

The University of Chicago Law Review

Volume 85

November 2018

Number 7

© 2018 by The University of Chicago

ARTICLES

In Defense of Territorial Jurisdiction

Cody J. Jacobs[†]

As the story is traditionally told, the minimum contacts test introduced in International Shoe v Washington freed personal jurisdiction from the dark age of territorialism and gave courts the flexibility to expand the scope of personal jurisdiction to keep pace with modern society. While scholars have critiqued the minimum contacts test on a number of grounds, the narrative that the Territorial Model was inherently problematic—and that Shoe was a step in the right direction—has gone largely unchallenged.

This Article challenges that narrative and argues for a return to the Territorial Model. While Shoe is traditionally cast as a step toward expanding personal jurisdiction, the minimum contacts test has now become a greater restraint on state power than the territorial regime that preceded it. This constriction of state power has been coupled with a doctrine that has become increasingly confusing and malleable, unmoored from coherent constitutional and theoretical foundations, and unable to respond to economic and technological changes. The Territorial Model, by contrast, gave states numerous tools to assert jurisdiction over out-of-state defendants, including quasi in rem jurisdiction, consent statutes, and constructive presence. The rules governing personal jurisdiction were relatively straightforward and relied on objective criteria that were easily ascertainable with minimal litigation costs. Once the mythology surrounding personal jurisdiction doctrine is dismantled, the original wisdom of the Territorial Model, and the benefits of returning to it, are clear.

[†] Visiting Assistant Professor, Chicago-Kent College of Law. Thanks to Stephen Sachs, Patrick Borchers, Alex Boni-Saenz, Mark Rosen, Chris Schmidt, Mike Gentithes, Lori Andrews, Richard Wright, Greg Reilly, and Harold Krent for their helpful comments on this Article.

INTRODUCTION.....	1590
I. DEBUNKING PERSONAL JURISDICTION MYTHOLOGY	1594
A. Personal Jurisdiction before 1945: No <i>Shoe</i> , No Problem	1595
1. Quasi in rem jurisdiction	1597
2. Consent and implied consent.....	1600
3. Constructive presence	1603
B. Personal Jurisdiction after 1945: The Broken Promise of <i>International Shoe</i>	1608
1. <i>Shoe</i> 's first steps	1609
2. The other shoe drops: purposeful availment.....	1612
3. Quasi in rem jurisdiction gets the boot, but tag jurisdiction keeps a toehold.....	1615
4. Stomping out general jurisdiction: <i>Daimler</i>	1620
II. BACK TO BASICS: THE ADVANTAGES OF THE TERRITORIAL MODEL.....	1623
A. Predictability	1625
B. Returning Jurisdiction to the Political Process	1628
C. Theoretical Consistency: A Limitation on State Power, Not a Protection of Liberty.....	1631
1. Individual liberty: descriptive but incoherent	1632
2. Convenience, but for whom?	1636
3. Horizontal federalism: limiting state power in the name of sovereignty.....	1637
D. A Return to the Original Meaning of the Due Process Clause	1638
III. "MODERN CONCERNS"	1641
A. The Internet.....	1641
B. Distribution Schemes	1644
CONCLUSION.....	1647

INTRODUCTION

Brent Tyrrell worked for railroads all his life.¹ When he was working for BNSF, a multibillion-dollar company and one of the largest railroads in North America,² Brent developed terminal kidney cancer, allegedly as a result of his on-the-job exposure to harmful industrial chemicals.³ He died at the age of forty-nine.⁴ His widow, Kelli Tyrrell, sued BNSF in Montana, a state where BNSF had dozens of offices, a manufacturing facility, over two

¹ See *Brent Thomas Tyrrell | 1962-2011 | Obituary* (Minnehaha Funeral Home), archived at <http://perma.cc/TF35-Y47U> ("Tyrrell Obituary").

² See Robert Wright, *The Biggest North American Railroads* *1 (Financial Times, Aug 22, 2011), archived at <http://perma.cc/83JF-QPEQ>.

³ Brief for Respondents, *BNSF Railway Co v Tyrrell*, No 16-405, *7 (US filed Mar 29, 2017) (available on Westlaw at 2017 WL 1192088) ("Brief for Respondents").

⁴ See *Tyrrell Obituary* (cited in note 1).

thousand miles of railroad tracks, and over two thousand employees.⁵ In the year preceding Kelli's lawsuit, BNSF received over \$1.7 billion from its operations in Montana.⁶ BNSF also was registered to do business in Montana and, as a condition of obtaining that registration, had appointed an agent to receive service of process there.⁷

Despite all of this, the Supreme Court ruled Montana courts could not obtain personal jurisdiction over BNSF.⁸ This result is just the latest in a series of cases going back several decades that have applied *International Shoe Co v Washington's*⁹ minimum contacts test to narrow the ability of states to assert personal jurisdiction over out-of-state defendants.¹⁰ Nevertheless, a myth persists in personal jurisdiction scholarship that *Shoe* represented the ushering in of a more flexible jurisdictional test that was more appropriate for the realities of America's changing economy and gave states more authority to assert jurisdiction over foreign corporations.¹¹ Conversely, academics and courts often deride the era predating *Shoe* as the "bad old days" when courts labored under the yoke of inscrutable and outdated jurisdictional rules that allowed corporations to evade jurisdiction while conducting business across state lines.¹²

⁵ Brief for Respondents at *5–6 (cited in note 3); Plaintiff's Response to Defendant's Motion to Dismiss, *Nelson v BNSF Railway Co*, No 11-0417, *2–3 (D Mont filed Apr 15, 2014) (available on Westlaw at 2014 WL 12721216).

⁶ Brief for Respondents at *5–6 (cited in note 3).

⁷ See *id.* at *5.

⁸ See *BNSF Railway Co v Tyrrell*, 137 S Ct 1549, 1559 (2017).

⁹ 326 US 310 (1945).

¹⁰ See Part I.B.

¹¹ See, for example, Eric Schepard, *The Battle for the Soul of International Shoe: Why the Author of International Shoe Would Condemn the Nicaastro Plurality for Hijacking His Legacy of Judicial Restraint*, 32 *Quinnipiac L Rev* 353, 358–59 (2014) (noting the *Shoe* Court's "desire to expand the jurisdictional reach of the states beyond the *Pennoyer* framework"); Donald L. Doernberg, *Resolving International Shoe*, 2 *Tex A&M L Rev* 247, 260 (2014) ("*International Shoe* expanded the reach of personal jurisdiction beyond the purely territorial."); Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 *UC Davis L Rev* 19, 55 (1990) ("*International Shoe* signalled a broader reach for state courts and an era of arguably fairer results."). See also *McGee v International Life Insurance Co*, 355 US 220, 222 (1957) ("Looking back over [the history of personal jurisdiction] a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents.>").

¹² See, for example, *J. McIntyre Machinery, Ltd v Nicaastro*, 564 US 873, 894 (2011) (Ginsburg dissenting) ("[T]he splintered majority today 'turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it.'"), quoting Russell J. Weintraub, *A Map out of the Personal Jurisdiction Labyrinth*, 28 *UC Davis L Rev* 531, 555 (1995); Schepard, 32 *Quinnipiac L*

This Article demonstrates that this traditional narrative has it exactly backward. The jurisdictional framework that preceded *Shoe*, which I call the Territorial Model, was neither as restrictive nor as confusing as it has been made out to be. The Territorial Model set out clear rules that respected states' sovereign authority over the people and things within their borders, but it also gave plaintiffs a number of helpful tools for bringing suit against out-of-state defendants, including quasi in rem jurisdiction, registration and implied consent statutes, and the constructive presence doctrine. *Shoe*, on the other hand, eviscerated all of those tools and replaced them with a minimum contacts test that has increasingly constrained the jurisdictional reach of state courts. Indeed, Kelli would have had a much better chance of obtaining personal jurisdiction over BNSF had her lawsuit been filed in 1914 instead of 2014 because she could have relied on either quasi in rem jurisdiction or BNSF's compliance with Montana's registration statute.¹³

To be sure, the Court's development of the minimum contacts test has been met with plenty of scholarly critique. Commentators have criticized the doctrine for being undertheorized, inconsistent, and indecipherable.¹⁴ Recently, some scholars have also begun to recognize that the minimum contacts test, at least in its current form, places an undue burden on plaintiffs attempting to sue out-of-state defendants.¹⁵ Yet no one has recognized the most

Rev at 356–57 (cited in note 11) (“Unsurprisingly, the Court struggled to define or apply the concepts of ‘implied consent,’ ‘corporate presence,’ and ‘doing business,’ which scholars pre-*International Shoe* savaged for producing unpredictable and contradictory results.”); Christopher D. Cameron and Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination under International Shoe*, 28 UC Davis L Rev 769, 782–83 (1995) (“[T]erritoriality proved too inflexible a tool for a developing national economy. . . . Besides increasing the potential for nonresidents to cause injury in a state, these developments made it harder to catch up with the people whose conduct created mischief in the forum state. Wrongdoers could simply avoid setting foot there.”). See also Stephen E. Sachs, *Pennoyer Was Right*, 95 Tex L Rev 1249, 1251–52 (2017) (collecting sources critiquing *Pennoyer*).

¹³ The Supreme Court did not rule on the argument that BNSF consented to suit through the registration statute. See *BNSF*, 137 S Ct at 1559. For the reasons explained in Part I.B, consent statutes are unlikely to survive under the Court's current conception of the minimum contacts test.

¹⁴ See, for example, Todd David Peterson, *The Timing of Minimum Contacts*, 79 Geo Wash L Rev 101, 101–02 & nn 2–3 (2010) (collecting sources critiquing the Supreme Court's approach to personal jurisdiction doctrine); Charles W. “Rocky” Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 Tulane L Rev 567, 568 (2007) (“Everyone's a critic. Or at least it appears that way when reading academic commentary on personal jurisdiction's constitutional boundaries. Article after article blasts the United States Supreme Court for creating an incoherent, chaotic doctrine.”).

¹⁵ See, for example, Schepard, 32 Quinnipiac L Rev at 380 (cited in note 11).

obvious, if radical, solution to these problems—a return to the Territorial Model.¹⁶

This Article makes that argument. Besides expanding the ability of states to assert personal jurisdiction over out-of-state corporations, returning to the Territorial Model would have several other practical and theoretical benefits. The Territorial Model's rules-based system would provide litigants with much clearer guidelines about personal jurisdiction's boundaries and actually keep the promise of allowing potential defendants to structure their primary conduct to avoid personal jurisdiction in a particular state.¹⁷ And the replacement of long-arm statutes with registration and implied consent statutes would return state legislatures to a central role in defining the scope of courts' jurisdiction. This would allow for much greater flexibility in dealing with technological developments that impact the way people interact across state and national boundaries. Finally, the Territorial Model would at last give personal jurisdiction doctrine a clear animating principle that is in accord with the original meaning of the Fourteenth Amendment's Due Process Clause.

Part I.A of this Article re-examines the history of personal jurisdiction doctrine in order to demonstrate that the pre-*Shoe* era of personal jurisdiction doctrine was much more expansive and clearer than the critics recognize. Part I.B of this Article demonstrates that the post-*Shoe* era has been marked by a nearly uniform movement toward greater restraints on the ability of states to exercise personal jurisdiction, all while creating a doctrine that ironically suffers from many of the same vagueness and flexibility deficiencies the critics ascribe to the pre-*Shoe* era. Part II outlines the Territorial Model's benefits over the status quo. Part III describes how the Territorial Model would apply to litigation involving the internet and product distribution chains—major personal jurisdiction issues that are currently vexing the courts.

¹⁶ Professor Stephen Sachs has argued for returning to the *Pennoyer* era in the general sense that courts ought to derive personal jurisdiction doctrine from international customary law, but he explicitly disclaimed any desire to “reset[] the clock to 1878” and noted that, because “[g]eneral law is customary law, and custom can change over time . . . today's generally accepted standards of jurisdiction [may] look more like *International Shoe* than *Pennoyer*.” Sachs, 95 Tex L Rev at 1255, 1319 (cited in note 12). I, on the other hand, do advocate turning back the clock—though perhaps just to 1944 rather than 1878. See Parts I.B and II.

¹⁷ See *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 297 (1980) (“The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”).

I. DEBUNKING PERSONAL JURISDICTION MYTHOLOGY

The popular story of personal jurisdiction has been famously “retold . . . thousand[s] of times” in law review articles and 1L civil procedure classrooms alike.¹⁸ Like any good story, it has heroes and villains. The story traditionally starts with *Pennoyer v Neff*¹⁹ and its holding that the Due Process Clause restricts state assertions of personal jurisdiction to those based on the defendant’s consent or on service of process while the defendant is physically present in a state.²⁰ The territorial power-based rules of *Pennoyer*, we are told, make sense only in light of the “horse and buggy” economy of the time when travel between states was rare and difficult.²¹ The inherent flaws in this model became apparent when the economy began to modernize over the next several decades and business across state lines became more common.²² Courts tried to keep up with this expansion through a web of complicated exceptions to the territorial model that led to confusing and contradictory outcomes.²³

Then, just when all hope seemed lost, along came our story’s hero, *Shoe*. *Shoe* discarded the inconvenient formalist fictions of the territorial era in favor of a new system “based on fairness and rationality.”²⁴ This new system—the minimum contacts test—expanded the power of states to allow their citizens to sue foreign corporations that cause them harm in the newly nationalized and increasingly globalized economy.²⁵

The next two Sections challenge this narrative. First, I demonstrate that the pre-*Shoe* law was not nearly as restrictive or indecipherable as the critics suggest. Rather, that framework empowered states to exert the full measure of their territorial

¹⁸ See Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 Or L Rev 485, 487 (1984).

¹⁹ 95 US 714 (1878).

²⁰ Id at 733.

²¹ See, for example, Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From Pennoyer to Denckla: A Review*, 25 U Chi L Rev 569, 573 (1958).

²² See, for example, Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 Mo L Rev 753, 755–56 (2003); Cameron and Johnson, 28 UC Davis L Rev at 782 (cited in note 12).

²³ See, for example, Cameron and Johnson, 28 UC Davis L Rev at 785–86 (cited in note 12); Borchers, 24 UC Davis L Rev at 52 (cited in note 11).

²⁴ Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 Colum L Rev 772, 783 (1983). See also, for example, Borchers, 24 UC Davis L Rev at 54 (cited in note 11) (“*International Shoe* has been widely heralded as the great ‘liberator’ of personal jurisdiction from the formalisms of *Pennoyer*.”).

²⁵ See note 11 and accompanying text.

power and allowed state legislators to take the lead in crafting new jurisdictional rules to fit new technological and economic developments. Second, I show that the post-*Shoe* era has not expanded the reach of personal jurisdiction and, instead, has contracted state power into a husk of what would have been available before *Shoe*.

A. Personal Jurisdiction before 1945: No *Shoe*, No Problem

The real story of personal jurisdiction in the United States does not begin with *Pennoyer*. Instead, it starts with a line of cases decided under the Full Faith and Credit Clause that predates the Fourteenth Amendment's ratification.²⁶ In these cases, the Supreme Court held that a defendant could resist the interstate recognition of a judgment by arguing that the state entering the judgment lacked personal jurisdiction over the defendant.²⁷ The rules for determining whether personal jurisdiction was present were fairly simple—a state could properly assert personal jurisdiction over a defendant only when the defendant either consented to personal jurisdiction or was served while physically present in the forum.²⁸ The Court found the source of these rules in principles of international law on the recognition of judgments.²⁹ Specifically, the Court held that, just as foreign countries may “disregard a judgment merely against the person, where he has not been served with process nor had a day in court,” so may a state disregard another state's judgment entered without service or consent because such a judgment is “an illegitimate assumption of power” by the state purporting to render it.³⁰

In *Pennoyer*, fewer than ten years after the Fourteenth Amendment was ratified, the Court for the first time used that amendment's Due Process Clause to allow direct intrastate

²⁶ See Wendy Collins Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 SC L Rev 729, 738 (2012) (“Limitations on personal jurisdiction were addressed under the Full Faith and Credit Clause long before the Fourteenth Amendment even existed.”); Borchers, 24 UC Davis L Rev at 25–32 (cited in note 11) (stating that “the Supreme Court decided a large number of cases on jurisdictional topics prior to *Pennoyer*” and chronicling the development of the Court's personal jurisdiction jurisprudence).

²⁷ See Borchers, 24 UC Davis L Rev at 25–30 (cited in note 11).

²⁸ See Cody J. Jacobs, *If Corporations Are People, Why Can't They Play Tag?*, 46 NM L Rev 1, 4 (2016).

²⁹ See Borchers, 24 UC Davis L Rev at 28–29 (cited in note 11) (stating that *D'Arcy v Ketchum*, 52 US 165, 176 (1850), “established that the Court could enforce rules of personal jurisdiction, without any specific constitutional directive, according to principles of international law”).

³⁰ *D'Arcy*, 52 US at 174.

challenges to state court assertions of personal jurisdiction.³¹ Although the vehicle for these challenges switched to the Due Process Clause, the content of the rules for acquiring personal jurisdiction remained unchanged—a defendant must have either consented to personal jurisdiction or been served with process while physically present in the state.³² *Pennoyer*'s rules would remain the guiding principles of personal jurisdiction until the Court's 1945 decision in *Shoe*.

One part of the traditional narrative is undeniably true: in the nearly seven decades between *Pennoyer* and *Shoe*, things in the United States and around the world certainly did change. Rail travel and, later, car travel became more commonplace, and modes of instant communication became more widely accessible.³³ Perhaps more importantly, the corporation's role in people's daily lives increased exponentially. Corporations went from being mere creatures of their home states to something resembling the powerful multinational entities that dominate the American political, cultural, and economic life that we know today.³⁴ These shifts in society ended up being reflected in the courts' dockets and led to many thorny personal jurisdiction problems, particularly with corporations doing business across state lines.³⁵

However, the traditional narrative goes awry in suggesting that the territorial system was ill-equipped to respond to these changes. On the contrary, the pre-*Shoe* system had at least three tools that allowed courts to adapt to these new realities: quasi in rem jurisdiction, consent statutes, and constructive presence. These doctrines were based on a respect for each state's sovereignty over the people and things within its borders and a deference to state lawmaking authority in determining the scope of personal jurisdiction in novel situations. These doctrines also provided relatively clear rules for litigants and courts.

³¹ See *Pennoyer*, 95 US at 733.

³² See *id.* *Pennoyer* also retained two long-standing exceptions to these rules: the status exception and in rem jurisdiction. See *id.* at 722, 725–26, 734–35. The status exception allows a state to assume jurisdiction over divorce cases even when it has personal jurisdiction over only one of the parties on the theory that the state has authority over the “status” of persons within its borders (that is, divorced or not divorced). See, for example, Cody J. Jacobs, *The Stream of Violence: A New Approach to Domestic Violence Personal Jurisdiction*, 64 UCLA L Rev 684, 689 (2017). I discuss in rem jurisdiction, which allows a state to assert jurisdiction over property, in the next Section.

³³ See, for example, Christopher E. Smith and Madhavi McCall, *Constitutional Rights and Technological Innovation in Criminal Justice*, 27 SIU L J 103, 104 (2002).

³⁴ See Jacobs, 46 NM L Rev at 35–36 (cited in note 28).

³⁵ See Gwynne L. Skinner, *Expanding General Personal Jurisdiction over Transnational Corporations for Federal Causes of Action*, 121 Penn St L Rev 617, 627 (2017).

1. Quasi in rem jurisdiction.

In rem jurisdiction allows a state to assert jurisdiction over physical property within the state's borders to determine its rightful owner.³⁶ *Pennoyer's* relatively strict rules for acquiring in personam jurisdiction did not apply to in rem actions—neither personal service nor consent was necessary for a court to proceed in rem and adjudicate the status of property within a state's borders.³⁷ Importantly, states retained not only the ability to exercise jurisdiction to determine the rightful owner of a piece of property, but also the ability to assert jurisdiction over actions in which “the plaintiff seeks to apply what he concedes to be the property of the defendant [within the state] to the satisfaction of a claim against him.”³⁸ This latter type of in rem jurisdiction became known as “quasi in rem” jurisdiction.³⁹

This exception to the general rule of *Pennoyer* not only predated the adoption of the Fourteenth Amendment; it predated the founding of the United States.⁴⁰ Its continuing vitality was most often justified by the ancient principle that a state has power over the property within its borders.⁴¹ But it was also justified as a manifestation of the state's power to protect its own citizens from out-of-state wrongdoers. The *Pennoyer* Court noted that “[e]very

³⁶ See *Shaffer v Heitner*, 433 US 186, 199 (1977).

³⁷ See *Pennoyer*, 95 US at 727 (“Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act.”). See also, for example, *Arndt v Griggs*, 134 US 316, 327 (1890) (“[A] State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication.”).

³⁸ *Shaffer*, 433 US at 199 n 17, quoting *Hanson v Denckla*, 357 US 235, 246 n 12 (1958).

³⁹ *Shaffer*, 433 US at 199 & n 17, quoting *Hanson*, 357 US at 246 n 12.

⁴⁰ See David F. Fanning, Note, *Quasi In Rem on the Cyberseas*, 76 Chi Kent L Rev 1887, 1908 (2001) (“The attachment of property might have occurred as early as 250 years ago, as a method of compelling a defendant to participate in the primitive trial by ordeal.”).

⁴¹ See *Pennoyer*, 95 US at 722:

One of th[e] [well-established principles of public law] is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself . . . the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred.

See also *Arndt*, 134 US at 321:

The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. . . . [T]his duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice.

State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens.”⁴² As Professor Joseph Kalo noted in his detailed history of the development of quasi in rem jurisdiction, the need to respond to the injustice caused by defendants who incurred a debt and left a jurisdiction were at least as much a driver of the development of quasi in rem jurisdiction in colonial America as traditional notions of state sovereignty.⁴³

Quasi in rem jurisdiction continued to be a vehicle for the protection of a state’s citizens from out-of-state wrongdoers a century later when concerns about runaway debtors somewhat faded and were replaced by concerns about harm done by foreign corporations.⁴⁴ This was especially true of one of the biggest and most politically powerful industries of the late nineteenth and early twentieth centuries: railroads. By their very function, railroads operated in many states and consequently ended up in disputes with consumers and workers who were impacted by their operations outside of the railroads’ home states. Potential plaintiffs in this situation could sometimes acquire personal jurisdiction over a railroad by serving a railroad’s in-state agent.⁴⁵ But when that option was unavailable, plaintiffs could turn to quasi in rem jurisdiction by attaching a railroad’s in-state assets—which were usually not hard to find because of the nature of railroads.

For example, in *Boston and Maine Railroad v Gokey*,⁴⁶ a former railroad employee who suffered a serious injury on the job in Vermont was able to sue his former employer, a Massachusetts corporation, in a federal court in Vermont by attaching two locomotives located in Vermont.⁴⁷ The plaintiff in *Gokey* happened to be suing the railroad in the state where the accident occurred, but such a nexus between the subject of the litigation and the forum was not required for quasi in rem jurisdiction. In *Davis v*

⁴² *Pennoyer*, 95 US at 723.

⁴³ See Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles*, 1978 Duke L J 1147, 1161.

⁴⁴ See *id.* at 1167–71. In fact, in rem and quasi in rem jurisdiction were the *only* ways to sue a corporation anywhere other than in its state of incorporation before courts began to recognize the ability of corporations to exist across state boundaries. *Id.* at 1162–63.

⁴⁵ See *Baltimore and Ohio Railroad Co v Harris*, 79 US 65, 69, 72, 83–84 (1870). See also Jacobs, 46 NM L Rev at 15–18 (cited in note 28) (describing nineteenth-century cases asserting personal jurisdiction over corporations based on in-state service on corporate agents).

⁴⁶ 210 US 155 (1908).

⁴⁷ *Id.* at 168.

Cleveland, Cincinnati, Chicago and St. Louis Railway Co.,⁴⁸ the Supreme Court upheld the exercise of quasi in rem jurisdiction in Iowa over an Ohio-based railroad based on the attachment of railroad cars located there even when the plaintiff's cause of action arose from an accident that occurred in Illinois.⁴⁹ The use of quasi in rem jurisdiction was, of course, not limited to railroads,⁵⁰ nor was it limited to tangible property.⁵¹

Quasi in rem jurisdiction did have some limitations, however. Most importantly, a judgment could be recovered against a defendant only up to the value of the attached (or more specifically, garnished)⁵² property.⁵³ Also, although personal service was not required, some form of notice to the defendant was necessary in order to attach or garnish its property.⁵⁴ Even with these limitations, the continuing vitality of quasi in rem jurisdiction gave plaintiffs an important tool for holding out-of-state wrongdoers accountable.

⁴⁸ 217 US 157 (1910).

⁴⁹ Id at 165, 179.

⁵⁰ See, for example, *Pennington v Fourth National Bank of Cincinnati, Ohio*, 243 US 269, 271 (1917) (allowing garnishment of bank account in alimony suit); *Clark v Wells*, 203 US 164, 173 (1906) (affirming judgment in action on a promissory note to the extent the judgment could be satisfied from attached property); *Dewey v Des Moines*, 173 US 193, 203–04 (1899) (finding attachment of property valid in suit to collect a tax assessment).

⁵¹ See, for example, *Davis*, 217 US at 179 (upholding garnishment of debts to the defendant held by third parties in the state).

⁵² Attachment is the seizure by the court of property owned by the defendant. See Joseph Henry Beale, *The Exercise of Jurisdiction In Rem to Compel Payment of a Debt*, 27 Harv L Rev 107, 110–11 (1913). “Garnishment is a form of attachment in which the property attached is not taken directly by the sheriff but is reached in the hands of a third person holding it. He is warned (garni) to hold the property subject to the order of the court.” Id at 111.

⁵³ See, for example, *Dewey*, 173 US at 203:

A judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken.

See also *Clark*, 203 US at 173 (modifying a judgment that purported to reach beyond attached property when the defendant was not served with process in the forum).

⁵⁴ See, for example, *Harris v City of Sarasota*, 181 S 366, 369–70 (Fla 1938) (“An action quasi in rem requires a seizure of property within the jurisdiction of the court or its equivalent and service of process.”); *Redzina v Provident Institution for Savings in Jersey City*, 125 A 133, 135 (NJ 1924) (“[I]f reasonable means—such as publication in the local newspapers—are taken to make [an action in rem or quasi in rem] public . . . the constitutional requirement[] [] of notice to parties . . . [is] met.”), citing *Arndt*, 134 US at 316. See also *Herbert v Bicknell*, 233 US 70, 74 (1914) (upholding exercise of quasi in rem jurisdiction based on service at the defendant’s last known domicile in a state).

2. Consent and implied consent.

States could also protect their residents from out-of-state businesses by requiring them to consent to personal jurisdiction in the state as a condition of doing business there. The validity of statutes requiring consent to the exercise of personal jurisdiction as a condition of conducting certain activities in a state was reaffirmed in *Pennoyer* and predated the Fourteenth Amendment's ratification.⁵⁵ These statutes were partially justified by a state's sovereign power—namely, its power to exclude foreign corporations.⁵⁶ But like quasi in rem jurisdiction, these statutes were also justified by the states' interest in giving their citizens a forum to sue foreign corporations. As the Supreme Court explained over twenty years before *Pennoyer* in upholding a statute requiring companies issuing insurance contracts to consent to jurisdiction:

It cannot be deemed unreasonable that [a state] should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed.⁵⁷

The development of this exception is often misrepresented in traditional personal jurisdiction mythology as something hastily thrown together to deal with an expanding national economy that the Territorial Model was ill-equipped to handle.⁵⁸ While it may

⁵⁵ See *Pennoyer*, 95 US at 734–35 (“Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process [in that state].”); *Lafayette Insurance Co v French*, 59 US 404, 407 (1855):

[O]ne of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision either unreasonable in itself, or in conflict with any principle of public law.

⁵⁶ See Edward Quinton Keasbey, *Jurisdiction over Foreign Corporations*, 12 Harv L Rev 1, 3 (1898).

⁵⁷ *Lafayette Insurance*, 59 US at 407.

⁵⁸ See, for example, Kevin D. Benish, Note, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman*, 90 NYU L Rev 1609, 1632 (2015) (suggesting that “[r]egistration statutes developed as a solution to th[e] ‘manifest injustice’ created by the Territorial Model”). See also *McGee v International Life Insurance*

be true that more consent statutes were enacted—and invoked in litigation more often—in response to the changing economy, the validity of these statutes under the Territorial Model was quite clear when *Pennoyer* was decided. In addition to explicit language in *Pennoyer* itself disclaiming any suggestion that the Court’s decision would invalidate such statutes,⁵⁹ the Court upheld the exercise of jurisdiction on the basis of such a statute in the very same term.⁶⁰ In *Ex parte Schollenberger*,⁶¹ the Court rejected a jurisdictional challenge to a lawsuit brought by a Pennsylvania plaintiff against several out-of-state insurance companies that had appointed agents for service of process in Pennsylvania pursuant to a state statute requiring such appointments as a condition of doing business there.⁶²

The validity of consent statutes was confirmed again and again over the next several decades.⁶³ And these statutes requiring consent to jurisdiction as a condition of undertaking certain activities in a state were not limited to corporations. In *Kane v New Jersey*,⁶⁴ the Supreme Court upheld a New Jersey statute requiring out-of-state drivers, as a condition of driving on the state’s roads, to appoint New Jersey’s secretary of state as their agent for receiving service of process in cases arising out of any traffic accidents that occurred there.⁶⁵

Later, the Court allowed the assertion of jurisdiction over out-of-state drivers based on a statute that deemed driving on a state’s roads implicit consent to jurisdiction without the requirement of any formal appointment.⁶⁶ Implied consent was applied to corporations under statutes specifying that a corporation’s failure to appoint its own agents to receive service of process pursuant to express consent statutes constituted implicit consent to allow a state official to accept service on the corporation’s

Co, 355 US 220, 222 (1957) (describing the acceptance and abandonment of “consent” as a basis for jurisdiction over corporations as part of a “continuing process of evolution” the Supreme Court underwent prior to *Shoe*).

⁵⁹ See *Pennoyer*, 95 US at 734–35.

⁶⁰ See *Ex parte Schollenberger*, 96 US 369, 376 (1878).

⁶¹ 96 US 369 (1878).

⁶² *Id* at 376–77.

⁶³ See, for example, *Henry L. Doherty & Co v Goodman*, 294 US 623, 628 (1935); *Washington v Superior Court of State of Washington for Spokane County*, 289 US 361, 364 (1933); *Pennsylvania Fire Insurance Co of Philadelphia v Gold Issue Mining & Milling Co*, 243 US 93, 95–96 (1917); *Commercial Mutual Accident Co v Davis*, 213 US 245, 255 (1909); *Mutual Reserve Fund Life Association v Phelps*, 190 US 147, 159 (1903).

⁶⁴ 242 US 160 (1916).

⁶⁵ *Id* at 167.

⁶⁶ See *Hess v Pawloski*, 274 US 352, 356–57 (1927).

behalf.⁶⁷ The Court also approved statutes directly providing that any company doing business in a state implicitly consents to service on officers and employees of the company.⁶⁸

Justice Oliver Wendell Holmes called implied consent a “mere fiction,”⁶⁹ and that framing has been picked up in modern personal jurisdiction decisions and scholarship.⁷⁰ However, whether it is characterized as a fiction or not, this rule provided very clear guidance to corporations in that era—if you do business in a state with a statute requiring consent to service, you will be subject to personal jurisdiction one way or another.

Such statutes could even furnish a basis for jurisdiction in actions that did not arise from activities in the state where the action was brought. In *Pennsylvania Fire Insurance Co of Philadelphia v Gold Issue Mining & Milling Co*,⁷¹ the plaintiff sued an insurance company in Missouri for breach of an insurance policy issued in Colorado that insured buildings in Colorado.⁷² Neither the plaintiff nor the defendant was based in Missouri; however, the defendant had obtained a license to do business in Missouri.⁷³ To comply with Missouri’s licensing statute, the defendant filed a power of attorney consenting to service of process on the superintendent of the Missouri insurance

⁶⁷ See *Washington*, 289 US at 364 (“Admission [of a corporation to do business in a state] might be conditioned upon the . . . terms that if the corporation had failed to appoint or maintain an agent service should be made upon a state officer.”); *Highway Steel and Manufacturing Co v Kincannon*, 127 SW2d 816, 817 (Ark 1939) (applying implied consent motorist statute to a corporation). See also *Wilson v Seligman*, 144 US 41, 45 (1892):

[A]ny state may by its laws require, as a condition precedent to the right of a corporation . . . to transact business[] within its territory, that it shall appoint an agent there on whom process may be served . . . [and] upon [its] failure to make such appointment or designation, the service may be made upon a certain public officer. . . . In such cases, the service is held binding because the corporation . . . must be taken to have consented that such service within the state shall be sufficient.

⁶⁸ See *Henry L. Doherty*, 294 US at 628.

⁶⁹ *Pennsylvania Fire*, 243 US at 96.

⁷⁰ See, for example, *J. McIntyre Machinery, Ltd v Nicastro*, 564 US 873, 900 (2011) (Ginsburg dissenting) (calling implied consent a “legal fiction[]” that “conceal[s] the actual bases on which jurisdiction rests”); Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 Wake Forest L Rev 999, 1002 (2012) (calling implied corporate consent a “fictional concept[]”); Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study on the Effects of a “Generally” Too Broad, but “Specifically” Too Narrow Approach to Minimum Contacts*, 57 Baylor L Rev 135, 145 (2005) (calling implied corporate consent a “fictional premise[]”).

⁷¹ 243 US 93 (1917).

⁷² *Id.* at 94.

⁷³ *Id.*

department.⁷⁴ The Supreme Court affirmed Missouri's exercise of personal jurisdiction over the suit.⁷⁵ The Court found that such consent was just as good as consent by "a corporate vote [to] accept[] service in this specific case" because consent was explicitly given and the language of the statute and the power of attorney could be reasonably construed to include lawsuits unrelated to the defendant's activities in Missouri.⁷⁶

Although the Court gave states wide latitude to enact statutes requiring explicit consent or providing for implicit consent, these statutes were still subject to some constitutional limits. Importantly, unlike lawsuits involving corporations that complied with express consent statutes, lawsuits involving implied consent were limited to those that related to the corporation's in-state activities.⁷⁷ Even when an express consent statute was involved, courts were reluctant to interpret such statutes to allow lawsuits unrelated to in-forum activities without clear text evincing an intent to do so.⁷⁸ And whether the consent was express or implied, a defendant was still required to be notified of any action against it through some mechanism that made it "reasonably probable" that the defendant would receive actual notice.⁷⁹

3. Constructive presence.

In the absence of implied or actual consent, a corporation that did business in a state could still be subject to jurisdiction through the doctrine of constructive presence. The idea was that, if a company did "business in [a state] in such a manner and to such an extent that its actual presence there [could be] established," it could be subject to personal jurisdiction in that state.⁸⁰ Unlike the

⁷⁴ *Id.*

⁷⁵ See *Pennsylvania Fire*, 243 US at 95–97.

⁷⁶ *Id.* at 95.

⁷⁷ See *id.* at 96; *Old Wayne Mutual Life Association of Indianapolis v McDonough*, 204 US 8, 22 (1907).

⁷⁸ See *Missouri Pacific Railroad Co v Clarendon Boat Oar Co*, 257 US 533, 535 (1922):

[I]n dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.

See also Craig Sanders, Note, *Of Carrots and Sticks: General Jurisdiction and Genuine Consent*, 111 Nw U L Rev 1323, 1331 n 46 (2017) (collecting cases construing registration statutes to not provide for jurisdiction over claims arising out of state).

⁷⁹ *Wuchter v Pizzutti*, 276 US 13, 19 (1928).

⁸⁰ *Bank of America v Whitney Central National Bank*, 261 US 171, 173 (1923). See also *St. Louis Southwestern Railway Co of Texas v Alexander*, 227 US 218, 227 (1913):

doctrines of consent and in rem jurisdiction, constructive presence was not already embedded in personal jurisdiction doctrine at the time *Pennoyer* was decided. However, contrary to the suggestions of the traditional narrative, the recognition of constructive presence was not a response to the Territorial Model's innate inability to deal with modern developments but, rather, was the result of changes in corporate law that recognized the ability of corporations to be present in places other than their state of incorporation.⁸¹ In other words, changes in corporate law modified the way corporations interacted with other states, and the courts simply applied the existing Territorial Model to these changes.

Still, the constructive presence doctrine has some roots in pre-*Pennoyer* case law. In the decades both before and after *Pennoyer*, courts recognized personal jurisdiction over corporations through service on corporate officers traveling to other states to do business on the corporation's behalf—on the theory that the corporation was actually present in the jurisdiction.⁸² Although I have argued elsewhere that these cases about *actual* presence are historically distinct from later cases addressing *constructive* presence,⁸³ they still reflect the Territorial Model's approach to dealing with the mobility of corporations and the consistency of jurisdiction based on corporate presence with the original understanding of the Fourteenth Amendment.

Although it had been recognized in at least some lower courts years earlier,⁸⁴ constructive presence was not explicitly recognized by the Supreme Court until its 1899 decision in *Connecticut Mutual Life Insurance Co v Spratley*.⁸⁵ In that case, a Connecticut life insurance company was selling insurance policies

[T]he business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process.

⁸¹ See Jacobs, 46 NM L Rev at 13–14, 36 (cited in note 28); Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 San Diego L Rev 125, 137 (2013).

⁸² See Jacobs, 46 NM L Rev at 15–18 (cited in note 28).

⁸³ Id at 15–20.

⁸⁴ See, for example, *Merchants' Manufacturing Co v Grand Trunk Railway Co*, 13 F 358, 359 (CC SDNY 1882).

⁸⁵ 172 US 602, 610–11 (1899). The concept was alluded to by the Supreme Court a few years earlier. See *Goldney v Morning News*, 156 US 518, 521–22 (1895) (“[A] judgment rendered in a court of one State, against a corporation neither incorporated nor doing business within the State, must be regarded as of no validity in the courts of another State.”).

in Tennessee.⁸⁶ During the time of the sales, Tennessee passed a statute requiring any out-of-state insurance companies selling policies in Tennessee to authorize the state insurance commissioner to receive process on its behalf for any lawsuits filed against it in Tennessee.⁸⁷ The Connecticut company complied with the statute and filed such an authorization with the insurance commissioner.⁸⁸ Almost ten years later, Tennessee passed a second statute that said that any company doing business in Tennessee was subject to personal jurisdiction there for any action arising out of such business.⁸⁹ After the passage of the second statute, the Connecticut company issued a life insurance policy to a Tennessee man who subsequently died.⁹⁰ His widow sued the company in Tennessee by serving the insurance adjuster the company sent into the state to investigate her claim (a method of service authorized by the second statute).⁹¹

The Supreme Court found Tennessee's assertion of jurisdiction in this manner constitutionally valid.⁹² The Court found that the company's issuing of numerous insurance policies in the state constituted "doing business" to a sufficient degree to make it amenable to personal jurisdiction in Tennessee.⁹³ Although the company had ceased issuing new policies in Tennessee at the time of the lawsuit, it still had numerous outstanding policies in the state that it continued to collect premiums on.⁹⁴ The Court also rejected the company's argument that its compliance with the earlier statute requiring appointment of the insurance commissioner as its agent for service of process estopped the state from authorizing service on other corporate agents.⁹⁵ The Court found that the earlier statute simply imposed a condition of doing business in the state but did not create a contract between the company and the state that prevented the state from authorizing other forms of service.⁹⁶

The peculiar facts of *Spratley* highlight the difference between constructive presence-based jurisdiction and consent (or implied consent-) based jurisdiction. The latter conditioned entry

⁸⁶ *Spratley*, 172 US at 605.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Spratley*, 172 US at 606–07.

⁹¹ *Id.* at 608.

⁹² *Id.* at 610–11, 622.

⁹³ *Id.* at 610–11.

⁹⁴ *Spratley*, 172 US at 611.

⁹⁵ *Id.* at 618–22.

⁹⁶ *Id.*

into a state's market on compliance with certain requirements, while the former allowed lawsuits against corporations that were doing business in a state without regard to consent. Notions of consent certainly informed the courts' creation of the "doing business" doctrine in the sense that companies were assumed to be aware of the jurisdictional consequences of doing business in a state.⁹⁷ However, the fundamental idea behind the doctrine was an analogy to the physical presence or residence of individuals rather than consent.⁹⁸ This dichotomy is also supported by the Court's acknowledgement in *Spratley* that explicit statutory authorization was not necessarily required to subject a corporation to personal jurisdiction based on constructive presence.⁹⁹ In the absence of a statute, there is nothing for the defendant to even figuratively consent to.

One common thread constructive presence did share with both consent-based and in rem jurisdiction is that it was justified both by states' sovereignty over activities within their borders and by states' legitimate interests in giving their citizens a forum to sue out-of-state corporations. In *Spratley*, for example, the Court noted that "justice requires that some fair and reasonable means should exist for bringing [corporations doing business across state lines] within the jurisdiction of the courts of the State where the business was done, out of which the dispute arises."¹⁰⁰

In the ensuing decades, the Supreme Court continued to approve the assertion of personal jurisdiction on this basis across a wide variety of contexts.¹⁰¹ Admittedly, the doctrine that developed around constructive presence jurisdiction was murkier than the rules governing consent and in rem jurisdiction. Nevertheless,

⁹⁷ See *id.* at 618 (observing that, by "[c]ontinuing to do business [in Tennessee], the company impliedly assented to the terms of [the] statute" authorizing service on any agent of a company doing business in the state).

⁹⁸ See Andrews, 47 Wake Forest L. Rev. at 1005–06 (cited in note 70) ("Particular states and courts typically chose to use only one theory—implied consent or presence—but the Supreme Court treated both as proper. The particular theory, however, tended to impact the jurisdictional consequences of the corporation's in-state activities.").

⁹⁹ *Spratley*, 172 US at 618 ("[W]here a corporation is doing business in a State other than the one of its incorporation, service may sometimes be made upon its regularly appointed agents there, even in the absence of a state statute conferring such authority."), citing *Barrow Steamship Co v Kane*, 170 US 100 (1898).

¹⁰⁰ *Spratley*, 172 US at 619.

¹⁰¹ See, for example, *Natural Gas Pipeline Co v Slattery*, 302 US 300, 306–07 (1937); *Washington-Virginia Railway Co v Real Estate Trust Co of Philadelphia*, 238 US 185, 189–90 (1915); *International Harvester Co of America v Kentucky*, 234 US 579, 585–86 (1914); *Alexander*, 227 US at 227; *Pennsylvania Lumbermen's Mutual Fire Insurance Co v Meyer*, 197 US 407, 418 (1905); *Board of Trade of City of Chicago v Hammond Elevator Co*, 198 US 424, 442 (1905).

by the time of *Shoe*, the rules for constructive presence were much clearer than later scholars gave the Court credit for. A corporation would not be considered “doing business” in a state if it was merely soliciting orders for products or services that would be delivered in a different state.¹⁰² However, a corporation could be subject to jurisdiction if it conducted actual transactions in the state—even if the transactions were completed entirely through the mail or by wire.¹⁰³ In this way, the constructive presence doctrine could protect consumers who had claims against corporations that were not subject to consent statutes and did not have sufficient property in a state to make in rem jurisdiction an effective remedy.

Constructive presence jurisdiction, however, was subject to more limitations than in rem or consent-based jurisdiction. Although a state statute explicitly authorizing service based on constructive presence was not required, the Court was often reluctant to apply constructive presence jurisdiction when companies did business through subsidiaries and other intermediaries without explicit statutory authorization for asserting jurisdiction through such intermediaries.¹⁰⁴ Also, unlike

¹⁰² See *People's Tobacco Co v American Tobacco Co*, 246 US 79, 87 (1918):

As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that State, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it.

See also *Green v Chicago, Burlington and Quincy Railway Co*, 205 US 530, 533–34 (1907) (finding no jurisdiction over a railroad that solicited ticket sales in Pennsylvania but actually completed the transactions and provided service in Illinois); *Philadelphia and Reading Railway Co v McKibbin*, 243 US 264, 268 (1917) (“Obviously the sale by a local carrier of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be ‘doing business’ in every State.”).

¹⁰³ See, for example, *International Harvester*, 234 US at 585–86 (approving the exercise of jurisdiction by Kentucky when a corporation solicited orders “which were sent to another State and in response to which the machines of the [company] were delivered within the State of Kentucky”); *Meyer*, 197 US at 418–19 (approving assertion of jurisdiction over a Pennsylvania company based on its issuance of an insurance policy insuring property in New York when the contract was entered into entirely through the mail); *Hammond Elevator Co*, 198 US at 441–42 (approving jurisdiction by service on a corporation’s agent doing business in the state even when the agent was an independent company that just took stock orders and transmitted them to the defendant through telegraph wires to the defendant’s offices in a different state).

¹⁰⁴ See *Cannon Manufacturing Co v Cudahy Packing Co*, 267 US 333, 336–37 (1925) (finding no jurisdiction over corporation based on service on its subsidiary, but noting the absence of a statute addressing the issue); *Whitney Central National Bank*, 261 US at 173 (finding that New York, “in the absence of statutory requirement or express consent,”

either in rem or explicit consent-based jurisdiction, a court could exercise jurisdiction based on constructive presence only when the lawsuit was related to the corporation's activity in the state.¹⁰⁵

* * *

Thus, a closer examination of the pre-*Shoe* era shows that the caricature the traditional narrative paints of an overly restrictive and inscrutable jurisdictional system does not stand up to scrutiny. Instead, what actually existed was a relatively simple system that, while resting on bedrock principles of territorial sovereignty, also reflected a concern for the ability of states to use that sovereignty to give their citizens a realistic forum to litigate disputes against foreign corporations. The system offered a bright-line rule along with several clear exceptions that allowed plaintiffs and defendants alike to structure their primary conduct with relative certainty of the jurisdictional consequences. The system also allowed states a great deal of leeway in crafting statutory schemes—particularly implied consent statutes—to deal with the rise of new economic and technological realities.

B. Personal Jurisdiction after 1945: The Broken Promise of *International Shoe*

The Territorial Model was subject to scholarly criticism in the early to mid-twentieth century for resting on “legal fictions.”¹⁰⁶ This critique was part of an ascendant legal realist movement

could not assert jurisdiction over a bank that “had what would popularly be called a large New York business,” in which all of that business “was transacted for it by its correspondents—[] six independent New York banks”).

¹⁰⁵ See *Louisville and Nashville Railroad Co v Chatters*, 279 US 320, 325 (1929) (“Even when present and amenable to suit [a corporation] may not, unless it has consented, . . . be sued on transitory causes of action arising elsewhere which are unconnected with any corporate action by it within the jurisdiction.”). Some courts of the era were not entirely consistent on this point. See Andrews, 47 Wake Forest L Rev at 1006 (cited in note 70), citing *Tauza v Susquehanna Coal Co*, 115 NE 915, 918 (NY 1917). However, that discrepancy can likely be explained by the distinction between constructive presence—which was triggered by the corporation doing business in a state—and actual presence, which was triggered by serving a corporate officer while in a state on the business of a corporation. See Jacobs, 46 NM L Rev at 15–20 (cited in note 28). The former required some connection between the forum and the litigation, while at least some courts held the latter did not.

¹⁰⁶ See, for example, George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 S Ct Rev 347, 351–53; Cameron and Johnson, 28 UC Davis L Rev at 779 & n 30 (cited in note 12) (collecting cases and articles that “clamored for reform”).

that undermined formalist legal rules and in some cases succeeded in replacing them with more malleable legal standards.¹⁰⁷ Some of these scholars argued for replacing the Territorial Model with a test that was based on a broader inquiry into the fairness of asserting personal jurisdiction in each case.¹⁰⁸ Something similar to that approach ultimately won out in *Shoe*, which discarded the *Pennoyer* approach in favor of the modern minimum contacts analysis we know today.¹⁰⁹

The traditional narrative casts *Shoe* as a turning point toward more expansive notions of personal jurisdiction.¹¹⁰ The reality is almost the opposite—over the course of the past several decades, *Shoe* has allowed the Supreme Court to drastically limit the ability of states to allow their citizens to sue out-of-state corporations.

1. *Shoe's* first steps.

In *Shoe*, the state of Washington attempted to sue a shoe company to recover unpaid unemployment compensation fund payments.¹¹¹ The company was based in Missouri and sold shoes in Washington through several salespeople.¹¹² Rather than analyzing whether the company's activities in Washington rendered it constructively present in the state as the lower court had done,¹¹³ the Court used this case to refashion the basic rules of personal jurisdiction.

Under *Shoe's* new regime, “in order to subject a defendant to [personal jurisdiction], if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹¹⁴ The Court noted that, in determining whether this standard was satisfied, the “reasonable[ness of asserting personal jurisdiction], in the context of our federal system of government” and an “estimate of the inconveniences which would result to the [defendant] from a trial away from its home” were relevant considerations.¹¹⁵

¹⁰⁷ See Schepard, 32 *Quinnipiac L Rev* at 363 (cited in note 11). See generally Rutherglen, 2001 *S Ct Rev* 347 (cited in note 106) (describing the role of legal realism in laying the foundation for *Shoe*).

¹⁰⁸ See Schepard, 32 *Quinnipiac L Rev* at 363–65 (cited in note 11).

¹⁰⁹ *Shoe*, 326 US at 316.

¹¹⁰ See notes 24–25 and accompanying text.

¹¹¹ *Shoe*, 326 US at 311–12.

¹¹² See *id.* at 313–14.

¹¹³ See *International Shoe Co v State*, 154 P2d 801, 812 (Wash 1945).

¹¹⁴ *Shoe*, 326 US at 316.

¹¹⁵ *Id.* at 317 (quotation marks omitted).

Justice Hugo Black was the only justice not to join the majority opinion in *Shoe*.¹¹⁶ He wrote an opinion that could technically be described as a concurrence because it agreed with the Court's judgment¹¹⁷ but strongly critiqued the new personal jurisdiction test the Court adopted.¹¹⁸ He argued that "it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating . . . a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere."¹¹⁹ He rejected the notion that there was some more "mystical" notion of presence (for example, minimum contacts) that was required for a corporation to be subject to suit in a state.¹²⁰ While the *Shoe* test is often cast as an expansion of state court jurisdiction, Black saw it as a highly uncertain test that would "tend[] to curtail the exercise of State powers to an extent not justified by the Constitution."¹²¹ In his view, "the Federal Constitution leaves to each State, without any 'ifs' or 'buts,' a power . . . to open the doors of its courts for its citizens to sue corporations whose agents do business in those States."¹²² Black was concerned that the *Shoe* majority's balancing test would "stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more 'convenient' for [a] corporation to be sued somewhere else."¹²³ In the decades that followed *Shoe*, the Court has largely proved Black right by repeatedly curtailing the ability of states to hold foreign corporations accountable.

The first fifteen years after *Shoe* have often been referred to as the "high-water mark" of expansive personal jurisdiction.¹²⁴

¹¹⁶ See *id.* at 322. Justice Robert Jackson did not participate in the case.

¹¹⁷ *Id.* at 322, 326 (Black writing separately). The opinion is simply called an "opinion" and is not styled as either a concurrence or dissent. *Id.* at 322.

¹¹⁸ See *Shoe*, 326 US at 326 (Black writing separately).

¹¹⁹ *Id.* at 323.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Shoe*, 326 US at 324 (Black writing separately).

¹²³ *Id.* at 325.

¹²⁴ See Robert J. Condlin, "Defendant Veto" or "Totality of the Circumstances"? *It's Time for the Supreme Court to Straighten Out the Personal Jurisdiction Standard Once Again*, 54 *Cath U L Rev* 53, 61 (2004); Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication without Judgment*, 33 *BC L Rev* 981, 999 n 82 (1992); Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 *Hastings Const L Q* 819, 876 (1991) ("[J]urists and scholars under the influence of the *Pennoyer* paradigm like to regard *McGee* as an exceptional case and the high water mark under the *International Shoe* standards.").

However, a closer look reveals that even the cases decided in that era could have reached the same results under the supposedly restrictive Territorial Model. First, in *Perkins v Benguet Consolidated Mining Co*,¹²⁵ the Court approved Ohio's exercise of jurisdiction over a claim against a company based in the Philippines when the claim did not concern the company's Ohio-based activities.¹²⁶ The Court concluded that jurisdiction was justified because the company had such continuous and systematic business contacts with Ohio that it made it fair to subject the company to personal jurisdiction there.¹²⁷ This form of exercising jurisdiction would later become known as general jurisdiction (as opposed to specific jurisdiction, which is when a state exercises jurisdiction over causes of action related to the forum).¹²⁸

Later, in *McGee v International Life Insurance Co*,¹²⁹ the Court approved California's exercise of jurisdiction over a Texas life insurance company that had just one policyholder in California (the one at issue in the litigation).¹³⁰ The company had assumed the policy from an Arizona company that originally issued the policy but agreed with the California policyholder by mail to continue the policy and accepted payment from him by mail.¹³¹ The Court found that California, pursuant to a statute authorizing such jurisdiction, could constitutionally exercise jurisdiction over the Texas company because the contract "had substantial connection with" California, California policyholders would be severely burdened by having to litigate claims in other states, and the evidence related to life insurance policy claims was more likely to be in the locale of the insured.¹³²

These seemingly revolutionary decisions may have been possible through doctrines that existed under the Territorial Model. Although constructive presence-based jurisdiction did not allow claims unconnected with the forum,¹³³ the Territorial Model did at least arguably allow such claims in cases when there was personal in-state service on a corporate officer who was engaged in

¹²⁵ 342 US 437 (1952).

¹²⁶ *Id.* at 438–39.

¹²⁷ *Id.* at 446–48.

¹²⁸ See, for example, Jacobs, 46 NM L Rev at 5–6 (cited in note 28).

¹²⁹ 355 US 220 (1957).

¹³⁰ *Id.* at 221–24.

¹³¹ *Id.* at 221–22.

¹³² *Id.* at 223.

¹³³ See note 105 and accompanying text.

business on the corporation's behalf.¹³⁴ Because the corporation's president in *Perkins* was served while in Ohio on the business of the corporation, the plaintiff would have had a strong argument for the assertion of personal jurisdiction on that basis in the pre-*Shoe* era.¹³⁵ Similarly, *McGee* could have been justified on the basis of consent in light of California's statute specifically subjecting insurance companies that issued policies in the state to jurisdiction in connection with those policies.¹³⁶ Indeed, in explaining why the connection between the contract and California was sufficient to give rise to jurisdiction, the *McGee* Court actually cited a pre-*Shoe* decision upholding an implied consent statute.¹³⁷

That said, these decisions did suggest some new innovations that theoretically could have broadened the scope of personal jurisdiction beyond what existed under the Territorial Model. *Perkins* suggested that a corporation that carried on continuous and systematic business in a particular state could be subject to jurisdiction there for any claim at all even in the absence of in-state service on a corporate officer. *McGee* suggested that the burden on the plaintiff of litigating in a different forum and the presence of evidence in a particular state could be relevant to the jurisdictional determination, which would indeed have represented a radical change from the Territorial Model's defendant-focused approach. However, as the following Sections explain, over the next several decades, the Court would not only reverse these innovations, but use the *Shoe* test to constrict a state's power to assert jurisdiction over foreign corporations to a shadow of what existed under the Territorial Model.

2. The other shoe drops: purposeful availment.

The first sign that *Shoe* would presage a tightening, rather than a broadening, of the scope of personal jurisdiction came less than a year after *McGee* in *Hanson v Denckla*.¹³⁸ That case involved a dispute over the validity of a trust that was issued in

¹³⁴ See Jacobs, 46 NM L Rev at 14–18 (cited in note 28).

¹³⁵ See id at 29 (“[B]ecause the Supreme Court ‘found that the foreign corporation was engaged in ‘continuous and systematic’ business in Ohio, . . . the Court was not presented with the issue of whether due process allowed transient jurisdiction over a corporation where such extensive contacts were lacking.”), quoting *Kahn Lucas Lancaster, Inc v Lark International Ltd*, 956 F Supp 1131, 1137 n 3 (SDNY 1997).

¹³⁶ See Cal Ins Code § 1610 (West 2018). This law was originally passed in 1949.

¹³⁷ See *McGee*, 355 US at 223, citing *Hess*, 274 US 352; *Henry L. Doherty*, 294 US 623; *Pennoyer*, 95 US at 735.

¹³⁸ 357 US 235 (1958).

Delaware prior to the settlor moving to Florida.¹³⁹ Once the settlor was in Florida, she continued to administer the trust, and the Delaware trustee continued to remit payments to her at her Florida address.¹⁴⁰ The Court held that Florida lacked personal jurisdiction over the Delaware trustee.¹⁴¹

That decision itself was relatively unremarkable, but the Court's reasoning introduced a brand new requirement for the assertion of personal jurisdiction—purposeful availment. The Court held “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”¹⁴² This requirement, which appears to have been invented completely out of whole cloth,¹⁴³ would dramatically reshape personal jurisdiction doctrine by making the subjective intent of the defendant to target a forum the lodestar of jurisdiction, whereas under the Territorial Model subjective intent was irrelevant.

The immediate effect of the purposeful availment requirement was to reverse *McGee's* holding that the convenience of the plaintiff and the location of relevant evidence were relevant factors in the jurisdictional analysis. As the *Hanson* Court explained in dismissing the plaintiffs' argument that most of the relevant players in the litigation were based in Florida, “[A state] does not acquire [] jurisdiction by being the ‘center of gravity’ of the controversy, or the most convenient location for litigation.”¹⁴⁴ The Court reaffirmed the irrelevancy of the plaintiff's interests and litigational convenience even more dramatically in *World-Wide Volkswagen Corp v Woodson*.¹⁴⁵ There, the Court rejected Oklahoma's attempt to exercise jurisdiction over a car dealership that sold an allegedly defective car to the plaintiff that caused a serious accident in Oklahoma,¹⁴⁶ even though most of the evidence and witnesses related to the accident were in Oklahoma.¹⁴⁷ Finally, in *J. McIntyre Machinery, Ltd v Nicastro*,¹⁴⁸ a plurality of

¹³⁹ *Id* at 238.

¹⁴⁰ *Id* at 239–43.

¹⁴¹ *Id* at 251–55.

¹⁴² *Hanson*, 357 US at 253.

¹⁴³ The Court cited *Shoe* for this proposition, but *Shoe* never mentions purposeful availment.

¹⁴⁴ *Hanson*, 357 US at 254.

¹⁴⁵ 444 US 286 (1980).

¹⁴⁶ *Id* at 288, 298–99.

¹⁴⁷ *Id* at 305 (Brennan dissenting) (“The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma.”).

¹⁴⁸ 564 US 873 (2011).

the Court scoffed at considering such convenience factors lest they take the focus away from purposeful availment, declaring that “the Constitution commands restraint before discarding liberty in the name of expediency.”¹⁴⁹

Recently, the purposeful availment requirement has been expanded even further to constrain the reach of personal jurisdiction. In *Nicastro*, the plurality explained that, to satisfy the purposeful availment requirement, it is not enough for the defendant to reasonably expect that its actions will have an impact in other states; rather the defendant must “manifest an intention to submit to the power of a sovereign.”¹⁵⁰ Further, that analysis must be conducted on “a forum-by-forum, or sovereign-by-sovereign” basis.¹⁵¹ Applying those principles, the *Nicastro* plurality held that the British defendant in that case was not subject to personal jurisdiction in New Jersey when it engaged an American distributor to sell its products all over the country but did not specifically instruct the distributor to sell products in New Jersey.¹⁵²

But the strictness of the purposeful availment requirement does not end there. The defendant not only must intentionally target individuals within a specific state, the defendant must also “follow[] 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.”¹⁵³ Although *Nicastro* was a plurality opinion, at least this aspect of its vision for purposeful availment was embraced by a unanimous Court in *Walden v Fiore*,¹⁵⁴ which held that “‘minimum contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there.”¹⁵⁵

Thus, purposeful availment now requires (a) a subjective intent on the defendant’s part, (b) to avail itself of a *specific* forum, and (c) a manifestation of that intent directed at the “society or economy” of the forum state rather than just persons who live

¹⁴⁹ Id at 887 (Kennedy) (plurality). See also *Walden v Fiore*, 134 S Ct 1115, 1122 (2014) (“Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.”); *Rush v Savchuk*, 444 US 320, 332 (1980) (holding that a plaintiff’s contacts with a forum are only relevant to jurisdictional analysis if the defendant independently has minimum contacts with that forum).

¹⁵⁰ *Nicastro*, 564 US at 882.

¹⁵¹ Id at 884.

¹⁵² Id at 886–87.

¹⁵³ Id at 884 (emphasis added).

¹⁵⁴ 134 S Ct 1115, 1118 (2014).

¹⁵⁵ Id at 1122.

there. This is a remarkable constriction of the scope of jurisdiction compared to the Territorial Model, which made no inquiry into the defendant's subjective intent *at all*, let alone one as exacting as this. Even the vaguest part of the Territorial Model—constructive presence—considered only the scope of a defendant's business in a forum, not the defendant's intent to do business or not do business in a particular place.

In light of the intent requirement, the *Nicastro* plurality's repeated insistence that the central question in personal jurisdiction cases is about sovereign authority, rather than fairness, is puzzling.¹⁵⁶ The source of the purposeful availment requirement that the plurality applied so strictly was not the "traditional practice[s]" that the opinion venerates¹⁵⁷ but, rather, was the fairness-focused *Shoe* test that the Court was interpreting in *Hanson*. As many scholars have already observed, the *Nicastro* plurality's vision of personal jurisdiction eviscerates rather than elevates state sovereignty by considerably weakening the states' ability to assert personal jurisdiction over out-of-state defendants.¹⁵⁸

3. Quasi in rem jurisdiction gets the boot, but tag jurisdiction keeps a toehold.

The Court's post-*Shoe* attack on state authority went beyond its narrow interpretation of the minimum contacts test. In *Shaffer v Heitner*,¹⁵⁹ the Court completely eliminated quasi in rem jurisdiction.¹⁶⁰ The Court concluded that the idea that a state could assert

¹⁵⁶ See *Nicastro*, 564 US at 883–84.

¹⁵⁷ *Id.* at 880.

¹⁵⁸ See, for example, Perdue, 63 SC L Rev at 742 (cited in note 26) ("[T]o the extent [Justice Anthony] Kennedy's approach is sovereignty-based, it reflects the view that states' sovereign powers are quite limited."); Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 Case W Reserve L Rev 769, 805 (2016) ("Although Justice Kennedy strongly implies that his limited reading of jurisdiction in stream of commerce cases is compelled by sovereignty concerns, the state of New Jersey had a sovereign interest in the defendant's conduct."); Brooke D. Coleman, *Civil-izing Federalism*, 89 Tulane L Rev 307, 324–25 (2014):

[W]hen Justice Kennedy discussed federalism in *Nicastro*, it was not with an eye toward the federal/state distribution of power, it was instead about the power relationship between the states themselves.

For the conservative Justices, their positions are converse to their traditional federalism stance.

¹⁵⁹ 433 US 186 (1977).

¹⁶⁰ See *id.* at 208–09. Technically, the Court also eliminated in rem jurisdiction, but, because it would be highly "unusual" for the state in which a property sits to not have jurisdiction over a dispute about property in its borders under the minimum contacts test, the major casualty of the Court's holding was quasi in rem jurisdiction. See *id.* at 207–08.

jurisdiction over property within its borders was simply an “ancient” “fiction” that lacked sufficient “modern justification.”¹⁶¹ In the Court’s view, quasi in rem jurisdiction’s “continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.”¹⁶² Thus, the Court swept aside this centuries-old practice and declared that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.”¹⁶³

Shaffer is a paradigmatic example of Justice Black’s warning that *Shoe*’s malleable standard could allow a future Court to constrict the reach of state jurisdiction “on the ground that it does not conform to this Court’s idea of natural justice.”¹⁶⁴ The *Shaffer* Court offered no real justification for its decision other than the Court’s view that quasi in rem jurisdiction is really jurisdiction over the person and such jurisdiction is unfair.¹⁶⁵ The first conclusion is questionable because quasi in rem jurisdiction allows recovery only up to the value of the property in question—that is, it does not result in a personal judgment.¹⁶⁶ The second conclusion is never really fleshed out. What exactly is unfair about a defendant being subject to suit anywhere that it holds property? The defendant can always move its property if it doesn’t want to be subject to suit in a particular state.

Even as the Court was in the process of removing a critical tool for asserting jurisdiction over nonresident defendants, the Court insisted that it was the Territorial Model that had “sharply limited the availability of in personam jurisdiction over defendants not resident in the forum State,” while *Shoe* “increase[d] the ability of the state courts to obtain personal jurisdiction over nonresident defendants.”¹⁶⁷ Relying on this piece of personal jurisdiction mythology, the Court concluded that eliminating quasi in rem jurisdiction would not cause substantial harm to plaintiffs.

After *Shaffer*, many predicted that the next domino to fall would be “tag” or “transient” jurisdiction—jurisdiction acquired by serving the defendant with process while the defendant is physically present in a forum.¹⁶⁸ However, in *Burnham v Superior*

¹⁶¹ *Id.* at 212.

¹⁶² *Id.*

¹⁶³ *Shaffer*, 433 US at 212.

¹⁶⁴ *Shoe*, 326 US at 326 (Black writing separately).

¹⁶⁵ See *Shaffer*, 433 US at 209–11.

¹⁶⁶ See notes 52–53 and accompanying text.

¹⁶⁷ *Shaffer*, 433 US at 199–200, 204.

¹⁶⁸ See, for example, Jacobs, 46 NM L Rev at 7–8 & n 37 (cited in note 28) (collecting sources predicting the demise of tag jurisdiction).

Court of California, County of Marin,¹⁶⁹ the Court upheld the continuing validity of tag jurisdiction—at least in the vast majority of situations.¹⁷⁰

The justices split, however, on the reasoning for reaching this conclusion, with no opinion receiving a majority of the vote. Justice William Brennan, in an opinion joined by three other justices, concluded that tag jurisdiction remained valid because it was consistent with the fairness principles animating *Shoe* due to tag jurisdiction's long history, which put defendants on notice that they may be subject to personal jurisdiction simply by entering a state.¹⁷¹ In addition, entering a state was itself a form of “purposeful availment” because even a transient visitor takes advantage of a “State’s police, fire, and emergency medical services; . . . travel[s] on the State’s roads and waterways; [and] likely enjoys the fruits of the State’s economy.”¹⁷² Both of these conclusions seem very difficult to reconcile with *Shaffer*.¹⁷³ Wouldn’t quasi in rem jurisdiction’s historical pedigree, which is at least as lengthy as tag jurisdiction’s,¹⁷⁴ also put defendants on notice? Also, wouldn’t having property in a state also take advantage of a state’s governmental resources and economy at least as much as a fleeting visit? These inconsistencies highlight the fundamentally indeterminate nature of *Shoe*’s focus on vague concepts of fairness.

¹⁶⁹ 495 US 604 (1990).

¹⁷⁰ See *id.* at 607, 628 (Scalia) (plurality); *id.* at 628 (White concurring); *id.* at 628–29 (Brennan concurring); *id.* at 640 (Stevens concurring).

¹⁷¹ *Id.* at 635–37 (Brennan concurring).

¹⁷² *Id.* at 637–38 (Brennan concurring).

¹⁷³ Indeed, Brennan’s opinion was widely critiqued at the time for this reason. See, for example, Mary Twitchell, *Burnham and Constitutionally Permissible Levels of Harm*, 22 Rutgers L J 659, 661 (1991) (“I do not see how Justice Brennan can assert that the benefits gained from traveling through a state are sufficient to justify a state’s authority to decide *any* claim a plaintiff might assert against the defendant.”); Stanley E. Cox, *Would that Burnham Had Not Come to Be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of Why Transient Presence Jurisdiction Is Unconstitutional, and Some Thoughts about Divorce Jurisdiction in a Minimum Contacts World*, 58 Tenn L Rev 497, 547 (1991) (“[T]he Brennan opinion fails to follow minimum contacts logic through to the compelled conclusion that transient presence jurisdiction is always unconstitutional.”); Eliot D. Prescott, Note, *Transient Jurisdiction Is Here to Stay: Burnham v. Superior Court of California*, 23 Conn L Rev 1125, 1161 (1991) (“Justice Brennan avoided the very analysis to which he pledged allegiance.”).

¹⁷⁴ See note 40.

Justice Antonin Scalia's opinion, which was joined in large part by three other justices,¹⁷⁵ appeared to take an altogether different approach, at least on the surface. Scalia noted that, "[t]o determine whether the assertion of personal jurisdiction is consistent with due process, we have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority."¹⁷⁶ Instead of casting *Shoe* as a departure from this territorial power-based regime, he called *Shoe*'s "traditional notions of fair play and substantial justice" standard "the classic expression of" the original territorial power regime from *Pennoyer*.¹⁷⁷ In this framing, the *Shoe* standard was merely an analogy to physical presence rather than a whole new way of thinking about personal jurisdiction.

Scalia noted that the exercise of personal jurisdiction based on in-state service was well established in American law at the "crucial time" for his analysis—when the Fourteenth Amendment was adopted.¹⁷⁸ From that observation, Scalia was able to conclude fairly easily that this form of acquiring personal jurisdiction remained valid.¹⁷⁹ In his view, because the *Shoe* standard was just developed as an "analogy to 'physical presence,' [] it would be perverse to say it could now be turned against that touchstone of jurisdiction."¹⁸⁰

Scalia's methodology is even more difficult to square with *Shaffer* than Brennan's conclusion. Scalia half-heartedly distinguished *Shaffer* on the grounds that it did not address jurisdiction over defendants who were physically present in the forum.¹⁸¹ However, he also gets a bit more candid by admitting that his "basic approach to the due process question is different" than the approach taken in *Shaffer*; he "conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule" because "its validation is its pedigree."¹⁸² As Scalia would have it,

For new procedures, hitherto unknown, the Due Process Clause [would] require[] analysis to determine whether [they

¹⁷⁵ *Burnham*, 495 US at 607 (Scalia) (plurality). Justice Byron White joined the whole opinion except for a portion that was dedicated to responding to Brennan's arguments and another portion that was devoted to distinguishing *Shaffer*. See *id.* at 628 (White concurring).

¹⁷⁶ *Id.* at 609 (Scalia) (plurality).

¹⁷⁷ See *id.* at 609–10 (emphasis added).

¹⁷⁸ *Id.* at 611.

¹⁷⁹ See *Burnham*, 495 US at 619 (Scalia) (plurality).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 621.

¹⁸² *Id.*

are consistent with] ‘traditional notions of fair play and substantial justice[,]’ . . . [b]ut a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed [would] unquestionably meet[] that standard.¹⁸³

Scalia’s approach—at least on the surface—would set the tools that states had for asserting personal jurisdiction at the time of the Fourteenth Amendment’s ratification as a floor while potentially allowing states to develop additional tools to assert jurisdiction over out-of-state defendants, provided that those new tools satisfy *Shoe*’s fairness test. But it is unclear why Scalia thinks the *Shoe* test even needs to be followed to determine the fairness of new procedures. Shouldn’t even new procedures be valid as long as they are consistent with the original meaning of the Due Process Clause?¹⁸⁴

More importantly, a majority of the Court has never adopted Scalia’s proposal to leave the states’ pre-*Shoe* jurisdictional powers undisturbed. Of course, *Shaffer*’s elimination of in rem jurisdiction is a major example, but so is the creation and expansion of the purposeful availment requirement, which has curtailed state jurisdiction considerably. Scalia himself joined the *Nicastro* plurality in the most aggressive framing of that requirement.¹⁸⁵

Despite these gaps in the reasoning of the opinions, the preservation of tag jurisdiction is commendable. However, it is likely to be far less impactful than the loss of quasi in rem jurisdiction. The main reason is that, even after *Burnham*, most courts have still held that *Shoe* does not allow the application of tag jurisdiction to corporations and other business entities.¹⁸⁶ Because the actors most likely to be sued across state lines are companies, the ability to subject individuals to tag jurisdiction is of little use to most plaintiffs. Moreover, even when courts do allow corporations to be subject to tag jurisdiction, the ability to tag a corporate

¹⁸³ *Burnham*, 495 US at 622 (Scalia) (plurality).

¹⁸⁴ See *District of Columbia v Heller*, 554 US 570, 582 (2008) (reasoning that, “[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding”) (citations omitted).

¹⁸⁵ See text accompanying note 150. See also *Nicastro*, 564 US at 877.

¹⁸⁶ See *Jacobs*, 46 NM L Rev at 26 (cited in note 28).

officer in any given case depends a lot on luck, and corporate defendants can more easily avoid tag jurisdiction than quasi in rem proceedings targeting their property.¹⁸⁷

4. Stomping out general jurisdiction: *Daimler*.

The final and most recent weakening of state jurisdictional power under *Shoe* has been the evisceration of general jurisdiction. The Court began to signal a serious retreat from *Perkins* in *Goodyear Dunlop Tires Operations, S.A. v Brown*,¹⁸⁸ in which it held that, in addition to having “continuous and systematic” contacts with a forum, a corporation must also be “essentially at home in the forum” to be subject to general jurisdiction.¹⁸⁹ Like the purposeful availment requirement, this “at home” requirement is nowhere to be found in *Shoe*.¹⁹⁰ Instead, it represents yet another judicially invented addition to *Shoe* to further constrain state power when the Court finds it desirable to do so.

But the severe impact of this new requirement on general jurisdiction did not become clear until the Court’s decision in *Daimler AG v Bauman*.¹⁹¹ There, the Court rejected California’s attempt to exercise general jurisdiction over Daimler, a German car manufacturer with an American subsidiary¹⁹² that had “multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine.”¹⁹³ Daimler also sold billions of dollars of cars per year in California, making it the “largest supplier of luxury vehicles to the California market.”¹⁹⁴ Yet the Court found that Daimler could not be subject to general jurisdiction in California because, despite these indisputably continuous and

¹⁸⁷ The fact that there are so few cases analyzing this question may suggest that the situations in which a corporate officer can be served while present in a desired forum are rare. See *id.* at 26–35.

¹⁸⁸ 564 US 915 (2011).

¹⁸⁹ *Id.* at 919.

¹⁹⁰ *Shoe* does say that “[t]o require [a] corporation . . . to defend [itself in suits unrelated to its activities in a forum] away from its home or *other jurisdiction where it carries on more substantial activities* has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.” *Shoe*, 326 US at 317 (emphasis added). Thus, *Shoe* specifically envisioned general jurisdiction arising in places *other than* the corporation’s “home.”

¹⁹¹ 134 S Ct 746 (2014).

¹⁹² The Court’s analysis assumed that, even if the contacts of the subsidiary were attributable to Daimler, “there would still be no basis to subject Daimler to general jurisdiction.” *Id.* at 760.

¹⁹³ *Id.* at 752.

¹⁹⁴ *Id.*; *id.* at 763 (Sotomayor concurring).

systematic contacts with California, Daimler was not “at home” in the forum for purposes of general jurisdiction.¹⁹⁵

The Court held that a corporation could almost never be subject to general jurisdiction anywhere other than its place of incorporation or its principal place of business.¹⁹⁶ The Court left open the possibility that in an extraordinary case general jurisdiction could still be available outside of those two places, but it did not specify what circumstances would warrant such an exception.¹⁹⁷ Despite the multitude of contacts between Daimler and California, the Court in any case found that California could not assert general jurisdiction over Daimler because it was so large a company that applying the continuous and systematic contacts rule would render it subject to general jurisdiction virtually everywhere it does substantial business.¹⁹⁸ Why exactly this would be a problem, the Court didn’t say.

In a break from some other cases, the Court actually admitted that its approach was more constraining than that of some Territorial Model-era cases. In a footnote, the Court dismissed the plaintiff’s reliance on two cases from that era allowing claims unrelated to the defendants’ in-forum activities in forums other than their place of incorporation or principal place of business, noting that they were “decided in the era dominated by *Pennoyer’s* territorial thinking [and] should not attract heavy reliance today.”¹⁹⁹ Unfortunately, personal jurisdiction mythology was still alive and well with the majority repeating the claim that *Shoe* “unleashed a rapid expansion of tribunals’ ability to hear claims against out-of-state defendants” in specific jurisdiction cases.²⁰⁰

In addition to decimating general jurisdiction, many scholars have suggested that *Daimler* presages the end of consent-by-statute jurisdiction, at least when it comes to claims unrelated to the defendant’s activity in the forum.²⁰¹ Even before *Daimler*, “implied consent as an independent basis for jurisdiction ha[d] been

¹⁹⁵ See *Daimler*, 134 S Ct at 760–62.

¹⁹⁶ See id at 760.

¹⁹⁷ See id at 761 n 19.

¹⁹⁸ See id at 761–62.

¹⁹⁹ *Daimler*, 134 S Ct at 761 n 18 (citations omitted). Those two cases were *Barrow Steamship Co v Kane*, 170 US 100 (1898), and *Tauza v Susquehanna Coal Co*, 115 NE 915 (NY 1917).

²⁰⁰ *Daimler*, 134 S Ct at 755.

²⁰¹ See, for example, Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 *Cardozo L Rev* 1343, 1346–47 (2015) (“Commentators have approached the analysis from a variety of perspectives over the years. Most are in agreement that jurisdiction based on registration to do business violates the Due Process

largely abandoned,”²⁰² with courts and scholars questioning the doctrine’s continued vitality in the era of *Shoe*.²⁰³ But *Daimler*—“and the dramatic contraction of general jurisdiction based on continuous and systematic general business contacts” it represented—suggests that the Court would be especially unlikely now to allow consent by statute to form a basis for general jurisdiction.²⁰⁴ Doing so would create “a profound gap between doing business as a basis for jurisdiction and registering to do business as a basis for jurisdiction.”²⁰⁵ Of course, that still leaves open the possible validity of consent statutes in specific jurisdiction cases, but that offers little solace to plaintiffs because, in cases in which there is a clear enough connection between the defendant’s forum-based activities and the litigation, jurisdiction would have likely already been available.

* * *

At this point, it is worth pausing to consider how far the gap is between where personal jurisdiction doctrine was prior to *Shoe* and where it stands now after *Daimler*. Prior to *Shoe*, a state had a number of options at its disposal for reaching out-of-state defendants, including quasi in rem jurisdiction, statutory consent, and constructive presence. Today, quasi in rem jurisdiction has been explicitly overruled, statutory consent is on its deathbed, and the replacement for constructive presence—the minimum contacts test—has been reduced to a shadow of its predecessor because of the strict purposeful availment requirement.

To see how impactful these changes are, one need look no further than *Daimler* itself. Much like the plaintiffs in *BNSF* that the Introduction describes, the plaintiffs in *Daimler* would have been much better off if their case had arisen in 1914 instead of 2014. They could have argued for a consent theory if *Daimler* complied with California’s registration statute.²⁰⁶ Or if the consent

Clause.”); Benish, Note, 90 NYU L Rev at 1613 (cited in note 58) (arguing that “it is unconstitutional to assert general jurisdiction over foreign corporations based on a consent-by-registration theory”). But see Jack B. Harrison, *Registration, Fairness, and General Jurisdiction*, 95 Neb L Rev 477, 541–44 (2016) (arguing that jurisdiction by consent statute may still be valid after *Daimler*).

²⁰² Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U Ill L Rev 1171, 1185–97.

²⁰³ See, for example, Harrison, 95 Neb L Rev at 512–16 (cited in note 201); Rhodes, 57 Baylor L Rev at 235–36 (cited in note 70).

²⁰⁴ Monestier, 36 Cardozo L Rev at 1401 (cited in note 201).

²⁰⁵ *Id.*

²⁰⁶ See Cal Corp Code § 2105.

statute was not construed to cover claims unrelated to Daimler's California activities, the plaintiffs could have simply attached some of Daimler's millions of dollars in assets in California in a quasi in rem action. Today, under *Shoe*, the Daimler plaintiffs and countless others like them are left with no remedy at all.

Some who decry this tightening of the scope of personal jurisdiction call it a perversion of *Shoe*'s fairness standard.²⁰⁷ But as Black recognized, while “[t]here is a strong emotional appeal in the words ‘fair play,’ ‘justice,’ and ‘reasonableness,’” such malleable standards ultimately serve to empower judges to “strike down [any] State or Federal enactment on the ground that it does not conform to [their] idea of natural justice.”²⁰⁸ For too long, the mythology that has grown around the Territorial Model and *Shoe* has kept courts and scholars from recognizing the *Shoe* system's jurisdiction-constricting effects and from seeing a return to the Territorial Model as a viable alternative.

II. BACK TO BASICS: THE ADVANTAGES OF THE TERRITORIAL MODEL

The history that Part I outlines shows that Justice Black's concerns in his *Shoe* opinion were quite prescient.²⁰⁹ The minimum contacts test has made it difficult for states to exercise personal jurisdiction over corporations selling products within their borders and has also led to much uncertainty as different justices have interpreted *Shoe*'s vague criteria very differently.²¹⁰ These

²⁰⁷ See, for example, Schepard, 32 *Quinnipiac L Rev* at 354 (cited in note 11) (“Justice Kennedy and his allies exploit the apparent ambiguity of the standards in *International Shoe* to justify what [Justice Harlan] Stone would have recognized as a most pernicious form of formalist judicial activism.”).

²⁰⁸ *Shoe*, 326 US at 325–26 (Black writing separately).

²⁰⁹ See Michael H. Hoffheimer, *General Personal Jurisdiction after Goodyear Dunlop Tires Operations, S.A. v. Brown*, 60 *U Kan L Rev* 549, 562 (2012) (“While Justice Black's vision of state power lost traction over time, his warning that *International Shoe*'s approach could reduce as well as expand personal jurisdiction was prescient.”); McFarland, 68 *Mo L Rev* at 766–67 (cited in note 22) (“As to the [vagueness] concern, he complained that the Court had ‘announced vague Constitutional criteria’ and ‘introduced uncertain elements confusing the simple pattern’ by its new ‘elastic standards.’ He was correct. The years have proved him even more prescient.”), quoting *Shoe*, 326 US at 325 (Black writing separately).

²¹⁰ Or as Black predicted less charitably, the Court has found that states lack personal jurisdiction whenever the assertion of personal jurisdiction has “happen[ed] to strike a majority of th[e] Court as for any reason undesirable.” *Shoe*, 326 US at 326 (Black writing separately).

issues have led many scholars to propose alternatives to, or variations on, the minimum contacts test.²¹¹ However, none of these scholars has actually proposed returning to the personal jurisdiction framework based on territorial power that existed prior to *Shoe*, and some have decried the idea.²¹²

The Territorial Model, contrary to the views of critics, is not one focused on “accentuating the defendant’s interests”²¹³ but instead is focused on accentuating the interests of states in protecting and regulating the people and property within their borders. This was the essential basis of the Court’s holding in *Pennoyer*,²¹⁴ and the concept’s origins are much older than that.²¹⁵ This concern for the interests of states in protecting their citizens from out-of-state wrongdoers, which has become (at best) an afterthought under the defendant-focused minimum contacts test, was also the basis for the three key exceptions to *Pennoyer*’s general rules that Part I.A outlines: quasi in rem jurisdiction, consent statutes, and constructive presence.

As I describe in the following Sections, returning to the Territorial Model would solve many of the problems currently plaguing personal jurisdiction doctrine. First, the Territorial Model would be much more predictable for litigants than the vague minimum contacts test and would empower potential defendants to exercise greater control over their exposure to liability in particular forums. Second, the Territorial Model would return primary power over the scope of personal jurisdiction to the political branches of government by increasing the role of implied consent statutes and decreasing the role of courts. Third, the Territorial Model would be much more well-grounded in a clear theoretical justification than the current iteration of the minimum contacts test. Fourth, the Territorial Model is much

²¹¹ See, for example, Sachs, 95 Tex L Rev at 1255, 1318–23 (cited in note 12) (advocating a personal jurisdiction doctrine based on principles derived from “the general law, not as it stood in 1878, but as it stands today”); McFarland, 68 Mo L Rev at 801 n 206 (cited in note 22) (collecting articles calling for approaches to personal jurisdiction based on convenience or fairness rather than minimum contacts); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 BC L Rev 529, 569–70 (1991) (advocating an approach that focuses on the forum’s legitimate interests in the dispute).

²¹² See, for example, Rhodes, 82 Tulane L Rev at 635 (cited in note 14) (“Undoubtedly, due to technological advances over the last 130 years, the old shibboleth of territorial presence is unworkable.”).

²¹³ See Schepard, 32 Quinipiac L Rev at 382–83 (cited in note 11).

²¹⁴ See *Pennoyer*, 95 US at 720 (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”).

²¹⁵ See *Burnham*, 495 US at 610–11 (Scalia) (plurality) (noting that territory-focused jurisdictions “had antecedents in English common-law practice”), citing *Mostyn v Fabrigas*, 98 Eng Rep 1021 (KB 1774); *Cartwright v Pettus*, 22 Eng Rep 916 (Ch 1675).

more consistent with the original meaning of the Due Process Clause than the current doctrine.

A. Predictability

Perhaps the most common critique of the current minimum contacts test is that it is unclear.²¹⁶ The test is unclear on two levels. First, the test itself, at least when it comes to specific jurisdiction,²¹⁷ is vague. It deliberately provides no bright-line rules and instead relies on a kind of balancing test: Are the defendant's litigation-related contacts with a forum enough to justify asserting jurisdiction over it is "fair?" Answering that question not only requires an inquiry into the judge's views of "fairness" but also a measurement of the "relatedness" of the contacts to the controversy.

Second, personal jurisdiction doctrine is vague as a result of divides on the Supreme Court about how to apply the test. *Nicastro* is just the most recent example of this divide, with the Court producing a four-justice plurality, a narrow two-justice concurrence, and a three-justice dissent that failed to give the courts much guidance about how to apply the minimum contacts test to cases involving products traveling through the so-called stream

²¹⁶ See, for example, Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 Creighton L Rev 1245, 1247 (2011) ("[T]he minimum contacts test is deeply incoherent."); Israel Packel, *Congressional Power to Reduce Personal Jurisdiction Litigation*, 59 Temple L Q 919, 919–20 (1986) ("The underlying reason for the continuing uncertainty as to personal jurisdiction seems to be the inability of the courts to effect any specific rules; the only guidance is the indefinite concept of minimum contacts."); Mark P. Gergen, Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U Chi L Rev 156, 160 (1982):

The [minimum contacts test] . . . is unpredictable, it offers no guidance to persons seeking to avoid being subject to a state's jurisdiction. Each decision is too fact-bound for general application, and the weight given to each competing variable is left to the discretion of individual judges. . . . [I]t is impossible for individuals to predict with any certainty where their conduct will render them subject to suit.

See also *Lakeside Bridge & Steel Co v Mountain State Construction Co*, 445 US 907, 911 (1980) (White dissenting from denial of certiorari) ("The disarray among federal and state courts [related to some aspects of the minimum contacts test] may well have a disruptive effect on commercial relations in which certainty of result is a prime objective."); Cody Jacobs, *A Fork in the Stream: The Unjustified Failure of the Concurrence in J. McIntyre Machinery Ltd. v. Nicastro to Clarify the Stream of Commerce Doctrine*, 12 DePaul Bus & Comm L J 171, 198 (2014) ("International manufacturers seeking entry into the American market and the domestic distributors who sell their products have no way to apportion the risk of liability among themselves or to plan to avoid liability in certain jurisdictions altogether.").

²¹⁷ The scope of general jurisdiction is arguably clear after *Daimler*, even if it is extremely restrictive.

of commerce.²¹⁸ That split was a repeat of a 4–4 split on the same issue thirty years earlier in *Asahi Metal Industry Co v Superior Court of California, Solano County*.²¹⁹ In the years between those two cases, eight of the nine justices on the Supreme Court were replaced, but the divide remained, suggesting that these divides are not just the result of an ideologically fractured Court but also a reflection of the malleability of the test itself. The stream of commerce issue is not the only personal jurisdiction issue to produce these kinds of divides on the Court—the Court also split 4–4 in *Burnham*. While *Burnham*'s split was less doctrinally impactful than the *Nicastro* and *Asahi* splits,²²⁰ it still reflected a deep divide about how to apply the minimum contacts test and what its “fairness” requirement means—that is, whether it is just about “traditional” notions of fairness or whether contemporary ideas about fairness should also be a factor.

The lack of clarity in the doctrine is not just theoretical. Personal jurisdiction has become one of the most frequently litigated issues in state and federal courts.²²¹ This has led to litigants expending significant resources on jurisdictional discovery.²²² These formidable costs can deter plaintiffs from filing potentially meritorious claims.²²³ Because there is often a large disparity in resources between plaintiffs and defendants, defendants can use jurisdictional issues to increase the plaintiff's litigation costs to increase their chances of forcing the plaintiff to give up or accept a favorable settlement—even when the ultimate outcome of a jurisdictional dispute is unclear.²²⁴

²¹⁸ See Jacobs, 12 DePaul Bus & Comm L J at 194–95 (cited in note 216) (describing circuit court opinions that found that “the law remains the same” after *Nicastro*).

²¹⁹ 480 US 102 (1987).

²²⁰ Despite Justice Brennan's opinion seeming to leave the door open, no court has refused to apply tag jurisdiction to a natural person on fairness grounds since *Burnham*. See Jacobs, 46 NM L Rev at 33 & n 201 (cited in note 28).

²²¹ See Walter W. Heiser, A “Minimum Interest” Approach to Personal Jurisdiction, 35 Wake Forest L Rev 915, 916–17 & n 5 (2000).

²²² See S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash & Lee L Rev 489, 493 & n 11 (2010). And the availability and scope of jurisdictional discovery itself is a highly contestable issue governed by malleable or nonexistent standards. See *id* at 558–64.

²²³ See Dustin E. Buehler, *Jurisdictional Incentives*, 20 Geo Mason L Rev 105, 129–30 (2012) (“[L]itigation over personal jurisdiction alters the private incentives of filing suit because the plaintiff incurs substantial costs.”).

²²⁴ See *id* at 130 (“Indeed, when a defendant has a significant financial advantage over the plaintiff, it frequently uses jurisdictional issues for strategic purposes, initiating a costly round of procedural litigation ‘to dry out the plaintiff's resources.’”).

Of course, unclear personal jurisdiction rules are not just bad for plaintiffs. Companies purchasing liability insurance or making agreements with distributors must do so under the cloud of uncertainty that is created by personal jurisdiction rules that turn on nonprecedential Supreme Court opinions and individual judges' conceptions of fairness.²²⁵ Uncertainty is especially problematic when it comes to products liability litigation because it undermines the ability of products liability law to provide a pricing signal to consumers about product risk.²²⁶ In other words, the prices consumers pay for products may be increased just based on jurisdictional uncertainty rather than actual risk associated with those products.²²⁷

Beyond these practical problems, there is something more fundamentally troubling about unclear personal jurisdiction rules. While a lack of clarity in any legal doctrine is undesirable, it is particularly problematic for personal jurisdiction to be a source of uncertainty because the authority to regulate personal jurisdiction determinations stems from the Due Process Clause. The Court itself has acknowledged that “[t]he Due Process Clause, by ensuring the orderly administration of the laws,” is supposed to provide “a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”²²⁸ The current state of personal jurisdiction doctrine does not provide defendants with an opportunity to do this.²²⁹

Returning to the Territorial Model would restore predictability to personal jurisdiction and eliminate or dramatically ameliorate many of these issues. The Territorial Model is governed by bright-line rules that leave little room for judicial discretion and will rarely require substantial jurisdictional discovery. Is the defendant's property physically located in the state or not? Is it registered to do business there or not? These are fairly easy questions to answer with minimal litigation cost. Although issues involving constructive presence might be a little bit more fraught, the “doing business” rule is still easier to apply than the minimum contacts test—if a company sells a product in a state, it is doing business there, and if it doesn't, it isn't. No purposeful availment is

²²⁵ See Jacobs, 12 DePaul Bus & Comm L J at 199–201 (cited in note 216).

²²⁶ See *id.* at 202.

²²⁷ See *id.*

²²⁸ *Woodson*, 444 US at 297 (quotation marks omitted).

²²⁹ See Jacobs, 12 DePaul Bus & Comm L J at 204–05 (cited in note 216).

required, so there is no need for a complex inquiry into whether the defendant was “targeting” the forum.

Moreover, a return to the Territorial Model would likely bring back a primary role for state statutes in defining the scope of personal jurisdiction. This would come about primarily through the revival of implied consent statutes and statutes that specifically define the activities that constitute doing business. Clear statutory guidance about what will subject potential defendants to jurisdiction will give potential defendants a path to structure their primary conduct to avoid liability in particular states if they choose to do so.²³⁰

To be sure, a return to the Territorial Model would not eliminate all difficult personal jurisdiction questions. But it would substantially reduce uncertainty compared to the status quo.

B. Returning Jurisdiction to the Political Process

Moving state legislatures back to the forefront of defining the scope of personal jurisdiction would not just reduce uncertainty; it would also make personal jurisdiction rules more democratically legitimate. Under the current regime, most states simply have long-arm statutes that extend jurisdiction to the farthest reaches allowable by the minimum contacts test.²³¹ The determination of what the actual outer limit of jurisdiction will be is left entirely in the hands of the courts applying the minimum contacts test as interpreted by the Supreme Court.

The Territorial Model envisions a more collaborative process. Because defendants who are not physically present in a state would no longer be subject to jurisdiction in the absence of an applicable exception, long-arm statutes that go to the limits of due process would no longer be effective. Instead, states would

²³⁰ Arguably, this would put a burden on companies to figure out the personal jurisdiction rules of fifty different jurisdictions. But this additional burden would be more than offset by no longer having to guess how the minimum contacts test might be resolved in any given situation. Plus, even under the minimum contacts test, there is no guarantee of geographic consistency. For one thing, not every state extends its long-arm statute to the limits of due process. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 BU L Rev 491, 497 (2004). Also, because the minimum contacts test is so beset with ambiguities, there are many circuit splits and splits among state courts in how they apply that test. See Jacobs, 64 UCLA L Rev at 688 (cited in note 32) (“There is a split in the lower courts over whether the status exception applies to actions seeking domestic violence restraining orders against out-of-state defendants.”); Jacobs, 12 DePaul Bus & Comm L J at 183 (cited in note 216) (describing a circuit split about the stream of commerce doctrine).

²³¹ See McFarland, 84 BU L Rev at 497 (cited in note 230).

be incentivized to create comprehensive implied consent statutes covering different activities out-of-state defendants may undertake that could subject them to personal jurisdiction. This would allow legislatures to deliberately pick and choose which activities warrant asserting jurisdiction.

However, the courts would still have a role in policing states that became overly aggressive in asserting personal jurisdiction. But that role would not be to reject the exercise of jurisdiction whenever it struck the courts as unfair; rather it would be to apply the clear built-in limitations on jurisdiction the Territorial Model provides. For example, courts would continue to not allow a quasi in rem judgment to exceed the value of the attached in-state property.²³² Courts would also require actual (rather than implied) consent when a state seeks to assert general jurisdiction through a consent statute.²³³ Finally, courts would continue to block assertions of jurisdiction based on constructive presence when a business only solicits, rather than conducts, actual business in a forum.²³⁴ Of course, on top of all this, courts would continue to require adequate notice before a proceeding could be validly initiated under any jurisdictional theory.²³⁵

Some may worry that a system that gives more control to state legislatures over the scope of personal jurisdiction will lead to legislators treating out-of-state businesses unfairly in order to help their constituents. However, this concern is overblown, especially in the modern economy. Today, so-called out-of-state businesses have far more ability to influence the political process in state legislatures through campaign contributions and direct lobbying efforts than even many state residents.²³⁶ Moreover, foreign

²³² See Part I.A.1.

²³³ See Part I.A.2.

²³⁴ See Part I.A.3.

²³⁵ See, for example, *Wuchter v Pizzutti*, 276 US 13, 19 (1928):

[T]he enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him, by some written communication, so as to make it reasonably probable that he will receive actual notice.

²³⁶ For example, through organizations like the American Legislative Exchange Council (ALEC), multinational corporations actually develop favored model legislation for legislators to enact. See generally Mike McIntire, *Conservative Nonprofit Acts as a Stealth Business Lobbyist* (NY Times, Apr 21, 2012), online at <http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html> (visited May 7, 2018) (Perma archive unavailable). These efforts have been very successful—ALEC alone succeeds in passing about two hundred state bills per year. See Alan Greenblatt, *What Makes Alec Smart?* (Governing the States and Localities, Oct 2003), archived at <http://perma.cc/V4CL-P4U8>; Gordon Lafer, *The One Percent Solution: How*

corporations can often use the threat of not doing business in a state to prevent state governments from enacting legislation that could hurt their business and may even have a built-in constituency in the state in the form of any employees they employ in those states.²³⁷ For example, if California wanted to enact a consent statute that required consenting to general jurisdiction, a corporation like Daimler could threaten to close its numerous offices in the state and put hundreds of Californians out of work.²³⁸

That's not to say that corporations would win every battle over what the scope of personal jurisdiction should be in states. States would return to being able to assert the full extent of their sovereign power to protect their citizens, and some would probably choose to use it. This is as it should be. While the Due Process Clause may protect the right of defendants not to be haled before a court with no authority over them, plaintiffs also have a due process interest in being able to have a realistic forum to sue companies that have wronged them. The pre-*Shoe* Court repeatedly recognized this interest, including in *Pennoyer* itself.²³⁹ Even the modern Court has recognized in other contexts that “the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.”²⁴⁰ The best way to balance these competing due process interests is through the legislative process.²⁴¹

Corporations Are Remaking America One State at a Time 12–16 (Cornell 2017) (describing the successful efforts of corporate lobbyists in enacting their agenda at the state level).

²³⁷ See, for example, J. Weston Phippen, *The Businesses against the Texas Bathroom Bill* (The Atlantic, July 17, 2016), archived at <http://perma.cc/GAC7-D5WB> (reporting on several major companies that urged Texas legislators not to pass a law that would require transgender citizens to use public bathrooms corresponding with the gender identity listed on their birth certificate).

²³⁸ The Dormant Commerce Clause also prevents states from unfairly targeting out-of-state businesses to benefit local ones. See, for example, *Department of Revenue of Kentucky v Davis*, 553 US 328, 353 (2008).

²³⁹ See Part I.A.

²⁴⁰ *Logan v Zimmerman Brush Co.*, 455 US 422, 429–30 & n 5 (1982).

²⁴¹ See Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S Cal L Rev 945, 972 (2017) (noting the courts’ “desire to . . . avoid having to adjudicate conflicts between competing constitutional interests”).

C. Theoretical Consistency: A Limitation on State Power, Not a Protection of Liberty

The minimum contacts test is often critiqued by scholars for lacking a coherent and consistent theoretical foundation.²⁴² This critique is well-grounded—most of the opinions in the *Shoe* era, including *Shoe* itself, have either failed to identify a justification for limitations on personal jurisdiction or been inconsistent about what that justification is. Scholars and the Court have suggested three broad categories of theoretical framings to fill this gap. Most often, scholars and the Court have cast modern personal jurisdiction rules as a function of personal liberty—that is, as a protection for each individual against being unexpectedly or unfairly haled into a foreign court.²⁴³ On the other hand, many scholars and a few members of the Court have suggested that personal jurisdiction doctrine ought to simply be a device for ensuring that litigants are not forced into an inconvenient forum.²⁴⁴ Finally, the Court has occasionally suggested that personal jurisdiction doctrine is a method of maintaining federalism by preventing states from interfering with each other’s sovereign interests.²⁴⁵

²⁴² See Allan Erbsen, *Impersonal Jurisdiction*, 60 Emory L J 1, 3–4 (2010) (“[C]ommentators cannot agree on the constitutional source of limits on state judicial authority. . . . Competing theories also abound about the purpose that limits on personal jurisdiction serve.”); Heiser, 35 Wake Forest L Rev at 916 (cited in note 221) (pointing out the “Court’s failure to adequately identify the reasons for the due process restrictions on personal jurisdiction”).

²⁴³ See, for example, *Insurance Corp of Ireland, Ltd v Compagnie des Bauxites de Guinee*, 456 US 694, 702 (1982) (“The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”); Jacob Kreutzer, *Incorporating Personal Jurisdiction*, 119 Penn St L Rev 211, 239–40 (2014) (“[O]n balance, the [Supreme Court’s] treatment of personal jurisdiction is highly consistent with the view that it is an individual right.”).

²⁴⁴ See, for example, *Woodson*, 444 US at 300 (Brennan dissenting) (advocating an approach that would focus on whether the defendant could demonstrate “actual inconvenience” created by a state’s assertion of jurisdiction); McFarland, 68 Mo L Rev at 801 n 206 (cited in note 22) (collecting articles calling for a convenience-based approach to personal jurisdiction).

²⁴⁵ See, for example, *Nicastro*, 564 US at 884 (Kennedy) (plurality) (citations omitted):

Personal jurisdiction, of course, restricts “judicial power not as a matter of sovereignty, but as a matter of individual liberty,” for due process protects the individual’s right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it. . . .

[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.

As the remainder of this Section discusses, each of these framings falls short of providing a coherent justification for the minimum contacts test or for personal jurisdiction limitations more generally. On the other hand, the Territorial Model, whether one agrees with it or not, has a very clear theoretical justification—respecting the territorial authority of states within their borders and keeping them from exercising authority outside their borders (as this Section discusses, this is similar to, but distinct from, the horizontal federalism rationale). This theoretical framework is evident in the language of *Pennoyer* itself, of course.²⁴⁶ But it is also consistent with the fact that the Territorial Model predates *Pennoyer*—its rules were developed in the context of international law about the recognition of judgments.²⁴⁷ These are inherent rules about the territorial limits of sovereign authority, not individual due process rights held by defendants. The Fourteenth Amendment’s Due Process Clause simply gave courts a vehicle to apply those rules to intrastate judgments.²⁴⁸

1. Individual liberty: descriptive but incoherent.

A justification for personal jurisdiction based on territorial sovereignty is likely to meet some resistance. Many scholars prefer an individual liberty justification. Under this conception, “[T]he personal jurisdiction requirement protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations.”²⁴⁹

This theory is consistent with the minimum contacts test’s purposeful availment requirement. The defendant itself must voluntarily make some kind of choice to make contact with the forum before it can give up its liberty interest in not being subject to personal jurisdiction there.²⁵⁰ The individual right interpretation

²⁴⁶ See *Pennoyer*, 95 US at 722 (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”).

²⁴⁷ See *D’Arcy v Ketchum*, 52 US 165, 174 (1850).

²⁴⁸ See, for example, Schmitt, 66 Case W Reserve L Rev at 786 (cited in note 158).

²⁴⁹ Rhodes, 82 Tulane L Rev at 604–05 (cited in note 14) (quotation marks omitted), quoting *Burger King Corp v Rudzewicz*, 471 US 462, 471–72 (1985).

²⁵⁰ See Rhodes, 82 Tulane L Rev at 604 (cited in note 14) (“As this phraseology suggests, the defendant itself, rather than some other person or entity, must establish the necessary ‘contacts, ties, or relations’; the ‘unilateral activity’ of other parties or persons ‘cannot satisfy the requirement.’”), quoting *Hanson*, 357 US at 253. See also *Walden*, 134 S Ct at 1122 (“[T]he relationship must arise out of contacts that the defendant *himself* creates with the forum State.”) (quotation marks omitted); *Asahi*, 480 US at 112 (O’Connor) (plurality) (“The ‘substantial connection[]’ between the defendant and the

also finds support in other parts of the Court's modern doctrine. The Court has held that personal jurisdiction objections are waivable, just like other individual rights.²⁵¹ And the Court's focus on fairness as an important criterion in determining whether jurisdiction is present makes sense when understood as a function of the Due Process Clause's protection of individuals against arbitrary assertions of government power.²⁵²

But many scholars go beyond claiming that the individual liberty interpretation is just descriptive. Rather, they argue that the individual liberty framing is logical and normatively desirable compared to a territorial-power framing. Professor Charles Rhodes, for example, argues that liberty is the appropriate framing for thinking about personal jurisdiction because courts have the power to compel defendants to act (or not act).²⁵³ The potential to exercise this power represents the quintessential restraint on liberty because, whatever else it means, liberty includes the right to freedom from physical restraint.²⁵⁴ Rhodes and others taking this position argue that state territorial sovereignty should play, at most, a supporting role in determining whether individual rights are violated.²⁵⁵

Some, such as Professor Harold Lewis, have argued that states lack a significant sovereign interest in personal jurisdiction analysis.²⁵⁶ In his view, a court ruling on a motion to dismiss for lack of personal jurisdiction does not determine anyone's "rights on the merits" or "resolve[] [] issues that implicate substantive state policy."²⁵⁷ Rather, disposing of these motions really impacts only the interests of private parties in having a forum of their

forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*") (citations omitted); Jacobs, 64 UCLA L Rev at 726 (cited in note 32) ("A defendant should be able to make a choice that determines whether or not he or she will be subject to jurisdiction in the forum, and not have that choice made for him by third parties.").

²⁵¹ See *Insurance Corp of Ireland*, 456 US at 703.

²⁵² See Rhodes, 82 Tulane L Rev at 573 (cited in note 14).

²⁵³ See id at 606–08.

²⁵⁴ See id.

²⁵⁵ See id at 635–36 (arguing that determining whether the sovereign has an "interest" in the conduct at issue should be a part of the analysis); Harold S. Lewis Jr, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 Notre Dame L Rev 699, 736 (1983) ("Sovereignty concerns should not find expression in personal jurisdiction rules that oust a fair forum of jurisdiction."). See also id at 735 n 198 (collecting articles reaching similar conclusions).

²⁵⁶ See, for example, Lewis, 58 Notre Dame L Rev at 717, 738–39 (cited in note 255).

²⁵⁷ Id at 732.

choice.²⁵⁸ As Professor Jacob Kreutzer put it, “[I]t is highly unlikely in most personal jurisdiction disputes that either state government particularly cares about the result.”²⁵⁹

Kreutzer also argues that centering the personal jurisdiction inquiry on state sovereignty will lead to reductions in individual liberty because the default assumption will become that the state may exercise power unless there is a reason that it can’t do so.²⁶⁰ In contrast, under an individual rights framing, the default assumption is that the right cannot be interfered with unless there is some reason that it ought to be.²⁶¹ Thus, if state sovereignty plays a central role in jurisdictional analysis, it will inevitably lead to expanded state power to bring remote defendants before its courts because the ability to exercise such power will become the default assumption.²⁶²

Each of these arguments is ultimately unpersuasive. First, the idea that a court bringing before it a defendant restrains the defendant’s liberty just begs the question. The basic statement that a court’s ability to make a defendant do something against his will is a restraint on liberty is true enough. But that tells us nothing about the validity of the court’s liberty restraint in any particular case. The measure of that validity is the court’s sovereign authority to render a judgment in a particular case, not the freestanding liberty interests of the defendant.²⁶³ This makes sense in light of the history of personal jurisdiction doctrine—when the Fourteenth Amendment was ratified, it gave defendants a vehicle to challenge the intrastate recognition of a judgment that was rendered without sovereign authority, but it did not change the substantive rules for determining when that authority existed.²⁶⁴ Thus, while a restraint on liberty may be involved whenever a court asserts personal jurisdiction, whether

²⁵⁸ See *id.* at 732. See also *id.* at 734 (“The sole stakes at that stage of the litigation are those of the parties in securing an advantageous forum or resisting an unfair one.”).

²⁵⁹ Kreutzer, 119 Penn St L Rev at 240 n 144 (cited in note 243).

²⁶⁰ *Id.* at 238–39.

²⁶¹ See *id.*

²⁶² See *id.*

²⁶³ See Schmitt, 66 Case W Reserve L Rev at 786 (cited in note 158):

In other words, defendants have a liberty interest in not being coerced by a state that lacks sovereign authority, just as they have a liberty interest against unjustified coercion by other state actors. When a state court hears a case over which it lacks jurisdiction, it has acted without valid sovereign authority. The defendant can then use the vehicle of the Due Process Clause to challenge the state’s invalid assertion of power. Although framed in liberty, the substance of the individual right is therefore defined by the scope of state sovereignty.

²⁶⁴ See Part I.A.

that restraint is valid is a question about state power, not individual liberty.

Second, while it is certainly true that a state government is highly unlikely to have any special interest in any individual personal jurisdiction determination, it is unclear why this should have an impact on the scope of state authority. It would be rather perverse to say that states have the power to adjudicate disputes that would otherwise be outside of their sovereign authority because they do not care very much about the outcome of those cases. Moreover, personal jurisdiction doctrine's limitations on state power do not primarily exist to protect some state interest in having disputes heard in their courts as opposed to in another state's courts.²⁶⁵ Instead, it exists to preserve the national interest in the rule of law by ensuring that a state does not adjudicate a dispute over which it has no lawful authority, whether or not another state may have any interest in the dispute.²⁶⁶

Finally, the concern that centering personal jurisdiction on state sovereignty as opposed to individual liberty is, in part, not justified in the context of the Territorial Model. But to the extent it is, it is a feature, not a bug. It is not completely justified because of the clear bright-line rules the Territorial Model provides. Even though state territorial power is respected under the model, it stops at the border—a state cannot hale someone into court who does not consent or is not served while physically present in the jurisdiction unless one of the clearly delineated exceptions I discuss in Part I.A applies. More fundamentally, though, the fact that the Territorial Model's default assumption would be that state power should *not* be limited would be a welcome change. The default assumption in all but the most suspect areas of lawmaking is that state statutes are constitutional,²⁶⁷ and there is no reason why jurisdictional statutes should be treated differently, especially when there are safeguards in place to ensure reasonable notice.

²⁶⁵ See Part II.C.3.

²⁶⁶ For instance, if Texas courts want to adjudicate a dispute between two French residents who have never set foot in Texas, and whose dispute has nothing to do with Texas, that would exceed Texas's sovereign authority even though doing so would have no impact on the interests of any other state.

²⁶⁷ See *City of Cleburne, Texas v Cleburne Living Center, Inc.*, 473 US 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”). See also Cameron and Johnson, 28 UC Davis L Rev at 841 (cited in note 12) (“[T]he unexplained disjunction between the Court's personal jurisdiction and general due process jurisprudence needs reconsideration.”).

2. Convenience, but for whom?

Other scholars agree that current doctrine is overly restrictive, but their proposed solution to that problem is to adopt an approach that is solely based on convenience.²⁶⁸ They would have the courts discard the minimum contacts test and instead focus on balancing the inconvenience to each party, the location of witnesses, and choice of law issues in determining whether personal jurisdiction is appropriate in a particular forum.²⁶⁹

However, this is not really a coherent explanation for the way any conception of personal jurisdiction doctrine would operate. For example, personal jurisdiction doctrine is completely unconcerned about intrastate venue choices “no matter how inconvenient the specific in-state venue may be.”²⁷⁰ It seems like it would be much more convenient for a defendant living in El Paso to litigate a dispute in Las Cruces than in Beaumont, yet only the former would raise a personal jurisdiction issue. More fundamentally, personal jurisdiction determinations simply aren’t about convenience—there are already other doctrines dedicated to that issue, such as venue and *forum non conveniens*.²⁷¹ Rather, as Professor Stephen Sachs put it, personal jurisdiction “is about *who* gets to decide. It’s about choosing the group of people who get to choose the judges, to write the rules of procedure and evidence, to supply the jury.”²⁷² Those choices are much more tied to notions of sovereign authority (that is, *who* can assert power over this dispute?) than they are to questions about convenience (that is, *where* should this case be heard?).

Finally, a law of personal jurisdiction based on convenience would lead to undesirable consequences. Convenience balancing is arguably an even more malleable standard than minimum contacts and would be at least as vulnerable to being bent to individual judges’ policy preferences as the minimum contacts standard has proven to be. If judges applied convenience factors in a way that allowed most exercises of jurisdiction, then the doctrine

²⁶⁸ See, for example, McFarland, 68 Mo L Rev at 801 n 206 (cited in note 22) (collecting sources).

²⁶⁹ See, for example, Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw U L Rev 1112, 1137–41 (1981); Arthur T. von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv L Rev 1121, 1166–67 (1966).

²⁷⁰ 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, 855 (2012).

²⁷¹ See Cameron and Johnson, 28 UC Davis L Rev at 843 (cited in note 12).

²⁷² Sachs, 95 Tex L Rev at 1324 (cited in note 12) (citations omitted).

would do little more than forum non conveniens and venue already do. On the other hand, if judges applied them too strictly, courts could end up doing what Black feared and “depriv[e] [] State[s] of the right to afford judicial protection to [their] citizens on the ground that it would be more ‘convenient’ for [] corporation[s] to be sued somewhere else.”²⁷³

3. Horizontal federalism: limiting state power in the name of sovereignty.

Another theoretical approach that has gained traction recently is the idea of looking at personal jurisdiction as a function of horizontal federalism—the distribution of power among states.²⁷⁴ The idea is that the scope of any one state’s jurisdictional power “is a function of the other states’ powers” and, thus, that personal jurisdiction decisions must ensure that one state does not encroach on the authority of others.²⁷⁵ This philosophical framing was very evident in the *Nicastro* plurality, which argued that, “if another State were to assert jurisdiction” over a company based in a different state “in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”²⁷⁶

While it is certainly true that a defendant in one state has an interest that is being intruded upon when jurisdiction is asserted inappropriately by another state, it is unclear how the *state’s* sovereign authority is upset by such an intrusion. States may have some generalized interest in protecting their citizens from unlawful exercises of authority by other states, but states do not suddenly lack authority over their citizens simply because another state exercises jurisdiction over a dispute involving one of them. If, for example, the State of Oklahoma had asserted jurisdiction over the New York–based car dealership’s dispute with the plaintiffs in *Woodson*, what exactly would the injury be to New York’s sovereign interests?

Moreover, the idea that one sovereign’s authority ends where another begins is not consistent with the fact that, in most cases involving an interstate dispute, there is more than one forum where personal jurisdiction may be appropriate. Nor is this theory consistent with cases arising in an international context when the

²⁷³ *Shoe*, 326 US at 324–25 (Black writing separately).

²⁷⁴ See Erbsen, 60 Emory L J at 67–75 (cited in note 242).

²⁷⁵ See *id* at 7.

²⁷⁶ *Nicastro*, 564 US at 884 (Kennedy) (plurality).

question is whether the case will be litigated in one particular state or not in the United States at all. In those cases, there is no horizontal federalism interest at stake. Personal jurisdiction is about defining the scope of each state's authority independently of any purported impact that authority may have on other states.

That said, proponents of the horizontal federalism view are correct that personal jurisdiction ought to be based on notions of sovereignty. But while advocates of this view often employ the language of state sovereignty, what they are advocating for is a regime that would place significant unwarranted limitations on state sovereignty. The purposeful availment requirement, for example, puts states in a position in which they have "no more inherent authority than private arbitration panels and are impotent in the judicial arena unless and until they have been empowered by the particular defendant."²⁷⁷ As sovereign entities, states do not need to be empowered by a defendant to exercise jurisdiction over disputes that take place within their territorial jurisdiction. When the Supreme Court forced states to give up that authority, it did much more to upset the balance of *vertical* federalism²⁷⁸ than it did to preserve horizontal federalism.

* * *

Thus, the best theoretical framework for thinking about personal jurisdiction is that it defines the outer limits of each state's sovereign territorial authority. States have authority over the people and property within their borders, which allows the assertion of tag jurisdiction, in rem jurisdiction, and jurisdiction based on domicile. States also have the authority to control the activities that are conducted within their borders, which allows them to extract consent to jurisdiction as a condition of allowing visitors to do certain things in the state. In this way, the Territorial Model's theoretical justifications and its doctrinal rules go hand in hand.

D. A Return to the Original Meaning of the Due Process Clause

The Territorial Model would also return personal jurisdiction doctrine to something that much more closely resembles the original public meaning of the Due Process Clause. One of the main

²⁷⁷ Perdue, 63 SC L Rev at 742 (cited in note 26). See also *id.* ("Thus, to the extent Kennedy's approach [in *Nicastro*] is sovereignty-based, it reflects the view that states' sovereign powers are quite limited.").

²⁷⁸ Vertical federalism is the term used to describe the relationship between the federal government and state governments.

techniques originalists use for divining the original public meaning of a constitutional provision is looking at court decisions interpreting the provision that were contemporaneous with that provision's ratification.²⁷⁹ In the case of personal jurisdiction, *Pennoyer* was decided just eleven years after the ratification of the Fourteenth Amendment and, of course, is the quintessential expression of the Territorial Model. Moreover, as discussed above, *Pennoyer* was simply applying principles of international law that predated the Fourteenth Amendment. The Court interpreted the Due Process Clause as allowing defendants to directly challenge judgments that were contrary to those principles.

Of course, a contemporaneous Supreme Court decision does not always end the debate on the original meaning of a constitutional provision.²⁸⁰ However, other historical sources do little to cast doubt on *Pennoyer's* interpretation. The debates leading up to the ratification of the Fourteenth Amendment barely mentioned the Due Process Clause and did not touch on jurisdictional issues at all.²⁸¹ While some have argued that preratification cases interpreting state due process clause analogues show that *Pennoyer's* territorial rules would not have been part of the original understanding of what due process meant,²⁸² there were very few cases that directly addressed the issue, and one of the only ones to do so actually did use a state's due process clause as a vehicle for applying territorial jurisdiction rules.²⁸³ Moreover, even if state due process clauses were not construed this way, that

²⁷⁹ See, for example, *Burnham*, 495 US at 611 (Scalia) (plurality) (using "evidence of contemporaneous or near-contemporaneous decisions" to determine that tag jurisdiction was considered valid by "American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted"). See also *District of Columbia v Heller*, 554 US 570, 611–13 (2008) (taking a similar approach to determine the meaning of the Second Amendment); *Crawford v Washington*, 541 US 36, 54–55 & n 5 (2004) (taking a similar approach in interpreting the Sixth Amendment).

²⁸⁰ See, for example, David T. Hardy, *Original Popular Understanding of the Fourteenth Amendment as Reflected in the Print Media of 1866–1868*, 30 Whittier L Rev 695, 710–21 (2009) (arguing that the original public meaning of the Privileges and Immunities Clause was that it applied the Bill of Rights to the states, but noting that the Supreme Court rejected that view in the *Slaughter-House Cases*, 83 US 36 (1872)).

²⁸¹ See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L J 408, 477 (2010); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 Creighton L Rev 735, 805 (1981).

²⁸² See Whitten, 14 Creighton L Rev at 835–36 (cited in note 281).

²⁸³ See *id.* at 799 (conceding that *Beard v Beard*, 21 Ind (Kerr) 321 (1863), was the only case in the era to "directly confront[]" the issue and that it endorsed the idea that due process incorporated international norms of personal jurisdiction).

does not necessarily foreclose the Fourteenth Amendment's Due Process Clause from having that construction.²⁸⁴

While scholars may disagree on whether *Pennoyer's* incorporation of territorial jurisdiction rules into the Due Process Clause was consistent with that clause's original meaning,²⁸⁵ there is "not a shred of evidence" that the Due Process Clause empowered judges to determine the validity of state procedures using a vague standard of "fairness" or through anything resembling the minimum contacts test.²⁸⁶ Those scholars who argue against *Pennoyer's* interpretation mostly propose models that would be much more deferential to state jurisdictional decisions than the minimum contacts test.²⁸⁷ For the reasons Part I describes, moving back to the Territorial Model would represent a step in a more deferential direction. Thus, while the Territorial Model may not be the *most* originalist interpretation of the Due Process Clause, it has far more fidelity to the original meaning than the minimum contacts test.

Of course, not everyone finds originalist interpretative methods persuasive.²⁸⁸ But the original understanding of a constitutional provision and the historical context in which it was ratified play *some* role in virtually all methods of constitutional interpretation.²⁸⁹ And here, while the exact meaning of the Due Process

²⁸⁴ Kreutzer, 119 Penn St L Rev at 236 (cited in note 243) ("The Reconstruction Amendments worked a massive shift in the relationship between the individual citizen, his state government, and the federal government.")

²⁸⁵ Compare Whitten, 14 Creighton L Rev at 835–36 (cited in note 281) (arguing that the original understanding of the Due Process Clause, to the extent it contained any substantive requirements at all, restricted only things like notice and opportunity to be heard, not territorial power), with John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 Iowa L Rev 1015, 1033 n 74 (1983) ("As the discussion above shows, and as *Pennoyer* itself indicates, *Pennoyer's* incorporation of the common-law territorial rules of jurisdiction into the meaning of due process was consistent with the earlier cases.")

²⁸⁶ Whitten, 14 Creighton L Rev at 795 (cited in note 281). See also *id.* at 821 ("[E]ven if the international [territorial] rules were an original component of due process, the modern 'minimum contacts' theory of the states' territorial authority surely was not.")

²⁸⁷ See, for example, Borchers, 24 UC Davis L Rev at 24 (cited in note 11) ("[T]he time is ripe for the Court to get out of the business of regulating personal jurisdiction."); Whitten, 14 Creighton L Rev at 846 (cited in note 281):

The primary "territorial" rule that the Court should follow . . . is that a court has jurisdiction to adjudicate an action against any defendant, unless the defendant demonstrates that the relative burdens imposed by suit in the particular court are so great that the defendant is, as a practical matter, unable to defend there adequately.

²⁸⁸ See, for example, Ilya Somin, *Originalism and Political Ignorance*, 97 Minn L Rev 625, 626 n 6 (2012) (collecting articles critiquing originalism).

²⁸⁹ See, for example, *McDonald v City of Chicago*, 561 US 742, 908 (2010) (Stevens dissenting) ("[H]istorical study can discipline as well as enrich substantive due process

Clause as it relates to jurisdiction may be unclear, neither the framers of that clause nor the broader public ever envisioned the Supreme Court using the amendment to constrain state court jurisdiction with a fairness-based balancing test. No matter what theory of constitutional interpretation one subscribes to, this state of affairs should at least be reason to re-examine the current doctrine critically.

III. “MODERN CONCERNS”²⁹⁰

Reviving a jurisdictional theory left for dead over seventy years ago naturally raises questions about how that theory will apply to modern technological and economic developments that either did not exist or were in their infancy at that time. Some scholars have dismissed the Territorial Model as unworkable in part because of its supposed inability to work in the context of these developments.²⁹¹ However, as I demonstrate below in the context of two of the biggest issues that are currently vexing the courts under the minimum contacts test—issues relating to the internet and issues relating to distribution schemes—the Territorial Model offers a much more coherent approach to these problems.

A. The Internet

The application of personal jurisdiction doctrine to the internet has been perhaps one of the most written about topics in personal jurisdiction scholarship over the past two decades.²⁹² Scholars have noted that courts have had considerable trouble applying

analysis.”); Morgan Cloud, *A Conclusion in Search of a History to Support It*, 43 Tex Tech L Rev 29, 49 (2010) (“Of course history is important for understanding our constitutional scheme.”); Mitchell N. Berman, *Originalism Is Bunk*, 84 NYU L Rev 1, 8 (2009) (“I hope to show that we can all care about framers’ intentions, ratifiers’ understandings, and original public meaning without being originalists.”).

²⁹⁰ See *Nicastro*, 564 US at 890 (Breyer concurring) (“Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that re-fashion basic jurisdictional rules.”).

²⁹¹ See, for example, Rhodes, 82 Tulane L Rev at 635 (cited in note 14) (“Undoubtedly, due to technological advances over the last 130 years, the old shibboleth of territorial presence is unworkable.”).

²⁹² See, for example, Alan M. Trammell and Derek E. Bambauer, *Personal Jurisdiction and the “Interwebs”*, 100 Cornell L Rev 1129, 1131–33 (2015); Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U Miami L Rev 133, 134 (2009); Scott T. Jansen, Comment, *Oh, What a Tangled Web . . . The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts*, 71 Mo L Rev 177, 178 (2006); Danielle Keats Citron, *Minimum Contacts in a*

the minimum contacts test to cases involving the internet because of the difficulty of determining whether litigation that arises primarily from online interactions relates to a particular forum.²⁹³ The purposeful availment requirement is particularly problematic because internet users are usually not “targeting” any particular place.²⁹⁴

The Supreme Court has yet to weigh in on how the minimum contacts test applies to cases involving the internet, but many lower courts grappling with the issue have adopted a test that turns on how “interactive” a website is with the user.²⁹⁵ The more interactive the website is, the more likely personal jurisdiction will be found over the operator of the website in the user’s forum.²⁹⁶ Despite being widely employed, this test has been attacked both in scholarship and in the courts for being somewhat subjective and not particularly helpful as applied to modern websites.²⁹⁷ Twitter, for example, is highly “interactive,” but it would be hard to argue that Twitter is subjectively intending to target any specific state in the way *Nicastro* would seem to require before personal jurisdiction could attach. It is slightly easier to imagine an individual Twitter user targeting a particular state by, for example, directing a defamatory message toward an individual known to live in that state, but even that would probably be insufficient given the new requirement that a defendant target not just a person known to live in a particular state but the state itself.²⁹⁸

The Territorial Model would provide relief from this confusion. Because the Territorial Model does not require purposeful availment, courts would no longer need to concern themselves

Borderless World: Voice over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory, 39 UC Davis L Rev 1481, 1483–85 (2006); Dennis T. Yokoyama, *You Can’t Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DePaul L Rev 1147, 1148 (2005); Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process through the Lens of Regulatory Precision*, 98 Nw U L Rev 411, 447 (2004).

²⁹³ See, for example, Trammell and Bambauer, 100 Cornell L Rev at 1158 (cited in note 292) (“For personal jurisdiction, physical location is a fundamental matter; for Internet communication, it is peripheral or even irrelevant. The Internet’s indifference to geography complicates purposeful availment analysis.”).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 1145–50. This test originated in *Zippo Manufacturing Co v Zippo Dot Com, Inc*, 952 F Supp 1119, 1123–25 (WD Pa 1997).

²⁹⁶ See Trammell and Bambauer, 100 Cornell L Rev at 1145–46 (cited in note 292).

²⁹⁷ See, for example, *id.* at 1147–50; Yokoyama, 54 DePaul L Rev at 1166–67 (cited in note 292).

²⁹⁸ See *Nicastro*, 564 US at 880, 883–84 (Kennedy) (plurality). See also Part I.B.2.

with whether a defendant's online activities were targeting a particular state. A plaintiff could not sue an out-of-state defendant based on its internet activities in the absence of personal service in the jurisdiction unless the plaintiff could utilize quasi in rem jurisdiction, implied consent, or constructive presence. Quasi in rem jurisdiction would be useful for plaintiffs suing large corporations with assets in multiple states. And constructive presence would be available when a company was actually selling things in a state even if it was selling those things over the internet. Even in the pre-*Shoe* era, such long-distance sales (accomplished at that time by mail or wire) were considered "doing business" for purposes of constructive presence.²⁹⁹

Of course, just like under the minimum contacts test, the harder cases would not be those that are related to disputes over commercial transactions but, rather, those involving things like defamation and trademark violations. But unlike the minimum contacts test, the Territorial Model provides a clear answer to these questions—a default rule of no jurisdiction but with the option for state legislatures to provide for jurisdiction through implied consent statutes. The default would be no jurisdiction because, in the absence of a commercial transaction, a website operator cannot be constructively present in a jurisdiction. However, state legislatures could pass a statute implying consent based on certain internet-based activities. Such legislation could be very broad—such as implying consent from anyone maintaining a website that is accessible in a particular state.³⁰⁰ It could also be much more narrowly tailored to address issues of particular concern to the state—for example, implying consent based on conduct that harasses the state's citizens online.

How aggressive states wanted to be about implying consent from internet defendants would surely be a messy debate with many competing policy considerations to weigh. While states would have a strong incentive to protect their citizens from internet-based wrongdoing, they also would want to avoid creating a climate that was so hostile to internet businesses that the state's citizens found their favorite websites no longer accessible.³⁰¹ The balance that each state ultimately strikes will likely not be satisfying to some group or another, but at least it will be the product of the democratic process rather than the

²⁹⁹ See, for example, note 103 and accompanying text.

³⁰⁰ Websites can block visitors from particular locations using IP addresses. See Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U Pa L Rev 1951, 1961–62 (2005).

³⁰¹ See Haynes, 64 U Miami L Rev at 167 (cited in note 292).

whims of judges. Moreover, legislation is much more easily subject to revision than constitutional doctrine. As technology evolves and states discover what works effectively, implied consent laws can be changed to strike a better jurisdictional balance.

B. Distribution Schemes

Another issue that has been difficult for courts to deal with under the minimum contacts test is the one that split the Supreme Court in *Nicastro*—cases involving distribution schemes and the so-called stream of commerce.³⁰² Like the internet cases, the purposeful availment requirement has proven difficult to apply in this context. Some courts require a plaintiff suing an out-of-state product manufacturer to demonstrate that the manufacturer intentionally targeted that specific state before personal jurisdiction can attach.³⁰³ Others don't explicitly require such targeting but do require a demonstration that the defendant should have known that its products would reach the state through the stream of commerce.³⁰⁴ Courts also struggle with whether to count contacts that a defendant's subsidiary or distributor has with a state in determining whether the defendant has sufficient contacts with a forum.³⁰⁵

These issues become particularly pronounced when they appear (as they often do) in the same case: a foreign manufacturer creates a domestic subsidiary for the purpose of distributing its products in the United States but without any specific direction to sell in a particular state. Does the sale of those products into a specific state constitute sufficiently purposeful availment of that state by the manufacturer because the manufacturer can honestly say they did not specifically target that state? And if specific targeting is required, is it enough that the subsidiary did the targeting or does the manufacturer itself have to do it?

The minimum contacts test does not provide clear answers to either of these questions, and the ones that have been suggested

³⁰² See generally Jacobs, 12 DePaul Bus & Comm L J 171 (cited in note 216). See also Buehler, 20 Geo Mason L Rev at 111–20 (cited in note 223). See also generally Danielle Tarin and Christopher Macchiaroli, *Refining the Due-Process Contours of General Jurisdiction over Foreign Corporations*, 11 J Intl Bus & L 49 (2012).

³⁰³ See Jacobs, 12 DePaul Bus & Comm L J at 183, 194–97 (cited in note 216).

³⁰⁴ *Id.*

³⁰⁵ See, for example, *Bauman v DaimlerChrysler Corp.*, 676 F3d 774, 778 (9th Cir 2011) (O'Scannlain dissenting from the denial of rehearing en banc) (describing the different approaches to this issue taken in different circuits).

are unsatisfactory. With the targeting issue, the *Nicastro* plurality's strict actual intent test would require extensive jurisdictional discovery to determine a company's motives with respect to specific states³⁰⁶ and would give companies a road map to easily avoid personal jurisdiction, even in states where they sell lots of products, simply by targeting some more general geographic region rather than a specific state. A constructive knowledge test, on the other hand, would give companies too little certainty about the jurisdictional results of their conduct because the determination would ultimately turn on each judge's relatively uninformed opinion about whether a company should have known where its products would be sold. With respect to subsidiaries, most courts will not impute the contacts created by a subsidiary to a parent company unless the parent company exercises such control over the subsidiary as to render it the parent's alter ego.³⁰⁷

These issues would largely vanish under the Territorial Model. Just like in the internet context, under the Territorial Model much of the responsibility for determining how to handle distribution chains would shift from the judiciary to state legislatures. An out-of-state manufacturer who sells products into a state through a distributor would generally not be subject to personal jurisdiction there in the absence of personal service in the jurisdiction. However, a state could provide by statute that selling products into the state through a distributor (whether the distributor is independent or a subsidiary) constitutes consent to

³⁰⁶ See, for example, *In re Testosterone Replacement Therapy Products Liability Litigation Coordinated Pretrial Proceedings*, 136 F Supp 3d 968, 975 (ND Ill 2015) (“[D]etermining whether Besins S.A. can be properly haled into this Court would require more information about, for example, the volume of AndroGel sales or revenue derived in particular states, or the underlying basis for Besins S.A.’s expectations about the ‘consequences’ its acts would have in those states.”). See also *Toys “R” Us, Inc v Step Two, SA*, 318 F3d 446, 457 (3d Cir 2003) (requiring jurisdictional discovery on the ground that it “may shed light on [the defendant’s] intentions with respect to the US market”); Cassandra Burke Robertson and Charles W. “Rocky” Rhodes, *The Business of Personal Jurisdiction*, 67 Case W Reserve L Rev 775, 802 (2017) (“[B]road discovery may be necessary now to give plaintiffs some opportunity to present evidence on new jurisdictional theories in an attempt to satisfy an uncertain governing standard.”).

³⁰⁷ See *Bauman*, 676 F3d at 778 (O’Scannlain dissenting from the denial of rehearing en banc) (describing the different approaches to this issue taken in different circuits). Some courts will impute the contacts of a subsidiary to a parent if the subsidiary is acting as the parent’s agent, but even then the test is usually a much more stringent one than what is required for a typical agency relationship and essentially ends up being the same as the alter ego test. See *Greenfield Energy, Inc v Duprey*, 252 SW3d 721, 733 (Tex App 2008) (“Generally, whether one describes the theory for imputing one corporation’s contacts to another as a theory of agency or alter ego, the critical test remains that of the right or exercise of control.”).

personal jurisdiction in the forum.³⁰⁸ Just like in the internet context, determining how far these consent statutes should go would require delicate weighing of competing policy considerations—a job much better suited to legislatures than the courts.

Even with the immense influence that large out-of-state businesses are now able to wield over state legislatures, some may fear that smaller businesses could be harmed by allowing states virtually unlimited reach into a product's distribution chain. For example, an individual artisan may make widgets that it sells to a large distributor who then sells such widgets to customers all over the country. Wouldn't it be unfair for an implied consent statute to require the artisan to consent to jurisdiction in some distant state when she has no control over where her products will be sold by the large distributor?

There are two rebuttals to this concern. First, the switch to a jurisdictional regime with certainty—one based on readily ascertainable statutes—would allow the actors involved in such transactions to structure their primary conduct to avoid such problems. A large distributor under the Territorial Model would probably have more success attracting small producers if its contracts provided for indemnification or allowed producers to limit the states where their goods would be sold. Second, as a practical matter, at least in products liability cases, a prospective plaintiff is much more likely to want to sue a large-pocketed distributor than a small-time producer anyway.

On the other hand, one could argue that the Territorial Model could be hard on plaintiffs in states that do not choose to adopt implied consent statutes that apply to “up the chain” manufacturers. However, those plaintiffs would still have the option of using quasi in rem jurisdiction to attach the manufacturers' in-state assets. Such assets would be readily available in cases in which the defendant utilizes an in-state distributor, especially if the in-state distributor is a subsidiary because the subsidiary would itself be an in-state asset of the manufacturer. Of course, there may be situations, like *Nicastro*, in which the distributor is also not based in the state where the plaintiff wants to sue. But ultimately, those plaintiffs would still have more options available to them to find

³⁰⁸ See *Cannon Manufacturing Co v Cudahy Packing Co*, 267 US 333, 336–37 (1925) (refusing to assert “doing business” jurisdiction over a corporation based on the activities of its subsidiary but noting the absence of a state or federal statute addressing the issue).

a way to assert jurisdiction in an amenable forum than they would under the minimum contacts test.³⁰⁹

* * *

Certainly, questions about how personal jurisdiction applies to the internet and distribution schemes raise difficult issues about where lawsuits ought to take place and who should bear the burden of litigating in an inconvenient forum. But whatever the right answers to these questions are, having clear answers is preferable to having amorphous ones. And having these questions decided through the democratic process, rather than by judges, will allow the answers to have greater legitimacy and flexibility as the economy continues to evolve.

CONCLUSION

Many practitioners, judges, and academics have long lamented that personal jurisdiction doctrine is a mess. But in order to fix what is wrong with that doctrine, we must first clear away the edifice of mythology on which the minimum contacts doctrine rests. Whatever its drafters may have intended, *Shoe* did not mark a pragmatic triumph ushering in a new flexible era of personal jurisdiction. Instead, its open-ended balancing test opened the door to decades of unwarranted judicial invasion of the states' sovereign authority to define the jurisdictional consequences of activities that take place within their borders. Returning to the Territorial Model would finally give personal jurisdiction the doctrinal clarity, theoretical consistency, and democratic and constitutional legitimacy it has been lacking.

³⁰⁹ For example, they could probably sue in the state where the distributor is based or in another state that requires actual consent to personal jurisdiction for actions that do not arise in the state.