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Recommended Citation
Wendy Collins Perdue, *What's Sovereignty Got to Do with It?: Due Process, Personal Jurisdiction and the Supreme Court,* 63 S.C. L. Rev. 729 (2012)

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WHAT'S "SOVEREIGNTY" GOT TO DO WITH IT? DUE PROCESS, PERSONAL JURISDICTION, AND THE SUPREME COURT

Wendy Collins Perdue*

Something about personal jurisdiction seems to bring out the worst in the Supreme Court. In the last twenty-four years, the Court has decided four personal jurisdiction cases, and in three of them, it has been unable to muster a majority opinion.[1] Between *Burnham v. Superior Court* in 1990, and *J. McIntyre Machinery, Ltd. v. Nicastro* and *Goodyear Dunlop Tires Operations, S.A. v. Brown* in 2011, the Court's composition has almost completely changed, with only Justices Scalia and Kennedy remaining.[2] Yet, the current Court is just as splintered as the old one. Personal jurisdiction also seems to inspire foolish remarks and poor opinions, and *Nicastro* may set a new low in that regard.

At least part of the problem stems from confusion over the sovereignty limitations inherent in personal jurisdiction, and the relationship between sovereignty concerns and due process in personal jurisdiction analysis. This confusion plays out vividly in *Nicastro*, with Justice Kennedy asserting that the problem with Justice Brennan's approach in *Asahi* was that "[i]t discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability."[3] By contrast, Justice Ginsburg asserts that "constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty."[4] Both statements are wrong, or are at least misleading.

In this symposium contribution I do two things. First, I explore the relationship between sovereignty and due process in personal jurisdiction

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1. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011) (decided by a majority of the Court); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (plurality opinion); Burnham v. Superior Court, 495 U.S. 604 (1990) (plurality opinion); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (plurality opinion).

2. *Compare Burnham*, 495 U.S. at 606–07, with *Nicastro*, 131 S. Ct. at 2785.

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

4. *Id.* at 2798 (Ginsburg, J., dissenting).

doctrine. Second, I examine how confusion about this relationship is manifested in some of the more problematic aspects of the *Nicastro* opinions. I conclude that, although at one time the concept of sovereignty provided an important analytic component of personal jurisdiction analysis, this is largely no longer true.

I. BACK TO THE FOUNTAINHEAD: *PENNOYER V. NEFF*

Much of the credit (or blame) for modern personal jurisdiction doctrine dates back to *Pennoyer v. Neff*.[5] It is there that the Court explicitly addressed concerns about sovereignty and, for the first time, introduced the Due Process Clause into personal jurisdiction doctrine.[6] However, these two elements—sovereignty and due process—were approached in *Pennoyer* quite differently than they are described in modern opinions, so it is worth revisiting what *Pennoyer* actually said.

Justice Field's personal jurisdiction analysis began by focusing on states and the scope of their power. He noted that except as limited by the Constitution, states "possess and exercise the authority of independent States," and that the principles of international law concerning personal jurisdiction are applicable to the states.[7] He then laid out what he believed to be universal and undisputed principles of public international law—that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[8] From these principles, Justice Field concluded that in-state service is a necessary prerequisite for personal jurisdiction.[9]

To the extent that Field believed that in-state service is a necessary corollary of territorial boundaries, the opinion is undeniably wrong. Many territorially defined nations do not agree that in-state service is either necessary or sufficient.[10] Nonetheless, Field's broader analytic approach is significant. In determining the scope of state judicial authority, his analysis focused on the state, not the defendant. Field formulated his jurisdictional inquiry by asking what power a state has over people inside and outside its boundaries, rather than asking when defendants are subject to jurisdiction.[11] Additionally, Field saw nothing in our federal structure that limits our states differently than nations are limited with respect to the substantive scope of their personal jurisdiction

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5. 95 U.S. 714 (1878).

6. *See id.* at 722, 733.

7. *Id.* at 722.

8. *Id.* (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19–20 (2d ed. 1841); HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 110–11 (George Grafton Wilson ed., William S. Hein & Co. photo. reprint 1995) (Richard Henry Dana, Jr. ed., 1866)).

9. *Id.* at 733.

10. *See* Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 613–16 (1991).

11. *See Pennoyer*, 95 U.S. at 722.

authority.[12] He therefore looked to international law as a source for delineating the scope of sovereign authority that states possess with respect to personal jurisdiction.[13] Whether or not his understanding of international law was correct, this part of the opinion puts states, and the scope of their sovereign authority, at the center of its analysis.

The real innovation of *Pennoyer* was not the focus on sovereignty, but rather the introduction of the Due Process Clause of the Fourteenth Amendment as a basis to refuse to enforce a judgment. Justice Field began this part of the analysis by noting that under the Full Faith and Credit Clause, one state was not required to enforce a judgment from another state that was void under the principles of jurisdiction he had laid out.[14] However, because the Full Faith and Credit Clause is applicable only to judgments where enforcement is sought in another state, Justice Field was concerned that a void judgment might nonetheless be enforceable within the rendering state:

> [I]f the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the State.[15]

As troubled as he was by the prospect of a state enforcing its own void judgment, Justice Field recognized that the Full Faith and Credit Clause did not provide a basis for challenging an intra-state enforcement of a void judgment and "there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered."[16] It was at this point that Justice Field turned to the Due Process Clause:

> Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.[17]

Thus, the Due Process Clause provided a hook to allow an intra-state challenge to a judgment rendered in violation of the principles of sovereignty and international law that he had earlier described.

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12. *See id.*
13. *See id.* at 729 (citing D'Arcy v. Ketchum, 52 U.S. 165, 174–75 (1850)).
14. *Id.* (citing M'Elmoyle v. Cohen, 38 U.S. 312, 327 (1839)).
15. *Id.* at 732.
16. *Id.*
17. *Id.* at 733.

Significantly, although Justice Field invoked the Fourteenth Amendment as a tool for challenging a judgment rendered without jurisdiction, the Court nowhere suggested that the Due Process Clause provided the substantive criteria for jurisdiction. This is evident in the structure of the opinion. The principles of jurisdiction are found in the beginning of the opinion before the discussion of the Fourteenth Amendment.[18] The Due Process Clause was introduced towards the end of the opinion after Field had already delineated the scope of states' jurisdictional authority. Treating the Due Process Clause as a tool to challenge enforcement of a judgment, but not as a source of the substantive criteria, also allows *Pennoyer* to fit more comfortably within the preexisting Full Faith and Credit Clause cases which had long recognized the existence of limits on personal jurisdiction and which Field cited.[19] Under *Pennoyer*'s approach, the Full Faith and Credit Clause continues to control in the inter-state context and the Due Process Clause simply provides a vehicle to transport the principle developed in the interstate full faith and credit context to the intra-state context.

Using the Due Process Clause as a tool to challenge invalid judgments, but not as the source of the standards for validity, is completely consistent with the principle that the Due Process Clause protects individual rights. Due process requires that a judgment be rendered by a court of competent jurisdiction.[20] The right that is protected by that clause is the right not to have liberty or property taken by a state that is acting "coram non judice"—without legitimate authority.[21]

Thus, from a broad structural perspective, *Pennoyer* established several noteworthy propositions. First, the state and an understanding of the scope of state power is the appropriate starting point for analyzing personal jurisdiction. Second, there is nothing unique in our federal structure that requires substantive limitations on our states that are different from those that exist in the international context. Third, the Due Process Clause provides a basis for resisting in-state enforcement of a judgment that exceeds a state's legitimate authority, but it does not provide the standards for determining the scope of each state's jurisdictional reach. Over the next century and a half, all three of these propositions were altered, although in most cases without explicit reexamination.

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18. *See id.* at 721–23.

19. *See id.* at 729–30 (citing D'Arcy v. Ketchum, 52 U.S. 165, 174 (1850) (holding that a New York judgment was not entitled to full faith and credit in Louisiana because one of the defendants was not served with process); M'Elmoyle v. Cohen, 38 U.S. 312, 327 (1839) (holding that the Full Faith and Credit Clause applied only when the court rendering the decision had jurisdiction of the parties)).

20. *See id.* at 733.

21. *See id.*

II. DUE PROCESS AS A SOURCE OF SUBSTANTIVE STANDARDS

Although *Pennoyer* introduced the Due Process Clause as a mechanism that would allow a direct challenge to excessive exercises of jurisdiction, by the twentieth century the Due Process Clause began to assume a more substantive role. This is apparent in the way the Supreme Court and litigants began to frame and understand the issue presented in personal jurisdiction cases. Consider *Hess v. Pawloski*.[22] In that case, a Massachusetts statute designated a state official to be the agent for service of process for any non-resident who drove a car into Massachusetts and was subsequently sued on a claim arising out of an automobile accident in Massachusetts.[23] If the issue were framed using the structure described in *Pennoyer*, the question presented would have been whether in acting pursuant to this statute, Massachusetts lacked legitimate authority and, as a result, enforcement of any subsequent judgment would have violated the Due Process Clause. Not surprisingly, that awkward formulation was framed instead as "whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment."[24]

While *Hess's* statement of the issue presented might have reflected simply a more streamlined use of language, by the time of *International Shoe*,[25] it was clear that the Due Process Clause was providing substantive criteria. In what is probably the most widely quoted sentence from *International Shoe*, Justice Stone suggests that the substantive criteria for personal jurisdiction derives from due process:

> *[D]ue process requires* only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[26]

Under the *Pennoyer* approach, the due process violation consisted of enforcing a judgment rendered by a court that lacked legitimate authority, but the standards for determining legitimacy were derived separately from that clause. In contrast, *International Shoe* suggests that the Due Process Clause itself embodies certain criteria for legitimacy.

In *World-Wide Volkswagen*,[27] the transformation of due process from a mechanism to allow a direct challenge of jurisdiction to the source of substantive

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22. 274 U.S. 352 (1927).

23. *Id.* at 354 (quoting MASS. GEN. LAWS ANN. ch. 90, *as amended by* Stat. 1923, ch. 431, § 2 (current version at MASS. GEN. LAWS. ANN. ch. 90 § 3A (West 2001)).

24. *Id.* at 355.

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

26. *Id.* at 316 (emphasis added) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

27. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

standards by which to assess such a challenge was so complete that the Court could, without notice or apparent embarrassment, misstate the actual holding of *Pennoyer*. The majority opinion in *World-Wide Volkswagen*, citing *Pennoyer*, stated: "A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere."[28] However, the more accurate description of *Pennoyer*'s holding would have been: If a judgment is void and not entitled to full faith and credit, then it would violate due process to enforce it in the rendering state.[29] The inversion of the holding is significant because it makes due process the source of the substantive standards for jurisdiction, which in turn facilitated the shift to a defendant-focused approach.

III. THE ROLE OF SOVEREIGNTY

Pennoyer began the analysis of personal jurisdiction by focusing on the state and its characteristics, and having concluded that our states are in all relevant respect like nations, looked to international law as the source of guidance.[30] *Pennoyer*'s analysis might therefore be called "sovereignty-based" because it focused on the nature of states and relied on a body of law—international law—that is similarly state-based in its focus. Modern jurisdictional cases have moved away from the state-based analytic approach that Justice Field used in *Pennoyer*. It is the defendant, not the state, that is at the center of the analysis, and international law has virtually disappeared as a relevant touchstone. It is true that the cases include frequent references to "sovereignty" and "federalism," but these words have little analytic significance.

The shift that put the defendant rather than the state at the center of the jurisdictional inquiry is strikingly evident in *International Shoe*. The underlying issue in that case was whether it was constitutional for Washington to extract unemployment taxes from the out-of-state defendant corporation, and the litigants thought that the primary issue concerned the power to tax, not personal jurisdiction.[31] The majority opinion deals with the taxing power only briefly at the end of the opinion and makes clear that the state's taxing power is obvious in this case.[32] Yet, the opinion does not address the relationship between this holding and the question of personal jurisdiction. Given the tax exception in choice of law,[33] had the Court not found personal jurisdiction, Washington could have been effectively powerless to collect this tax. The Court's failure to

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28. *Id.* at 291 (citing Pennoyer v. Neff, 95 U.S. 714, 732–33 (1878)).

29. *See Pennoyer*, 95 U.S. at 732–33.

30. *See supra* text accompanying notes 7–9.

31. *See Int'l Shoe*, 326 U.S. at 311; Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 798–99 (1995).

32. *See Int'l Shoe*, 326 U.S. at 321.

33. *See generally* Robert L. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193, 215–17 (1932).

consider the state's need for the tools to collect those taxes it was due, dramatically highlights that state power was no longer the analytical starting point. In place of a focus on the sovereignty needs of the state, Justice Stone created, largely out of whole cloth,[34] the now famous language that the defendant must have "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[35]

Justice Black, in his prescient concurrence in *International Shoe*, recognized that although the majority's holding expanded state jurisdictional authority, its analytic approach was not state-centered and indeed threatened state power.[36] He understood that states needed jurisdictional power in order to fully exercise other legitimate interests in protecting their citizens and implementing their laws.[37] He expressed the concern that "fairness" might be used to restrict the power of states to exercise judicial authority in support of their other legitimate interests, writing:

> I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts," a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court's notion of "fair play," however appealing that term may be. Nor can I 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 the corporation to be sued somewhere else.[38]

Justice Black went on to observe: "True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice."[39]

Not surprisingly, Justice Black later dissented in *Hanson v. Denckla*,[40] a case that further reinforced the shift away from the state as the analytic starting point of the personal jurisdiction analysis. Cases such as *McGee v. International Life Insurance Co.*[41] and *Hess v Pawloski*[42] had focused on the state's interest in

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34. *See* Cameron & Johnson, *supra* note 31, at 809–10.
35. *Int'l Shoe*, 326 U.S. at 316 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
36. *See id.* at 323 (Black, J., concurring).
37. *See id.*
38. *Id.* at 324–25.
39. *Id.* at 326.
40. 357 U.S. 235, 256 (1958) (Black, J., dissenting).
41. 355 U.S. 220, 223–24 (1957).
42. 274 U.S. 352, 356 (1927).

providing a forum. These cases were dismissed by the *Hanson* majority as exceptions,[43] and the Court offered a new verbal formulation, which added the requirement that "the defendant purposefully avail[] itself of the privilege of conducting activities within the forum State."[44] The Court cited *International Shoe* as the source of the purposeful availment requirement, though no such language appears in that case. *International Shoe* does say that a state cannot assert personal jurisdiction over a defendant "with which the state has no contacts, ties, or relations,"[45] but the opinion does not say that the contacts must have been created by the defendant.

Justice Black, in his *Hanson* dissent, focused, as he had in *International Shoe*, on the state. He discussed "Florida's interest" in the dispute and the many connections the dispute had with Florida,[46] and then observed that:

> [W]here a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice."[47]

In other words, Justice Black began by focusing on the state and then turned to concerns about the defendant as a kind of second-stage safety valve for the rare case that imposed unusual burdens. He was attentive to concerns about territoriality, and explained that there was nothing in his approach that was indifferent to state boundaries:

> Of course we have not reached the point where state boundaries are without significance, and I do not mean to suggest such a view here. There is no need to do so. For we are dealing with litigation arising from a transaction that had an abundance of close and substantial connections with the State of Florida.[48]

While Justice Black put the state at the center of the inquiry, the majority in *Hanson* focused on the activities of the defendant and this approach became even more firmly established in *World-Wide Volkswagen*.[49] *World-Wide Volkswagen*

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43. *See Hanson*, 357 U.S. at 251–53; 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, 621–22 (1958).

44. *Hanson*, 357 U.S. at 253 (citing *Int'l Shoe*, 326 U.S. at 319).

45. *Int'l Shoe*, 326 U.S. at 319.

46. *Hanson*, 357 U.S. at 257–59 (Black, J., dissenting).

47. *Id.* at 258–59 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940); *Int'l Shoe*, 326 U.S. at 316).

48. *Id.* at 260.

49. World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980).

was not a case of a state reaching out to decide a matter in which it had no legitimate interest. In that case, a car had exploded within Oklahoma, Oklahoma citizens had put their lives at risk trying to rescue the victims, and the plaintiffs had spent months in a burn ward in Oklahoma.[50] Nonetheless, the Court held that there was no jurisdiction in Oklahoma because, according to the majority, the defendant had not purposefully affiliated itself with the state of Oklahoma.[51]

Despite (or maybe because of) the strong focus on the defendant, rather than on the needs or character of the state as a sovereign, the Supreme Court in *World-Wide Volkswagen* tried to situate its approach within broader concerns about sovereignty and federalism. The Court observed that states retained "the sovereign power to try causes in their courts," but then noted that "[t]he sovereignty of each State . . . implied a limitation on the sovereignty of all of its sister States."[52] Unfortunately, this general observation about the relationship among the states does little to illuminate the scope of personal jurisdiction in any particular case. Even if it were true that allowing Oklahoma jurisdiction in this case would somehow diminish the sovereignty of other states *with respect to this case*, allowing jurisdiction here would also mean that other states would have greater power when the tables were turned.

Not satisfied to talk about sovereignty in general, the Court in *World-Wide Volkswagen* also refers to federalism and describes the Due Process Clause as "an instrument of interstate federalism."[53] The reference to federalism implies that with respect to personal jurisdiction, states within our federal structure must have powers that are different from those that foreign nations have. Justice Field in *Pennoyer* thought otherwise,[54] and the Court in *World-Wide Volkswagen* never explains why it disagrees with Field. Moreover, as with its discussion of sovereignty, the Court never explains the link between federalism and the particular jurisdictional test that the Court adopts. Even assuming that states are different from nations in some relevant way, what feature of interstate federalism necessitates purposeful availment as the appropriate test? The Court does not say. Nor does it connect concerns about federalism with its analysis of the facts of the particular case.

Despite the Court's talk about federalism and sovereignty, these concepts do not do any analytic work in *World-Wide Volkswagen*, and neither the state nor state sovereignty are at the center of its analysis. The Court does not frame the jurisdictional inquiry by asking, "What jurisdictional authority does a state or nation have (and need) by virtue of being a sovereign entity?" Instead, the Court

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50. *See id.* at 288; Charles W. Adams, World-Wide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122, 1123–26 (1993).

51. *World-Wide Volkswagen*, 444 U.S. at 295.

52. *Id.* at 293.

53. *Id.* at 294.

54. *See supra* text accompanying note 30.

focuses on the defendant and whether it has acted purposefully to affiliate itself with the forum.[55]

Two years after *World-Wide Volkswagen*, the Court in *Insurance Corp. of Ireland*[56] explicitly recognized the reality of modern personal jurisdiction doctrine—that it was no longer a state-centered doctrine, but defendant-centered instead. As the Court explained: "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."[57] Of course, as noted above, even when the analysis is not sovereignty-based, personal jurisdiction remains a doctrine about sovereignty in the definitional sense that whatever jurisdictional reach the Court accords a state is by definition the scope of its jurisdictional sovereignty.

In a footnote, the Court explicitly embraced the view that the Due Process Clause is the source of the substantive criteria for personal jurisdiction: "The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement . . . ." [58] The Court's analysis includes an inaccurate premise—it is not true that the Due Process Clause "is the only source of the personal jurisdiction requirement." Limitations on personal jurisdiction were addressed under the Full Faith and Credit Clause long before the Fourteenth Amendment even existed.[59] Still, the statement leaves no doubt that the Court has moved away from the more limited function of due process that the Court in *Pennoyer* set forth.

The Court in *Insurance Corp. of Ireland* also explicitly rejects "federalism" as a restriction on jurisdiction:

> [T]he [Due Process Clause] itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.[60]

The Court is certainly correct that the Due Process Clause is not a provision directed at federalism. The Fourteenth Amendment was enacted to protect people (particularly the newly freed slaves) from states, not to protect states from

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55. *See World-Wide Volkswagen*, 444 U.S. at 295.
56. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982).
57. *Id.* at 702.
58. *Id.* at 703 n.10.
59. *See supra* text accompanying note 19.
60. *Ins. Corp. of Ir.*, 456 U.S. at 702–03 n.10.

other states. However, the Court's waiver argument is not particularly persuasive. It is not true that a federalism-based constraint on state power would preclude waiver by private litigants. Federalism concerns animate the limitations on legislative jurisdiction (i.e., choice of law).[61] Nonetheless, if the parties do not raise a choice of law issue, most courts will apply forum law on the theory of party acquiescence.[62]

Notwithstanding *Insurance Corp. of Ireland*'s explicit rejection of sovereignty as a core component of personal jurisdiction, the theme of sovereignty has persisted and, as discussed below, returned to center stage in *Nicastro*.[63] One explanation for this persistence is that regardless of whether sovereignty does any analytic work, there is a sense in which all personal jurisdiction cases are about sovereignty. The power to exercise judicial authority is an important element of state sovereignty, just as "legislative jurisdiction"—the power of a state to regulate conduct through its substantive law—is an important aspect of state sovereignty. Sovereignty used in this sense tells us nothing about the proper analytic approach to personal jurisdiction, it is simply the label we apply to whatever judicial authority is granted to the states. Thus, even a defendant-focused approach to personal jurisdiction, or one based solely on considerations of fairness, is ultimately about sovereignty since the outcome of the analysis tells us, essentially by definition, the extent to which the state will be able to exercise this element of sovereign authority. But there is a critical difference between using sovereignty in this definitional sense and the approach of Justices Field and Black. Those Justices put the state at the center of their analytic approach. In contrast, the Court in *World-Wide Volkswagen* focuses its analysis on the defendant and the defendant's conduct, not on the state. Having determined that Oklahoma could not exercise jurisdiction, the Court likewise determined the scope of Oklahoma's "sovereignty." However, sovereignty is what is left at the end of the analysis, rather than the starting point.

To summarize, the changes since *Pennoyer* are these: Due process has been transformed from a tool to challenge otherwise void judgments into a doctrine that provides the standard for assessing whether personal jurisdiction should be permitted. Moreover, the core inquiry in personal jurisdiction is no longer a state-centered inquiry that focuses on the nature of state sovereignty, but rather a defendant-centered inquiry. Finally, the Court has implied, by its references to federalism that there is something unique within our federal system that requires a different approach to jurisdiction than exists in international law, though it has never explicitly articulated what those differences are.

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61. *See* Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 544–47 (1935) (discussing full faith and credit limits on choice of law).

62. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 610 (5th ed. 2010).

63. *See infra* text accompanying notes 67–71.

IV. CONFUSION NOW HATH MADE ITS MASTERPIECE[64]

The Supreme Court's latest unsuccessful attempt to bring some coherence to the area of personal jurisdiction is *J. McIntyre Machinery Ltd. v. Nicastro*.[65] In *Nicastro*, the Court voted 6-to-3 to reverse New Jersey's exercise of personal jurisdiction over the defendant, but it could not muster a majority opinion.[66] Of the three opinions, Justice Kennedy's puts the most apparent reliance on sovereignty and federalism, but it uses them least persuasively.

Much of Justice Kennedy's opinion is devoted to criticizing Brennan's opinion in *Asahi* for "discard[ing] the central concept of sovereign[ty]."[67] Yet, despite frequent references to sovereignty, it is not clear what Kennedy means. He does not seem to mean an analytic approach that puts the state, rather than the defendant, at the center of the inquiry because, as Kennedy explains, "it is the defendant's actions . . . that empower a State's courts to subject him to judgment."[68] One irony about Kennedy's attack on Brennan, is that Brennan, unlike Kennedy, had suggested that the Court should in fact consider the needs of the state as a sovereign entity in constructing the rules for personal jurisdiction. In his dissent in *World-Wide Volkswagen*, and again in *Burger King*, Brennan invoked the state's "'manifest interest in providing effective means of redress' for its citizens."[69]

In addition to relying on sovereignty as an explanation for the particular rule of jurisdiction that he endorses, Kennedy briefly refers to federalism as a relevant principle. But, as with sovereignty, the invocation here is largely vacuous: "[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance . . . ."[70] Maybe so, but this statement hardly explains what constitutes "an inappropriate case." It is hard to see how the federal balance would have been upset if the United States adopted jurisdictional rules comparable to those used in the European Union that would permit jurisdiction at the place of the injury.[71] Would federalism really have been jeopardized if Oklahoma had been allowed to provide a forum for redress of injuries that occurred in Oklahoma in *World-Wide Volkswagen*?

Maybe Kennedy's reference to federalism is intended as an indirect way to counter Justice Ginsburg's reference to jurisdictional practices internationally. Ginsburg notes, for example, that the European Union allows personal

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64. WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH act 2, sc. 3.

65. 131 S. Ct. 2780 (2011).

66. *See id.* at 2785.

67. *Id.* at 2788 (plurality opinion).

68. *Id.* at 2789.

69. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) (quoting McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483 (1985) (citing *McGee*, 355 U.S. at 223).

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

71. *See id.* at 2803–04 (Ginsburg, J., dissenting).

jurisdiction in tort cases in the place where the harmful event occurs.[72] Kennedy's opinion, maybe by way of response, refers to "the premises and unique genius of our Constitution."[73] Justice Field in *Pennoyer* thought that states were sufficiently like nations for purposes of jurisdiction and that international law provided the appropriate set of principles.[74] Justice Kennedy is not alone in ignoring this aspect of *Pennoyer*, but the invocation of general language about the "unique genius of our Constitution" does not begin to explain why we have rejected this aspect of *Pennoyer*.

What is unique about our federal system is the presence of a Full Faith and Credit Clause.[75] Among independent nations, a country may exercise its judicial sovereignty as it sees fit, but it runs the risk that other nations may not enforce its judgments. Unlike independent nations, states are not free to decide for themselves which judgments they will and will not enforce. They are also not free to enter into treaties or conventions with each other and thereby negotiate about what would constitute a sensible allocation of judicial authority. Because of the Full Faith and Credit Clause, we need a federal standard delineating what judgments are enforceable under that clause. But there is nothing in that clause that requires the adoption of any particular standard or approach to jurisdiction. Justice Field thought that the operative standard under the Full Faith and Credit Clause was "natural justice" and the "rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another."[76] Justice Kennedy may think otherwise, but he has identified nothing inherent in our federal structure that mandates a particular set of jurisdictional rules.

Notwithstanding Kennedy's insistence that his approach is based on sovereignty, it seems instead to be based on a particular notion of individual liberty. Kennedy's focus on "purposeful availment" by the defendant and "submission"[77] suggests that Kennedy believes that defendants have a liberty interest in not being subject to the governmental authority of a state with which they have not affirmatively affiliated themselves.

To the extent Kennedy's approach to jurisdiction is informed by a conception of state sovereignty, Justice Kennedy apparently believes that states have no power or authority separate from what is conferred by the defendant.[78] Kennedy argues first that the foundational element of personal jurisdiction is whether the defendant "manifest[ed] an intention to submit to the power of a

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72. *See id.*

73. *Id.* at 2789 (plurality opinion).

74. *See supra* text accompanying note 7.

75. U.S. CONST. art. IV, § 1.

76. Pennoyer v. Neff, 95 U.S. 714, 730 (1878) (quoting Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 406 (1855)) (internal quotation marks omitted).

77. *Nicastro*, 131 S. Ct. at 2787–88 (plurality opinion) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984); Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

78. *See id.*

sovereign."[79] He explains that "it is the defendant's actions . . . that empower a State's courts to subject him to judgment."[80] In his view, a state's jurisdictional authority is conferred in any particular case by the actions of the defendant and not by preexisting authority. State courts apparently 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. Thus, to the extent Kennedy's approach is sovereignty-based, it reflects the view that states' sovereign powers are quite limited.

Kennedy's strong embrace of the language of sovereignty in *Nicastro* is met with an equally strong rejection of the concept by Justice Ginsburg. In her dissent, Ginsburg explains that "the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty,"[81] and that the "modern approach to jurisdiction" gives "prime place to reason and fairness."[82] She concludes that "it would undermine principles of fundamental fairness to insulate the foreign manufacturer from accountability in court at the place within the United States where the manufacturer's product caused injury."[83]

Justice Ginsburg insists that jurisdiction is a concept grounded solely in due process and concerns for the protection of the individual liberty of the defendant.[84] Yet ironically, Ginsburg seems to be approaching jurisdiction not from the point of view of the individual defendant, but from a broader institutional perspective of state power. At one point in her opinion Justice Ginsburg asks:

> On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?[85]

Her very phrasing of the question puts the "sensible . . . allocation of adjudicatory authority" at the center of her concerns. Likewise, the focus of her fairness analysis is not limited to the particular defendant in the case before her. Instead, she considers the realities of modern marketing[86] and worries about the impact of this jurisdictional ruling on domestic producers.[87] Thus, while Justice

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79. *Id.* at 2788.
80. *Id.* at 2789.
81. *Id.* at 2798 (Ginsburg, J., dissenting).
82. *Id.* at 2800.
83. *Id.* at 2801–02.
84. *See id.* at 2798.
85. *Id.* at 2797.
86. *See id.* at 2799–801.
87. *See id.* at 2803–04.

Ginsburg insists that jurisdiction is a concept anchored in due process, not sovereignty, her approach is less defendant-centered and more focused on the question of what authority states should be able to exercise in light of the realities of modern commercial life.

V. CONCLUSION

In the topsy-turvy world of personal jurisdiction, Justice Kennedy can assert that he is mostly concerned about sovereignty but adopt an approach to jurisdiction that seems far more grounded in a particular vision of individual liberty. In contrast, Justice Ginsburg can profess that her primary concern is to protect due process rights of individuals, but in fact focus on what powers it is reasonable for a state to have to address injuries occurring within its borders. Conservative Justices, not otherwise known for their aggressive invocation of the Fourteenth Amendment, can embrace a Due Process Clause that provides expansive protection, while more liberal Justices seem to be on the states' rights bandwagon, endorsing the power of the states to act without being unreasonably limited by federal constitutional provisions.

If we could hit the doctrinal "reset" button, we might go back to those aspects of *Pennoyer* that have been largely forgotten, but not explicitly repudiated. We could begin with the reference point of international law and give states the same jurisdictional authority that is generally accepted internationally. Due process would not add substantive content, but would provide the vehicle to challenge intrastate enforcement of judgments that would not be recognized in the interstate context. I recognize that given the political heat surrounding references to international law, this is not a likely outcome. A more modest alternative would be for the Court to stop invoking sovereignty as if it provided some analytical content—probably also not likely.

A final hopeful sign might be found in the concurrence of Justices Breyer and Alito. They did not wade into the doctrinal thicket, but seemed to leave open the possibility that with the right case, they would examine the doctrine afresh. One can only hope that when the Justices find that case, the Court moves away from formulaic invocations of sovereignty and federalism and towards a more coherent approach.