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The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction

Harold S. Lewis, Jr. *

I. Introduction

Few fields of legal thought have been as plagued by a penchant for abstraction as has personal jurisdiction. Even as today’s Supreme Court mocks the metaphysics of an earlier era, its own state-court jurisdiction decisions remain infected by notions equally as vague, and counterproductive and unworkable as well. One example is the Court’s concept of “state sovereignty,” which purports to employ personal jurisdiction restrictions to protect the sovereign interests of the several states. In the past the Court has asserted that the forum’s own interests are a factor in whether the forum may fairly adjudicate a civil dispute. More recently, it has suggested that sovereignty concerns may divest a court of jurisdiction even if the forum is fair to the parties.¹ This article examines the resilience of state sovereignty in the personal jurisdiction jurisprudence. It contends that the concept died a third death last Term with the Supreme Court’s decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,² points to some lessons to be drawn from this history, and highlights the *Ireland* decision’s larger significance for personal jurisdiction.

Part II identifies the abstract antecedents of state sovereignty that served as the centerpiece of *Pennoyer v. Neff*.³ It then discusses the role played by state sovereignty and its cognate construct of “forum state interest” in the comprehensive framework that dominated personal jurisdiction decisions from *Pennoyer* until *International Shoe Co. v.*

* Associate Professor of Law, Mercer University School of Law. A.B., Columbia College, 1969; J.D., Stanford University, 1972. The author is grateful to Becky J. Dasher and Charles P. Taylor, students at Mercer University School of Law, for their editorial and research assistance in the preparation of this article. Of particular value were the thoughtful comments on a draft version of the article by Professors Martin Redish, Northwestern University School of Law; Bruce Posnak, Mercer University School of Law; and John Drobak, Washington University School of Law.

1 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 289-94 (1980). See text accompanying notes 40-42, 67-68, 75 *infra*.

2 102 S. Ct. 2099 (1982).

3 95 U.S. 714 (1878).

Washington.⁴ The author contends that, properly understood, the Court's fundamental reconceptualization of personal jurisdiction in *International Shoe* should have rendered obsolete both state sovereignty and its cousin, forum state interest, as determinants of personal jurisdiction.

Part III observes how the sovereignty concept, following the lead of forum state interest, nevertheless resurfaced in the oft-cited dictum of *Hanson v. Denckla*⁵ that personal jurisdiction limitations "are a consequence of territorial limitations on the power of the respective States."⁶ The article takes issue with *Hanson's* evident premise that state sovereign interests, as opposed to the rights of individual civil litigants, are of distinct jurisdictional concern after *International Shoe*. It therefore applauds what appeared to be the Court's summary execution of the *Hanson* sovereignty reference in *Shaffer v. Heitner*.⁷

Part III then turns to the unaccountable rebirth of state sovereignty only three years later in *World-Wide Volkswagen v. Woodson*,⁸ again through observations entirely unnecessary to the decision. The article argues that the attempted resuscitation was particularly unwarranted because it was based on a distorted reading of *International Shoe*; it relied on *Hanson's* reference to sovereignty without mentioning that *Shaffer* had, at the very least, cast grave doubt on its continuing vitality; and it ignored the thrust of two contemporaneous decisions⁹ that had further eroded the premises of sovereignty.

Finally, Part III relates how the Supreme Court, in *Insurance Corp. of Ireland*, approved an exercise of jurisdiction predicated on a theory of implied consent or waiver, despite the absence of demonstrated defendant-forum contacts of the kind that the Court had declared indispensable since *Shaffer*. The Court thus came to grips with the apparent inconsistency between the *Shaffer* Court's pronouncement that "all assertions of state-court jurisdiction must be evaluated according to the [contacts-based] standards set forth in *International Shoe* and its progeny"¹⁰ and pre-*Shaffer* decisions upholding jurisdiction based on consent alone. In doing so, the Court recognized for the first time what should long since have been clear: that the due

4 326 U.S. 310 (1945).

5 357 U.S. 235 (1958).

6 *Id.* at 251.

7 433 U.S. 186 (1977).

8 444 U.S. 286 (1980).

9 *Rush v. Savchuk*, 444 U.S. 320 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1977).

10 433 U.S. at 212 (emphasis added).

process clause¹¹ is the only constitutional restriction on the personal jurisdiction of state courts; that the sole interest protected, therefore, is "individual liberty," exclusive of state sovereignty; and, accordingly, that the objection to personal jurisdiction, like any other objection grounded in an individual constitutional right, is subject to defeasance through the operation of consent, waiver, or estoppel. This recognition, in turn, compelled *Ireland's* implicit acknowledgment that the *World-Wide* concept of sovereignty, announced just two years earlier, does not in fact operate as an "independent restriction on the sovereign power of the court."¹²

Part IV compares the personal jurisdiction situation with other contexts in which the Court, having embraced a rule of decision based on "inherent" attributes of federalism, soon had to do an abrupt about face. Although some of the governmental interests the sovereignty concept seeks to serve are surely legitimate and even concrete, the doctrine that asserts their significance for personal jurisdiction purposes is woefully abstract and pregnant with mischief. The Court failed in *Hanson* and *World-Wide* to provide workable criteria for deciding when another state's sovereign prerogatives would be unduly invaded by a forum state's asserting jurisdiction, just as, in earlier cases, the Court had been unable to identify circumstances in which the forum state's own interests would suffice for jurisdiction in the absence of the ordinary indicators of forum fairness. The article argues that these government interests should find expression in the resolution of choice-of-law issues rather than as limitations on personal jurisdiction.

Last, Part IV explores the implications of *Insurance Corp. of Ireland* for the future of personal jurisdiction. Since the Court, so soon after *World-Wide*, reached so far to dispose of state sovereignty,¹³ this third death of the concept should prove more durable. Further, the premise underlying the *Ireland* decision—that only the individual liberty interests of the parties are properly considered in the personal jurisdiction decision¹⁴—augurs well for the elaboration of jurisdictional doctrine. If that premise takes root, it should sound the death knell not only for sovereignty but also for sovereignty's persistent companion, the doctrine of forum state interest. *Ireland* could thus clear both major governmental interest obstructions from the path of

11 U.S. CONST. amend. XIV.

12 102 S. Ct. at 2104-05 n.10.

13 See text accompanying notes 138-41 *infra*.

14 See text accompanying notes 129-34 and 196-98 *infra*.

personal jurisdiction adjudication, paving the way for theoretical unification of the entire body of the Court's decisions since *International Shoe* around the individual rights of litigants.

II. Historic Origins and Apparent Obsolescence

The idea of the forum as sovereign over persons and property "found" within its borders is of course at the heart of the *Pennoyer* decision.¹⁵ With the conspicuous exception of jurisdiction founded on consent,¹⁶ the categories of state court jurisdiction approved in *Pennoyer* assumed that either the defendant himself or his property could be literally or figuratively seized by forum state agents. The "tagging" basis of jurisdiction rested on the fortuity that a transient defendant might be served with summons and complaint within the state—a metaphysical manifestation of state authority over the defendant.¹⁷ To secure the kind of quasi in rem jurisdiction attempted in *Pennoyer*, an agent of the forum state could, at plaintiff's instance, seize the defendant's forum-sited property, with the consequence that jurisdiction would attach to the extent of the value of the property seized, even if it were wholly unrelated to the plaintiff's claim.¹⁸ "True" in rem jurisdiction was an *a fortiori* case: the very "object of the action"¹⁹ was within the state's boundaries and, accordingly, subject to execution by the state's judicial agents. Finally, in status cases, it is the parties' relationship itself which is conceptually located in the forum state. That relationship is arguably analogous to the in

15 See Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 773 (1982). Professor Ripple and Ms. Murphy state that the "fundamental concern" of *Pennoyer* was "state sovereignty." Ripple & Murphy, *World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead*, 56 NOTRE DAME LAW. 65, 70 (1980).

16 At first blush domicile might appear another exception. As later clarified by *Milliken v. Meyer*, 311 U.S. 457 (1940), domicile is a sufficient basis for extraterritorial service over any nonresident defendant, even one who owns no forum-sited property, when he "sojourns without the forum state." *Id.* at 463-64. The Court in *Milliken* did not grapple with the definition of domicile employed by the forum court. If, however, a prerequisite to a finding of domicile for jurisdictional purposes is that the nonresident defendant maintain some personal or physical presence in the forum—a very likely possibility under modern fairness concepts—then domicile, too, may be firmly planted in the *Pennoyer* ground of sovereign power over the in-forum person or property of the defendant.

17 See Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 EMORY L.J. 729, 729 n.2 (1981).

18 95 U.S. at 727-28.

19 95 U.S. at 727. *Cf. Shaffer*, 433 U.S. at 207 ("[W]hen claims to the property itself are the source of the underlying controversy . . . it would be unusual for the State where the property is located not to have jurisdiction").

rem "res."²⁰

There is strong evidence that the basic *Pennoyer* sovereignty concept was so abstract as to foreordain its demise. Much of that evidence is supplied by the failure of some of its mechanisms to serve their intended purposes in practice. For example, the Court's "holding" in *Pennoyer*, on whatever constitutional provision it may rest,²¹ seems to be that published notice (and presumably also actual notice) in a "personal" action against a nondomiciliary defendant who is not served with process while within the forum state cannot be the basis of a binding judgment against him unless he happens to have an interest in some forum-sited property that is seized when the action commences.²² The Court's repudiation of the state court's jurisdiction turned on the fact that the nonresident defendant's property had not been seized until after that action had commenced. The Court rationalized its timing requirement as necessary to ensure against the risks of hollow judgments and forum state embarrassment that could result whenever there was no property to levy on after a judgment for the plaintiff.²³

Those risks, however, will not be obviated in three of the jurisdictional classifications that the *Pennoyer* dicta approved. The nonresident defendant "tagged" within a state may well have no property there amenable to the satisfaction of a judgment. The same could be true of a forum domiciliary; any property he might have in the forum at the commencement of an action may be spirited outside the forum before the sheriff levies execution. Similar difficulties attend even a classical action in rem. If the object of the action is capable of removal from the state, as would be true in cases of replevin, a plaintiff's judgment may turn out to be as hollow as if the court had declared his right to damages in an action in personam, for the defendant may have no other forum property.²⁴

20 See, e.g., *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) (child custody); *Williams v. North Carolina*, 317 U.S. 287 (1942) (divorce).

21 Whatever the Court actually held in *Pennoyer*, it could not have rested its holding on the fourteenth amendment, which was not in effect at the time the Oregon state court assumed jurisdiction. 95 U.S. at 733. See Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 572 (1958); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1115 n.25 (1981); Whitten, *The Constitutional Limitations on State Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499, 504-05 (1981).

22 95 U.S. at 727-28.

23 *Id.* at 728.

24 In a pure status case, the "res," theoretically within the forum, has no physical embod-

Thus the specific modes of jurisdiction *Pennoyer* approves fall short of avoiding the practical pitfalls with which the Court purported to be concerned. This reinforces the suspicion that at bottom the *Pennoyer* jurisdictional prescriptions are not functionally grounded and amount to little more than an abstract pastiche of the "eternal principles of justice,"²⁵ "public law,"²⁶ and the law of nations²⁷ from which they are directly descended.²⁸

Given the *Pennoyer* majority's less than overwhelming fidelity to the state power principles it espouses, sovereignty may instead be viewed as merely a mechanism for measuring the rights of individual litigants by reference to the convenient, historic yardstick of state boundaries. Consistent with this view is the Court's description of personal jurisdiction rules as designed "for the protection and enforcement of private rights."²⁹ In this connection it may not be accidental that the dissent, rather than the majority, considered public interests paramount over those of the defendant. Justice Hunt argued that the majority's rejection of Oregon's jurisdiction on a timing technicality subordinated Oregon's "sovereign" authority over all property "actually being within its limits"—authority necessary for Oregon to "subject the same to the payment of debts justly due to its citizens."³⁰

The majority's underlying focus on private rights helps explain how it could sanction jurisdiction based entirely on consent, for example, even where the defendant had no property within the forum's borders. The Court may have been moved to approve such jurisdic-

iment and hence is incapable of literal seizure and cannot possibly serve to satisfy any money judgment.

25 *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting).

26 *Pennoyer*, 95 U.S. at 722; *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855).

27 *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977).

28 See *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855); *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting); Kurland, *supra* note 21, at 570-72 (1958); McDougal, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 1-2 (1982); Ripple & Murphy, *supra* note 15, at 69-70; Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 303-04 (1970).

29 95 U.S. at 733.

30 *Id.* at 737 (Hunt, J., dissenting). Thus Professor Whitten argues that the sole, proper concern of the Court in *Pennoyer* should have been with territorial limitations on sovereignty. Professor Whitten also states that the Court erroneously addressed sovereignty as a problem of due process rather than full faith and credit. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses* (Part Two), 14 CREIGHTON L. REV. 735, 839 n.428, 846 (1981). In this view, the Court in *Pennoyer* reckoned too little with sovereign power out of an unwarranted concern for individual rights.

tion just because it recognized that jurisdiction acquired through actual, uncoerced consent would not trample on individual rights. Still, the opinion does pay linguistic homage to sovereignty at every turn, including the announcement that the authority of every judicial tribunal "is necessarily restricted by the territorial limits of the State in which it is established."³¹ *Pennoyer*, then, sits astride the tension between, on the one hand, a perhaps ultimate but certainly understated concern for individual rights, and, on the other, the long tradition of expressing jurisdictional limitations in terms of public or sovereign power. It is therefore not surprising that the Court would reflect this tension in succeeding years by employing public law terminology to uphold exercises of jurisdiction that the Court considered fair as between the parties, but that could not be justified under a rigorous application of any of the particular sovereignty-based modes of jurisdiction that *Pennoyer* approved.

The evolution of sovereignty is most marked in the doctrine of forum state interest. The Court first invoked state interests to approve the exercise of jurisdiction over nonresident motorists and others who had transacted affairs within a forum, but had left behind no physical or personal presence on which state sovereign authority could operate. In these cases the "public interest"³² of the forum state was endowed with critical, apparently dispositive jurisdictional significance, amidst circumstances that could not have supported jurisdiction under the categories created by *Pennoyer*.³³

In the nonresident motorist cases,³⁴ the Court vainly attempted to isolate the kind of forum state interests that would warrant deviations from the *Pennoyer* restrictions. At first it identified a state interest in regulating dangerous instrumentalities.³⁵ Finally, however, the Court was compelled to expand the state interest concept to embrace any activity, dangerous or not, in which the forum, through legislation, has expressed a particular interest.³⁶

To those steeped in a new tradition which emphasizes fairness to litigants over the limits of sovereignty, reliance on the presence or absence of a forum state's interest in the litigation seems grossly misplaced. The presence of a strong forum interest in opening its courts to a plaintiff's claim is wholly fortuitous from the standpoint of the

31 95 U.S. at 720.

32 *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

33 *See generally* Lewis, *supra* note 15, at 775-81.

34 *E.g.*, *Hess v. Pawloski*, 274 U.S. 352 (1927); *Kane v. New Jersey*, 242 U.S. 160 (1916).

35 *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

36 *See Doherty & Co. v. Goodman*, 294 U.S. 623 (1935).

defendant and does not even tend to show that the forum is fair to him. By the same token, if a forum is fair to the defendant, the absence of a forum state interest in hearing the case should not preclude the plaintiff from pursuing his claim there. Before *International Shoe*, to be sure, reliance on the interests of states to bridge the doctrinal gap between *Pennoyer's* territorial tests and judges' expanding horizons of jurisdictional fairness was a natural byproduct of the abstract rhetoric about sovereignty for which *Pennoyer*, then as now, was principally known. But the question raised by the Court's most recent references to sovereign limitations on jurisdiction is whether *International Shoe's* preference for private rights over public law should have supplanted the historical solicitude for sovereignty altogether. To answer this question, we must place in fuller perspective certain errant remarks in Chief Justice Stone's momentous opinion for the Court.

The starting point in *International Shoe* was the proposition, cited to *Pennoyer*, that the defendant's "presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him."³⁷ The Court continues, however, in a very different vein:

But now . . . due 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."³⁸

The Court's clear concern here is with "fair play and substantial justice" from the standpoint of the defendant, not the sovereign. This is confirmed by the succeeding discussion, in which the Court, by reference to previous decisions, classifies the factual configurations that make jurisdiction fair to defendants based on their forum contacts.³⁹

Recently, though, in *World-Wide Volkswagen v. Woodson*, the Court has identified two passages from Chief Justice Stone's opinion in *International Shoe* as support for the Court's lingering concern with sovereign power and *Pennoyer's* territorially defined restrictions.⁴⁰ The first is the statement in *International Shoe* that the demands of due process "may be met by such contacts of the corporation with the

37 *International Shoe v. Washington*, 326 U.S. 310, 316 (1945) (citing *Pennoyer*, 95 U.S. at 733).

38 326 U.S. at 316 (footnotes omitted).

39 *Id.* at 317.

40 *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 293-94 (1980).

state of the forum as make it reasonable, *in the context of our federal system of government*, to require the corporation to defend the particular suit which is brought there."⁴¹ The second is Chief Justice Stone's Delphic observation that jurisdictional due process depends on "the quality and nature of the [defendant's] activity in relation to the *fair and orderly administration of the laws* which it was the purpose of the due process clause to insure."⁴²

Contrary to the import of *World-Wide*, the quoted passages do not even suggest that the interests of the forum or of any other state may substitute for the defendant's forum contacts, or that a forum which is fair in light of the parties' interests will be precluded from adjudicating by notions of sovereignty or state interest. On its face, the first passage says only that the "context of our federal system of government" is the framework within which to assess whether the defendant's forum contacts make it "reasonable" for the defendant to "defend a particular suit which is brought there." The discussion before and after that sentence identifies these "contacts" as the activities of a defendant within or affecting a putative forum.⁴³

Moreover, even though the State of Washington, the forum in *International Shoe*, had an unusually strong interest in facilitating the particular suit—among other reasons because it also happened to be the plaintiff—the Court made no mention of Washington's interests as a reason for upholding jurisdiction. This silence acquires additional significance when contrasted to Justice Black's insistence that jurisdiction should have been upheld on the ground of state interests alone.⁴⁴ The reference, therefore, to "the context of our federal system of government" appears to mean nothing more than that, in "a nation composed of states, state boundaries furnish a history-hal- lowed, if somewhat arbitrary, matrix within which it is convenient to assess the jurisdictional significance of the conduct of a defendant."⁴⁵

The second passage that the Court in *World-Wide* cited as support for viewing jurisdiction as a function of sovereignty appears equally pegged, in context, to the process due defendants. In a very

41 326 U.S. at 317 (emphasis added).

42 *Id.* at 319 (emphasis added).

43 *Id.* at 316-17.

44 *Id.* at 323-26 (Black, J., concurring). For a discussion of Justice Black's views concerning forum state interests, see Lewis, *supra* note 15, at 784-85.

45 Lewis, *supra* note 15, at 786. Professor Ripple and Ms. Murphy more cautiously state that the Court's reference in *International Shoe* to the "context of our federal system of government" creates "doctrinal ambiguity with respect to the continued viability of state sovereignty as a significant constitutional policy concern." Ripple & Murphy, *supra* note 15, at 71.

general sense due process does, of course, deal with the "fair and orderly administration of the laws." But that phrase could refer, not just to personal jurisdiction, but to any of the many settings in which due process applies: to the standards that should govern the validity of pre-judgment security devices;⁴⁶ to choice of law;⁴⁷ to the "interstate judicial system's interest in obtaining the most efficient resolution of controversies";⁴⁸ to the "shared interest of the several States in furthering fundamental substantive social policies";⁴⁹ to the "plaintiff's interest in obtaining convenient and effective relief";⁵⁰ to the "forum State's interest in adjudicating the dispute";⁵¹ or, for that matter, to methods for selecting judges or relieving calendar congestion.

Personal jurisdiction is the only one of these settings that is pertinent to the use of this amorphous phrase in *International Shoe*. And the meaning of the phrase as it appears in the decision can best be gleaned by examining the standards the Court actually employed for deciding the motion to dismiss for lack of personal jurisdiction. The irreducible reality is that the only tests *International Shoe* provided to structure the fair and orderly disposition of those motions are addressed to the current or historical forum contacts of the defendant. This is illustrated in the sentence immediately following the "fair and orderly" phrase, where the Court reiterated that due process condemns exercises of jurisdiction by a forum with which the defendant "has no contacts, ties, or relations."⁵² In particular, the Court eschewed reliance on the undoubtedly strong interest of the State of Washington in asserting its own jurisdiction so as to assure itself a convenient forum and a hospitable governing substantive law. It is therefore more than a little puzzling that the modern court,⁵³ echoed by commentary,⁵⁴ has traced the origins of "interstate federalism" to Chief Justice Stone's "fair and orderly administration of the laws."

46 See, e.g., *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

47 See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

48 *World-Wide Volkswagen v. Woodson*, 444 U.S. at 292.

49 *Id.*

50 *Id.*

51 *Id.*

52 *International Shoe*, 326 U.S. at 319.

53 *World-Wide Volkswagen v. Woodson*, 444 U.S. at 293-94.

54 Casenote, *Retracting the Long Arm: World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 22 B.C.L. REV. 385, 386 (1981).

III. Two Rebirths in the Cradle of Dictum, Two Summary Executions by Footnote

A. Hanson and Shaffer: *Sovereignty's Reemergence and Apparent Extinction*

Although *International Shoe* ignored the interests of the State of Washington, the forum state interest doctrine continued to enjoy currency in the Court's next few decisions.⁵⁵ By contrast, the historic sovereignty theory for a time remained quiescent. But in *Hanson v. Denckla*,⁵⁶ the Court, after noting the evolution of personal jurisdiction requirements from the "rigid rule" of *Pennoyer* to the "flexible standard" of *International Shoe*, warned:

[I]t is a mistake to assume that this trend [triggered by *International Shoe*] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are *more than a guarantee of immunity from inconvenient or distant litigation*. They are a *consequence of territorial limitations on the power of the respective States*. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.⁵⁷

Did the Court mean that a forum might lack the power to proceed even if minimal contacts were shown? Certainly the *International Shoe* Court had not so intimated. Nor had *International Shoe* suggested that a minimal burden on the defendant would warrant jurisdiction despite the absence of contacts. Chief Justice Stone's calculus did not measure fairness directly, according to the forum's convenience to a given defendant, but only indirectly, through measures of defendant-forum contacts designed to ensure that a forum would be at

55 See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). These decisions apparently relied on *International Shoe* as justification for considering the forum state's interest as a jurisdictional factor. See Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 N.Y.U. L. REV. 126, 132 n.41, 134 n.55 (1978). Justice Brennan, for example, dissenting in *World-Wide Volkswagen Corp. v. Woodson*, writes: "The 'orderly administration of the laws' provides a firm basis for according some protection to the interests of plaintiffs and States as well as of defendants." 444 U.S. at 309 (emphasis added). Yet the first of the forum state interest decisions—*Kane v. New Jersey*, 242 U.S. 160, (1916)—antedated *International Shoe* by twenty-nine years, and *International Shoe* itself is silent on the matter, under circumstances that would imply, if anything, the Court's disapproval of the doctrine. See text accompanying notes 46-47, 54-55 *supra*.

56 357 U.S. 235 (1958).

57 *Id.* at 251 (emphasis added) (footnotes omitted). See *International Shoe v. Washington*, 326 U.S. 310, 319 (1945).

least minimally "fair" as between the parties, even if somewhat inconvenient to the defendant.

Thus, the statement in *Hanson* that the personal jurisdiction restrictions prevalent after *International Shoe* are "a consequence of territorial limitations on the power of the respective States" may merely confirm two established, pedestrian features of personal jurisdiction adjudication: First, that the dominant tests for determining the constitutionality of an exercise of jurisdiction center on the defendant's contacts with a forum; and second, by historic tradition, that the governmental unit denoted by the concept of "forum" is the state.

Even if the quoted passage is considered an endorsement of sovereignty as an independent jurisdictional variable, it remains the most extravagant sort of dictum. The Court in *Hanson* simply had no occasion to consider whether a potential for sovereign injury could warrant rejecting jurisdiction despite constitutionally adequate defendant-forum contacts, for no established test of contacts was met. Since the Court was of the view that plaintiff's claim concerned the validity of a trust agreement executed in Delaware, rather than the validity of a power of appointment exercised pursuant to the trust in the forum state, Florida,⁵⁸ it found that the cause of action "is not one that arises out of an act done or transaction consummated in the forum State."⁵⁹ Further, the nonresident defendant trust company had not engaged in any regular or substantial course of business in Florida apart from the incidental contacts related to the trust agreement. Accordingly, in the first sentence after the passage on "territorial limitation," the Court concludes: "We fail to find . . . [constitutionally adequate defendant-forum] contacts in the circumstances of this case."⁶⁰

It may appear that the foregoing analysis trivializes the "consequence" passage of *Hanson*. Yet the Court itself, in *Shaffer v. Heitner*,⁶¹ treats the *Hanson* sovereignty notion as a vacuous sweet nothing. After identifying the "central concern" of the personal jurisdiction inquiry as the "relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest," the Court adds the following footnote:

58 357 U.S. at 252-53.

59 *Id.* at 251. See also the Court's statement that the "suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida." *Id.* at 252.

60 *Id.* at 251.

61 433 U.S. 186, 204 (1977).

Nothing in *Hanson* . . . is to the contrary. The *Hanson* Court's statement that restrictions on state jurisdiction "are a consequence of territorial limitations on the power of the respective States," . . . *simply makes the point that the States are defined by their geographical territory*. After making this point, the Court in *Hanson* determined that the *defendant* . . . had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard.⁶²

In its time the *Hanson* invocation of sovereignty was surely thought to stand for more than the revelation that "the States are defined by their geographical territory."⁶³

B. World-Wide: *Short-Lived Revival*

The sovereignty concept gained new life when it was disinterred, however briefly, in *World-Wide Volkswagen v. Woodson*.⁶⁴ Paraphrasing *Hanson*, Justice White wrote for the court: "[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution."⁶⁵ He then argued that the sovereign power of each state to try causes in its courts implies "a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."⁶⁶ By quotation to *International Shoe*, the Court reminded us that the reasonableness of asserting jurisdiction over the defendant must be "assessed 'in the context of our federal system of government,'" and that "the Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws.'"⁶⁷ Justice White concluded with an expanded formulation of sovereignty that constitutes a key feature of the *World-Wide* opinion:

Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, [326 U.S.] at 319. *Even if the defendant would suffer minimal or no inconvenience* from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the contro-

62 *Id.* at 204 n.20 (emphasis added).

63 Kurland, *supra* note 21, at 621, 623.

64 444 U.S. 286 (1980).

65 *Id.* at 293.

66 *Id.*

67 *Id.* at 293-94.

versy; even if the forum State is the most convenient location for litigation, *the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.* *Hanson v. Denkla*, [357 U.S.] at 251, 254.⁶⁸

Arguably the Court did not intend these pronouncements to say anything more about sovereignty than the *Hanson* "consequence of" statement, which *Shaffer* had since consigned to seeming oblivion. When the Court suggested that "interstate federalism" might oust a forum of jurisdiction even if the defendant would "suffer minimal or no inconvenience," the Court was not necessarily saying that interstate federalism would oust the forum of jurisdiction over a defendant whose forum *contacts* satisfied the standards of *International Shoe*. After all, even *Hanson's* disapproval was limited to jurisdiction based solely on convenience; it cast no aspersions on jurisdiction supported by constitutionally sufficient forum contacts. And *World-Wide* is clearly in accord on the critical importance of contacts. As the Court stated immediately before the "even if" sentence, what due process forbids is the exercise of jurisdiction over a defendant who lacks forum "contacts, ties or relations,"⁶⁹ not an exercise of jurisdiction that is to some degree inconvenient.⁷⁰

But this interpretation—that *World-Wide* simply restated *Hanson* on sovereignty—is ultimately not persuasive. It is doubtful that, absent adequate contacts, the Court would have even considered upholding jurisdiction just because a forum happened to be convenient to the defendant.⁷¹ The Court had twice recently reaffirmed that personal jurisdiction turns on contacts, not convenience.⁷² Indeed, in the preceding sentence in *World-Wide*, the Court stresses that "contacts" are the indispensable prerequisites of jurisdiction.⁷³ In any event, it strains credulity to hypothesize that the Court would indulge in its sweeping statements about interstate federalism simply to provide a rule of decision for the rare case where a nonresident defendant would suffer no or only de minimis inconvenience by being

68 *Id.* at 294 (emphasis added).

69 *Id.*

70 Admittedly, there is some slight support for a contrary position elsewhere in *World-Wide*. The Court refers to the goal of the *International Shoe* contacts tests as guaranteeing against "inconvenient litigation" or protecting defendants "against the burdens of litigating in a distant or inconvenient forum." *Id.* at 292.

71 See Texas/Arkansas hypothetical discussed at R. CRAMPTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 513 (2d ed. 1975); New York/New Jersey hypothetical discussed at Lewis, *supra* note 15, at 821-22 n.306 and at Posnak, *supra* note 17, at 780.

72 *Kulko*, 436 U.S. at 100-01; *Shaffer*, 433 U.S. at 204, 209.

73 444 U.S. at 294.

forced to litigate in the plaintiff's forum of choice.⁷⁴

A far more likely interpretation of the "even if" sentence, viewed either in isolation or in contrast to the sentence immediately preceding, is that the Court really did see state sovereignty as an independent concern of jurisdictional due process. "Independent" in this sense means that if the demands of "sovereignty" would be diserved by an exercise of jurisdiction, then jurisdiction should be declined notwithstanding satisfaction of a contacts test or other measure of the forum's fairness to the parties. This interpretation is supported by the Court's preface to the subject earlier in the *World-Wide* opinion:

The concept of minimum contacts, in turn, can be seen to perform two related, *but distinguishable*, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. *And* it acts to ensure that States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.⁷⁵

In other words, under the most plausible reading of the *World-Wide* opinion, the Supreme Court not only resubscribed to but amplified on the sovereignty concept it had trivialized in *Shaffer* only three years before. It taught that, in unspecified circumstances and to an unstated degree, due process in the context of personal jurisdiction is concerned with something more than preventing unfair deprivations of property. The Court evoked a doctrine which would justify declining jurisdiction even when upholding jurisdiction would fully satisfy the tests of fairness to the parties that have evolved obediently to *International Shoe*.

World-Wide's ostensible reliance on *International Shoe* as support for this position is forced, to say the least. In context, Justice Stone actually equated the "fair and orderly administration of the laws" not with state sovereignty, but with the due process imperative of protecting persons from having to mount defenses in distant forums under unfair circumstances. To make the phrase serve for sovereignty, Justice White subjected it to mitosis. He transmuted the "fair and orderly administration of the laws" into "fairness" *and* the "orderly administration of the laws."⁷⁶ As a result, the "orderly admin-

⁷⁴ Professor Posnak concludes that under *World-Wide* a defendant having no contacts with the plaintiff's forum of choice cannot be forced to litigate there, even if that forum is more convenient for the defendant than any with which he has contacts. Posnak, *supra* note 17, at 780.

⁷⁵ 444 U.S. at 291-92 (emphasis added).

⁷⁶ *Id.* at 294.

istration of the laws" becomes a separate goal of jurisdictional due process, distinct from fairness to the defendant. Consequently, a concept that was originally unitary, and almost undoubtedly concerned in its entirety with individual rights, was split in two. *World-Wide's* reliance on *Hanson* to buttress these conclusions about sovereignty is especially astonishing, since the Court entirely overlooked *Shaffer's* abrupt dismissal of the *Hanson* formulation only three years earlier.

Ironically, in the decisions before *World-Wide* but after *Hanson*, the Court had placed a higher value on protecting defendants than on furthering the interests of plaintiffs or forum states. In *Shaffer*, for example, the Court suggested that even a strong, legislatively articulated forum state interest could not justify jurisdiction unless the forum were "fair" to the defendant,⁷⁷ with fairness to be measured by the "ties among the defendant, the State, and the litigation."⁷⁸ Similarly, California's acknowledged interest in asserting jurisdiction in *Kulko v. Superior Court* was held insufficient to make that forum constitutionally fair.⁷⁹ The Court commented in *Kulko* that "[w]hile the interests of the forum State . . . are, of course, to be considered . . . , an essential criterion in all cases is whether the 'quality and nature' of the *defendant's activity* is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State."⁸⁰ In *World-Wide* itself, the Court treated the "burden on the defendant" as the "primary concern" of due process, in light of which "other relevant factors, including the forum State's interest" should merely be "considered."⁸¹

In *Rush v. Savchuk*,⁸² decided the same day as *World-Wide*, the Court observed that a "variety of factors"—including a forum state's interest in asserting jurisdiction—become "relevant" to the jurisdictional determination only if the defendant has the requisite "judicially cognizable ties with a State."⁸³ The Court emphasized that the "judicially cognizable ties" in question are, in *Shaffer's* terms, those "among the defendant, the forum, and the litigation."⁸⁴ Most im-

77 433 U.S. at 215.

78 *Id.* at 209.

79 436 U.S. at 100.

80 *Id.* at 92 (emphasis added) (citations omitted).

81 444 U.S. at 292. The Court classified as additional subordinate jurisdictional factors "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Id.*

82 444 U.S. at 320.

83 *Id.* at 332.

84 *Id.* at 327.

portantly, the Court stressed that the “[s]tate’s interests in providing a forum for its residents and in regulating the activities of insurance companies . . . [may not be] substituted for its contacts with the defendant and the cause of action.”⁸⁵

The Court in *World-Wide* should at least have reckoned with this steadily diminishing reliance on the forum state interest factor before positing another governmental interest factor, state sovereignty, as critical to personal jurisdiction.⁸⁶ Eventually this realization dawned on the Court when it treated the “fair and orderly administration of the laws” component of due process as just another emblem of fairness to defendants: “The Due Process Clause, by ensuring the ‘orderly administration of the laws,’ . . . 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.”⁸⁷ Thus some commentators have concluded that *World-Wide*’s actual measure of sovereign power—which insists that a defendant’s claim-related forum contact be not only purposeful but also, in some non-collateral way, beneficial—aims more at protecting the defendant than at assessing the relative interests of two or more states in adjudicating a dispute.⁸⁸

Furthermore, a discussion of state sovereignty was as unnecessary to the decision in *World-Wide* as it was in *Hanson*. The Court twice asserted, in the most emphatic, if overstated,⁸⁹ terms, that there was a “total absence” of “those affiliating circumstances⁹⁰ that are a

85 *Id.* at 332.

86 For a discussion of the decline of forum state interest, see Lewis, *supra* note 15, at 796-806.

87 444 U.S. at 297 (emphasis added).

88 Jay, “Minimum Contacts” as a *Unified Theory of Jurisdiction: A Reappraisal*, 59 N.C. L. REV. 429, 474 (1981); Lewis, *supra* note 15, at 803-04 & n.190; Whitten, *supra* note 21, at 842-43.

89 The *World-Wide* Court acknowledged that the defendant New York automobile retailer and regional distributor did have at least one indirect contact with the Oklahoma forum: a car distributed by the distributor and sold by the retailer in New York was driven to Oklahoma, where its occupants suffered personal injury when the car allegedly malfunctioned because of a product defect. 444 U.S. at 295. The Court also acknowledged the possibility, not proven of record, that the moving defendants “earn[ed] substantial revenue from goods used in Oklahoma.” *Id.* at 298. The Court decided, however, that any financial benefits accruing to the defendants from the use in Oklahoma of the cars they distributed or sold in New York stemmed from a “collateral relation” to the forum and thus did not represent a “constitutionally cognizable contact with that State.” *Id.* at 299. It is thus more accurate to say that in *World-Wide* there was an “apparent paucity of contacts,” rather than a complete absence of contacts, between the moving defendants and Oklahoma. *Id.* at 289.

90 “Affiliating circumstances” was apparently a throwback to the use of those words in *Hanson*, 357 U.S. at 246. There they were used to refer to defendant-forum contacts sufficient

necessary predicate to any exercise of state-court jurisdiction."⁹¹ In the Court's opinion, the *World-Wide* defendants who objected to jurisdiction had "no contacts, ties, or relations" with the forum state.⁹² Accordingly, the Court simply had no occasion to consider whether jurisdiction should have been declined for reasons of state sovereignty, since, as the Court simultaneously asserted in *Rush*, a non-contacts factor like sovereignty becomes relevant only if the requisite contacts are present.⁹³

Put bluntly, the neo-sovereign utterances of the Court since *International Shoe* enjoy scant standing in precedent, amount to little more than fanciful obiter dicta on facts that fell short of satisfying party-fairness standards, and make no discernible decisional difference. Nevertheless, the insistent, highly specific iteration of the concept in *World-Wide* commands our attention and compels us to try to come to grips with what may be there.

One scholarly conclusion is that *World-Wide*

subtly but emphatically transformed *Pennoyer's* concern for state sovereignty into a far broader concept. After *Woodson*, "state sovereignty" is no longer a self-contained quality designed simply to preserve the dignity of the individual state. Rather it has been recast as an essential element of interstate federalism—a relationship preserved only when "the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."⁹⁴

Yet even this positive view admits that "the Court gives only the vaguest idea" of what its emphasis on interstate federalism "will mean in concrete application."⁹⁵

Not the least of the practical problems with applying the "interstate federalism" concept is that of assigning weights to the several state interests the concept appears to embrace. The interests of the forum state—interests themselves elusive of precise quantification⁹⁶—must presumably be weighed against the interests of other sovereign states in vindicating their own substantive policies or affording local litigants a forum. The Court provided no criteria to

to enable the forum fairly to enter a personal judgment. *See Kulko v. Superior Court*, 436 U.S. 84, 92 (1978).

91 444 U.S. at 295.

92 *Id.* at 299.

93 444 U.S. at 332.

94 Ripple & Murphy, *supra* note 15, at 75 (footnotes omitted).

95 *Id.*

96 For a discussion of the difficulties of defining and weighing forum state interests, see Lewis, *supra* note 15, at 835-49.

identify competing sovereigns' legitimate interests, to weigh them appropriately, or to resolve the resulting conflicts. It offers no clue as to how strongly sovereignty concerns must tilt against the forum's jurisdiction in order to overcome the factors that demonstrate its fairness to the parties. We are told only that the due process clause, acting as an instrument of "interstate federalism," may divest a fair forum of jurisdiction "sometimes."⁹⁷

In fact, *World-Wide* suggests that two of the components of "interstate federalism" may already be accounted for under the *International Shoe* standards of fairness to the parties. However illogically,⁹⁸ the Court treats the "interstate judicial system's interest in obtaining the most efficient resolution of controversies" and the "shared interest of the several States in furthering fundamental substantive social policies" as factors in ascertaining the "burden on the defendant."⁹⁹ Yet these two government interests are also obvious ingredients of any concept of interstate federalism.¹⁰⁰

When we scratch the surface of phrases like "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" and the "shared interest of the several States in furthering fundamental substantive social policies," we find little concern with convenience to parties and witnesses or with efficiency. Would a Court motivated by a desire to assist the parties in resolving their controversies efficiently oust a fair forum of jurisdiction and relegate the plaintiff to instituting suit elsewhere? Rather, the Court's evident concern is with resolving controversies "correctly" by principled application of rules on choice of law. Indeed, the very phrase "interstate system" used in *World-Wide*¹⁰¹ may be traced to the Restatement (Second) of Conflict of Laws.¹⁰² *World-Wide*'s resort to disguised choice-of-law considerations to resolve a personal jurisdiction dispute is also consistent with the dictum in *Kulko* which countenanced a forum's assuming jurisdiction to ensure application of its own law and thereby advance its own substantive policies.¹⁰³ Of course, the reason a potential forum lacks confidence about the law that an alternative forum may apply is that to date the Court has steadfastly declined to impose meaningful constitutional restrictions

97 444 U.S. at 294.

98 See Lewis, *supra* note 15, at 802-03.

99 444 U.S. at 292.

100 See Ripple & Murphy, *supra* note 15, at 74 & n.75.

101 444 U.S. at 294.

102 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 caveat a (1971).

103 436 U.S. at 98.

on choice of law in cases where that issue has been raised directly.¹⁰⁴ By conjuring up federalism in its personal jurisdiction decisions, perhaps the Court is subconsciously assuaging a conscience tinged with guilt over its neglect of legitimate sovereign interests in the choice-of-law arena, where those interests should receive top billing but have not.

C. Insurance Corp. of Ireland: *Swift Second Death*

After *Shaffer's* cavalier dismissal of the *Hanson* sovereignty dictum, it is scarcely surprising that the *World-Wide* sovereignty dictum would meet a similar fate. Nevertheless, when parents murder a two-year child—or, more cruelly, simply belittle it—we may fairly wonder why they conceived it in the first place.

Similar wonderment attends the Supreme Court's quiet killing of "interstate federalism" in *Ireland*. The form of dismissal, a footnote,¹⁰⁵ is faithful to that used in *Shaffer*; *Shaffer* and *Ireland* differ only in their techniques of denigration. *Shaffer* dismissed *Hanson's* sovereignty excursion as a truism. *Ireland* disposed of *World-Wide's* more elaborate description of interstate federalism by draining it of any operative content different from the fairness due defendants.

Ireland was an action filed in the United States District Court for the Western District of Pennsylvania by a Delaware corporation, "CBG," to recover under an insurance policy covering the operations of its bauxite mines in the Republic of Guinea. Among the defendants were twenty-one insurance companies, based outside the United States, which had undertaken to provide excess insurance for the second ten million dollars of potential losses resulting from business interruptions in CBG's Guinea operation. These "excess insurer" defendants had undertaken that liability by initialing a "placing slip" in London, England.¹⁰⁶

The excess insurers moved for summary judgment on the ground that they were not amenable to personal jurisdiction in Pennsylvania.¹⁰⁷ CBG attempted to develop evidence through discovery about the excess insurers' contacts with Pennsylvania,¹⁰⁸ and the district court ultimately ordered the insurers to produce copies of their policies which had been "delivered in . . . Pennsylvania . . . or cov-

104 See text accompanying notes 204, 213-16 *infra*.

105 *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2049, 2104 n.10 (1982).

106 *Id.* at 2101.

107 *Id.* at 2102.

108 *Id.* at 2102-03.

ered a risk located in . . . Pennsylvania.”¹⁰⁹ After failing to meet the court-ordered deadline, the insurers eventually offered to make their records available for CBG’s inspection in London, in lieu of producing them in Pennsylvania. Responding to CBG’s motion to compel, the district court warned the defendants that if they failed to produce the requested policies in Pennsylvania within an additional sixty days, it would “assume, under rule of Civil Procedure 37B, subsection 2(A), that there is jurisdiction.”¹¹⁰ The court qualified this order by adding that it would not indulge that assumption if the defendants themselves “produce[d] statistics and other information . . . that would indicate otherwise.”¹¹¹

About four months later, after concluding that the requested material had not been timely produced, the district court ruled that the excess insurers were, “for the purpose of this litigation,” subject to personal jurisdiction “because of their business contacts with Pennsylvania.”¹¹² The court offered three grounds to support this ruling. The first was that jurisdiction should be found through the operation of the rule 37(b)(2)(A) sanction, resulting in the fictitious finding that the defendants had business contacts with Pennsylvania sufficient to support jurisdiction.¹¹³ Second, the court found that the record actually showed “sufficient business contacts with Pennsylvania to fall within the Pennsylvania long-arm statute.”¹¹⁴ The court did not explain how, even if the record showed contacts sufficient to satisfy the forum’s long-arm statute, those contacts would also satisfy due process.¹¹⁵ Third, the court found that the excess insurers, by adopting

109 *Id.* at 2102.

110 *Id.* Among other available sanctions that FED. R. CIV. P. 37(b)(2)(A) authorizes for a failure to comply with discovery orders is: “An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.”

111 102 S. Ct. at 2103.

112 *Id.*

113 The district court did not explain if these contacts sufficed for jurisdiction under the Pennsylvania long-arm statute, the due process clause, or both. FED. R. CIV. P. 4(e) incorporates by reference in federal diversity cases the applicable long-arm statute of the forum state.

114 102 S. Ct. at 2103.

115 In *International Shoe, McGee, Shaffer, Kulko, World-Wide*, and *Rush*, it was clear that the forum’s long-arm statute, at least as interpreted by its courts, reached far enough to subject a nonresident defendant to jurisdiction. Nevertheless, the question remained whether an exercise of jurisdiction under such a statute would satisfy due process. The converse is also true. That an exercise of jurisdiction may satisfy due process does not answer the question whether the forum state wishes to assert it, and, in general, a state’s failure to provide for long-arm jurisdiction is not a denial of due process. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Pulson v. American Rolling Mill Co.*, 170 F.2d 193, 194 (1st Cir. 1948); *Missouri Pac. R.R. v. Clarendon Co.*, 257 U.S. 533, 535 (1922).

the terms of the primary insurer's "Pennsylvania insurance contract" with CBG, had "implicitly agreed to submit to the jurisdiction of the court."¹¹⁶ In other words, the court found jurisdiction based on a supposed implied consent.

The United States Court of Appeals for the Third Circuit affirmed the jurisdiction holding, "relying entirely upon the validity of the sanction."¹¹⁷ The Supreme Court granted certiorari to resolve a conflict between this decision and a Fifth Circuit ruling that the facts concerning forum contacts may not be found fictitiously as a sanction for failure to make discovery, but must "appear from the record independently of the sanction."¹¹⁸ The grant of the certiorari petition¹¹⁹ was limited to "the question of the validity of the Rule 37(b)(2) sanction."¹²⁰ The Supreme Court framed the question thus posed: "May a District Court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, proceed on the basis that personal jurisdiction over the recalcitrant party has been established?"¹²¹

The Court initially likened the rule 37(b)(2)(A) sanction to a finding of waiver of the jurisdictional objection, analogous to the waiver resulting from a failure to timely object to personal jurisdiction in the defendant's answer or first motion.¹²² Later, however, the Court more accurately observed that the district court "simply placed the burden of proof upon . . . [defendant] on the issue of personal jurisdiction."¹²³ This observation recognized that the burden is ordinarily on the plaintiff, once personal jurisdiction is challenged, to produce evidence of the defendant's forum contacts on which the personal jurisdiction finding usually rests.¹²⁴ It also recognized that the district court, in threatening to impose the rule 37 sanction, offered *defendants* the opportunity to produce evidence that they lacked

116 102 S. Ct. at 2103.

117 *Id.*

118 *Id.* at 2103 & n.8. The courts of appeals for the Fourth and Eighth Circuits had agreed with the Third Circuit that a determination upholding personal jurisdiction might be predicated on a discovery sanction. *Id.* at 2103 n.8.

119 The petition granted was actually a cross-petition filed by defendant excess insurers in response to a petition filed by CBG challenging the court of appeals' dismissal of the complaint with respect to three other excess insurers. 102 S. Ct. at 2101 nn.1 & 3.

120 *Id.* at 2101 n.1.

121 *Id.* at 2101.

122 *Id.* at 2105-06. The combined effect of FED. R. CIV. P. 12(h)(1) and 12(g) is to impose a waiver of the personal jurisdiction defense if it is not timely raised in the answer or if it is omitted from a motion made before answer.

123 102 S. Ct. at 2107.

124 *Id.* at 2105.

the constitutionally requisite contacts with Pennsylvania. The real effect of the sanction, then, was twofold: to alter the normal burden of producing evidence about jurisdictional facts, by placing it on defendants; and to declare a conditional waiver by defendants of their jurisdictional objection if they failed to discharge that burden. In *Ireland*, the conditional waiver became absolute when the defendants declined the proffered opportunity.

The Supreme Court affirmed the Third Circuit's judgment, thereby upholding jurisdiction in a case where, as the Court acknowledged, the record itself did not demonstrate that the moving defendants had claim-related or non-claim-related forum contacts of the kind that *International Shoe* and its progeny had considered indispensable to personal jurisdiction. Moreover, although the action happened to lie in a federal court, the authors of both the majority and concurring opinions agreed that the Court's decision carried identical constitutional consequences for the personal jurisdiction requirements governing state courts.¹²⁵ The concurring justice, Justice Powell, citing the Court's state-court jurisdictional decisions from *International Shoe* through *World-Wide*, complained that "minimum contacts" between defendants and forum states must appear of record. By

finding that the establishment of minimum contacts is not a prerequisite to the exercise of jurisdiction to impose sanctions under Fed. Rule Civ. Proc. 37, the Court may be understood as finding that "minimum contacts" no longer is a constitutional requirement for the exercise by a state court of personal jurisdiction over an unconsenting defendant.¹²⁶

Justice Powell then lamented that the decision inevitably also signals the death of jurisdictional sovereignty. He cited *World-Wide* and *Hanson* for the proposition that the *International Shoe* framework "had linked minimum contacts and fair play as *jointly* defining the 'sovereign' limits on state assertions of personal jurisdiction over unconsenting defendants."¹²⁷ Justice Powell concluded:

The Court appears to abandon the rationale of these cases in a footnote . . . [n.10] [b]ut it does not address the implications of its action. By eschewing reliance on the concept of minimum contacts as a "sovereign" limitation on the power of States . . . the court today effects a potentially substantial change of law. For the first time it defines personal jurisdiction solely by reference to abstract notions

125 *Id.* at 2104-05; *id.* at 2109-10 (Powell, J., concurring).

126 *Id.* at 2110 (Powell, J., concurring).

127 *Id.*

of fair play.¹²⁸

Justice Powell's remarks fairly reflect the gist of the majority's holding and supporting rationale. The Court started with the proposition that the due process clause is the only source of constitutional limitations on the personal jurisdiction of state courts.¹²⁹ Second, and by explicit contrast to the requirements of subject matter jurisdiction,¹³⁰ the Court stated that personal jurisdiction requirements recognize and protect "an individual liberty interest." Due process in the personal jurisdiction setting, therefore, "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."¹³¹ In turn, "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."¹³² Somewhat circularly, the Court argued that these characteristics of the personal jurisdiction defense—its susceptibility to waiver, consent, or estoppel—"portray it for what it is: a legal right protecting the individual."¹³³ Reviewing a variety of situations in which, both before and after *International Shoe*, the Court had upheld jurisdiction based on theories of waiver or express or implied consent, the court concluded: "The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not."¹³⁴

What, then, of sovereignty? Whenever jurisdiction is exercised without proof of defendant-forum contacts on the record, there will necessarily also be no evidence that the defendant, through his activities, has brought himself within the realm of the State's sovereign power. The humiliating task of explaining the sovereignty concept so recently elaborated in *World-Wide*, in the face of its apparent abandonment in *Ireland*, fell to Justice White, *World-Wide*'s author. He addressed the sovereignty concept most explicitly in the footnote of which Justice Powell principally complained:

It is true that we have stated [in *World Wide*] that the requirement of personal jurisdiction, as applied to state courts, reflects an

128 *Id.* (footnotes omitted).

129 *Id.* at 2104 n.10.

130 This contrast between the rules that allow waiver of the personal jurisdiction defense (*E.g.*, *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964); *York v. Texas*, 137 U.S. 15 (1890)) and those that preserve the subject matter jurisdiction defense (*E.g.*, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804)) had been foreshadowed in the literature. *See Lewis, supra* note 15, at 812.

131 102 S. Ct. at 2104.

132 *Id.* at 2105.

133 *Id.*

134 *Id.*

element of federalism and the character of state sovereignty vis-a-vis other states. . . . Contrary to the suggestion of Justice POWELL, our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum state. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. *The restriction on state sovereign power described in World-Wide Volkswagen Corp., however, 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 and the 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.¹³⁵

It is hard to disagree with Justice Powell that this footnote cuts sovereignty completely adrift. The Court's statement that *World-Wide's* restriction on state sovereign power "must be seen as ultimately a function of the liberty interest preserved by the Due Process Clause" effectively equates the nonequatable. If sovereignty really were a function of the individual interests of civil litigants, why would sovereignty concerns *ever* oust a fair forum of jurisdiction, as *World-Wide* had warned they might? By upholding jurisdiction even in the absence of forum contacts, *Ireland* demonstrates that the sovereignty concept does not independently restrict personal jurisdiction. The Court acknowledged as much when it commented that "if" federalism independently limited personal jurisdiction, waiver of jurisdictional objections—held constitutional in *Ireland*—would be impossible, since individuals may not waive sovereign objections.

This repudiation of sovereignty is striking in style as well as in substance. By declaring the due process clause to be the only source of constitutional limitations on personal jurisdiction, and noting that the clause "itself makes no mention of federalism concerns," the Court cast the gravest doubt on Justice White's observation in *World-Wide* that sovereignty limitations on state judicial jurisdiction are "express or implicit in the original scheme of the Constitution and the Fourteenth Amendment."¹³⁶ The *Ireland* recognition that restrictions on state sovereign power really protect an individual liberty in-

135 *Id.* at 2104-05 n.10 (emphasis added) (footnotes and quotation from *World-Wide* omitted).

136 444 U.S. at 293.

terest is reminiscent of *World-Wide's* ultimate concession that the "orderly administration of the laws" relates to the ability of the defendant to structure his own activities to avoid inconvenient suit.¹³⁷ The "ultimately a function of" language in *Ireland* also ironically echoes the assertion in *Hanson* that jurisdictional restrictions are a "consequence of" state territorial limitations. In what sense are jurisdictional restrictions "a consequence of" limitations on state territories and, at the same time, "ultimately a function of" the liberty interest of individuals?

The conclusion that the Court has scotched sovereignty altogether is fortified by considering how far it reached to decide that issue. The majority might have joined Justice Powell in finding that plaintiff had made a "prima facie showing of minimum contacts" sufficient to warrant the entry of discovery orders and the consequent rule 37 sanction. Under that approach the majority would have preserved at least a vestige of the sovereignty theory by refusing to uphold jurisdiction absent some evidence of defendant-forum contacts. Instead, the majority followed the Third Circuit's lead, upholding jurisdiction based on a presumption that defendants' "refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."¹³⁸ As a result, the facts about minimum contacts were "found," if at all, through a fictitious admission of jurisdiction attributed to the defendants. The Court considered this "legal presumption" tantamount to "the finding of a constructive waiver."¹³⁹ On this approach jurisdiction was upheld without a true finding of *any* of the forum contacts that the sovereignty theory demands. Thus Justice Powell commented, "Fair resolution of this case does not require the Court's broad holding [on sovereignty],"¹⁴⁰ pointing out that "this rationale for decision was neither argued nor briefed by the parties."¹⁴¹

But the majority's decision to rest its ruling entirely on the theory of constructive waiver, rather than on the trial court's apparently erroneous¹⁴² determination that defendants had extensive forum con-

137 See discussion of *World-Wide* at text accompanying note 87 *supra*.

138 102 S. Ct. at 2106 (citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909)).

139 102 S. Ct. at 2106.

140 *Id.* at 2108.

141 *Id.* at 2110.

142 As Judge Gibbons observed in his partial dissent from the decision of the Third Circuit, the district judge, as a sanction for noncompliance with discovery orders, deemed it established that the excess insurer defendants had engaged in substantial, continuous activity within Pennsylvania. This conclusion was apparently thought necessary to justify an asser-

tacts, is squarely in accord with the Court's most recent pronouncements on jurisdictional fact-finding. In *World-Wide*, the Court frowned on the Oklahoma Supreme Court's inference that the defendants must have derived substantial revenue from Oklahoma because one of the automobiles they had distributed or sold in New York was ultimately used there.¹⁴³ Although the Court reluctantly respected that inference on the state-law question of how to interpret Oklahoma's long-arm statute,¹⁴⁴ it demurred when it came to the Constitution, rejecting the notion that such a one-time "use" contact reaped a benefit for defendants directly or substantially enough to satisfy due process.¹⁴⁵ In brief, the Court desired the facts about forum contacts to appear of record, at least where it was fair to expect the plaintiff to produce them.

Actually, the *Ireland* defendants did not advertently or voluntarily waive their jurisdictional defense any more than, so far as the record revealed, they were subject to jurisdiction under the usual contacts test. "Waiver" was declared as a sanction for unjustified refusal to provide discovery about jurisdictional facts. Thus the real question concerns the nature and gravity of a defendant's conduct that will warrant a court, consistent with due process, to declare a forfeiture of the personal jurisdiction defense. As the Court noted, the forfeitures imposed by Federal Rule of Civil Procedure 12 for failure to timely contest personal jurisdiction have not been thought offensive to due process. For the *Ireland* majority, due process protections are similarly not transgressed by a rule 37 sanction that defeats the personal jurisdiction defense of a defendant who interposes it timely but prevents it from being fairly decided. In a sense such a defendant is very much like the first, in that he, too, fails to press the defense in a manner conducive to its efficient, expeditious resolution. Further, the property impaired by the personal jurisdiction sanction obviously pales next to the property put at risk by a full default judgment, and entry of a default judgement as a discovery sanction had earlier passed constitutional muster in a decision the Supreme Court

tion of "general" jurisdiction as to a claim that arose outside the forum. To Judge Gibbons, it seemed very clear that the trial court's "extensive and pervasive" presumed jurisdictional facts were contrary to the reality of the defendants' contacts with Pennsylvania. *Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877, 889, 890 (3d Cir. 1981). See also Note, *Federal Rules of Civil Procedure—Discovery Sanctions*, 27 VILL. L. REV. 744, 756 (1982).

143 444 U.S. at 298.

144 OKLA. STAT. tit. 12, § 1701-03(a)(4) (1971).

145 444 U.S. at 298-99.

reaffirmed in *Ireland*.¹⁴⁶

In sum, interstate federalism no longer operates, if it ever did, as an independent restriction on a state court's sovereign power. This decision may be defended on pragmatic as well as theoretical grounds. If sovereignty in the *World-Wide* sense were an independent prerequisite to personal jurisdiction, long-standing rationales for upholding jurisdiction based on consent, waiver, or estoppel would be of doubtful validity. The Court is clearly convinced, however, that exercises of jurisdiction predicated on express contractual consent,¹⁴⁷ constructive consent by plaintiffs to submit to counterclaims,¹⁴⁸ or defendants' waivers of the jurisdictional objection at the onset of litigation,¹⁴⁹ are not only useful but fully consistent with fair play to the parties, and, therefore, constitutional under *International Shoe*. This conclusion holds true even though jurisdiction in such cases will generally not be based on a demonstration of the ordinarily required forum contacts and will, accordingly, lack the traditional foundation for the exercise of state sovereign power.

However sound its conclusion, *Ireland* represents such an abrupt about face from *World-Wide* that, despite the distance the Court went to uphold jurisdiction without reference to contacts, it is natural to doubt whether the decision represents sovereignty's definitive demise. Yet the arguments that would limit the significance of *Ireland* to its facts will not withstand analysis. It might be supposed, for instance, that the Court's willingness to dispense with evidence of the defendant's forum contacts was influenced by its desire to promote adherence to the discovery processes of the Federal Rules of Civil Procedure. But it is clear from *World-Wide* that the source of sovereignty interests lies somewhere in the federal constitution. It is unlikely that a constitutional imperative would be shelved in favor of rules of procedure.

An allied argument is that the Court relaxed its usual insistence on a factual predicate for the exercise of sovereign power out of special concern for the predicament of the *Ireland* plaintiff. It was, after all, the plaintiff who was prevented by the excess insurers' recalci-

146 See the Court's approving discussion of *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), at 102 S. Ct. 2106-07.

147 See *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 495 (1956) (discussed with approval in *Ireland*, 102 S. Ct. at 2105).

148 See *Adam v. Saenger*, 303 U.S. 59 (1939) (also discussed with approval in *Ireland*, 102 S. Ct. at 2105).

149 The Court cited the waiver created by FED. R. CIV. P. 12(h) resulting from the defendant's failure to timely object to personal jurisdiction. 102 S. Ct. at 2105.

trance from producing evidence of the ordinarily required contacts. This argument overlooks the fact that the *World-Wide* sovereignty concept always overrides the interests of plaintiffs. In *World-Wide* the Court said that even if the forum were convenient to the defendant, sovereignty concerns might oust the forum of jurisdiction. That result would clearly be at the plaintiff's expense rather than the defendant's.

Ireland has thus probably dispatched interstate sovereignty as a jurisdictional determinant as completely as *Rush* had dispatched forum state interest two years before. *Rush* instructed that a forum state's interest in asserting jurisdiction may not substitute for the defendant-forum contacts described by *International Shoe*. *Ireland* instructs that *International Shoe* fairness standards may occasionally be met even where the record is devoid of evidence of adequate forum contacts. In the process, *Ireland* also necessarily recognizes that a nexus between sovereign and defendant is not an invariable requisite of jurisdiction, and hence that a forum which is fair to the parties should not be ousted of jurisdiction out of deference to the sovereignty of other states.

It remains to consider the lessons to be drawn from this somewhat shabby history of sovereignty, and to venture some thoughts about its larger implications for personal jurisdiction theory.

IV. The Lessons of Abstract Jurisprudence and Larger Implications for Personal Jurisdiction

A. *Lessons*

The Court's sudden switches on sovereignty from *Shaffer* to *World-Wide* to *Ireland* spanned a period of only five years. The erratic course of decision suggests that what went awry was fairly fundamental. Two speculations will be offered here about the disarray in doctrine. First, the Court erred in resting personal jurisdiction decisions on an abstract, assumed first principle of government like "sovereignty." Second, the Court strayed because, until *Ireland*, it repeatedly failed to apprehend that the *sole* proper concern of the due process clause in the personal jurisdiction setting is with the interests of individual litigants, and not with interests of state governments.

The personal jurisdiction brand of "sovereignty" lacks specific constitutional roots, is vague in the description of its concerns, and has had negligible operative impact. As described by Justice White in *World-Wide*, the doctrine rests on nothing more solid than features postulated as "implicit" in our federal system. Perhaps as a result,

the Court has been unable to articulate adequately the relevant interests of individual forum states or of the "collective community"¹⁵⁰ of states which sovereignty seeks to serve. It has developed no relative ranking of the various state sovereign prerogatives that might be invaded by the forum's assertion of jurisdiction. Still less has it suggested how severe a threat of sovereign injury must be to require the displacement of an otherwise fair forum. For example, in *World-Wide* the interest of New York, the presumptive alternative forum, was at most only equal to Oklahoma's interest in providing the arena for resolving the controversy.¹⁵¹ The Court did not explain how New York's sovereignty would be undermined by a decision depriving its already overburdened courts of the opportunity to decide whether Arizona plaintiffs could recover for injuries allegedly sustained in Oklahoma at the hands of four defendants, only two of whom were shown to be based in New York.

From vagueness comes undue discretion. *World-Wide's* state sovereignty concept is manipulable at will to justify denials of jurisdiction without benefit of concrete standards. In this respect interstate sovereignty shares many of the characteristics of the related governmental interest doctrine that focuses more narrowly on the concerns of forum states. In short, it is yet another unweighted personal jurisdiction fudge factor.

It is therefore somewhat baffling to read Justice Powell's complaint in *Ireland* that the majority defines personal jurisdiction restrictions solely "by reference to abstract notions of fair play," rather than also by reference to the even more abstract concerns of state sovereignty. By and large, the Court has succeeded in giving concrete meaning to its concept of "fair play" to the parties, through case-by-case elaboration of the standards of *International Shoe*. In particular, it has developed highly specific tests of forum contacts which range at the extremes from a single, purposeful, and beneficial claim-related contact to a series of regular, substantial and continuous but non-claim-related contacts. These tests, in turn, are geared to the somewhat more general, but still workable, overall fairness criteria of foreseeability and benefit.¹⁵² It is, rather, the *Hanson* and *World-Wide* notion of state sovereignty that the Court has failed to endow with specific content.

150 The term is Professor McDougal's. McDougal, *supra* note 28, at 15, 29.

151 *Id.* at 56.

152 For a discussion of the foreseeability and benefit rationales for these tests, see Lewis, *supra* note 15, at 781-83.

In the Court's partial defense, it should be said that resort to assumed first premises of government—sovereignty and federalism are signal examples—as tools of decision is in the mainstream of a rich jurisprudential tradition. Unfortunately, in these other contexts where the Court has principally relied on its abstract conception of the role of sovereignty in a federal system, the resulting decisions have likewise been ripe for overruling.

In the *License Cases*,¹⁵³ for instance, Chief Justice Taney invoked general principles of federal-state relations to sustain state regulations of commerce, declaring them “valid unless they come in conflict with a law of Congress.”¹⁵⁴ Just four years later, though, *Cooley v. Board of Wardens*¹⁵⁵ cast doubt on this suggestion in the *License Cases* that only federal statutory law could overcome state commerce regulations,¹⁵⁶ and before long, in *Leisy v. Hardin*,¹⁵⁷ the Court invalidated an Iowa law prohibiting the sale of certain intoxicating liquors despite the absence of any positive federal enactment to the contrary. In doing so the Court acknowledged that the “authority of [the *License Cases*] . . . must be regarded as having been distinctly overthrown.”¹⁵⁸ Similarly, a preliminary decision which denied federal authority to tax the salaries of state officials out of deference to the “reserved rights of the States”¹⁵⁹ was twice qualified¹⁶⁰ before it was

153 46 U.S. (5 How.) 504 (1847).

154 *Id.* at 579.

155 53 U.S. (12 How.) 299 (1851).

156 The Court in *Cooley* upheld state regulations requiring the use of local pilots by foreign and interstate ships, but, in dictum, disclosed a category of cases in which state regulation would not be allowed, even in the absence of congressional action: “Whatever subjects of this [commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.” 53 U.S. at 319.

157 135 U.S. 100 (1890).

158 *Id.* at 118.

159 *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870). The Court in *Collector* held that the salaries of state court judges were immune from a national income tax. The exemption was said to rest upon “necessary implication” from the concept of the “reserved rights of the States, such as the right . . . to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government.” *Id.* at 128 (quoting *Veazie Bank v. Fenno*, 75 U.S. (11 Wall.) 533, 547 (1869)).

160 The *Collector* principle was first limited to preclude only “direct and substantial interference” with state functions. *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 387 (1937). Then, in *Helvering v. Gerhardt*, 304 U.S. 405 (1937), the Court upheld federal income taxation of employees of the Port of New York Authority. The burden on the home states of those employees was now termed “but a necessary incident to the co-existence within the same organized government of the two taxing sovereigns, and hence is a burden the existence of which the Constitution presupposes.” *Id.* at 424.

ultimately overruled¹⁶¹ upon more mature reflection by the Court about the paramount interests of the national government.

An instructive contemporary illustration of the frailty of decisions bottomed on a generalized concern for sovereignty is furnished by the saga of *National League of Cities v. Usery*.¹⁶² There the Court, overruling the recently decided *Maryland v. Wirtz*,¹⁶³ reasoned that federal wage and hour restrictions "interfere with the integral governmental functions" of the states and would "significantly alter or displace the states' abilities to structure employer-employee relationships" in providing services "which the States have traditionally afforded their citizens." Such an exercise of congressional authority, the Court said, "does not comport with the federal system of government embodied in the Constitution."¹⁶⁴

National League of Cities was then almost immediately distinguished in *Fitzpatrick v. Bitzer*,¹⁶⁵ where the Court held that the Constitution did not forbid applying the sex discrimination prohibitions of Title VII of the Civil Rights Act of 1964 to the State of Connecticut. The Court did not deny that a federal ban on sex discrimination in employment might "significantly alter or displace the States' abilities to structure employer-employee relationships,"¹⁶⁶ nor did it find that the employees who enjoyed the protection of Title VII were engaged in providing services other than those "which the States have traditionally afforded their citizens."¹⁶⁷ Instead, the Court simply stated that the eleventh amendment, which had been urged as a bar to the recovery of damages in the action, "and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the fourteenth amendment,"¹⁶⁸ one of the constitutional sources of authority for the enactment of Title VII. The Court purported to distinguish *National League of Cities* by observing that the Fair Labor Standards Act (FLSA) provisions under attack in that case were not enacted under the authority of the four-

161 *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), flatly overruled *Collector* to the extent that it had recognized an implied "constitutional immunity from income taxation of the salaries of officers or employees of the national or state government or their instrumentalities." 306 U.S. at 486.

162 426 U.S. 833 (1976).

163 392 U.S. 183 (1968).

164 426 U.S. at 852.

165 427 U.S. 445 (1976).

166 *National League of Cities*, 426 U.S. at 851.

167 *Id.*

168 *Fitzpatrick v. Bitzer*, 427 U.S. at 456.

teenth amendment.¹⁶⁹ Still, since the FLSA must have been enacted under the authority of some constitutional legislative grant, probably the commerce clause,¹⁷⁰ one might have expected the Court to explain why authority flowing from the commerce clause does not limit the principle of state sovereignty, while authority flowing from the fourteenth amendment does.

Perhaps at least some of the inconsistency to this point was a product of the Court's obscurity in *National League of Cities* concerning the specific constitutional textual source of the underlying state sovereignty limitation on congressional power.¹⁷¹ But in a decision issued during the current term, *Equal Employment Opportunity Commission v. Wyoming*,¹⁷² the Court explicitly identified the tenth amendment as the locus of a state's sovereignty-based objection to enforcement of a cognate federal employment statute aimed against age discrimination.¹⁷³ Further, the five-member majority treated the commerce clause as the sole source of the countervailing federal authority, expressly disclaiming reliance on section 5 of the fourteenth amendment.¹⁷⁴ Nevertheless, although the basis on which *Fitzpatrick* had distinguished *National League of Cities* was thus rendered unavailable, the Court once more refused to strike down federal employment discrimination legislation, seizing on yet another way to distinguish *National League of Cities*. The Court found the "degree" of federal intrusion on state functions worked by the age discrimination statute to be "sufficiently less serious" than that created by the general wage and hour legislation at issue in *National League*, and held, accordingly, that it was "unnecessary" to condemn the age act.¹⁷⁵

In a separate dissenting opinion, Justice Powell cited footnote ten of *Ireland* as an example of the Court's continuing respect for the "significant sovereign powers" retained by the states.¹⁷⁶ The citation is more than a little incongruous, since the overwhelming thrust of that footnote (as Justice Powell himself bemoaned at length in his concurring opinion in *Ireland*) was to deny state sovereignty any independent role in the personal jurisdictional determination, or, at the

169 *Id.* at 452-53.

170 See *National League of Cities*, 426 U.S. at 836 (citing *United States v. Darby*, 312 U.S. 100, 115 (1941)).

171 See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 308 n.9 (1978).

172 51 U.S.L.W. 4219 (U.S. March 2, 1983).

173 The Age Discrimination In Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 621-643. (1976 & Supp. 1980).

174 51 U.S.L.W. at 4224.

175 *Id.* at 4222-23.

176 *Id.* at 4232 n.12 (Powell, J., dissenting).

very least, to dilute drastically the *World-Wide Volkswagen* dictum to the contrary.

Judges have sought refuge behind ill-defined first principles of government almost routinely in interpreting the jurisdictional facet of the due process clause, itself one of the murkiest constitutional mandates. Interstate sovereignty has some notoriously amorphous ancestors: the natural, international, and public law principles which underpinned *Pennoyer v. Neff*; *Pennoyer*'s own strict territorial limitations, with their curiously nonterritorial exceptions; and Justice Stone's breezy references in *International Shoe* to the "context of our federal system of government" and the "fair and orderly administration of the laws." The brief life of "interstate sovereignty," then, is but a minor disharmony in a far grander discordant theme. Judges seem addicted to ad hoc, abstract lawmaking when they dispense jurisdictional due process. Nowhere has that tendency been manifested more persistently than in the doctrine of "forum state interest."

Both of the governmental interest doctrines, interstate sovereignty and forum state interest, are motivated by the Court's concern with undeniably important interests of state government. But the Court's preoccupation with those interests has led it to overlook their irrelevance to a motion to dismiss for lack of personal jurisdiction. When that motion is granted, the plaintiff may almost always start over again in another forum. The motion usually determines no rights on the merits and resolves no issues that implicate substantive state policy. Had the Court heeded these limited litigation consequences, it might have eliminated governmental interests from jurisdictional analysis well before *Ireland*.

An even more salient cause of the misplaced respect paid to government interests in this context has been the Court's blindness to the elementary proposition that the personal jurisdiction motion determines purely personal rights. In a noteworthy article,¹⁷⁷ Professor Redish has argued that "there is nothing in either the language or purposes of the due process clauses—both of which are rooted in the protection of the individual from governmental oppression—to credit a federalism theory of due process."¹⁷⁸ Although there is no logical "connection between the development of the doctrine of due process and the limits imposed on personal jurisdiction based on federalism,"¹⁷⁹ the Court nevertheless "infused vague concepts of interstate

177 Redish, *supra* note 21.

178 *Id.* at 1121 (footnotes omitted).

179 *Id.*

sovereignty into the due process clause. These limitations on state authority are imposed in the name of the clause, regardless of whether private parties—the ultimate beneficiaries of these protections—are in danger of suffering real injustice.”¹⁸⁰

At least since *International Shoe*, jurisdictional due process has revolved around what the Court in *Pennoyer* termed the “personal rights and obligations of parties” and the “protection and enforcement of private rights.”¹⁸¹ For present purposes it is unnecessary to debate whether these quotations from *Pennoyer* are sufficiently encompassing to support the contention that the “person” protected by due process includes the civil plaintiff.¹⁸² It is enough to observe that the “sole concern” of due process should be “the prevention of injustice to the individual.”¹⁸³ Chief Justice Stone’s expansive language notwithstanding, the Court’s actual approach in *International Shoe* was to appraise the forum contacts of the defendant corporation in order to ascertain whether its degree of benefit from forum activities, or its expectancy of suit there, sufficed to make forum jurisdiction “fair.” Although the Court may also have been concerned with the State of Washington as a plaintiff, it showed no similar solicitude for Washington as a forum state.

Ironically, the modern Court’s lax concept of relevance—that is, its emphasis on government interests to resolve an issue of individual rights—appeared as early as Justice Black’s concurring opinion in *International Shoe*, the very case that should have rendered this sidetrack obsolete. To Justice Black, the State of Washington had jurisdiction over the defendant corporation because of that State’s “power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business” there.¹⁸⁴ So strongly did he

180 *Id.* at 1113-14.

181 95 U.S. 714, 733 (1878).

182 There is some support for a “plaintiff’s due process” position in the Supreme Court’s decisions. The use of the forum state interest doctrine to uphold jurisdiction in the nonresident motorist cases may be seen as promoting the plaintiff’s interest in the enforcement of private rights. The Court in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), took explicit account of convenience to the plaintiff, and in *World-Wide* the Court explicitly recognizes the plaintiff’s interest as a relevant factor. 444 U.S. at 292. The Court has recently affirmed in a nonjurisdictional context that a state-created cause of action is a species of “property” protected by due process from arbitrary deprivation by the state. *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 428 (1982). *But see* *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (condemning substitution of plaintiff’s forum contacts for defendant’s). *See also* Brillmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. Ct. Rev. 77, 110; McDougal, *supra* note 28, at 9.

183 Redish, *supra* note 21, at 1143.

184 326 U.S. at 324 (Black, J., concurring).

believe that the legislative power could not be judicially conditioned upon notions of fair play to the parties¹⁸⁵ that he would have dismissed the appeal in *International Shoe* as lacking in substance.¹⁸⁶

Justice Black's reliance on forum state interest fundamentally confuses state substantive power and judicial jurisdiction.¹⁸⁷ It is certainly true that a state's interest in upholding its legislative policies against a substantive due process attack deserves great weight.¹⁸⁸ By force of the full faith and credit clause, the policies embedded in state legislation should receive deference from *any* forum properly seized of jurisdiction when those policies are drawn in question.¹⁸⁹ But substantive state policy is not, or at least should not,¹⁹⁰ be in jeopardy on the personal jurisdiction motion. The sole stakes at that stage of the litigation are those of the parties in securing an advantageous forum or resisting an unfair one.

Any doubt that individual rights predominate over state interests in personal jurisdiction decisions should have been put to rest by the Court's opinions in *Shaffer*, *Kulko*, and *Rush*. *Shaffer* strongly suggested that even an important, statutorily expressed forum interest in hearing a dispute would be subordinate to the "central" relationship "among the defendant, the forum, and the litigation."¹⁹¹ *Kulko* characterized the interests of the forum in that case as "important" and "substantial," yet considered fairness to the defendant the "essential

185 *Id.* at 324-25.

186 *Id.* at 322.

187 This same confused conceptual line divided the Court in *Pennoyer*. See Lewis, *supra* note 15, at 784-85. Note in particular Justice Black's contention in *International Shoe* that *Hoopston Canning Co. v. Cullen*, 318 U.S. 313 (1943), which had sustained state substantive taxing legislation, was dispositive of the jurisdictional issue in *International Shoe*. 326 U.S. at 323 (Black, J., concurring).

188 This is especially true when the entire citizenry is the intended beneficiary of legislative policies embodied in the statutory regulation. Invalidating a statute as an impermissible forum regulation not only prevents implementation of these policies in the present action, but also denies their application in future actions.

189 See Posnak, *Choice of Law: A Very Well Curried Leflar Approach*, 34 MERCER L. REV. 731, 751-52 (1983).

190 Personal jurisdiction motions govern only the place where an action may be brought. In this situation, unlike those concerning questions of what law applies, the state has no legitimate interest unless it happens to be a party to the litigation, in which case its interest is not that of a sovereign. A legal "realist" would probably counter that in practice, once a forum asserts jurisdiction, it will be substantially free to pick and choose among the laws of all the states that have any connection, however remote, to a litigation with interstate elements. See text accompanying notes 204, 213-16 *infra*. The short answer is that two wrongs not only fail to right the problems with the Supreme Court's hands-off approach to choice of law, but create the additional problem of encouraging jurisdictional decisions that may be unfair to the parties. See text accompanying notes 211 and 205-07 *infra*.

191 433 U.S. at 204.

criterion in all cases."¹⁹² *Rush* explicitly condemned any shift of focus from the forum contacts of the defendant to the interests of the forum state (or for that matter, the plaintiff).¹⁹³

In summary, although the government interest doctrines have enjoyed a remarkable rhetorical vitality in the Supreme Court's decisions since *International Shoe*, they have made no decisional difference.¹⁹⁴ They have not caused the Court to deny jurisdiction which should otherwise have been upheld under fairness standards, or to uphold jurisdiction when, by those standards, it should have been denied.¹⁹⁵ Building on the Court's de facto rejection of the government interest factors, a growing body of scholarly opinion anticipated the several critical conclusions announced in *Ireland* that ordain the death of sovereignty. These conclusions are, in the commentators' words: First, that the due process clause is "the only constitutional limitation on the reach of state judicial jurisdiction";¹⁹⁶ second, that in the personal jurisdiction context "the protections of the due process clause should accrue to private parties alone";¹⁹⁷ and third, consequently, that "the due process analysis of personal jurisdiction should be redefined to focus exclusively on the interests of the [parties]."¹⁹⁸

Nothing said here is intended to detract from the importance of the government interests sought to be advanced by the doctrines of forum state interest and state sovereignty. To the contrary, such in-

192 436 U.S. at 98, 100, 92.

193 444 U.S. at 332. Shifting the analysis from a defendant's due process rights to the plaintiff's interest in a convenient forum is "forbidden by *International Shoe* and its progeny." *Id.*

194 In view of these decisions, it is most difficult to agree that, until *World-Wide*, the "relative importance of state sovereignty and of fairness to the defendant was still largely undetermined." Ripple & Murphy, *supra* note 15, at 73.

195 *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), is a case in which the absence of an apparent forum interest in proceeding did not cause the court to deny jurisdiction appropriate under party-fairness standards. For cases where admitted government interests failed to persuade the court to uphold jurisdiction otherwise deficient under party fairness standards, see *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958). See generally Lewis, *supra* note 15, at 806-07.

196 Redish, *supra* note 21, at 1143.

197 Lewis, *supra* note 15, at 811. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

198 Redish, *supra* note 21, at 1135. See also Jay, "Minimum Contacts" as a Unified Theory of Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429, 450 (1981); Lewis, *supra* note 15, at 810, 821; Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 192 (1976); Whitten, *supra* note 31, at 843. Cf. Brillmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 111. But see Jay, *supra*, at 441.

terests¹⁹⁹ are fundamental to a well-run federated system of government. The Court's encomiums to those interests are wrong not because the interests themselves are unimportant, but because they should not be taken into account in deciding a motion that determines only the battleground for the parties' dispute. Sovereignty concerns should not find expression in personal jurisdiction rules that oust a fair forum of jurisdiction. Instead, respect for the sovereign rights of the states should be enforced through the development of meaningful restrictions on choice of law under the full faith and credit clause.

For example, where no state has a "specific" interest and only one state has a "general" interest in a controversy,²⁰⁰ that state's law should apply, as a matter of constitutional compulsion.²⁰¹ Similarly, in a false conflict, i.e., where only one state has a "specific" interest,²⁰² the single specifically interested state has a sovereignty-based objection to the application of the law of any other state, and should enjoy some confidence that *whatever* forum accepts jurisdiction will apply the law of the specifically interested state.²⁰³ The Supreme Court's unwillingness to impose such restrictions²⁰⁴ gives forum courts a practical incentive to bias their jurisdictional determinations in favor of jurisdiction, for they may rest secure that, once seized of jurisdiction, they may apply forum law with constitutional impunity even absent a specific interest.

Such a bias in favor of accepting jurisdiction, motivated by a desire to ensure the application of forum law, may run afoul of *Ireland's* strong indication that jurisdictional due process should be "ultimately" concerned with the rights of individual litigants. Even the

199 Among other interests, forum states may want to apply their own law to controversies arising from transactions occurring within their borders, affecting their residents, or implicating their policies; provide the arena for resolving those controversies, or for that matter any controversy involving a resident or domiciliary plaintiff; and shield their own statutes from substantive due process attack. See Lewis, *supra* note 15, at 822-26; McDougal, *supra* note 28, at 13-26. Other states will want to ensure that their own comparable interests are not encroached on by the forum's exercise of jurisdiction.

200 See Posnak, *supra* note 189, at 733-34.

201 *Id.* at 739 & 739-40 n.38.

202 *Id.* at 733.

203 *Id.* at 745-46, 753.

204 *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) is the most recent and one of the most glaring instances of the Court's failure to develop meaningful federal constitutional limitations on choice of law. Commentators have noted that, after *Allstate*, there are as a practical matter few or no sovereignty-based constitutional limitations on choice of law rules. Posnak, *supra* note 189, at 746-47; Redish, *supra* note 21, at 1132 n.139; Whitten, *supra* note 21, at 843. See also Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945).

highest degree of state interest does not assure or even signify that the forum is a fair one to the defendant.²⁰⁵ The use of a forum state's interest as even a "tipping" factor for personal jurisdiction may result in exercises of jurisdiction that would be considered unfair to the parties if examined independently under fairness standards. On the other hand, denying the jurisdiction of a fair forum for want of an identifiable forum state interest superior to the interest of another state would be manifestly unfair to the plaintiff, who already encounters formidable obstacles in demonstrating that the forum is fair to the defendant.²⁰⁶ As a policy matter, resolution of a dispute over choice of law should not "turn on the fortuity of the plaintiff's choice of forum."²⁰⁷ As a matter of constitutional law, it should be apparent after *Ireland* that the individual rights determined by the personal jurisdiction dispute need not be compromised in the name of sovereign interests proclaimed by a self-interested forum.

When the Court has explicitly addressed the overlap between choice-of-law and personal jurisdiction standards, it has quite properly rejected the proposition that a state's law-application interest, standing alone, demonstrates its constitutional adequacy as a forum.²⁰⁸ Nevertheless, choice-of-law concerns still figure in the Supreme Court's personal jurisdiction decisions, perhaps because the factors commonly employed to decide both issues significantly overlap. Thus the defendant's contacts with the forum state, a primary test of personal jurisdiction since *International Shoe*, may also point towards that state as one with a "general" or "specific" interest for purposes of choice of law. It is therefore no accident that the two justices, Black and Brennan, who more than any other have sought to elevate the forum state's interests to a status at least equal to fairness for defendants,²⁰⁹ are also the same justices who, in dissent, would let a state's strong law-application interest be virtually dispositive of its constitutional adequacy as a forum for purposes of personal

205 See *Rush*, 444 U.S. at 332; *Kulko*, 436 U.S. at 100; *Shaffer*, 433 U.S. at 215.

206 *Rush*, 444 U.S. at 332; *Kulko*, 436 U.S. at 92. See the discussion of the Court's recent tilt toward the interests of the defendant, as against those of the plaintiff, in *Lewis*, *supra* note 15, at 811.

207 See *Lewis*, *supra* note 15, at 834.

208 See, e.g., *Shaffer*, 433 U.S. at 215-16; *Hanson*, 357 U.S. at 254.

209 *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 309 (1980) (Brennan, J., dissenting); *Shaffer v. Heitner*, 433 U.S. 186, 222-23 (1977) (Brennan, J., concurring and dissenting in part); *McGee v. National Life Ins. Co.*, 355 U.S. 220, 223 (1957) (Black, J., for the Court); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950) (Black, J., for the Court); *International Shoe v. Washington*, 326 U.S. at 322-326 (Black, J., concurring).

jurisdiction.²¹⁰

The recurrent sovereign interest overtones of the Supreme Court's personal jurisdiction opinions may well have retarded the development of rigorous constitutional principles regulating choice of law. Although the references to sovereignty do not appear to have dictated the results of the personal jurisdiction decisions, they may have fostered the illusion that the Court, through those decisions, has given adequate consideration to constitutional constraints on choice of law. If so, the Court may still be underestimating the need to develop those restrictions in cases where the choice-of-law issue is raised directly.²¹¹

A contrary prediction, that the "Court's new interest [voiced by *World-Wide*] in interstate federalism may . . . lead it to more carefully examine cases posing choice of law problems,"²¹² remains unfulfilled. The hope was that *Allstate Insurance Co. v. Hague*,²¹³ then on certiorari to the Supreme Court, might be the court's vehicle for creating meaningful constitutional restrictions on choice of law.²¹⁴ Unfortunately, the Court in *Allstate* dashed this hope, spurning the opportunity to create those restrictions and leaving the state courts substantially free to apply the law of any state that has even the most tangential relationship to either of the parties or the claim.²¹⁵ In the process, the Court threw cold water on the conjecture that *World-Wide* would usher in an era of "new stability" to the "chronically elusive areas of constitutional limitations on personal jurisdiction and choice of law."²¹⁶

In brief, the Court seems to have committed two conceptual errors in elaborating the interstate sovereignty doctrine. First, the Court merely sketched a rough blueprint, without ever identifying or quantifying specific, sovereignty-based interests of states other than the forum that would suffice to outweigh the party-fairness factors on which jurisdiction ordinarily depends. Second, and more fundamentally, even if the concept had become associated with particular government interests—for example, a state's interest in having its own

210 *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 310 (1980) (Brennan, J., dissenting); *Shaffer v. Heitner*, 433 U.S. 186, 225 (1977) (Brennan, J., concurring and dissenting in part); *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, J., dissenting).

211 *See Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

212 Ripple & Murphy, *supra* note 15, at 86.

213 449 U.S. 302 (1981).

214 Ripple & Murphy, *supra* note 15, at 85.

215 *See* note 204 *supra*.

216 Ripple & Murphy, *supra* note 15, at 88.

law applied to a controversy or in providing a forum to resolve it—the Court should never have factored those interests into decisions on personal jurisdiction. That the Court did so reflects its inadequate appreciation of both the limited significance of the motion to dismiss for lack of personal jurisdiction and the purely individual interests at stake. Since the Court in *Ireland* appears to have corrected these misapprehensions, it may be useful to consider the promise the *Ireland* opinion holds for the evolution of personal jurisdiction and choice of law.

B. *Larger Implications*

It is unclear why Justice Powell would support a state sovereignty doctrine that defies precise definition, unfairly threatens both parties in their quest for a relatively fair forum, makes no decisional difference, and has, in *Ireland*, been all but abjured by its most recent judicial exponent, Justice White. Justice Powell surely is correct, though, when he observes that the majority, by eliminating the sovereignty factor from the jurisdictional equation, “effects a potentially substantial change of law” and “could require a sweeping but largely unexplicated revision of jurisdictional doctrine.”²¹⁷ Contrary to his suggestion, however, this development is an auspicious one for the construction of a coherent unified theory of personal jurisdiction and perhaps for choice of law.

Precisely because the Court did reach so far to discuss the sovereignty concept in *Ireland*, the third death of sovereignty will likely prove fatal. Moreover, the Court’s reasons for holding that the satisfaction of sovereignty interests is not a *sine qua non* of personal jurisdiction also undermine the foundations of the other government interest doctrines that have played such a distracting part in personal jurisdiction adjudication. The linchpins of the *Ireland* decision were the Court’s explicit recognition that the due process clause is the sole source of constitutional limitations on personal jurisdiction and the Court’s recognition that due process regulates purely personal rights. We may therefore anticipate the formal repudiation not just of interstate sovereignty, but also of the other government interest factors that have figured in the Court’s recent decisions: among others, the “forum State’s interest,” the “shared interest of the several States,” and the “interstate judicial system’s interest in obtaining the most efficient resolution of controversies.”²¹⁸ If the sole ultimate concern

217 102 S. Ct. at 2110, 2108.

218 *World-Wide*, 444 U.S. at 292.

of jurisdictional due process is to ensure a forum that is relatively fair as between the parties, then the presence or absence of a forum state or other governmental interest—of whatever kind or degree and whether or not articulated through legislation²¹⁹—should come to be seen as utterly irrelevant to the personal jurisdiction decision, since those interests have no necessary bearing on the single pertinent factor of party fairness.

The *Ireland* opinion has auspicious potential because it has all but entirely cleared away this doctrinal debris. In doing so it has immeasurably eased the task of unifying jurisdictional theory so as to reconcile the Court's decisions since *International Shoe*. An illustration is furnished by the majority in *Ireland*. The bold declaration of *Shaffer v. Heitner* that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny"²²⁰ had raised some question about the standing of other post-*International Shoe* decisions that had upheld jurisdiction based on express contractual consents or stipulations to jurisdiction.²²¹ In those situations, or when the defendant waives the personal jurisdiction objection by failing to timely assert it,²²² or when the court infers a plaintiff's constructive consent to be served with a counterclaim,²²³ jurisdiction is exercised without the ordinarily required evidence of forum contacts by the defendant (or, in the counterclaim case, by the plaintiff).²²⁴ Yet the Court gives every indication that it strongly adheres to *Shaffer*,²²⁵ and thus it evidently considers all these non-contacts-based exercises of jurisdiction consonant with "the standards set

219 See Note, *Measuring the Long Arm After Shaffer v. Heitner*, 53 N.Y.U. L. REV. 126 (1978); Note, *Recent Interpretations of "Doing Business" Statutes*, 44 IOWA L. REV. 345 (1959).

220 433 U.S. at 212.

221 See, e.g., *Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (contractual consent to forum jurisdiction and "cognovit" provisions confessing judgment there); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964) (consent to jurisdiction and appointment of agent for service); *Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495 (1956) (stipulation). In *Ireland*, the Court referred to the last two cases as among several examples of a "variety of legal arrangements . . . taken to represent express or implied consent to the personal jurisdiction of the court." 102 S. Ct. at 2105.

222 FED. R. CIV. P. 12(h)(1).

223 The majority in *Ireland* recognized this example by citing, with approval, *Adam v. Saenger*, 303 U.S. 59 (1938). 102 S. Ct. at 2105.

224 Even if the defendant in such cases may be said to have had forum contacts, e.g., by agreeing to litigate there, the plaintiff's claim may not "arise out of" any of these contacts, and, therefore, jurisdiction could not be upheld on a theory of claim-related forum contacts. Further, in the same situations, the defendant will often not have reaped substantial forum benefits in a regular, continuous manner, so that the alternative major test of contacts will also not be satisfied.

225 See text accompanying notes 77-88 *supra*.

forth in *International Shoe* and its progeny." The conclusion is inescapable that, to today's Court, the "standards set forth in *International Shoe*" must refer to transcendent criteria of fairness to parties which, while they may be satisfied by the particularized tests of substantial or claim-related defendant-forum contacts, are not restricted to them.

The particularized contacts tests have always served as surrogates for these broader indicia of fairness. For example, satisfaction of the particularized "claim-relatedness" test demonstrates a constitutionally sufficient expectancy by the defendant that the particular suit might be brought in the forum. A person who has engaged in certain conduct in or affecting a foreign state should reasonably expect that he may later be called on to defend that conduct in that state. This will be the case even if the defendant cannot reasonably be held to have anticipated any litigation at all.²²⁶

The Court's principal alternative particularized test of contacts is met by regular, continuous and substantial defendant-forum contacts, no one of which need be related to the plaintiff's claim. The theory is that when the defendant undertook extensive and weighty forum contacts, he presumably anticipated receiving significant benefits and protections. These, in turn, make it substantively fair to saddle him with a reciprocal obligation to defend any civil action in the forum, wholly apart from his expectations as to where a particular lawsuit might be filed.²²⁷

To date, jurisdictional theory has not been able to account for other, satellite bases of personal jurisdiction like domicile, place of incorporation, waiver, or consent that do not meet the particularized tests of claim-related or regular, substantial, non-claim-related forum contacts. Theoretical unification may be attempted by analyzing whether jurisdiction on these grounds comports with one of the broader fairness criteria of expectation or benefit, and hence with the overarching "standards" of *International Shoe*.²²⁸ For example, jurisdiction in the express consent and waiver situations is readily explicable as consonant with the overall fairness indicator of litigational expectation, even though jurisdiction on those grounds could not be justified by reference to the particularized claim-related contacts test from which that expectation is most commonly inferred.

226 See *World-Wide*, 444 U.S. at 297.

227 For a discussion of this regular and continuous contacts test, see Lewis, *supra* note 15, at 782-83.

228 The author will undertake this analysis in a forthcoming article.

Less important for jurisdiction, although surely more important²²⁹ for the real interests symbolized by the slogan "state sovereignty," *Ireland* has the salutary potential of spurring the development of meaningful constitutional restrictions on choice of law. Once governmental interest concepts are excised from personal jurisdiction adjudication, the Court may finally be persuaded that significant constitutional restrictions on choice of law will come about, if at all, only through cases raising the choice-of-law question directly, rather than through the back door of jurisdictional adjudication.

Ireland should hasten that day. At a minimum it should promote jurisdictional decisions geared exclusively to assessing the relative fairness of the forum to the parties. By resisting the temptation to succumb to sovereignty, the Court has freed itself from a formalistic ghost of *Pennoyer*. Unencumbered by governmental interest baggage, it may continue to chart a course consistent with the individual rights focus of *International Shoe*.

²²⁹ It is generally agreed that the resolution of a substantial choice-of-law dispute is far more likely to be outcome determinative than is the resolution of a motion to dismiss for lack of personal jurisdiction. Posnak, *supra* note 189, at 732, 739 n.37.