal jurisdiction on notions of fairness.¹⁷⁹ As discussed earlier, that is not in fact what the Court's historical approach to "traditional notions of fair play and substantial justice" refers to.¹⁸⁰ Rather, the Court in *Milliken* adopted that phrase and applied it to mean that *when a sovereign has authority over a defendant* it does not offend notions of fair play and justice to hail that defendant into its courts.¹⁸¹ Thus, Justice Kennedy's assertion seems to be the most historically accurate account of identifying the central concept at play in personal jurisdiction analysis. At the very least, it does not amount to "a bull-headed attempt to ground personal jurisdiction in a sovereignty theory."¹⁸² Further, it certainly was not the case that the Court "hoped to overrule *International Shoe* and return U.S. jurisdiction to *Pennoyer*-era notions of sovereignty and consent."¹⁸³ Rather, *International Shoe* was much more about sovereignty than Borchers and fellow critics recognize.

This historical analysis of the Supreme Court's personal jurisdiction doctrine also helps to show why *International Shoe* was not an important "shift that put the defendant rather than the state at the center of the jurisdictional inquiry."¹⁸⁴ Instead, as we have seen, the shift in *International Shoe* was merely the Court allowing personal jurisdiction over out-of-state corporate defendants without service of process on some representative agent, which had been the prior means of gaining a jurisdictional exception under *Pennoyer*'s absolute territorial restrictions doctrine.¹⁸⁵ Indeed, *International Shoe* and *Milliken* read together stand for the proposition that

¹⁷⁷ *Nicastro*, 131 S. Ct. at 2789 (plurality opinion) (discussing the conclusion that "jurisdiction is in the first instance a question of authority rather than fairness").

¹⁷⁸ See *supra* Section III.B.

¹⁷⁹ Borchers, *supra* note 4, at 1263.

¹⁸⁰ See *supra* Section I.B.

¹⁸¹ 311 U.S. 457, 463 (1940).

¹⁸² Borchers, *supra* note 4, at 1263.

¹⁸³ *Id.* at 1264.

¹⁸⁴ Perdue, *supra* note 6, at 734.

¹⁸⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (citing, *inter alia*, *St. Clair v. Cox*, 106 U.S. 350, 355 (1882)).

a state may properly exercise jurisdiction over a defendant when the state has sovereign authority over the defendant such that it does not offend traditional notions of fair play and substantial justice. The focus is still on the state's sovereign power, but the defendant's conduct and status now play a more prevalent role in determining where there is a sufficient relationship with a forum state such that sovereign authority may be properly exercised.

In sum, the historical evolution of the Supreme Court's personal jurisdiction doctrine shows that some scholars' criticism concerning the perplexing nature of the Court's reliance on sovereign authority in the personal jurisdiction arena is misplaced. In fact, embracing the Court's historical focus on sovereignty helps to create a much more coherent view of personal jurisdiction doctrine and thus resolves many of the confusing aspects alleged by those scholars.

CONCLUSION

A historical analysis of the Supreme Court's personal jurisdiction jurisprudence is a refreshingly clear way to make sense of the often-criticized doctrine. The Court's cases from *Pennoyer* to *International Shoe* paint an interesting perspective on the development of the absolute territorial limitations doctrine laid down by the Court in *Pennoyer*. Most interestingly, the doctrine shows the Court grappling with how to deal with out-of-state defendants who were clearly availing themselves of the benefits of the state such that the state ought to have some authority over them. The Court created exceptions to its bright-line rule to deal with those changing economic circumstances, eventually holding in *Milliken* that expanding the authorial reach of the states did not offend traditional notions of fair play and substantial justice when the corporate defendant had availed itself of the state's benefits. Understood in this way, *International Shoe*'s famous recitation of that proposition underscores *International Shoe* not as a shift away from sovereign consideration, but as a novel way of considering how a state might have the authority to exercise jurisdiction over a defendant.

International Shoe thus helps to explain the Court's reliance on notions of sovereignty throughout the latter half of its doctrine, culminating in *Nicastro*. Further, this historical understanding shows why Justice Kennedy's plurality opinion was the most faithful to *International Shoe*'s tradition. Finally, this historical approach addresses recent scholarly criticism of the Court's use of sovereignty. Rather than trying to assert some antiquated notions of sovereignty as the Court has been accused of, the Court is merely following the dictates of stare decisis and creating a

coherent historical framework of personal jurisdiction. This historical approach is thus an important step in understanding the Court's personal jurisdiction doctrine.