Article

Rethinking the Conflicts Revolution in Personal Jurisdiction

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INTRODUCTION

Each legal field has its own way of understanding both its past and its present. In the field of Conflicts of Law, this understanding takes the form of an oft-repeated historical narrative—one that revolves around the central event of the "Conflicts revolution."[1] Prior to the 1940s, this narrative observes, tests and standards in Conflicts of Law shared a common theme: they were anchored in the idea of "sovereignty."[2] During this period, in other words, questions in Conflicts of

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1. The term "Conflicts revolution" apparently was coined by Albert Ehrenzweig in a 1966 article. *See* Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 405 n.21 (2000) (citing Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts of Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966)). This term is sometimes used to discuss only the choice-of-law elements of this larger revolution but other times is used to capture the jurisdictional elements as well. Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws: In with a Bang and Out with a Whimper*, 163 U. PA. L. REV. 1919, 1921 (2015).

2. *See, e.g.*, Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2517 (2005) ("Much like regulatory law during the era of *American Banana*, legal spatiality was central to considerations of constitutional law in the nineteenth century. Here too, decisions . . . [were about] the spatial limits of sovereignty."); John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 443 (2003) ("[N]otions of exclusive sovereignty were a linchpin of the classical approach to choice of law."); Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. REV. 681, 682 (1989) ("Underlying the concept of vesting is the notion of sovereignty."); Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 241–42 (2002) ("[T]raditional conflict of laws emphasized a strongly territorial definition of sovereignty."); Austen L. Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 AND. L. REV.

Law were viewed as questions about the breadth of power that a particular type of entity, the "sovereign," could justifiably possess.[3] Based on the answers to these questions, limits on legislative jurisdiction (i.e., choice of law) and personal jurisdiction were developed.[4] In practice, this approach usually limited states to the governance of people and things existing within their territorial boundaries—a limit that grew out of the assumption that sovereign states, by definition, were entities whose power ceased at their borders.[5] By the early twentieth century, this approach had generated tests applied by the courts for: (1) personal jurisdiction under the Fourteenth Amendment;[6] (2) choice of law under the Due Process Clause;[7] (3) choice of law under

1455, 1466 (2008) ("In the United States, the territoriality principle reached its zenith in the 1800s.").

3. This view had some traction in America since the Founding, but it entered American Conflicts thinking with particular force beginning with the publication of Joseph Story's treatise in 1834. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 22–23 (Melville M. Bigelow ed., 8th ed. 1883) (1834). On Story's focus on sovereignty, see, for example, Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 24 (2010), stating that "Story . . . erected his conflict of laws system on sovereignty and comity"; and Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 399 (2008), stating that "Joseph Story . . . made 'sovereignty' of the state over a territory the premise of his conflicts theory." On Story's influence, see, for example, ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS 2 (1992), referencing Story as "the prime architect of nineteenth-century American conflicts law"; and Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws–One Hundred Years After*, 48 HARV. L. REV. 15, 38 (1934), noting that "[i]n the United States and England, Story is revered today as the father of the conflict of laws." For the cases that translated Story's concepts into sovereignty-based conflicts rules, see *infra* notes 6–10.

4. *See, e.g.*, STORY, *supra* note 3, at 21 ("[I]t would be wholly incompatible with the equality and exclusiveness of the sovereignty of [any] nation, that [other] nation[s] should be at liberty to regulate either persons or things not within its own territories.").

5. For a detailed analysis of this territorial definition of sovereignty, and its intellectual history, see *infra* Part II.A.1.

6. *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[N]o tribunal established by [a state] can extend its process beyond [its] territory so as to subject either persons or property to its decisions."). For a discussion of *Pennoyer*, see *infra* Part II.A.1.

7. *See* Home Ins. Co. v. Dick, 281 U.S. 397, 407 (1930) ("A State may, of course, prohibit and declare invalid the making of certain contracts within its borders, . . . [I]t may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws."); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 155, 162 (1914) ("[A] State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction . . . [consequently a] state, by a license, may [not] acquire the right to exert an authority beyond its borders.").

the Full Faith and Credit Clause;[8] (4) federal intent to legislate extraterritorially;[9] and (5) state choice of law selection methods.[10]

This approach to Conflicts of Law would not last, however. Instead, in the period spanning from the 1940s through the 1960s, the Conflicts revolution would remake the field.[11] As Ralph Whitten has

8. *See* Mod. Woodmen of Am. v. Mixer, 267 U.S. 544, 551 (1924) ("[A]s marriage looks to domicil, membership [in a corporation] . . . looks to and must be governed by the law of the State granting the incorporation."); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 399 (1924) ("The Texas statute [is] incapable of being constitutionally applied to [the Tennessee contract] since the effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other States in disregard of their laws . . . ."); Am. Fire Ins. Co. v. King Lumber Co., 250 U.S. 3, 10 (1919) ("[This] case [does not] present an attempt of the Florida law to intrude itself into the State of Pennsylvania and control transactions there . . . . There is no foundation, therefore, for the contention that full faith was not given to a law of Pennsylvania . . . ."); *N.Y. Life Ins. Co.*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and . . . destroy freedom of contract without throwing down the constitutional barriers . . . . The principle . . . lies at the foundation of the full faith and credit clause and the many rulings which have given effect to the clause.").

9. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909) (explaining that as a general rule, statutes are construed to apply only within the territorial limits in which its lawmakers have legitimate power and that words with universal scope, such as "every contract in restraint of trade," shall be interpreted to mean "only every one subject to such legislation").

10. *See, e.g.*, Ala. Great S. R.R. v. Carroll, 11 So. 803, 809 (Ala. 1892) (holding that a plaintiff's rights were determined solely by the laws of Mississippi because that was the state where the injury occurred); *see also* RESTATEMENT (FIRST) OF CONFLICTS OF L. § 1 (1934) (endorsing this choice-of-law approach).

11. The starting date of the "Conflicts revolution" has been debated. *See, e.g.*, Katherine Florey, *Big Conflicts Little Conflicts* 47 ARIZ. ST. L. REV. 683, 719 (2015) (identifying the revolution as "[s]tarting in the 1920s and 1930s and continuing through the mid-twentieth century"); Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After* Currie*: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1870 (identifying "the 1960s as the decade of the choice-of-law revolution"); Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 584 (1999) ("This development, often called the 'American conflicts revolution,' began in the 1950s, reached its climax in the 1960s and 1970s, and petered out in the 1980s."). In part because this Article adopts a broad definition of the "Conflicts revolution" that includes topics beyond state choice-of-law rules, a period stretching back to the 1940s seems appropriate. *See* Pac. Emp's. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 503 (1939) (analyzing to what extent the Full Faith and Credit Clause can compel "the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state"); Int'l Shoe Co. v. Washington, 326 U.S. 310, 311 (1945); United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 443 (2d Cir. 1945) (questioning whether Congress intended for a law to have an extraterritorial effect). For a timeline of states adopting modern (i.e., post-revolution) approaches to choice of law, see SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 37–50 (2006).

put it, this movement was "successful in destroying the premises on which the [preceding] system of conflict of laws was based."[12] William Tetley has described it as a period in our legal history "the creativity and dynamism of which remain unequalled elsewhere."[13] It was clear at the time, and it remains clear today, that a profound change was occurring in the field of Conflicts of Law in the mid-twentieth century—a change that was fundamentally altering the tests and standards used by American courts.[14]

What, then, was the nature of this profound change? According to the conventional view, this Conflicts revolution amounted to a rejection of the same idea across each of its many domains: the idea that Conflicts tests should be grounded in a theory of sovereignty.[15] In place of a sovereignty-based approach, this conventional view suggests, the Conflicts revolution introduced tests that focused instead on pragmatic concerns such as convenience, judicial flexibility, practicality, and litigant fairness.[16]

12. Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 259 (2001).

13. William Tetley, *A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems (Corrective Vs. Distributive Justice)*, 38 COLUM. J. TRANSNAT'L L. 299, 299 (1999).

14. For contemporaneous realizations of the revolution's transformative impact, see, for example, Ehrenzweig, *supra* note 1, at 379, stating that "[c]urrent conflicts doctrine is usually viewed as a revolution against the 'Establishment' of the first Restatement of Conflict of Laws"; Hans W. Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading* Cavers*, the Choice-of-Law Process*, 46 TEX. L. REV. 141, 144, 147 (1967), referring to "the Currie revolution" and citing "Brainerd Currie's epochal 1958 study"; and Friedrich Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 202–03 (1969), stating that "[i]t seems clear that *lex loci* is no longer the federal choice of law rule. This is a remarkable development considering that the rule was once followed in word, if not in deed, by virtually every court in the United States. . . . [Many courts] have embraced modern conflicts thinking cheerfully, and the terms . . . have become part and parcel of the judicial vocabulary." (emphasis added) (footnotes omitted).

15. *See infra* Part I.

16. Many scholars have made this assertion about the Conflicts revolution generally. *See* Raustiala, *supra* note 2, at 25–48 ("The evolution of American law has been a process in which formalistic categories based on spatial location and geographic borders were rejected in favor of more supple, contextual concepts such as 'effects' and 'minimum contacts.'" (footnote omitted)); Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 453 (2000) ("Territorial theory, which utterly dominated thinking in American conflicts law for over a century, has given way piecemeal in the courts to methods of analysis that [are] more complex and sensitive." (footnote omitted)); George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347 (describing the revolution as triumph of a destructive realist impulse that lacked a positive vision or agenda); David M. Kroeger,

This understanding of the Conflicts revolution is of enormous consequence today. Most of the tests and standards that this revolution introduced are still, in some form, the tests employed by the courts.[17] These tests show no signs of disappearing anytime soon.[18]

Welcome to the Big World: The Emerging Tort of the Public Policy Exception to Employment at Will and Its Chaotic Encounter with Conflict of Laws, 1989 U. ILL. L. REV. 795, 795 ("A field of law once steeped in traditional rules and vested rights, conflict of laws is now metamorphosing from a rigid analysis to a highly flexible approach."). Some have made this point specifically about choice of law rules. *See* ROBERT L. FELIX & RALPH U. WHITTEN, AMERICAN CONFLICTS LAW: CASES AND MATERIALS 8–9 (2015) (describing an approach that "shifted from the vested rights approach to conflicts based upon a territorial theory of law, to an approach based on the functioning of the judicial process"); LEA BRILMAYER, CONFLICTS OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 1–4 (1991) (describing the post-revolution tests as pragmatic tests that refused any inquiry into first principles, created by a figure (Brainerd Currie) who "took as his cornerstone the abandonment of metaphysical premises"); Wani, *supra* note 2 ("Pragmatism replaced the formalism and conceptualism of the traditional approach and the focus of choice of law analysis shifted from territorial sovereignty to the expectations of the parties and the fairness of the results reached."). Others have made this point specifically about personal jurisdiction. *See infra* notes 42–45; *see also* Leff v. Berger, 383 F. Supp. 441, 443 (D. Wyo. 1974) ("[T]he rigidity of *Pennoyer v. Neff* had evolved to the flexibility of the *International Shoe* precepts.").

This view of the "Conflicts revolution" has sometimes resulted from its association with the legal realist movement. *See, e.g.*, Symeonides, *supra* note 11, at 1851 (". . . Currie projected his legal realist conception . . . ."); BRILMAYER, *supra*, at 30–37 (explaining the legal realists' critiques of the First Restatement of Conflicts, such as that it "brought about arbitrary results"); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1193 (1987) ("The choice of law revolution was solidly grounded in one theme within the larger movement of American Legal Realism."); LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986). *See generally* William C. Powers Jr., *Formalism and Non-Formalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 27, 52–57 (1976) (analyzing the shift from formalism to non-formalism in choice-of-law methodology from the standpoint of a theory of "judicial shifts between major legal paradigms").

17. *See, e.g.*, Browne v. P.A.M. Transp., Inc., No. 5:16-CV-5366, 2019 WL 333569, at *5 (W.D. Ark. Jan. 25, 2019) (stating that the application of a state law will conform to the Due Process Clause and Full Faith and Credit Clause, if it is "neither arbitrary nor fundamentally unfair" (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 308–10 (1981))); Freestream Aircraft (Berm.) Ltd. v. Aero L. Grp., 905 F.3d 597, 603 (9th Cir. 2018) ("As to specific jurisdiction, we generally conduct a three-part inquiry—commonly referred to as the minimum contacts test . . . ."); Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 739 F.3d 45, 48 (2d Cir. 2013) ("The crucial New York Court of Appeals decision relevant to this proceeding . . . explicitly establishes an interest-analysis approach."); Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 438 (6th Cir. 2012) ("Since Judge Learned Hand's leading opinion in [*Alcoa*] . . . it has been generally established that the so-called 'effects test' limits the Sherman Act . . . ." (citation omitted)).

18. The relevant elements of these tests have been retained, thus far, in early drafts of the Third Restatement of Conflict of Laws. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 1.02, cmt. b, at 6 (AM. L. INST., Preliminary Draft No. 1, Oct. 1, 2015) (on the Full Faith and Credit Clause); *id.* § 5.05, cmt. c, at 98 (on the Due Process Clause); *id*. at xiv (on state choice-of-law selection methods).

When courts and scholars face a question about Conflicts of Law, therefore, they typically find an answer by applying a test that emerged from the Conflicts revolution.[19] And when they are faced with a question about the deeper purposes of such a test, they usually answer by turning to the pragmatic values that, according to the traditional narrative of the Conflicts revolution, these tests are assumed to embody.[20]

As this Article will explain, however, this traditional narrative fundamentally misunderstands the Conflicts revolution. Properly understood, this revolution was a continuation of the Court's tradition of relying upon sovereignty-based tests, not a repudiation of that tradition. The unappreciated triumph of the Conflicts revolution, rather, was to substitute one theory of sovereignty for another.[21]

What, then, was this competing theory of sovereignty? According to this theory, the sovereign state is not defined—as it had been in earlier cases—simply as an entity possessing exclusive power over a territory.[22] Rather, a sovereign is understood as an entity that, by definition, is tasked with a specific mission: namely, to protect a community.[23] Under this definition, sovereign power exists in order to accomplish a protective mission, and it logically should reach only so far as is needed to accomplish that mission. In the following pages, this

19. *See supra* note 17 (listing recent cases that have applied tests from the conflicts revolution).

20. *See, e.g.*, Gillier v. Servicios Agecom, LLC, No. 17-Civ-23155,, 2018 WL 324997, at *2 n.3 (S.D. Fla. Jan. 8, 2018) ("The reason for minimum contacts is because it ensures fairness and the expectation that 'the defendant's conduct and connection with the forum State [is] such that he should reasonably anticipate being haled into court there.'" (quoting World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980))); Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 320 (S.D.N.Y. 2018) ("Under New York conflict principles, '[t]he New York Court of Appeals has explicitly held that the New York interest analysis is not rigid. . . .' Interest analysis is a fact intensive 'flexible approach . . . .'" (first quoting Abu Dhabi Inv. Auth. v. Citigroup, Inc., No. 12 Civ. 283(GBD), 2013 WL 789642, at *6 (S.D.N.Y. Mar. 4, 2013); then quoting Fin. One Pub. Co. v. Lehman Bros. Special Fin., 414 F.3d 325, 337 (2d Cir. 2005))); Brink's Ltd. v. S. Afr. Airways, 93 F.3d 1022, 1030 (2d Cir. 1996) ("New York courts, recognizing that '[a] State may lack sufficient nexus with a case so that choice of its law is arbitrary or fundamentally unfair,' abandoned [the prior period's] rigid rules in favor of a more flexible approach." (quoting Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 70 (1993))); *In re* Simon II Litig., 211 F.R.D. 86, 167 (E.D.N.Y. 2002) ("Post-*Babcock* Court of Appeals cases emphasize the need to be flexible in following interest analysis.").

21. *See infra* Part II.B.

22. *See infra* notes 92–95 and accompanying text (discussing the sovereignty thesis in *Pennoyer* and the intellectual views behind it).

23. *See infra* Part II.B.

alternate theory will be referred to as the "*protective sovereignty thesis*."[24]

Even those who have discussed the idea of community protection in the context of Conflicts of Law, this Article argues, have not fully appreciated the meaning and import of this protective sovereignty thesis. Instead, the thesis has remained entangled with lingering assumptions from the territorial idea of sovereignty, and the relationship the thesis reveals between three key concepts—community-protecting mission, sovereignty, and the Conflicts revolution—has gone overlooked. Addressing these shortcomings is essential to unlocking the potential of the Conflicts revolution, this Article argues.

As this Article will illustrate, this thesis has a centuries-long history in the literature on sovereignty, animating theorists from Thomas Hobbes to Henry Hart.[25] Moreover, it reentered American political thought with renewed force during the New Deal, thereby leaving it well-positioned to shape the Conflicts revolution that would begin in the 1930s and 1940s.[26] And shape this revolution it did. In the Conflicts revolution, we see a repeated effort to take this longstanding theory of sovereignty and translate it into a series of concrete tests—and our modern tests gain coherence and clarity once this central development is properly understood.[27]

In what way, it might be wondered, does the protective sovereignty thesis generate tests that differ from those of its predecessor? Before the Conflicts revolution, as already noted, the prevailing theory defined the sovereign state as a territorial power.[28] Consequently, it generated Conflicts tests that effectively began with an instruction: draw a circle around the territory of the state.[29] Then, it instructed courts: look for actors that intrude into that circle.[30] Those intruding actors, it posited, were the individuals who could be justifiably subject to state legislative or judicial authority.[31] After the Conflicts revolution, by contrast, the protective sovereignty thesis issued a different instruction to courts. Because that thesis defined the state as the

24. *See infra* Part II.B.2.

25. *See infra* Part II.B.

26. On the role this thesis played in the political rhetoric and constitutional decisions of the New Deal, see *infra* Part II.B.2.b.

27. *See infra* Part III.

28. *See infra* Part II.

29. *See infra* Part II.A.1 (discussing sovereignty theory as it relates to *Pennoyer v. Neff*).

30. *See infra* Part II.A.1.

31. *See infra* Part II.A.1.

protector of a community, the resulting tests began with a new instruction: draw a circle around the state's community (or, around the set of protections doled out to that community).[32] Next, it instructed these courts: look for actors that intrude into that circle.[33] These actors, it suggested, were the individuals who now could be subject to state legislative or judicial authority.[34] The challenges that Conflicts of Law has wrestled with ever since the Conflicts revolution have been, in effect, the challenges of giving substance and meaning to this particular approach to state power.

To develop this understanding of Conflicts of Law, this Article specifically chronicles the central role that the protective sovereignty thesis played during the Conflicts revolution in remaking one of the most important tests in the field: the Fourteenth Amendment test for state court personal jurisdiction.[35] In the famous 1945 case of *International Shoe Co. v. Washington*,[36] the Court created a new "minimum contacts" test for this purpose—thereby discarding the jurisdictional test it previously had articulated in *Pennoyer v. Neff*.[37] In so doing, it typically is assumed that *International Shoe* pivoted this Fourteenth Amendment test away from a focus on "sovereignty," and committed it instead to a focus on "fairness" or "convenience."[38] By contrast, this Article shows, the Court accomplished something very different in the

32. *See infra* Part II.A.2 (discussing sovereignty theory as it relates to *International Shoe v. Washington*).

33. *See infra* Part II.A.2.

34. *See infra* Part II.A.2.

35. Prior to Pennoyer v. Neff, 95 U.S. 714 (1877), the only constitutional means of challenging an assertion of personal jurisdiction was to do so indirectly by inviting the court of another state, after the initial trial, to refuse under the Full Faith and Credit Clause to recognize the original judgment. *See, e.g.*, Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: The Illusion of Adjudication Without Judgment*, 33 B.C. L. REV. 981, 1015–16 (1992) (discussing this means of indirect attack). Since *Pennoyer*, however, the Court has held that a litigant may challenge the constitutionality of an assertion of personal jurisdiction directly in the originating court. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 315 (1945) (discussing the appellant's due process challenge to a state's exercise of jurisdiction).

36. 326 U.S. at 310.

37. This label (of the "minimum contacts" test) was taken from the Court's assertion in *International Shoe* that: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (emphasis omitted) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

38. For sources repeating this conventional view, see *infra* notes 65–68.

creation of the minimum contacts test: it installed the protective sovereignty thesis at the center of personal jurisdiction.[39]

Once we understand the minimum contacts test as re-orienting personal jurisdiction around the protective sovereignty thesis, a number of the most vexing problems in the field are diminished or resolved.[40] Several of these warrant comment at the outset. First, personal jurisdiction doctrine often has been accused of dissolving into confusion and discord in the post-*International Shoe* era.[41] It is a doctrine unmoored, it is argued, from any consistent logic that can guide lower courts.[42] However, recognition of the protective sovereignty thesis at the center of the minimum contacts test reveals that, beneath the seeming chaos, the Court essentially has been engaged in three specific debates about the legacy of this thesis. These debates have asked:

(1) Is it the entanglement of the defendant, or of the plaintiff, with a protective sovereign that is relevant to jurisdiction?[43]

(2) What level of entanglement with a protective sovereign is sufficient to warrant jurisdiction? Is mere enjoyment of its protections sufficient, or must a party actively seek out those protections?[44]

(3) Should a party's relationship to a protective sovereign be the sole factor in jurisdictional analysis, or one of several?[45]

39. *See infra* Part II.A.2.

40. *See infra* Part III (explaining the implications and benefits that come with viewing the minimum contacts test as aligned around the protective sovereignty thesis).

41. For scholars making this assertion, see *infra* notes 181–85.

42. *See* Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 777 (2003) ("Since *International Shoe* created the minimum contacts/fair play test in 1945 for constitutional supervision of assertions of state court personal jurisdiction, the Supreme Court and lower courts have labored to refine and clarify the test. While a small minority of commentators have declared these efforts a success, the great majority of commentators have branded these efforts a dismal failure." (footnote omitted)).

43. *See infra* Part III.A.1.

44. *See infra* Part III.A.2.

45. *See infra* Part III.A.3.

Awareness of these underlying debates, and of their connection to the protective sovereignty thesis, brings structure to a doctrine that many have assumed to be hopelessly confused.[46]

Second, personal jurisdiction doctrine has consistently been subjected to accusations of constitutional illegitimacy.[47] Once the minimum contacts test is understood to be anchored in a protective sovereignty thesis, however, it becomes clear that this test has greater claims to constitutional legitimacy than previously assumed.

Third, this new, sovereignty-based view of the minimum contacts test provides good reason to rethink the widespread judicial practice of deferring to forum selection clauses in contracts.[48] After all, to the extent that personal jurisdiction is meant to ensure that a forum is convenient for litigants, it makes sense to outsource that determination to litigants themselves. However, if personal jurisdiction is meant to ensure that a state, viewed as a protective sovereign, has a justifiable reason to assert state power over a case, then it makes far less sense for courts to defer to private parties in making that determination.

Fourth, there has been confusion since *International Shoe* about the extent to which territorial boundaries remain relevant in personal jurisdiction—and about whether, if they do, it means that older ideas about sovereignty survive in modern-day doctrine.[49] When *International Shoe* is understood as re-orienting personal jurisdiction around a protective sovereignty thesis, however, it becomes clear that territorial boundaries do remain relevant—but for a new reason. Under an earlier theory of sovereignty, these boundaries were important simply because they were viewed as providing the inherent limits of sovereign power.[50] Under the protective sovereignty thesis, by contrast, their relevance stems primarily from an American constitutional tradition of using sovereign boundaries to demarcate the community that the sovereign must work to protect.[51] As this Article explains, both legal and expressive benefits would result from the Court explicitly acknowledging that, beneath its continued references to territorial boundaries, this shift in logic has occurred.

46. For scholars arguing that the doctrine is hopelessly confused, see *infra* notes 222–23 and accompanying text.

47. For scholars who assert its illegitimacy, see *infra* note 166.

48. For a more in-depth discussion on this topic, see *infra* Part III.C.

49. *See infra* Part III.G (analyzing this confusion in greater detail and encouraging the Supreme Court to provide clarification).

50. *See infra* Part II.B.1.

51. *See infra* Part II.B.2.

Finally, personal jurisdiction—and Conflicts of Law generally—has developed a lamentable reputation as an intimidating topic of daunting complexity. While some of this complexity may be unavoidable, much of it issues from the fact that, today, students and practitioners are expected to intuitively know certain facts about the sovereign state. What, for example, are the "benefits and protections" that a sovereign state affords?[52] What are the "interests" that a state possesses?[53] What is the community that a sovereign state is assigned to protect?[54] Too often, these questions remain buried in the Court's opinions, where their answers are presented as natural assumptions about the behavior of states.[55] By contrast, once we acknowledge that ideas of sovereignty remain relevant in modern Conflicts of Law analysis, these qualities of the sovereign state can be acknowledged, discussed, and rendered accessible.

For all these reasons, personal jurisdiction doctrine is improved when the "sovereignty revolution" in *International Shoe* is properly understood. At the same time, this argument also revises our understanding of two areas of law that have evolved alongside the Court's Fourteenth Amendment doctrine: (1) federal personal jurisdiction doctrine under the Fifth Amendment, and (2) the extraterritoriality principle under the Dormant Commerce Clause.[56] The Court has been explicit that these tests share a logic with the minimum contacts test—and, as such, a revised understanding of the minimum contacts test sheds new light on the function and utility of these parallel doctrines.

In numerous ways, therefore, a proper understanding of the sovereignty revolution in personal jurisdiction can transform our

52. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

53. Pac. Emps. Ins. Co. v. Indus. Accident Co., 306 U.S. 493, 503 (1938) (discussing one state's interest in safeguarding the compensation of its employees while temporarily abroad in their employment and another state's interest in providing physical safety and economic protection for employees injured within it).

54. *See infra* note 251 (identifying opinions positing, alternately, that the sovereign community consists of residents and of citizens).

55. For a prominent scholar voicing this frustration in the choice-of-law context, see Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 467 (1985), asking

> [n]ow where did this 'of course' come in? Why not say, 'Why, those with whose welfare Massachusetts is concerned, of course—married women entering into contracts in Massachusetts'? or 'married women whose property is located in Massachusetts'? or any other connecting factor that might be singled out? Currie later simply referred to this crucial premise as having been shown. Through endless repetition and self-evident treatment, the rabbit was placed into the hat with great fanfare and then pulled triumphantly out.

56. *See infra* Parts III.D–E.

understanding of the law, both within personal jurisdiction and beyond it. In so doing, it hopefully begins to illustrate the many benefits that can accrue from recognizing the broader sovereignty revolution in Conflicts of Law. Within the field of Conflicts of Law, this is often how doctrinal change has come about: from Brainerd Currie to Robert Leflar, scholars have looked back on prior decades' decisions and distilled the concerns that courts actually were addressing, as opposed to those courts superficially claimed to address.[57] In so doing, they clarified the field's true concerns and thereby redirected the evolution of its doctrinal tests. Taking these works as its inspiration, this Article aspires to a similar mode of analysis. It shows that, despite their superficial rhetoric, courts still care about sovereignty. They just happen to care about a different idea of sovereignty than that which prevailed a century ago.

This argument is made in three parts. Part I begins by recounting the conventional understanding of *International Shoe Co. v. Washington*, the pivotal case that brought the Conflicts revolution to personal jurisdiction. Part II illustrates that, contrary to this conventional understanding, the central innovation in the minimum contacts test of *International Shoe* was the replacement of one theory of sovereignty with another. Part III then outlines the various implications of this revised understanding of modern personal jurisdiction doctrine, both for personal jurisdiction and beyond.

I. THE TRADITIONAL VIEW OF PERSONAL JURISDICTION

The Introduction to this Article traced the conventional narrative that, among courts and scholars, is used to explain the Conflicts revolution of the mid-twentieth century.[58] One domain to which this conventional narrative is applied—a domain that is the focus of this Article—is personal jurisdiction. In this domain, the narrative is told through the lens of two landmark cases. The first case is *Pennoyer v.*

57. *See, e.g.*, Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585–86 (1966) (claiming that a "tentative summarization" of major choice-of-law influencing decisions can replace the mechanical rules that courts have used as "cover-ups" for the real reasons behind their decisions, which will bolster the legal community's understanding of choice-of-law opinions); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 279 (1966) (describing a study that identified nine policy factors that have affected choice-of-law rules and results (citing Elliot E. Cheatham & Willis L. M. Reese, *Choice of Applicable Law*, 81 COLUM. L. REV. 959 (1952))); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 188–282 (1963) (presenting extensive case studies on choice-of-law decisions).

58. *See supra* notes 11–15 and accompanying text.

Neff.[59] Decided in 1878, the Court in *Pennoyer* asserted—for the first time in its history—that the Due Process Clause of the Fourteenth Amendment places limits upon the jurisdictional reach of state courts.[60] The limits that the Court articulated, as many have noted, emerged directly from the Court's definition of the sovereign state.[61] Consequently, *Pennoyer* is taken (quite understandably) to represent the first epoch in Conflicts of Law—i.e., the period in which Conflicts tests were anchored in theories of sovereignty.[62]

The Conflicts revolution would arrive to personal jurisdiction in 1945, however, in the form of a second landmark case: *International Shoe Co. v. Washington*.[63] In this case, the Court dispensed with the personal jurisdiction test that it had outlined in *Pennoyer*, and it replaced it with a new test—one typically referred to as the "minimum contacts" test.[64] Under this new test, it was permissible for state courts to assert jurisdiction over defendants who had "contacts, ties, or relations" with the state—even though, in some instances, the defendant might not be physically present within the state.[65]

59. Pennoyer v. Neff, 95 U.S. 714 (1878).

60. *Id.* at 733 ("Since the adoption of the Fourteen Amendment . . . the validity of [state court] judgements may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligation of parties over whom that court has no jurisdiction do not constitute due process of law.").

61. *See id.* at 722 (deriving a jurisdictional rule from the premise that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"); *infra* Part II (detailing the Court's logic in *Pennoyer*).

62. *See, e.g.*, John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1026 ("*Pennoyer v. Neff* marked the apogee of the state sovereignty theory of personal jurisdiction."). Drobak argues that *Pennoyer*, even as the apex of the sovereignty approach, was nonetheless more concerned with issues of fairness to defendants than has generally been acknowledged. *Id.*; *see also* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 504 (1987) ("[T]he focus is not on concerns about fairness to the particular defendant, but instead is on the inherent limitations on the power of governments."); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 690 (1987) ("From *Pennoyer v. Neff* through *International Shoe Co. v. Washington*, due process limits on personal jurisdiction explicitly served as a device to allocate political authority between sovereigns. From 1877 to 1945, inappropriate assertions of jurisdiction were viewed not as mere infringements on a defendant's freedom, but as violations of the sovereignty of other states.").

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

64. *Id.* at 316.

65. *Id.*; see also *id.* at 319. ("[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it . . . .").

Today, *International Shoe* is cited in cases,[66] textbooks,[67] treatises,[68] and academic articles[69] as the case that marked the Court's

66. *See, e.g.*, Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 577 (2d Cir. 1996) ("The Supreme Court's opinion in *International Shoe* . . . made it clear that whether due process is satisfied turns exclusively on the fairness to the defendant in being made to defend a suit in a particular forum."); Jonnet v. Dollar Sav. Bank of N.Y., 530 F.2d 1123, 1135 (3d Cir. 1976) ("Fairness, of course, lies at the heart of *International Shoe* and of contemporary due process learning."); Hutson v. Fehr Bros., 584 F.2d 833, 836 (8th Cir. 1978) (referencing the "*International Shoe* 'minimum contacts' fairness doctrine"); Energy Rsrvs. Grp., Inc. v. Superior Oil Co., 460 F. Supp. 483, 506 (D. Kan. 1978) (referencing "the fundamental fairness analysis of *International Shoe*"). For Supreme Court cases, see *infra* note 70.

67. *See, e.g.*, STEPHEN C. YEAZELL, CIVIL PROCEDURE 80 (8th ed. 2011) ("[International Shoe] rearrang[ed] the landscape of personal jurisdiction; most contemporary debate concerns its application and interpretation.").

68. *See, e.g.*, 1 SPENCER WEBER WALLER & ANDRE FIEBIG, ANTITRUST AND AMERICAN BUSINESS ABROAD § 6:3 (4th ed. 2015) (discussing the minimum contacts test under the heading: "§ 6:3. Jurisdiction in the Constitutional Sense––Fairness Standard of *International Shoe*"); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.8, at 118 (3d ed. 1986) (claiming that *International Shoe* established a "jurisdictional standard of fairness to the defendant"); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 4A FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1072 (4th ed.) (referencing "the *International Shoe* standard of fairness").

69. *See* George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 360–61 ("[A strand in *International Shoe* that has] come to dominate academic analysis of its consequences . . . is the invocation of 'traditional notions of fair play and substantial justice' as the test for jurisdiction under the Due Process Clause. . . . [Academics conducting these analyses contend] that any examination of the defendant's contacts with the forum state must be subordinated to an overall inquiry into the fairness of continuing the litigation there."); *see also* Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 9 (1993) ("Chief Justice Stone . . . proclaimed that henceforth it was possible to deduce the proper scope of jurisdiction from the Fourteenth Amendment's basic ingredient of 'fairness.'"); Stein, *supra* note 62, at 690 (arguing that *International Shoe* began "an erosion of this political [i.e., sovereignty] element" and led to a doctrine that focuses "solely on the relationship between the defendant and the forum, and the legitimacy of the forum's assertion of jurisdiction depends exclusively on fairness to the defendant"); McFarland, *supra* note 42, at 794 (referring to "the fairness test of *International Shoe*, [which] . . . has become the fairness/convenience test of today"); Taylor Simpson-Wood, *In the Aftermath of* Goodyear Dunlop*: Oyez! Oyez! Oyez! A Call for a Hybrid Approach to Personal Jurisdiction in International Products Liability Controversies*, 64 BAYLOR L. REV. 113, 149 (2012) ("The original test of *International Shoe* was one of fairness . . . ."); Jayci Noble, *Personal Jurisdiction and the Internet: A Shift in the* International Shoe *Analysis for Users of E-Commerce and Peer-to-Peer Websites*, 42 S. ILL. U. L.J. 521, 524 (2018) (referencing "the fairness that the *International Shoe* personal jurisdiction test emphasizes as a crucial point in the analysis"); Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209, 215 n.54 (2015) ("In the mid-twentieth century, *International Shoe Co. v. Washington* reformulated the jurisdictional touchstone from a state's power over those present within its territory to an analysis of . . . fairness or

shift to a jurisdictional test focused upon issues of "fairness" rather than issues of "sovereignty." The Supreme Court has largely accepted this conventional account.[70] According to that account, *International Shoe* rejected the idea that, in personal jurisdiction, the Fourteenth Amendment is designed to enforce limitations that are inherent in the idea of sovereign power. In place of a sovereignty-based jurisdictional test, the conventional account posits, *International Shoe* inserted a new type of jurisdictional test: one that requires courts to focus upon questions of fairness or reasonableness to defendants, not questions of sovereignty.[71]

In recent years, the Court has adopted the familiar vocabulary of this account of *International Shoe*—i.e., the vocabulary of "sovereignty" versus "fairness"—to characterize its ongoing disagreements over personal jurisdiction. Here, several Justices (mainly from the

reasonableness . . . ."); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 13 (2006) ("If territorial sovereignty was the governing paradigm for cases before *International Shoe*, due process and its focus on the individual litigant was the one for the cases that followed."). *But see* Stein, *supra* note 62, at 698–700 (arguing that *International Shoe* contained an effort to extend *Pennoyer*'s focus upon Westphalian sovereignty); Raustiala, *supra* note 2, at 2516–17 (describing *International Shoe* as a case that "embraced a set of pragmatic, instrumental, and contextual considerations").

70. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 300 (1980) ("The clear focus in *International Shoe* was on fairness and reasonableness."); Shaffer v. Heitner, 433 U.S. 186, 188, 211 (1977) (referring twice to the "fairness standard of *International Shoe*"); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 427 (1984) (Brennan, J., dissenting) ("At least since *International Shoe Co. v. Washington* . . . the principal focus when determining whether a forum may constitutionally assert jurisdiction over a nonresident defendant has been on fairness and reasonableness to the defendant."); Rush v. Savchuk, 444 U.S. 320, 328 (1980) (referring to "the fairness standard of *International Shoe*"); *see also* Hanson v. Denckla, 357 U.S. 235, 251 (1958) (describing *International Shoe* as marking the move "from the rigid rule of *Pennoyer v. Neff* . . . to [a] flexible standard").

71. This conventional account also persists in the important work that has been done to forge a field of horizontal federalism. *See, e.g.*, Heather K. Gerken, *The Taft Lecture: Living Under Someone Else's Law*, 84 U. CIN. L. REV. 377, 383 (2016) ("Personal jurisdiction questions, for example, were once cast in the vernacular of federalism, with its talk of territory and sovereigns. Now they are cast in terms of individual rights."); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 75–76 (2014) (noting that "the Court has recast [jurisdiction] in the language of individual rights" and asserting that "most commentators think of this doctrinal shift as proof of the shortcomings of the sovereignty model"); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 548 (2008) (describing minimum contacts test as protecting "the liberty interest" within a sovereignty-versus-liberty divide); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1521–22 (2007) (describing "the Court's switch . . . to a minimum contacts and fundamental fairness approach").

conservative wing of the Court) have advocated for more restrictive jurisdictional tests—and, in so doing, they have framed their approach as a return to "sovereignty" in personal jurisdiction.[72] While it is not entirely clear, it appears that these Justices often have in mind, by the term "sovereignty," a territorial theory of state sovereignty akin to that found in cases from the pre-*Shoe* era.[73] The Justices who continue to defend a more relaxed jurisdictional test, meanwhile, present themselves as the heirs to the tradition of *International Shoe*—which typically means defending an approach to jurisdiction that is grounded in "fairness."[74] Textbooks and articles regularly adopt the Court's description of this disagreement, framing the debate among the Justices as a debate over the role of "fairness" versus "sovereignty" in jurisdiction.[75]

This conceptual debate over "sovereignty" and "fairness," meanwhile, has been embarrassingly unmoored from the doctrines that the Court continues to espouse. As Louise Weinberg already noted several

72. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 874 (2011) ("The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign."); Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780 (2017) (noting the idea that jurisdictional tests "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." (quoting *Denckla*, 357 U.S. at 251)*; see also* Case Comment, *Leading Cases*: *Personal Jurisdiction: Stream-of-Commerce Doctrine:* J. McIntyre Machinery, Ltd v. Nicastro, 125 HARV. L. REV. 311, 312 (2011) (describing Justice Kennedy's plurality opinion as "elevating principles of sovereignty over principles of fairness and reasonableness" and as "signal[ing] the return of sovereignty as an important due process rationale"). These recent cases have drawn upon occasional language in the Court's earlier opinions asserting the value of sovereignty in jurisdiction, such as *Denckla* and *World-Wide Volkswagen*.

73. *See Denckla*, 357 U.S. at 251 ("They are a consequence of territorial limitations on the power of the respective States."); *World-Wide Volkswagen*, 444 U.S. at 293 (describing the Framers' intention that the states retain "essential attributes of sovereignty"); *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quoting verbatim the language from *Denckla* on "territorial limitations").

74. *See Nicastro*, 564 U.S. at 903 (Ginsburg, J., dissenting) ("The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness."); *Bristol-Myers Squibb*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting) ("A core concern in this Court's personal jurisdiction cases is fairness.").

75. *See, e.g.*, RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 224 (2004) (speaking of "the Court's ongoing ambivalence about the role of state sovereignty . . . in jurisdictional analysis" as opposed to the role of "the fairness of jurisdiction"); Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 1000 (1999) (describing the Court's "prolonged equivocation about whether our law of judicial jurisdiction is not more appropriately designed to serve litigation fairness, than federalism-sovereignty, considerations").

decades ago: "The trouble is, as even the Court concedes, the cases do not turn on the articulated purposes of the jurisprudence. The Court talks about convenience, fairness, reasonableness, and comity, but the Court has detached the cases from these moorings . . . ."[76] The contemporary Court continues to debate the merits of "sovereignty" versus "fairness" in jurisdiction—yet, in so doing, it appears to be mechanically repeating vocabulary from the traditional narrative of Conflicts of Law, not outlining principles that bear any logical connection to its jurisdictional tests.

This state of affairs led Weinberg to despair that, ultimately, modern jurisdictional tests simply lack any foundation in deeper principles.[77] As Weinberg concluded: "So quite obviously we now have a body of rules without reasons."[78] Fortunately, however, this conclusion does not necessarily follow. The Court may be marked by an embarrassing inability to explain the foundational principles that underlie its post-*International Shoe* jurisdictional tests—yet this does not mean that, beneath these modern tests, no foundational principles exist. Beneath the Court's recent rhetoric of "sovereignty" and "fairness," after all, there appears to be an underlying consensus that essential elements of the minimum contacts test should be retained. And, as Part II will explain, the Court in *International Shoe* did place a coherent, enduring principle at the core of the minimum contacts test: namely, a commitment to a protective sovereignty thesis.

II. THE SOVEREIGNTY REVOLUTION IN *INTERNATIONAL SHOE*

This Part will argue that, contrary to conventional wisdom, *International Shoe* actually created a jurisdictional test anchored in a theory of sovereignty. This raises the question: what does it mean, exactly, to say that a jurisdictional test is anchored in "sovereignty"? This Article assumes that, in order for a test articulated by the Court to be considered a sovereignty-based test, two elements should be present. First, the Court's opinion should contain a claim about the nature of sovereign states. Ideally, this claim also is grounded in an established, longstanding theory of sovereignty. In the following pages, this type of claim will be referred to as a "*sovereignty thesis*." Second, the opinion should derive a jurisdictional test from its sovereignty thesis. If both these elements are present, then it seems reasonable to say that a jurisdictional test is a sovereignty-based test.

76. Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 101–02 (1988).

77. *Id.* at 102.

78. *Id.*

With this standard in mind, the following pages compare the Court's opinions in *Pennoyer v. Neff* and *International Shoe Co. v. Washington*. As Section A explains, these two opinions were similar in that they each: (1) articulated a sovereignty thesis; and (2) derived a jurisdictional test from that thesis. As Section B then shows, the sovereignty thesis found in each opinion has an equally impressive intellectual pedigree. The difference between these two opinions is not found, therefore, in the extent to which they were about "sovereignty." Rather, the crucial difference is found in the fact that the Court used a different sovereignty thesis in each case—one based on territorial exclusivity in *Pennoyer*, and one based on a protective mission in *International Shoe*.

A. SOVEREIGNTY IN *PENNOYER* AND *INTERNATIONAL SHOE*

1. Pennoyer v. Neff

In order to understand the common use of sovereignty theses in *Pennoyer* and *International Shoe*, first consider the Court's reasoning in *Pennoyer v. Neff*. In *Pennoyer*, the Court began its jurisdictional reasoning with a declaration that: "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[79] Once the Court had articulated this idea about "every state," it then proceeded to derive a jurisdictional test from it. To accomplish this, the Court relied on two assumptions. First, the Court assumed that its theory of the state logically entailed a limitation on sovereign power. Beginning with its thesis that sovereigns possess territorial exclusivity, in other words, the Court then assumed—based on this thesis—that sovereign power must be entirely coterminous with the sovereign's domain of territorial exclusivity.[80] As the Court put it: "The other principle of public law . . . follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory."[81] The sovereign power of each state, the Court concluded, must terminate at the state's borders.[82]

Having made this assumption about the limits of sovereign power, the Court then added a second assumption: namely, that

79. Pennoyer v. Neff, 95 U.S. 714, 722 (1878).

80. *See id.* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.").

81. *Id.* at 722.

82. *See* Perdue, *supra* note 62, at 502 ("The basic premise of the [*Pennoyer*] opinion is that there are limitations on state power that are simply inherent in the nature of government.").

jurisdiction is an exercise of sovereign power. The Court assumed, in other words, that if sovereignty is limited by the principle of territorial exclusivity, then so is personal jurisdiction.[83] Consequently, the Court concluded with a jurisdictional rule: a state court's jurisdictional reach must terminate at the state's borders.

When we examine the Court's reasoning in *Pennoyer*, therefore, we find that the Court purported to derive a jurisdictional rule via the following three-step logic:

(1) A state is an entity that possesses exclusive power over a territory.

(2) A state therefore has power only within its territory.

(3) One such power is the ability to assert jurisdiction—so a state has jurisdiction only within its territory.

At the root of this *Pennoyer* test, therefore, is a descriptive claim about the sovereign state (premise 1 above). In this sense, the opinion was anchored in a sovereignty thesis. Beginning with that thesis, the Court then purported to reason its way to a jurisdictional rule. While the Court's reasoning certainly can be faulted (and the leap from premise 1 to premise 2 is particularly striking), it nonetheless seems reasonable to say, based on this professed reasoning, that the Court in *Pennoyer* offered a test rooted in sovereignty.

2. International Shoe Co. v. Washington

Next, consider the Court's reasoning in *International Shoe*.[84] In that case, the Court would develop a new test for personal jurisdiction—one commonly referred to as the "minimum contacts" test. In the crucial passage of its opinion, the Court outlined the logic of this test, saying:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[85]

83. Here, the Court made an unexplained pivot from an abstract discussion about sovereign "power" to a concrete rule regarding how far a "tribunal established by [such a state] can extend its process." *Pennoyer*, 95 U.S. at 722.

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

85. *Id* at 319.

In this passage, the Court arrives at its "minimum contacts" test through a three-step logic. Here, the Court begins (logically, although not grammatically) with the idea that a state is an entity which, through its laws, provides "benefits and protection" to a community.[86] The Court then assumes that, when a party receives those benefits and protections, the state is entitled to impose corresponding "obligations."[87] Finally, the Court assumes that the requirement to "respond to a suit" is one such obligation.[88] In this way, the Court arrives at a jurisdictional test. Under that test, if an entity has received benefits

86. *Id.*

87. Here, the Court suggests that an entity drawing upon state benefits and protections can be conceptualized as entering into a reciprocal relationship with that state. According to this formulation, in-state activity creates "ties" that mutually bind the corporation and the state to each other. *Id.* at 320. This notion of "ties" was a metaphorical expression of a theory of reciprocity that the Court already had articulated in *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), wherein the Court had said that: "The state which accords [an individual] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties." The Court in *Milliken* added: "'Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable' from the various incidences of state citizenship. The responsibilities of that citizenship arise out of the relationship to the state which domicile creates." *Id*. at 463–64 (citation omitted). For an argument that Justice Douglas drew this reciprocity-as-fairness rationale from precedents involving substantive tax questions, see Korn, *supra* note 75, at 997. Justice Stone also had used a similar logic in cases regarding conscientious objectors. For a study of the similarities that the reciprocity logic of *International Shoe* bears to "just deserts" theories in the literature on retribution, see Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189 (1998).

88. *Int'l Shoe*, 325 U.S. at 319. This interprets the Court as saying that personal jurisdiction was reasonable and comported with "traditional notions of fair play and substantial justice" if that assertion of jurisdiction was grounded in a reciprocal relationship of the sort that the Court described. For other scholars who similarly interpret *International Shoe* as asserting that the fairness or "reasonableness" of jurisdiction was determined by the presence or absence of minimum contacts (rather than being a separate criterion that had to be met), see, for example, Linda Silberman, *Reflections on* Burnham v. Superior Court*: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 576–83 (1991); Robert C. Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conveniens and Forum Non Conveniens*, 7 TUL. J. INT'L & COMPAR. L. 91, 107–08 (1999).

While versions of the phrase "traditional notions of fair play and substantial justice" previously had been used in *Milliken*, 311 U.S. 457 (1940), and also in *McDonald v. Mabee*, 243 U.S. 90 (1917), they were used to a different end: to discuss the requirement that a defendant receive adequate notice. For a discussion of the evolution of this phrase, see McFarland, *supra* note 42. McFarland uses this evolution to argue, in part, that *International Shoe* belongs on the fairness side of the fairness/sovereignty binary; he contends that Justice Stone, when using this phrase, had in mind the traditions of equity jurisprudence, where the most basic principle is fairness in an individual case. *Id*. at 760.

and protection from a state's laws, then an assertion of personal jurisdiction by the state can "hardly be said to be undue"—a use of "undue" that is meant to allude to the notion that due process, in that instance, is not violated.[89]

When we examine the Court's reasoning in *International Shoe*, therefore, we find that the Court derived a jurisdictional rule via the following logic:

(1) The state is an entity that, through its laws, affords benefits and protections to some community.

(2) When a party receives those benefits and protections, it is fair for the state to impose reciprocal obligations.

(3) One such reciprocal obligation is the burden to "respond to a suit" (i.e., submit to jurisdiction).

At the root of this jurisdictional test, therefore, is an initial premise—one that, once again, offers a descriptive claim about the sovereign state (premise 1 above). In this way, the Court began with a sovereignty thesis. (It would repeat this description elsewhere in the opinion, moreover, underscoring its significance.[90]) Beginning with this premise, the Court reasoned its way to a jurisdictional rule. In this sense, *International Shoe*—no less than *Pennoyer*—was an opinion anchored in a theory of sovereignty.

B. INTELLECTUAL HISTORY OF THE SOVEREIGNTY THESES IN *PENNOYER* AND *INTERNATIONAL SHOE*

The sovereignty theses found in *Pennoyer* and *International Shoe* also both drew on deep intellectual traditions in the sovereignty literature. This Section illustrates this point, showing the connection each case's sovereignty thesis bears to longstanding theories of sovereignty.

89. *Int'l Shoe*, 326 U.S. at 319. This phrasing is reminiscent of the Court's later rhetoric in Brown v. Board of Education, 347 U.S. 483, 495 (1954), where its pronouncement that "separate educational facilities are inherently unequal" was meant to allude, in the negative, to the Fourteenth Amendment concept of equal protection.

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

1. Pennoyer v. Neff

First, consider the sovereignty thesis found in *Pennoyer*. That thesis, it will be recalled, provided that: "[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[91] When the Court offered this thesis, it plainly drew upon a long intellectual tradition. There is a longstanding theory that associates sovereignty with two traits: territoriality and exclusivity. Stephen Krasner, the international relations scholar, has described this tradition as one marked by a commitment to "an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures."[92] Under this theory, "sovereignty" refers primarily to the government's ability to retain a monopoly as the only legitimate state actor within a given territory.[93] Early thinkers who espoused this theory, such as Emer de Vattel and Christian Wolff, viewed this territorial monopoly as a core right to which states were entitled—a right akin to the natural rights that Enlightenment thinkers believed rational

91. Pennoyer v. Neff, 95 U.S. 714, 722 (1878). For the argument that this theory of sovereignty was already being regularly employed in federal common law relating to the Full Faith and Credit Clause prior to *Pennoyer*, see Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 870–76 (1989).

92. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20 (1999).

93. Over the past two decades, it is worth noting, federalism scholarship has productively cast aside this vision of exclusive sovereigns to document the complex overlapping institutional arrangements that define modern governance and jurisdiction, and to examine the benefits and downsides of such arrangements. *See, e.g.*, Gerken, *supra* note 71 (documenting state-to-state legal spillovers and their relationship to democracy values); Gerken & Holtzblatt, *supra* note 71 (discussing the affirmative case for state-to-state legal spillovers); Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1245 (2008) (documenting governmental overlap and coordination which illustrate that "the paradigm of dual federalism embedded within the Westphalian state is no longer apposite"); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 33 (2007) (documenting "translocal" arrangements that defy "exclusive sovereigntism" models); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (discussing the complexities of law in a world where a single act or actor is subject to multiple legal or quasi-legal regimes); Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007) (exploring the evolving nature of modern jurisdiction); *see also* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981) (discussing "jurisdictional redundancy"); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (discussing the overlapping constitutional requirements between state and federal courts in criminal cases).

individuals to possess.[94] Modern-day adherents to this tradition have tended to leave this natural rights heritage behind, but they have continued to assert that self-determination and autonomy for territorially-defined communities are fundamental values that are worth pursuing.[95] Surveying this tradition, Krasner concludes: "The rule [required by this theory] is the exclusion of external actors . . . from the territory of a state."[96]

This definition of the sovereign state—referred to in the following pages as the "*Westphalian sovereignty thesis*"—also has a long history in American thought. As Gary Born has observed, Thomas Jefferson employed it in his correspondences,[97] and Chief Justice Marshall invoked it in early opinions such as *Schooner Exchange v. McFaddon*.[98] And the theory would gain unique force in the field of Conflicts of Law

94. *See* EMMERICH DE VATTEL, THE LAW OF NATIONS; OR THE PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 137 (Joseph Chitty ed., P.H Nicklin & T. Johnson 1835) (1758) ("But, though a nation be obliged to promote, as far as lies in its power, the perfection of others, it is not entitled forcibly to obtrude these good offices on them. Such an attempt would be a violation of their natural liberty. In order to compel any one to receive a kindness, we must have an authority over him; but nations are absolutely free and independent (Prelim. § 4)."); ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., NON INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 5 (1956) ("To interfere in the government of another, in whatever way indeed that may be done is opposed to the natural liberty of nations, by virtue of which one is altogether independent of the will of other nations in its action." (quoting CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM ch. 1 § 256 (1764 ed.) (1934)); *see also* KRASNER, *supra* note 92, at 14 ("Vattel reasoned from the logic of the state of nature. If men were equal in the state of nature, then states were also free and equal and living in a state of nature. For Vattel a small republic was no less a sovereign state than was a powerful kingdom.").

For Krasner, this tradition dates back to the writings of Vattel—not necessarily to the Peace of Westphalia itself, even though this theory of sovereignty is commonly associated with the Peace of Westphalia. *See* KRASNER, *supra* note 92, at 20–21 ("The norm of nonintervention in internal affairs had virtually nothing to do with the Peace of Westphalia, which was signed in 1648. It was not clearly articulated until the end of the eighteenth century. . . . Vattel argued that no state had the right to intervene in the internal affairs of other states.").

95. *See, e.g.*, U.N. CHARTER art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . .").

96. KRASNER, *supra* note 92, at 4.

97. Letter from Mr. Jefferson to Mr. Morris (Aug. 16, 1793), *in* AMERICAN STATE PAPERS 167, 169 (Walter Lowrie & Matthew St. Claire Clarke eds., 1833), *as quoted in* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 11 (1992) ("Every nation has, of natural right, entirely and exclusively, all the jurisdiction which may be rightfully exercised in the territory it occupies.").

98. Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (asserting that, within a given territory, sovereign power was "necessarily exclusive and absolute").

with the publication of Joseph Story's influential *Commentaries on the Conflict of Laws* in 1834.[99] Borrowing from European theorists such as Ulrich Huber, Story took the Westphalian theory of sovereignty and transformed it into a centerpiece of his theory of Conflicts of Law.[100] Due partly to the enormous influence of Story's treatise, this theory would dominate the field of Conflicts of Law in the late nineteenth and early twentieth centuries.[101]

This theory of sovereignty clearly shaped the Court's opinion in *Pennoyer*. Justice Field famously cited Joseph Story's treatise for the idea behind the opinion's sovereignty thesis—an explicit acknowledgment that the Court was drawing upon the intellectual history of Westphalian sovereignty.[102] As Kal Raustiala has observed: "One need only read Justice Stephen Johnson Field's opinion in *Pennoyer v. Neff* to see the connection between Westphalian territorial sovereignty as understood in international law and the prevailing jurisdictional principles of nineteenth-century American law."[103]

2. International Shoe Co. v. Washington

For centuries, an alternate theory of sovereignty has competed with the Westphalian sovereignty thesis invoked in *Pennoyer*. According to this competing theory, the sovereign state is an entity that is tasked with a specific mission: it must protect a community. Its powers, rather than being axiomatic, grow out of this core mission. In this Article, this idea is referred to as the "*protective sovereignty thesis*."

As the following pages illustrate, this protective sovereignty thesis enjoys an intellectual pedigree no less impressive than that of its Westphalian counterpart. To this end, Subsection (a) briefly traces the

99. STORY, *supra* note 2.

100. *See, e.g.*, WATSON, *supra* note 3, at 1–27 (detailing Huber's influence on Story); James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMPAR. L. 73 (1990); Childress, *supra* note 3 (explaining that Story "adopt[ed] Huber's conflicts doctrine" and noting that "Huber's theory was based . . . on state sovereignty"). As Harold Korn has noted, Huber actually advanced a theory of personal jurisdiction that was more flexible than that found in Story's treatise (and later imported into *Pennoyer*); Story had added this rigid application of Huber's principles to the area of personal jurisdiction, with his only citation in support of this application coming from a district court opinion that Story himself had authored. *See* Korn, *supra* note 75, at 977–82.

101. *See, e.g.*, Mathias Reimann, *A New Restatement—For the International Age*, 75 IND. L.J. 575, 577 (2000) (describing Story's treatise as "the foundation of the conflicts discipline in this country"); Childress, *supra* note 3, at 23 (describing Story's theory as "seminal").

102. Pennoyer v. Neff, 95 U.S. 714, 722–23 (1878).

103. Raustiala, *supra* note 2, at 2509.

appearance of this protective sovereignty thesis in the following intellectual movements: (i) Enlightenment-era social contract theory; (ii) nineteenth-century nationalist theory in Europe; and (iii) legal process theory. Then, Subsection (b) documents the resurgence of this protective sovereignty thesis in the New Deal, thereby highlighting its salience at the moment when the Court was deciding *International Shoe*.

a. Thesis in Sovereignty Scholarship

i. Social Contract Theorists

In order to develop a theory of the sovereign state, Enlightenment-era social contract theorists regularly engaged in a thought experiment that imagined back to a "state of nature"—i.e., to a time period that preceded the existence of sovereign states.[104] Through this thought experiment, social contract theorists posed the question: what incentives might induce individuals living in a state of nature to create—and then submit themselves to—a sovereign entity?[105] The answer, these theorists typically suggested, was that the sovereign must offer to perform some protective function for the community.[106] It was only through the offering of some such protections, it was thought, that rational individuals would be induced to willingly sacrifice their liberty. As Hobbes put it, the factor that leads individuals to accept "the introduction of that restraint [of sovereignty] upon themselves . . . is the foresight of their own preservation."[107] Put differently, the sovereign state must offer to provide protection and preservation to individuals; otherwise, it cannot justify its own existence.

A similar line of thought can be found in Rousseau's writings.[108] However, the idea may have been most articulately expressed by John Locke, who wrote in his *Two Treatises of Government* that:

104. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 189 (1821).

105. *See, e.g.*, THOMAS HOBBES, LEVIATHAN, OR, THE MATTER, FORM, AND POWER OF A COMMON-WEALTH ECCLESIASTICAL AND CIVIL 87 (A.R. Waller ed., 1904) (1651) (reflecting on what would induce an individual "to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe"); LOCKE, *supra* note 104, at 189 ("To understand political power right, and derive it from its original, we must consider, what state all men are naturally in . . . ."); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 5 (Ernest Rhys ed. 1920) (1762) ("Man is born free; and everywhere he is in chains. . . . What can make [this change] legitimate? That question I think I can answer.").

106. *See infra* notes 107–09 and accompanying text.

107. HOBBES, *supra* note 105, at 115.

108. *See* ROUSSEAU, *supra* note 105, at 14 ("I suppose men to have reached the point at which the obstacles in the way of their preservation in the state of nature show their

> If man in the state of nature be so free . . . why will he part with his freedom? . . .To which it is obvious to answer, that though in the state of nature he hath such a right, yet . . . the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to . . . join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.[109]

Through this "state of nature" thought experiment, social contract theorists concluded that the essential quality of the sovereign state—the quality that brings it into existence—is its promise to afford protections to a vulnerable community.

This social contract theory famously would be incorporated into American political culture via the Declaration of Independence. There, the Founders embraced the protective sovereignty thesis of Locke and others, and they argued that it also implied an important corollary: namely, that a political community always retains the right "to alter or to abolish" its sovereign government when such government ceases to protect their safety and happiness.[110] In this sense, the Founders viewed a sovereign's right to continued existence to be dependent upon its ability, and its willingness, to afford basic protections to a sovereign community.[111] As the historian Mark Hulliung put it:

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power of resistance to be greater than the resources at the disposal of each individual for his maintenance in that state. That primitive condition can subsist no longer . . . .").

109. LOCKE, *supra* note 105104, at 294–96 (emphasis omitted).

110. The Declaration states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

111. This idea also appeared in the Massachusetts constitution drafted by John Adams (and still in force today), which provided in the preamble that:

> The end of the institution, maintenance, and administration of government is to secure the existence of the body-politic, to protect it; and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life; and whenever these great objects are not obtained, the people have a right to alter the government . . . .

See DAVID MCCULLOUGH, JOHN ADAMS 221 (2001). Adams also connected this idea of protective government to an idea of reciprocal obligations, providing in Article X that: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection . . . ." MASS. CONST. art. X. On a

> The preamble of the Declaration of Independence . . . enshrined a full-blown version of Locke's theory. Rather than taking government for granted, as had the English in 1689, Jefferson's text saw it as something willed into being by the sovereign people to protect their inalienable natural rights. In the event that the government fails to discharge its duty, the people . . . may remove their rulers and change the political system. What the people giveth, they may taketh away. The contract is ongoing, not signed once and forever.[112]

ii. Nineteenth-Century Nationalists

The protective sovereignty thesis also appeared in an intellectual movement in private international law that spread across Italy, France, and Belgium (and, to a lesser extent, Germany and Spain) in the nineteenth century.[113] Referring to the participants of this movement as the supporters of a "doctrine of nationality," Joseph Beale gave insight into the prominence of these scholars in his landmark work, *A Treatise on the Conflict of Laws*.[114] There, he presented these scholars as offering one of two "modern systems of thought" that rivaled his own vested rights system.[115]

One of these nationalist theorists, Fraçois Laurent, usefully described the difference between the protective sovereignty thesis and the Westphalian sovereignty thesis. As Laurent put it:

> The realists [who adopt a Westphalian theory] think that sovereign power should embrace all persons and things which are within the territory or which make up the country. That is the feudal system which confounds sovereignty with property. The Italian publicists say, as I do, that *sovereignty is a mission rather than a power. It has for its object the defense and preservation of society and it should be invested with such powers as would permit it to fulfill its mission*.[116]

As Laurent observes in this passage, the Westphalian sovereignty thesis presents the sovereign state as an entity that—by definition—has a certain type of power (viz., exclusive power over a fixed

similar idea of reciprocity in *International Shoe*, see *supra* notes 89–90 and accompanying text. *See also* THE FEDERALIST NO. 43 (James Madison) ("The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.").

112. MARK HULLIUNG, THE SOCIAL CONTRACT IN AMERICA: FROM THE REVOLUTION TO THE PRESENT AGE 145 (2007).

113. *See* 1 JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW 71 (1916).

114. *Id.* at 62.

115. *Id.*

116. FRANÇOIS LAURENT, DIRITTO CIVILE INTERNAZIONALE 632–36 (1885) (It.), *quoted in* BEALE, *supra* note 113, at 71–72 (emphasis added).

territory). By contrast, Laurent and others viewed the sovereign state as an entity tasked with a certain mission: namely, to preserve or protect a particular society.[117] For Laurent, therefore, coercive power was not an axiomatic trait of the sovereign state.[118] Rather, it was the logical outgrowth of the sovereign's foundational mission.[119] Sovereign power, in other words, exists in order to accomplish a protective mission—and should reach only so far as is needed to accomplish that mission.

For these nineteenth-century scholars, the protective sovereignty thesis also generated a corresponding view of the law. In the words of one such theorist, André Weiss, the law was simply "the formulated expression" of sovereignty.[120] Since these scholars viewed sovereigns as protectors of a sovereign community, and also viewed the law as a mechanism by which sovereigns realize their essential character, they inevitably viewed the law as protective in character. Weiss, for example, argued that the "true function" of the law was to "protect the citizen" and "to provide for the interests of those for whom it is made, that is, for the interests of citizens of the state which has given it force."[121] Weiss added: "When a law deals with a private interest, it always has the object of utility to the person."[122] Antoine Pillet similarly posited that: "One cannot deny that the essential feature of law is its social object," and he explained that a key social object was "to protect the private interests of individuals, [in order to] place the individual in the position most favorable for his development and preservation."[123] Summarizing this view, Beale observed that, in the work of these nationalist scholars, there was a consistent emphasis on the fact that a "sovereign . . . wishes to throw . . . the protection of his personal law" around the subjects of that sovereign state.[124] For these theorists, a protective vision of the law emerged directly from an underlying theory about the sovereign state. The law was a vehicle

117. *See id.*

118. *See id.*

119. *See id.*

120. ANDRÉ WEISS, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT INTERNATIONAL PRIVÉ (1892) (Fr.), *quoted in* BEALE, *supra* note 113, at 68.

121. WEISS, *supra* note 120, *quoted in* BEALE, *supra* note 113, at 68. Weiss also thinks through how these goals collide with the territorial goals of states.

122. WEISS, *supra* note 120, *quoted in* BEALE, *supra* note 113, at 70.

123. ANTOINE PILLET, PRINCIPES DE DROIT INTERNATIONAL PRIVÉ (1903) (Fr.), *quoted in* BEALE, *supra* note 113, at 82–83.

124. BEALE, *supra* note 113, at 67. In offering this description, Beale also was noting that these nationalist thinkers can be viewed as a continuation of earlier statutist theorists.

through which the sovereign expressed and realized its essential character—and that character was molded by a mission to protect a particular community.

This nationalist school, it should be noted, paired its theory of sovereignty with a particular (and particularly troubling) definition of the sovereign community. For these nationalist thinkers, the sovereign community was a naturally forming collectivity—one that had been shaped into a unified culture by its geography, its history, and perhaps even its racial or ethnic underpinnings.[125] In the vocabulary of legal scholar Richard T. Ford, these thinkers posited the existence of an "organic jurisdiction" for the state; they suggested that the sovereign community could be viewed as "the natural outgrowth of circumstances, conditions and principles that, morally, preexist the state."[126] Elaborating, Ford notes that: "The ideological foundation of nation-states is primarily that of organicism; nations are thought to represent 'a people' who are both distinctive and relatively homogeneous."[127] The nineteenth-century nationalists made use of this antiquated ideological foundation. To these theorists, the national community was not merely a collection of rational individuals; it was an organic, quasi-racial entity.[128] It was a very different vision of the sovereign community than that which social contract theorists had embraced—a fact which illustrates the diversity of thought that has existed among those who share a commitment to the protective sovereignty thesis.

These nationalist theorists therefore differed from the social contract theorists in important ways, including in their definition of the

125. *See* LAURENT, *supra* note 116, at 632–36, *quoted in* BEALE, *supra* note 113, at 71–72 ("[National laws] do more than stick to our bones, they circulate in our veins with our blood, for we receive our nationality with the blood which our parents transmit to us . . . ."); P.S. Mancini, *De L'utilité de Rendre Obligatoires pour Tous les Etats, Sous la Forme d'un ou de Plusieurs Traites Internationaux, Un Certain Nombre de Règles Générales du Droit International Prive pour Assurer la Décision Uniforme des Conflits Entre les Différentes Législations Civiles et Criminelles*, 1 J. DU DROIT INT'L PRIVÉ 221 (1874) (Fr.), *quoted in* BEALE, *supra* note 113, at 69–70 ("Climate, temperature, geographical situation, whether mountainous or maritime, the nature and fertility of the soil, difference of needs and of customs, determine with every people, almost without exception, their legal system. They determine in a greater or less degree the precocity of physical and moral development, [and] the organization of family relations . . . . For these reasons the status and capacity of persons in the private law of the different nations must differ in accordance with this difference in conditions.").

126. Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 859 (1999).

127. *Id*.

128. *Id.* at 872.

sovereign community. They agreed with social contract theory, however, on the basic quality that marks the state as a sovereign: its foundational mission to protect a community.[129]

iii. Legal Process Theory

As Subsection (b) will explain below, the New Deal ushered in a resurgence of the protective sovereignty thesis in the United States, in both political rhetoric and constitutional doctrine. Before exploring that resurgence in detail, however, it is worth noting a variant of the protective sovereignty thesis adopted by a school of thought often associated with the New Deal: legal process theory.[130] This school differed with both social contract theory and the nineteenth-century nationalists in its definition of the sovereign community—yet it shared their basic commitment to the protective sovereignty thesis.

This scholarly movement is perhaps best encapsulated in the work of Henry Hart and Albert Sacks. In their defining work, *The Legal Process*,[131] Hart and Sacks outlined a concept of the sovereign community that distilled an idea in circulation in the academy throughout the New Deal.[132] This definition of the sovereign community, while grounded in a humanist view of the individual, nonetheless emphasized people's fundamental interdependence in ways that social contract theory did not.[133] According to Hart and Sacks, a "community of interest" naturally grows out of people's unavoidable

129. *See supra* notes 104–05 and accompanying text.

130. On the association of legal process theory with the New Deal, see William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2042 (1994) stating that, "The Hart and Sacks materials posit a theory of society inspired by the New Deal . . . .".

131. *See* Henry Hart, Jr. & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law (1958) (unpublished manuscript), *in* THE CANON OF AMERICAN LEGAL THOUGHT 243, 255 (David Kennedy & William W. Fisher eds., 1958).

132. *The Legal Process* would not appear in print until after the Court's decision in *International Shoe*. Nonetheless, contemporary scholars have viewed that work not only as representative of the material that Hart had been teaching at Harvard Law School since the late 1930s, but more broadly as the culmination of prevailing trends in American legal thought in the first half of the twentieth century. *See, e.g.*, Eskridge & Frickey, *supra* note 130, at 2034 ("[I]t was Henry Hart who completed the project of synthesizing the three pre-World War II concepts into a systematic way of teaching and thinking about legislation (specifically) and public law (more generally).").

133. *See* Hart & Sacks, *supra* note 131, at 255 ("Here enters the most fundamental of the conditions of human society. In the satisfaction of all their wants, people are continuously and inescapably dependent upon one another."); *see also* CASE MATERIALS ON LEGISLATION 599 (William Eskridge, Jr. et al. eds., 1995) ("Hart and Sacks posited a New Deal-inspired theory of society different from traditional liberal (social contract) theory.").

interdependence.[134] This causes a sovereign community to take shape, as "people form themselves into groups for the protection and advancement of their common interests."[135]

The sovereign state, Hart and Sacks added, is the vehicle by which this sovereign community realizes its desire for these common protections. The sovereign state's purpose, in other words, is to provide the community with the "protection and advancement of [its] common interests."[136] Elaborating, they explained:

> The challenge [of protecting the community's common interests] is only partly met by the many kinds of special groups which people form—such as the family in simple societies, or clubs, churches, labor unions, business associations, and the like in complex societies. There is, in addition, an invariably felt need for an overriding, general purpose group to protect and further the overriding, basic interests which the members of a community have in common and which must be protected and furthered if they are to survive and to prosper and if their various special-purpose groups are to be able to exist and to function.[137]

The sovereign state, Hart and Sacks posited, is the institution that individuals create in order to answer this need.[138] As with the nineteenth-century nationalists, moreover, this view of the sovereign state also led these authors to a protective vision of the law. As Hart and Sacks put it: "Law . . . is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living."[139]

Hart and Sacks therefore broke with both social contract theory and the nineteenth-century nationalists in their definition of the sovereign community. Yet they retained the idea that sovereigns are entities that, by definition, mobilize a lawmaking apparatus in order to afford protections to a particular community.

b. Thesis in the New Deal

The protective sovereignty thesis (and its correspondingly protective vision of the law) also have appeared repeatedly in American constitutional discourse. One example from the Founding era, the Declaration of Independence, already was discussed above.[140] Another example is found in the Fourteenth Amendment, where the Equal Protection Clause provides that: "No State shall . . . deny to any person

134. Hart & Sacks, *supra* note 131, at 256.

135. *Id.*

136. *Id*.

137. *Id*.

138. *Id.*

139. David Kennedy, *Introduction to* THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 131, at 245.

140. *See supra* notes 110–12 and accompanying text.

within its jurisdiction the equal protection of the laws."[141] Here, state laws are not presented simply as coercive impositions; rather, they are viewed as fundamentally protective in nature.[142] Early drafts of the Clause tied this legal vision directly to the protective sovereignty thesis found in the Declaration of Independence, cross-referencing the triumvirate of rights that, when adequately protected, were said to justify the ongoing power of sovereign government.[143] Senator Jacob Howard echoed this protective vision when he introduced the final version of the Amendment, as he observed that: "It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."[144] This vision of the law, where the legal regime is presented as a "shield" designed to afford protection, anticipated the language of nineteenth-century nationalists such as Antoine Pillet, who would remark that: "All protection is armor, which does not fulfill its office unless it is without flaw."[145] Despite holding very different visions of the sovereign community, these thinkers shared a protective vision of the law—one that appears rooted, in each instance, in a protective sovereignty thesis.

The protective sovereignty thesis would gain particular force in America, moreover—in both political rhetoric and legal doctrine—during the New Deal. Time and again, Roosevelt would invoke the logic of social contract theory—including its protective sovereignty thesis—in order to justify the New Deal agenda.[146] To accomplish this, Roosevelt repeatedly suggested that the modern American economy created, in effect, a new state of nature.[147] He regularly offered a depiction of the national economy in which the idea of an inherently benevolent marketplace collapsed to reveal a very different economic reality—one dominated by chaos, with selfish economic actors who were working to no greater end.[148] In the absence of a belief in the inherent benevolence of economic forces, Roosevelt explained, the economy appeared dominated simply by "the lone wolf, the unethical

141. U.S. CONST. amend. XIV, § 1.

142. In a future article, I will examine more deeply the interaction of the Equal Protection Clause with Conflict of Laws.

143. The first draft of the Amendment provided that: "The Congress shall have power to make all laws which shall be necessary and proper to secure . . . to all persons in the several States equal protection in the rights of life, liberty, and property." CONG. GLOBE, 39th Cong., 1st Sess. 1033–34 (1866).

144. *Id.* at 2766.

145. PILLET, *supra* note 123, *quoted in* BEALE, *supra* note 113, at 84.

146. *See infra* notes 149–55 and accompanying text.

147. *See infra* notes 149–55 and accompanying text.

148. *See infra* notes 149–55 and accompanying text.

competitor, the reckless promoter, the Ishmael or Insull whose hand is against every man's, [who] declines to join in achieving an end recognized as being for the public welfare, and threatens to drag [industry] back to a state of anarchy."[149] According to Roosevelt, the Great Depression had shown modern economic forces to be chaotic, uncoordinated, and amoral—forces akin to those found in the state of nature imagined by the social contract theorists.

149. Franklin D. Roosevelt, Address Before the Commonwealth Club of San Francisco (Sept. 23, 1932) [hereinafter Commonwealth Club Address], *in* FRANKLIN DELANO ROOSEVELT: GREAT SPEECHES 26 (John Grafton ed., 1999) [hereinafter SPEECHES]; *see also id.* at 21 (describing the collapse of "the dream of an economic machine"); *id.* at 22–23 (asserting that "our industrial combinations had become great uncontrolled and irresponsible units of power within the state" marked by "irresponsibility and greed"); Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933) [hereinafter First Inaugural], *in* SPEECHES, *supra,* at 28, 30 (asserting that these economic actors "know only the rules of a generation of self-seekers," appeared merely to be engaged in "the mad chase of evanescent profits," and seemed "[unable to] apply social values more noble than mere monetary profit"); Franklin D. Roosevelt, Assessing the New Deal and Manipulating the Currency (Oct. 22, 1933), *in* FDR'S FIRESIDE CHATS 115–16 (Russel D. Buhite & David W. Levy eds., 1992) [hereinafter CHATS] (evoking the "Cleansing of the Temple," a Gospel episode in which Jesus expels the money-changers from the temple, to emphasize the unregulated American scene of economic actors who possessed "some selfish interest, some private axe to grind" and declaring that the government was "constructing the edifice of recovery—the temple which, when completed, will no longer be a temple of money-changers or of beggars, but rather a temple dedicated to and maintained for a greater social justice, a greater welfare for America—the habitation of a sound economic life"); First Inaugural, *supra*, at 66 ("Practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men. . . . The money changers have fled from their high seats in the temple of our civilization. We may now restore that temple to the ancient truths. The measure of the restoration lies in the extent to which we apply social values more noble than mere monetary profit."); Franklin D. Roosevelt, Answering the Critics (June 28, 1934) [hereinafter Critics Speech], *in* CHATS, *supra*, at 47 (describing the modern economy as "characterized by a mad chase for unearned riches and an unwillingness of leaders in almost every walk of life to look beyond their own schemes and speculations"); Franklin D. Roosevelt, Government and Modern Capitalism (Sept. 30, 1934) [hereinafter Government Speech], *in* CHATS, *supra*, at 54 (referring to "the old chaos" of the laissez-faire economy); Franklin D. Roosevelt, Defending the WPA and Pressing for Social Security (Apr. 28, 1935) [hereinafter Defending WPA Speech], *in* CHATS, supra, at 65 (depicting an economic world as one in which "individual self-interest and group selfishness were paramount in public thinking"); *id.* (describing a world populated by individuals and institutions incapable of "considering the whole rather than a mere part relating to one section or to one crop, or to one industry, or to one individual private occupation"); Franklin D. Roosevelt, Praising the First Hundred Days and Boosting the NRA (July 24, 1933) [hereinafter Hundred Days Speech], *in* CHATS, *supra*, at 28, 33 ("[W]ithout united action a few selfish men in each competitive group will pay starvation wages and insist on long hours of work. Others in that group must either follow suit or close up shop. We have seen the result of action of that kind in the continuing descent into the economic hell of the past four years.").

The institution that was designed to remedy such a state of nature, Roosevelt also explained, was the sovereign state. To this end, Roosevelt repeatedly asserted that government, at its core, was a purposive institution created to serve the community. As he put it in one fireside chat, the creation of the sovereign state was an endeavor that, "like the building of a ship," was aimed at "the creation of a useful instrument for man."[150] For Roosevelt, the origin of the state, and its ongoing claim to legitimacy, was bound up in its need to fulfill a purpose on behalf of a community.[151] To use Roosevelt's words, it was the idea that: "[G]overnment . . . exists to serve individual men and women."[152]

That overriding institutional purpose, Roosevelt added, was to provide protections to a community—to furnish the community with "protection against the vicissitudes of modern life," as he put it.[153] Roosevelt repeatedly turned to this idea that government, above all, existed to ensure that the public was afforded the basic "protections" necessary in order for them to conduct their private lives with some

150. Defending WPA Speech, *supra* note 149, at 64–65.

151. *See, e.g.*, Franklin D. Roosevelt, Acceptance Speech (June 27, 1936), *in* SPEECHES, *supra* note 147, at 47, 49 (arguing that, in the face of modern economic conditions, "the American citizen could appeal only to the organized power of government"); Hundred Days Speech, *supra* note 149, at 33 ("There is nothing complicated about it and there is nothing particularly new in the principle. It goes back to the basic idea of society and of the nation itself that people acting in a group can accomplish things which no individual acting alone could even hope to bring about."); Franklin D. Roosevelt, The Four Freedoms Speech (Jan. 6, 1941), *in* MY FELLOW AMERICANS 109, 110 (Michael Waldman ed., 2010) [hereinafter Four Freedoms] ("[The] inner and abiding strength of our [political system] is dependent upon the degree to which [it] fulfill[s] these expectations [held by the community that it serves]."); Defending WPA Speech, *supra* note 149, at 72 (describing the New Deal as marked by "renewed faith in the vast possibilities of human beings to improve their material and spiritual status through the instrumentality of the democratic form of government"); Government Speech, *supra* note 149, at 55 ("[I]n many directions, the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which obtained through the attrition of individuals before the new conditions arose." (quoting Elihu Root)); Defending WPA Speech, *supra* note 149, at 72 ("[I]t is more than the recovery of the material basis of our individual lives. It is the recovery of confidence in our democratic processes, our republican institutions. . . . Fear is vanishing and confidence is growing on every side, renewed faith in the vast possibilities of human beings to improve their material and spiritual status through the instrumentality of the democratic form of government."); Commonwealth Club Address, *supra* note 149, at 19 ("[A] factor that tended to limit the power of those who ruled, was the rise of the ethical conception that the ruler bore a responsibility for the welfare of his subjects.").

152. Commonwealth Club Address, *supra* note 149, at 19.

153. Critics Speech, *supra* note 149, at 50.

measure of safety and security.[154] In this regard, the New Deal contained a forceful assertion that the protective sovereignty thesis captured the origin and essence of sovereignty.

For Roosevelt, this sovereignty thesis entailed a commitment to protect a sovereign community that was not defined along racial or ethnic lines. As Roosevelt put it in his Four Freedoms speech: "[O]ur national policy in internal affairs has been based upon a decent respect for the rights and the dignity of all our fellow men within our gates."[155] In this definition of the sovereign community, territorial boundaries returned to relevance—but not because, as in Westphalian theory, they marked the logical bounds of sovereign power. Rather, these boundaries were relevant because they provided an egalitarian way to define the sovereign community that the state, understood via the protective sovereignty thesis, must work to protect.

This return to a protective sovereignty thesis led Roosevelt to the key conclusion of the New Deal constitutional project: namely, that it was necessary to remove constitutional constraints that prevented American governments from acting as protective sovereigns. In particular, it was assumed necessary to remove constitutional impediments that prevented protective sovereigns from protecting the community from the harshest consequences of modern economic forces.[156]

As the Supreme Court eventually gave sanction to the New Deal, it translated these Rooseveltian premises into a constitutional

154. *See* Defending WPA Speech, *supra* note 149, at 72 (outlining the need to provide "wise provisions for the protection of the weak against the strong"); Franklin D. Roosevelt, A Preelection Appeal to Farmers and Laborers, *in* CHATS, *supra* note 149, at 73, 81 ("They deserve practical protection in the opportunity to use their labor at a return adequate to support them at a decent and constantly rising standard of living, and to accumulate a margin of security against the inevitable vicissitudes of life."); Franklin D. Roosevelt, A National Service Law and an Economic Bill of Rights, *in* CHATS, *supra* note 149, at 282, 292 (addressing "[t]he right to adequate protection from the economic fears of old age and sickness and accident and unemployment"); Acceptance Speech, *supra* note 151, at 50 ("The brave and clear platform adopted by this Convention, to which I heartily subscribe, sets forth that Government in a modern civilization has certain inescapable obligations to its citizens, among which are protection of the family and the home . . . ."); *see also* Government Speech, *supra* note 149, at 55 ("[P]rivate enterprise in times such as these cannot be left without . . . reasonable safeguards lest it destroy not only itself but also our processes of civilization.").

155. Four Freedoms, *supra* note 151, at 110.

156. For a discussion of the constitutional dimensions of Roosevelt's policies during this time period, see, for example, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 125–47 (1998); and Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169 (2013).

jurisprudence. No case better illustrates this than *West Coast Hotel Co. v. Parrish*.[157] In *West Coast Hotel*, the Court reevaluated the limitations that the Due Process Clause of the Fourteenth Amendment had placed, through the Court's jurisprudence on a "freedom of contract," upon state regulation of contractual relations in the economic marketplace.[158] As Bruce Ackerman has observed, the Court's "switch in time" in *West Coast Hotel* was the Justices' "signal that they could be trusted to codify the New Deal revolution without the further need for formal instruction."[159]

In *West Coast Hotel*, the Court openly acknowledged the chaotic economic reality cited repeatedly by Roosevelt. Here, the Court pointed toward "the economic conditions which have supervened"[160] in America during the Great Depression, and it stated that: "We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved."[161] Moreover, the Court endorsed the changed view of the economy that resulted from these economic forces; it described "unconscionable employers," and it spoke of the "abuse which springs from their selfish disregard of the public interest."[162] In this regard, the Court aligned itself with Roosevelt's claims that the Great Depression marked a turning point after which economic forces were revealed to be nasty, chaotic forces of the sort that sovereigns were designed to regulate.

In response to these economic realities, the Court in *West Coast Hotel* then followed Roosevelt's embrace of a protective sovereignty thesis. For the Court, this sovereignty thesis was crystallized in a single term: "protection."[163] Time and again, the Court described the overriding need for sovereign states to be capable of promulgating and enforcing regulations that would offer "protection" to vulnerable individuals in the economic marketplace.[164] The Court began its opinion, for example, by repeating the relevant statute's declaration that: "The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious

157. W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
158. *Id.* at 391.
159. ACKERMAN, *supra* note 156, at 315 (emphasis omitted).
160. *W. Coast Hotel*, 300 U.S. at 390.
161. *Id.* at 399.
162. *Id.* at 399–400.
163. *Id.* at 391.
164. *Id.* at 393–95, 398–99.

effect on their health and morals."[165] In enacting the statute, the Court said, the state of Washington was simply "carrying out its policy of protection."[166]

These policies of "protection," the Court suggested, are at the core of a state's sovereign power. Consequently, rather than labeling the state power at issue a "police power"—the term typically used to describe such regulations for health and morals—the Court instead referred throughout the opinion to the "protective power" of the state.[167] In so doing, the Court connected this police power to an underlying, New Deal vision of its purpose—namely, the purpose of enabling the government to afford protections to a community. Viewed as such, the Court explained, these regulations not only are imposed upon the community; they also are imposed "in the interests of the community."[168] This is a vision of a sovereign entity whose powers are molded by the purpose that it has been assigned—here, the purpose of protecting a community.

Not surprisingly, therefore, the Court in *West Coast Hotel* also embraced Roosevelt's willingness to identify—and to remove—constitutional constraints that prevented sovereigns from pursuing their protective agenda. Announcing that "freedom of contract" no longer would operate as a barrier to state legislation, the Court explained the manner in which the Due Process Clause would operate in the absence of this constraint, saying:

> [T]he liberty safeguarded [by the Fourteenth Amendment] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[169]

Notice that, in this passage, the Court outlined an overriding function that governments are assumed to serve: namely, the "require[d]" function of providing "the protection of law against the evils which menace the health, safety, morals and welfare of the people."[170] Going forward, the Court explained, the contours of permissible state power under the Due Process Clause would be shaped by the overriding need

165. *Id*. at 386.

166. *Id.* at 399.

167. *Id.* at 390 (referring to "the exercise of the protective power of the State"); *id.* at 396 (describing the state's "broad protective power"); *id.* at 400 (referring to "the State's protective power").

168. *Id.* at 391.

169. *Id.*

170. *Id.*

for states to perform this protective function. Here, the Court explained that: "[R]egulation which is reasonable in relation to its subject and *is adopted in the interests of the community* is due process."[171] In the absence of the old constitutional constraint, in other words, the only limitation upon state legislative activity would be the limitation inherent in the very idea of the protective sovereignty thesis. Sovereign legislative activity was justifiable, the Court said—and was constitutional under the Due Process Clause—to the extent that it performed this function of protecting and advancing the "interests of the community."[172] Under this interpretation, the term "liberty" meant, simply, freedom from governmental action that is disconnected from the government's mission as a protective sovereign.[173] In this manner, the Court not only employed a protective sovereignty thesis in *West Coast Hotel*; it also asserted that the Due Process Clause operated to ensure that states were empowered to act in their capacity as protective sovereigns, and that they were prevented from acting beyond that essential capacity.

West Coast Hotel was not the only New Deal opinion in which the Court reasserted the protective sovereignty thesis. At the same time, the Court also was cementing this thesis in other domains within Conflict of Laws. These developments will be explored in a future article, and so they will not be discussed in detail here. Still, it is worth noting that Justice Stone—the author of *International Shoe*—would write several such opinions, particularly with respect to the application of the Full Faith and Credit Clause to state choice-of-law determinations.[174] There, Stone would develop a constitutional test which, with respect to "the constitutional authority of [a] state to legislate for the bodily safety and economic protection of employees injured within it," would emphasize that: "Few matters could be deemed more appropriately the concern of the state . . . or more completely within its power."[175]

c. Thesis in International Shoe

By the time of *International Shoe*, therefore, the protective sovereignty thesis was inescapable. Used by social contract theorists, it had

171. *Id.* (emphasis added).

172. *Id.*

173. *Id.*

174. *See* Pac. Emps. Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 503 (1939); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 543 (1935); Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 163–64 (1932) (Stone, J., concurring).

175. *Pac. Emps.*, 306 U.S. at 503.

shaped American political thought since the Founding.[176] Used by nineteenth-century nationalists, it had featured prominently in the *Shoe* era's leading treatise on Conflict of Laws.[177] Used in the crafting of the Equal Protection Clause, its rhetoric had infused debates over the constitutional amendment at issue in *Shoe*. Used to articulate and defend the New Deal project, it had reclaimed a central role in American political thought during the period when *Shoe* would be decided. Used by members of the legal process school, it had gained widespread acceptance among the Court's academic peers.[178] Used in *West Coast Hotel*, it had infused the Court's own rethinking of sovereign power in the wake of the New Deal's political triumph.

These various schools of thought differed in their vision of the sovereign community—positing, for example, that the proper community was a series of atomistic, rational individuals (social contract theorists), an ethnically-defined organic community (nineteenth-century nationalists), or an interdependent, purpose-driven community (legal process theorists). Yet they all converged on a common idea: namely, that the sovereign state is an entity tasked with a foundational mission to protect a sovereign community. Moreover, they tended to agree that: (1) sovereigns pursue this protective mission through their laws; and (2) when sovereign action is undertaken in pursuit of this protective mission—and only when it is so undertaken—that action is legitimate and justifiable. In *International Shoe*, the Court took these ideas about sovereignty, and it placed them at the center of a new test for personal jurisdiction.

Through the foregoing analysis, it is possible to reach a proper understanding of the manner in which the Court's ruling in *International Shoe* deviated from its prior ruling in *Pennoyer v. Neff*. On the one hand, the Court's opinion in *International Shoe*—no less than its opinion in *Pennoyer*—grounded its jurisdictional test in a theory of sovereignty. After all, the Court's opinion in each case contained a sovereignty thesis, and each derived a jurisdictional test from that sovereignty thesis.[179] On the other hand, the Court's pivot in *International Shoe* to an alternate theory of sovereignty was a significant innovation.[180]

176. *See supra* Part I.B.2.a.i.

177. *See supra* Part I.B.2.a.ii.

178. *See supra* Part II.B.2.a.iii.

179. *See supra* Part II.A.1 (outlining *Pennoyer*'s jurisdictional test); *supra* Part II.A.2 (outlining *Shoe*'s jurisdictional test).

180. *See supra* Part II.B.2.

As this landmark case of *International Shoe* has been reduced to a mere symbol for fairness-based approaches to jurisdiction, in other words, an important dimension of the case has been lost. *International Shoe*, it has been forgotten, was an opinion centered around the very topic that it now is made to stand against: state sovereignty.[181] The case took the revolutionary step of advancing its own theory of state sovereignty into the field of personal jurisdiction—a protective sovereignty thesis that was alien to *Pennoyer*, but that was resurgent during the New Deal, and that was reminiscent of contemporary opinions such as *West Coast Hotel*. In *International Shoe*, the Court placed this theory at the center of modern jurisdictional analysis—and that is where it remains, in modified form, today.

III. IMPLICATIONS

Part II argued that courts and scholars have fundamentally misunderstood the "minimum contacts" test in personal jurisdiction. Rather than repudiating sovereignty-based approaches to personal jurisdiction, it argued, the minimum contacts test actually re-oriented personal jurisdiction around an alternate theory of sovereignty. This alternate theory of sovereignty, which Part II labeled as the "protective sovereignty thesis," defines the sovereign state as an entity that is tasked with a specific mission: namely, to provide a set of fundamental protections to a sovereign community.

This Part explores the implications and benefits of understanding the minimum contacts test as oriented around a protective sovereignty thesis. As the following pages explain, this corrected understanding of the minimum contacts test holds the potential to alleviate numerous problems in the modern doctrine of state court personal jurisdiction—problems that have proved particularly vexing in the

181. Relatedly, community-based approaches to jurisdiction now are regularly made to stand against the minimum contacts test and sovereignty-based approaches. *See, e.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 321–22 (2002) (arguing that "a contacts-based approach must now yield to a conception of jurisdiction based on community definition"); *id.* at 424 (using community-based theory to "open space for the articulation of norms that challenge sovereign power"); Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 3 (1991) (arguing that "general jurisdiction seems to reflect communitarian assumptions whereas specific jurisdiction seems to reflect liberal ones"); ROBERT M. COVER, *The Folktales of Justice: Tales of Jurisdiction*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173 (Martha Minow et al. eds., 1992) (identifying aspiration to jurisdiction devoid of sovereignty); Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 52 (1983) (dismissing sovereignty theories as obfuscating tools invoked to avoid the indefensibility of the state's coercive role over other communities' laws).

decades since *International Shoe* was first decided. These include its ability to: (1) clarify a confused doctrine; (2) bolster the constitutional legitimacy of the doctrine; (3) cast new doubt on the legitimacy of forum selection clauses; and (4) reveal the assumptions embedded in the doctrine that, when left unspoken, often leave students and lawyers overwhelmed.

Additionally, this corrected understanding of the minimum contacts test also has implications that extend beyond the Fourteenth Amendment. As the following pages explain, it sheds new light on: (1) the Fifth Amendment test for federal personal jurisdiction; and (2) the extraterritoriality test that the Court employs under the Dormant Commerce Clause.

Finally, this revised understanding of the minimum contacts test holds the promise of dispelling lingering confusion about the role that territorial boundaries play in modern Conflict-of-Laws analysis. As the following pages explain, there would be both legal and practical benefits if the Court were to explicitly embrace the protective sovereignty thesis and provide new clarity on this particular topic. Each of these implications is considered below.

A. CLARIFYING A CONFUSED DOCTRINE

Personal jurisdiction doctrine often has been accused of dissolving into confusion and discord in the post-*International Shoe* era. It has become a doctrine unmoored, it is argued, from any consistent logic that can guide lower courts. In the words of some leading scholars in the field:

"[Post-*Shoe* doctrine] is a body of law whose purpose is uncertain, whose rules and standards seem incapable of clarification, and whose connection to the Constitution cannot easily be divined."[182]

"[It is] an unsatisfactory body of law that is extremely difficult for jurisdiction scholars to organize, synthesize, and comprehend."[183]

"Over 100 years after issuing *Pennoyer* the Supreme Court is still laboring to articulate a coherent doctrine of personal jurisdiction within the framework established by that opinion."[184]

"Ambiguity and incoherence have plagued the minimum contacts test . . . ."[185]

182. Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1076 (1994).

183. William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 600 (1993).

184. Perdue, *supra* note 62, at 479.

185. McMunigal, *supra* note 87, at 189.

"[J]urisdiction in the United States is a mess."[186]

For their part, the Justices themselves seem equally confused by the doctrine. The Court's recent opinions on personal jurisdiction regularly splinter into pluralities, failing to unite the Court behind any single view of the minimum contacts test.[187] Moreover, as Part I explained, the Court's opinions consistently fail to identify, much less defend, any principles that bear a rational connection to their proposed jurisdictional tests.[188] Instead, the Court conducts debates about general principles of "fairness" and "sovereignty," while offering jurisdictional tests that support neither.[189] The result, it seems, is a doctrine adrift.

As the forgoing pages have shown, however, the Court did place a coherent principle at the core of the minimum contacts test in *International Shoe*. Once this principle is recognized, the Court's myriad cases in the post-*Shoe* era suddenly acquire some structure and coherence. Specifically, recognition of the protective sovereignty thesis at the center of the minimum contacts test reveals that, beneath the seeming chaos, the Court essentially has been engaged in three specific debates about the legacy of this thesis. These debates have asked:

(1) Is it the entanglement of the defendant, or of the plaintiff, with a protective sovereign that is relevant to jurisdiction?

(2) What level of entanglement with a protective sovereign is sufficient for jurisdiction? Is mere enjoyment of its protections sufficient, or must a party actively seek out those protections?

(3) Should a party's relationship to a protective sovereign be the sole factor in jurisdictional analysis, or one of several?

Subsections 1 through 3 trace each of these three debates in the Court's case law. As they illustrate, once personal jurisdiction doctrine is seen through the lens of the Court's turn to a protective sovereignty thesis, it becomes apparent that the Court's doctrine is not chaotic.

186. Patrick J. Borchers, *Jurisdictional Pragmatism:* International Shoe*'s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 564 (1995)*; see also* Juenger, *supra* note 1, at 403 (describing the current approaches as "gibberish").

187. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877–80 (2011); Burnham v. Superior Ct., 495 U.S. 604, 619 (1990); Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102 (1987).

188. *See supra* note 75 and accompanying text.

189. *See supra* note 75 and accompanying text.

Rather, it is an evolving discussion—occurring on several fronts—about the role of this protective sovereignty thesis in personal jurisdiction.

1. Plaintiff or Defendant?

In *International Shoe*, the Court posited that it was the entanglement of the defendant, not the plaintiff, with a protective sovereign that was relevant.[190] In a pair of opinions, however, Justice Black challenged this defendant-focused approach.[191] While agreeing with the *Shoe* Court that states should be viewed as protective sovereigns, Black expressed a belief that a state's "power to protect" the community must include an ability to "open [the] doors" of its courts to that community, as he put it in his *International Shoe* concurrence.[192] To his mind, each state possesses a "right to afford judicial protection to its citizens"[193] and has a "manifest interest in providing effective means of redress for its residents,"[194] as he put it in separate opinions. This protective interest, he believed, alone should justify an assertion of jurisdiction—and, consequently, such assertions should not necessarily be conditioned upon a defendant's receipt of state benefits.[195] In other words, if the plaintiff was part of the sovereign community that the state had an interest in protecting, Justice Black suggested that should be sufficient to justify an assertion of personal jurisdiction—regardless of the defendant's entanglement with the protections and benefits afforded by the state. This was an idea that Justice Black began to develop in his concurrence in *International Shoe*, and that he fully embraced in his opinion for the Court in *McGee v. International Life Insurance Co*.

Today, *McGee* in particular lives on in a very confused state in the Court's jurisprudence. Selectively citing dicta that bears no connection

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

191. *Id.* at 323 (Black, J., concurring) ("The Court . . . has engaged in an unnecessary discussion in the course of which it has announced vague Constitutional criteria applied for the first time to the issue before us."); McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).

192. *Int'l Shoe*, 326 U.S. at 323–24 (Black, J., concurring).

193. *Id.* at 324–25 ("I believe that the Federal Constitution leaves to each State, without any 'ifs' or 'buts' a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court's notion of 'fair play,' however appealing that term may be.").

194. *McGee*, 355 U.S. at 224.

195. Justice Black's *Shoe* concurrence is more equivocal on this, emphasizing that the corporation's agents still must do business in those states. *Int'l Shoe*, 326 U.S. at 323 (Black, J., concurring).

to Justice Black's underlying proposal, the Court now cites *McGee* in support of plaintiff-focused tests,[196] defendant-focused tests,[197] and convenience-focused tests that discard entirely the focus on a protective sovereign.[198] In one case, *Burger King v. Rudzewicz*, the Court somehow cited *McGee* in support of all three competing approaches.[199] No wonder commentators find chaos and confusion in this area of law.

By contrast, once the key innovation of *International Shoe* is properly understood, Justice Black's dispute with the majority in *International Shoe* properly comes into focus. On the one hand, his underlying agreement with the majority becomes evident; he concurs that states should be viewed as protective sovereigns, and he agrees that a jurisdictional test should emerge from this theory of sovereignty. On the other hand, his point of contention also becomes clear: he believes that the entanglement of a plaintiff, not a defendant, with a protective sovereign should provide the root of jurisdictional analysis.

By and large, it should be noted, the Court has settled this underlying disagreement (despite its failure to acknowledge it). Today, the Court consistently focuses on whether the defendant, not the plaintiff, is sufficiently entangled with the protective sovereign.[200] Nonetheless, it is worth noting that Justice Black's approach appears particularly logical once the minimum contacts test is understood as an effort to implement a protective sovereignty thesis. The retroactive nature of civil cases means that, in the paradigmatic civil case, it is the plaintiff who is seeking the relief through the law's protective power, not the defendant. In this way, a protective sovereignty thesis does seem to generate a natural focus on the plaintiff.

As this hopefully illustrates, explicit recognition of the protective sovereignty thesis has several important benefits. First, it clarifies the real arguments that are occurring between the Justices—thereby removing odd and inaccurate interpretations of prior case law from jurisdictional discussions. Second, it may create new understandings of

196. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 483 n.25 (1985).

197. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 109 (1987).

198. *See, e.g.*, Burnham v. Superior Ct., 495 U.S. 604, 638 (1990) (Brennan, J., concurring); *Burger King*, 471 U.S. at 484.

199. *Burger King*, 471 U.S. at 475 (citing *McGee* in support of the defendant-focused purposeful availment test); *id.* at 484 (citing *McGee* for the inconvenience rationale); *id.* at 483 n.25 (citing *McGee* for its plaintiff-focused approach).

200. *See, e.g.*, Walden v. Fiore, 571 U.S. 277, 284 (2014) ("We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.").

which positions within these arguments are more intuitive or compelling.

2. Receipt or Availment?

Even if one accepts the Court's defendant-focused approach to the minimum contacts test, that only gives rise to another question: what level of entanglement by a defendant with a protective sovereign is sufficient to warrant jurisdiction? In *International Shoe*, it will be recalled, the Court asserted that mere enjoyment of the benefits afforded by a protective sovereign could justify an exercise of jurisdiction. A defendant did not need to seek out a state's benefits, or intend to receive those benefits, in order to be subject to jurisdiction.[201] Relatedly, the Court made clear in *International Shoe* that its jurisdictional test was not grounded a theory of implied consent.[202] Its test required no purposeful action directed toward the forum, in other words, partly because its test was not based on the notion that, through purposeful action, one expresses a constructive consent that is necessary to an exercise of jurisdiction.

The Court challenged this element of the minimum contacts test, however, in *Hanson v. Denckla*.[203] Rather than inquiring into whether the defendant "enjoys the benefits and protection of the laws of that state[,]" as it had in *International Shoe*, the Court in *Denckla* asked whether the defendant had taken purposeful action in pursuit of those benefits.[204] As the Court put it: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[205] In this way, the "purposeful availment" standard from *Denckla* proposed that, notwithstanding the Court's approach in *International Shoe*, only a party that provided implied consent to receive the benefits and protection of a protective sovereign should be subject to jurisdiction.

The debate provoked by this element of *Denckla* continues to divide the Court. It was on full display, for example, in *J. McIntyre*

201. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

202. *See id.* at 318 ("True, some of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents. But more realistically it may be said that those authorized acts were of such a nature as to justify the fiction." (citations omitted)).

203. 357 U.S. 235 (1958).

204. *Id.* at 253.

205. *Id.*

Machinery, Ltd. v. Nicastro.[206] Adopting the purposeful availment approach, Justice Kennedy cited *Denckla* while endorsing the propositions that: (1) jurisdiction is proper only when the defendant purposefully seeks the state's benefits;[207] and (2) the legitimacy of jurisdiction is grounded in a theory of implied consent.[208] This led Justice Ginsburg, in her dissenting opinion, to retort:

> [I]n *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably "presence" and "implied consent," should be discarded, for they conceal the actual bases on which jurisdiction rests . . . .
>
> [T]he plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.[209]

Once it is understood that the minimum contacts test anchored jurisdictional analysis in a protective sovereignty thesis, the root of this debate over "implied consent" becomes more apparent. One famous iteration of the protective sovereignty thesis—that offered by the social contract theorists—was paired, by several of its exponents, with a theory of implied consent.[210] By advocating for an implied consent standard, therefore, Justice Kennedy and others seem to be accepting the use of a protective sovereignty thesis—and, at the same time, to be advocating for a particular iteration of this thesis. Namely, they seem to endorse the replacement of a New Deal iteration with an earlier Enlightenment-era version.

This context, it should be noted, brings much more clarity to *Nicastro* than the Justices themselves manage to bring. Justice Kennedy and Justice Ginsburg did not understand themselves to be disagreeing over the correct iteration of, or proper implementation of, an agreed-upon protective sovereignty thesis. Instead, both viewed their dispute as a debate over whether to anchor jurisdiction in "fairness"

206. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011).

207. *Id.* at 877 ("As a general rule, the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (quoting *Denckla*, 357 U.S. at 253)).

208. *Id.* at 881 ("Each of these examples [of where jurisdiction is proper] reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State.").

209. *Id.* at 900–01 (Ginsburg, J., dissenting) (footnote omitted) (citations omitted).

210. *See* HOBBES, *supra* note 105, at 113 (treating submission to a conqueror as implied consent); LOCKE, *supra* note 105, at 119 (stating that the "very being of any one within the territories" of a sovereign constitutes implied consent to the sovereign's rule).

or "sovereignty."[211] It was an odd characterization of their dispute—and one that likely has its roots in the 1980 case of *World-Wide Volkswagen Corp. v. Woodson*.[212] In *Volkswagen*, the Court did not make any significant changes to the prevailing iteration of the minimum contacts test—yet the Court justified this test, in language that would become consequential, by referencing two "functions" that the test ostensibly performed.[213] As the Court put it:

> The concept of minimum contacts . . . 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 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.[214]

Importantly, when the Court referred to "sovereigns" in *Volkswagen*, it apparently was attempting a return (in rhetoric, at least) to a Westphalian sovereignty thesis. Here, the Court turned not to the vision of sovereignty sanctioned in *International Shoe*, but rather to "the original scheme of the Constitution and the Fourteenth Amendment" as the Court understood them.[215] In these sources, the Court found a system of interstate federalism that emphasized the exclusivity of state power—a defining trait of Westphalian sovereignty, not of protective sovereignty.[216]

In *Volkswagen*, therefore, the Court provided a gloss of the minimum contacts test—one that has done great harm to the Court's ongoing debate over this test. It has convinced the Justices that, at the core of their disagreement, a debate must exist about which side of the *Volkswagen* logic they support. Consequently, Justice Ginsburg claimed to defend a fairness-based test, while Justice Kennedy claimed to defend a test rooted in sovereignty.[217] In so doing, these Justices

211. *See Nicastro*, 564 U.S. at 882 ("The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign."); *id*. at 903 (Ginsburg, J., dissenting) ("The modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness.").

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

213. *Id*. at 291–92. In *Volkswagen*, the Court reiterated the purposeful availment test it had previously articulated in *Denckla*, and it developed a stream-of-commerce theory that instructed courts on the application of this purposeful availment test in the context of consumer products cases. *Id.* at 297–98.

214. *Id*. at 291–92.

215. *Id*. at 293.

216. *See id.* ("The sovereignty of each State, in turn, implied 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.").

217. *Compare* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion), *with id.* at 903 (Ginsburg, J., dissenting).

obscured the genuine root of their disagreement—a disagreement that is significantly narrower than their *Volkswagen*-inspired rhetoric suggests. This dispute asks: Which specific iteration of the protective sovereignty thesis is most compelling? And, relatedly: What form of entanglement with the benefits of a protective sovereign warrants a corresponding assertion of jurisdiction? These are manageable, debatable questions—but only when courts and scholars know to ask them.

3. Sovereignty Alone or Multi-Factor Reasonableness?

In addition to inaugurating a misguided sovereignty-versus-fairness debate, the Court's opinion in *Volkswagen* also brought a more substantial innovation into personal jurisdiction analysis. Here, the Court introduced the notion that, in the pursuit of "reasonableness[,]" courts might conduct an all-things-considered test that, in deciding whether to exercise jurisdiction, would balance the interests of all the parties and entities involved in the litigation.[218] Describing this balancing-of-interests approach, the Court said:

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, 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.[219]

Under this analysis, the sovereign state is merely one of several entities with interests that ought to be considered. While this balancing-of-interests approach recognizes the state as a protective sovereign, in other words, it rejects the idea that this sovereign is specifically or uniquely relevant to the development of a constitutional test for personal jurisdiction.

In two subsequent opinions, the Court would incorporate this "reasonableness" test into its jurisdictional test. First, in *Burger King Corp. v. Rudzewicz*, the Court suggested that passage of this "reasonableness" test could justify an assertion of jurisdiction even in the absence of a showing of purposeful availment.[220] Then, in *Asahi Metal Industry Co. v. Superior Court*, the Court suggested that a failure of this "reasonableness" test could thwart an exercise of jurisdiction, even if

218. *Volkswagen*, 444 U.S. at 292.

219. *Id.* (citations omitted).

220. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 467–68 (1985).

there was a showing of purposeful availment.[221] In each case, the Court still required a purposeful availment analysis—but it suggested that this availment check, which was grounded in an individual's entanglement with a protective sovereign, would be considered alongside other pragmatic factors that bore no connection to the state's role as a protective sovereign.[222]

In a sense that has gone unappreciated, therefore, this line of cases presents a challenge to the legacy of *International Shoe*—a challenge that is more profound than that seen in other post-*Shoe* cases. Prior cases had begun with an acceptance of the fundamental innovation at the heart of *International Shoe*: namely, that a jurisdictional test should be anchored in a protective sovereignty thesis. By contrast, the cases culminating in *Asahi*—while retaining the idea that a state's status as a protective sovereign remains relevant to jurisdictional analysis—nonetheless proposed a test that is not solely derived from that status.

B. CONSTITUTIONALITY

The Court's Fourteenth Amendment personal jurisdiction doctrine has consistently been subjected to accusations of constitutional illegitimacy. For most commentators, this legitimacy problem has its origins in *Pennoyer v. Neff*.[223] In the words of one scholar, the Court was guilty in *Pennoyer* of "engrafting, without justification, the sovereignty-based international law approach to territorial jurisdiction into the due process clause of the fourteenth amendment."[224] This unjustified act of linking state court personal jurisdiction to the Fourteenth Amendment has caused problems for the legitimacy of any Fourteenth Amendment test for state court jurisdiction that the Court has articulated in the wake of *Pennoyer*. How can any particular Fourteenth Amendment test be constitutionally legitimate, after all, if the very association of personal jurisdiction with the Fourteenth Amendment was an unjustified judicial innovation?

221. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 104 (1987).

222. *See id.* at 113; *Burger King*, 471 U.S. at 461–62.

223. *See* Drobak, supra note 38, at 1019–24; Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1120–26 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part 2)*, 14 CREIGHTON L. REV. 735, 804–08 (1981).

224. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 298 (1990).

Once *International Shoe* is understood as grounding personal jurisdiction in a protective sovereignty thesis, however, the Court's post-*Shoe* jurisprudence gains new claims to legitimacy. Consider, for example, an analysis under Bruce Ackerman's theory of constitutional legitimacy. According to Ackerman, one can observe a distinctive political practice that has occurred occasionally throughout American history—a practice that Ackerman labels "higher lawmaking."[225] When conducting "higher lawmaking," the citizenry engages in a protracted dialogue with its representatives—a dialogue about fundamental constitutional values.[226] This extended dialogue emerges from America's constitutional design; in particular, the separation of powers enshrined in the Constitution (and the staggered elections that result) creates the need for reformers to repeatedly prevail at the ballot box in order to implement their constitutional vision in all of the separate branches of the federal government.[227] When reform ideas persevere through this period of protracted dialogue and enter into all three branches, Ackerman asserts, they have achieved a unique level of deep, sustained public approval—one that the Founders sought to protect via the distinctive category of "constitutional law."[228] As such, Ackerman concludes, the achievements of such reformers can—and should—be viewed as legitimate parts of the constitutional canon.[229]

One such moment of higher lawmaking, Ackerman asserts, occurred in the New Deal.[230] Under Ackerman's theory, therefore, constitutional reforms that were integral to the New Deal project should be viewed as constitutionally legitimate. This raises the question: what reforms were integral to the New Deal? As Part II explained, one vital element of the New Deal constitutional project was a forceful reassertion of a protective sovereignty thesis—and a concomitant commitment to removing constitutional constraints that impeded states

225. ACKERMAN, *supra* note 156, at 3–7.

226. *See id.* at 187 ("For me, 'the People' is . . . the name of an extended process of interaction between political elites and ordinary citizens . . . . If the higher lawmaking system operates successfully, it will channel this active citizenship engagement into a structured dialogue between political elites and ordinary Americans—first giving competing elites the chance to elaborate alternative constitutional meanings; then inviting citizens to share in the debate . . . . and decisions of political elites during the next period, which are then subjected to citizen debate and decision at the next election; and so forth.").

227. *Id.* at 187–88.

228. *Id.*

229. *Id.*

230. *Id.* at 279–311. Ackerman identifies four moments in American history that meet the standards of higher lawmaking: (1) the Founding, (2) Reconstruction, (3) the New Deal, and the (4) Civil Rights movement. *See generally id*.

from acting as protective sovereigns, particularly vis-à-vis newly ascendant corporate economic forces.[231] When *International Shoe* is interpreted as re-orienting personal jurisdiction doctrine around a protective sovereignty thesis, therefore—and as removing constitutional barriers that prevented states from acting as protective sovereigns with respect to the newly-prevalent phenomenon of interstate corporate business—the case suddenly appears to be a coherent part of this New Deal constitutional project. Consequently, it also appears legitimate under Ackerman's theory of constitutional legitimacy.

Not all jurisdictional tests promulgated under the Fourteenth Amendment, it should be noted, benefit from this claim to legitimacy. Rather, only those jurisdictional tests that capture and retain the key innovation of *International Shoe*—viz., its derivation of a jurisdictional test from a protective sovereignty thesis—receive this benefit.[232] To those who find Ackerman's theory compelling, this provides further shape and structure to the Court's personal jurisdiction doctrine. Namely, it suggests that the Court's original iteration of the minimum contacts test is constitutionally defensible, but that earlier constitutional tests (e.g., the *Pennoyer* territorial test) and some later tests (e.g., the *Asahi* all-things-considered test) are not.[233]

C. FORUM SELECTION CLAUSES

Today, courts regularly uphold forum selection clauses in contracts, so long as the selected forum is reasonable.[234] Courts will apply this rule even when the chosen forum could not, independent of the forum-selection clause, constitutionally exercise personal jurisdiction over the parties.[235] This approach makes sense, perhaps, when the

231. *See supra* Part II.B.2.

232. *See* discussion *supra* Part II.A.2.

233. *See* discussion *supra* Part II.A.1.

234. Federal courts generally take this approach. *See, e.g.*, Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18–19 (1972). Several states also follow the federal standard. *See, e.g.*, Smith, Valentino & Smith, Inc. v. Superior Ct., 551 P.2d 1206, 1209 (Cal. 1976). Several also follow the Second Restatement approach, which provides that a forum-selection clause will be enforced unless it is unreasonable. RESTATEMENT (SECOND) OF CONFLICT OF L. § 80 cmt. c (AM. L. INST. 1988); *see, e.g.*, St. Paul Fire and Marine v. Courtney Enters., 270 F.3d 621 (8th Cir. 2001). Some state statutes direct courts to enforce forum selection clauses, in certain instances, even if the parties have no connection whatsoever to the forum state. *See, e.g.*, N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2020) (requiring New York courts to accept personal jurisdiction if a contract is worth at least $1 million and the parties select New York law to govern the contract).

235. *See, e.g.*, Hemlock Semiconductor Pte. Ltd. v. Jinglong Indus., 51 N.Y.S.3d 818, 825–26 (Sup. Ct. 2017) (holding that, despite lacking New York contacts, application of forum selection clause did not violate due process, as applied to long-term supply

minimum contacts test is understood as preventing inconvenient litigation. After all, the contracting parties ought to have a better sense than the courts of what does—and does not—constitute an inconvenient forum for them.

By contrast, when the minimum contacts test is understood as a check to ensure that parties have become adequately entangled with a protective sovereign, it is less obvious that parties should have the capacity to override those determinations. After all, a party's desire to avoid a particular forum does not alter the fact that the party may have received benefits from the state—benefits that the state may believe warrant the imposition of reciprocal obligations. Similarly, even if parties share a desire to select a forum, it is possible that neither party belongs to the sovereign community that the forum seeks to protect—raising questions about the capacity in which the state acts when deciding to resolve their legal dispute. If the point of personal jurisdiction is to empower states to act as protective sovereigns, in other words—and to prohibit them from acting outside this sovereign capacity—then there is little justification for outsourcing a jurisdictional determination to private parties, and the conventional approach to forum selection clauses would seem misguided.

D. FIFTH AMENDMENT PERSONAL JURISDICTION

Courts typically have held that, in the Fifth Amendment context, federal courts are subject to the same minimum contacts test for jurisdictional limitations that the Fourteenth Amendment imposes upon states.[236] That said, the Supreme Court recently raised some question about this in *Bristol-Myers Squibb Co. v. Superior Court*.[237]

agreement between Singapore manufacturer and Chinese buyer); Ameritas Inv. Corp. v. McKinney, 694 N.W.2d 191, 199 (Neb. 2005) (holding that "a valid and enforceable choice of forum clause in a contract is sufficient in itself to waive the requirement of minimum contacts and to submit a nonresident to the jurisdiction of the forum state"); *St. Paul Fire & Marine*, 270 F.3d at 623–24; Menorah Ins. Co. v. INX Reinsurance Corp., 72 F.3d 218, 222 (1st Cir. 1995); Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1406 (9th Cir. 1994); Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1290–91 (7th Cir. 1989); Eli Lilly & Co. v. Home Ins. Co., 794 F.2d 710, 717–20 (D.C. Cir. 1986); Jacobsen Constr. Co. v. Teton Builders, 106 P.3d 719, 723–26 (Utah 2005).

236. *See, e.g.*, Livnat v. Palestinian Auth., 851 F.3d 45, 54 (D.C. Cir. 2017) ("No court has ever held that the Fifth Amendment permits personal jurisdiction without the same 'minimum contacts' with the United States as the Fourteenth Amendment requires with respect to States. To the contrary, both the Supreme Court and this court have applied Fourteenth Amendment personal-jurisdiction standards in Fifth Amendment cases.").

237. Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1780, 1783–84 (2017) ("[S]ince our decision concerns the due process limits on the exercise of specific

Moreover, in *Bristol-Myers*, the Court also suggested that the current minimum contacts test is anchored in a theory of federalism—a theory that plainly would not extend to the federal government under the Fifth Amendment.[238] This has introduced some uncertainty about the assumption that the minimum contacts test applies to the federal government under the Fifth Amendment, as well as to states under the Fourteenth Amendment.[239]

The idea offered in this Article—viz., that the minimum contacts test reorients jurisdictional analysis around a theory of protective sovereignty—offers several lessons for this Fifth Amendment issue. First, to the extent that the Fifth Amendment standard does indeed mirror the minimum contacts test, this Article's new understanding of this minimum contacts test provides a concomitant reconceptualization of the Fifth Amendment standard. This would import into Fifth Amendment jurisprudence many of the benefits already mentioned in the context of the Fourteenth Amendment. For example, the Fifth Amendment test presumably also would benefit from the aforementioned arguments for increased constitutional legitimacy—since, after all, the New Deal constitutional project was more centrally focused on expanding and reconceptualizing federal power.

Meanwhile, this Article's new understanding of the minimum contacts test also rebuts the suggestion, mentioned in *Volkswagen* and reiterated in *Bristol-Myers*, that the minimum contacts test was a limited effort to rethink the role of states in a federal system (rather than an effort to examine the broader roots of sovereign power).[240] This rebuttal is of consequence, as the *Bristol-Myers* approach suggests that the logic of the minimum contacts test in inapplicable to federal courts. By contrast, seeing the minimum contacts test as a rethinking of sovereignty principles generally, as opposed to a rethinking of state-specific principles, vindicates and supports the extension of this test to federal courts. As such, it reveals that the continued alignment of Fifth and Fourteenth Amendment jurisdictional tests is a far more logical path than the Court suggests in *Bristol-Myers*.

jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.").

238. *Id.* at 1781 (explaining the test as an instance where "the Due Process Clause [is] acting as an instrument of interstate federalism" (quoting World-Wide Volkswagen v. Woodsen, 444 U.S. 286, 294 (1980)); *see also Bristol-Myers*, 137 S. Ct. at 1788 (Sotomayor, J., dissenting) ("The majority's animating concern, in the end, appears to be federalism.").

239. *See Bristol-Myers*, 137 S. Ct. at 1784.

240. *See id.* at 1785 (quoting *Volkswagen*, 444 U.S. at 294).

E. THE DORMANT COMMERCE CLAUSE

The foregoing analysis of the minimum contacts test also has ramifications for our understanding of the Commerce Clause. This is because, in order to survive a Dormant Commerce Clause challenge, the Court has directed that a state law must, *inter alia*, respect an extraterritoriality principle.[241] According to this principle, a state may not enact legislation that has the effect of regulating commerce occurring wholly outside its borders.[242] This extraterritoriality principle has been compared to the limits on state court personal jurisdiction, since both prevent states from exerting power over commercial actors that did not, in their relevant business transactions, have meaningful contact with the state.[243] As Justice White remarked: "The limits on a State's power to enact substantive legislation [under the Dormant Commerce Clause] are similar to the limits on the jurisdiction of state courts."[244]

The Court has been careful to note that, while similar, the Dormant Commerce Clause limits are not identical to the personal jurisdiction limits.[245] Indeed, as the Court moved away from the rigid territorial rule for jurisdiction in the post-*Shoe* era, the Dormant Commerce Clause test has retained a lingering focus on territoriality.[246] That said, the Court has shown some recent interest in bringing these tests back into alignment. In *South Dakota v. Wayfair*, the Court brought the "substantial nexus" rule, which serves an analogous anti-extraterritoriality function in the application of the Dormant Commerce Clause to tax-related statutes, into close alignment with the contemporary personal jurisdiction test, for example.[247] Moreover, the Court justified its new test in *Wayfair* with logic plainly borrowed from its post-*Shoe* jurisdiction cases, with the Court asserting: "[T]here is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection."[248]

In the coming years, the Court presumably will make further decisions about the extent to which this Dormant Commerce Clause test

241. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 336 (1989).

242. *See, e.g.*, *id.* (holding that a state cannot prevent distributors from raising out-of-state prices after submitting their monthly prices to the regulating state).

243. *See* Edgar v. MITE Corp., 457 U.S. 624, 643 (1982).

244. *Id.*

245. *See Healy*, 491 U.S. at 336 n.13.

246. *See, e.g.*, *id*. at 326 & n.1.

247. *See* South Dakota v. Wayfair Inc., 138 S. Ct. 2080 (2018).

248. *Id.* at 2096.

should be brought into alignment with the minimum contacts test, as opposed to continuing its commitment to a *Pennoyer*-style territoriality principle. As it does, the Court should have full awareness of the logic, and the benefits, of the modern minimum contacts test. To this end, the Court would do well to recognize that the minimum contacts test anchors personal jurisdiction in a protective sovereignty thesis—and to consider whether this vision of states, as opposed to the more rigid territorial vision, would better serve the end of fostering economic unity and cooperation through the Dormant Commerce Clause.

F. DEMYSTIFYING CONFLICTS

As Section A mentioned, personal jurisdiction has a reputation as being confused. Generally, this area of law—along with the broader field of Conflicts of Law—also has a reputation of being confusing. Students and lawyers regularly view it as an intimidating topic, assuming that it is prohibitively daunting to the uninitiated. This reputation is lamentable; it steers thoughtful students and practitioners away from engaging in an important field of theory and practice. Fortunately, this reputation also is largely avoidable. Conflicts of Law is not an inherently difficult legal topic. Rather, it is rendered difficult when students and practitioners are expected to produce, on command, ideas that are presented as commonsense—but that actually are learned, not intuitive.

This is precisely what happens across several domains in Conflicts of Law. Ideas about sovereign states, and about their powers, are presented as intuitive, obviously-shared ideas.[249] In reality, however, they are contested and contestable assumptions[250]—ones that become manageable once they are acknowledged. To this end, acknowledgment of the role played by the protective sovereignty thesis can help demystify this area of law, as it brings to the fore questions that, for too long, have remained implicit. What, for example, are the relevant "benefits and protection" that a state affords?[251] What are the "interests" that states legitimately pursue through their laws? Who belongs to the sovereign community that the "benefits and protection" are designed to protect?[252]

249. *See* discussion *supra* Part II.

250. *See* discussion *supra* Part II.

251. For example, does this include the benefit of seeking redress in courts, as Justice Black repeatedly suggested? *See, e.g.*, Int'l Shoe Corp. v. Washington, 326 U.S. 310, 324 (1945) (Black, J., concurring). Or is it referring solely to outside-the-courtroom benefits, such as protection against harms from negligent actors?

252. For example, is it the state's citizens, as Justice Black assumed in his *Shoe*

These questions rise to the surface once the protective sovereignty thesis is acknowledged. Absent that acknowledgment, they too often remain buried in the Court's opinions, presented as natural assumptions about the behavior of states. In fact, they are anything but that—they are debatable ideas that cut to the root of our self-understanding as a political community, and they warrant demystification and explicit discussion.

G. THE ROLE OF TERRITORY

Under the regime of *Pennoyer v. Neff*, the role that territorial boundaries played in personal jurisdiction analysis was clear. Here, state boundaries were seen as demarcating the inherent limits of a state's sovereign power.[253] Consequently, these territorial boundaries were viewed as crucial to an assessment of a state's claim to jurisdiction, since jurisdiction was seen as simply one manifestation of state sovereign power.

By contrast, the role of territorial boundaries after *International Shoe* is less obvious.[254] On the one hand, the Court in *International*

concurrence, *see id.*, or is it state residents, as Black posited in *McGee*, *see* McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)?

253. Pennoyer v. Neff, 95 U.S. 714, 722 (1878) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

254. For illustration, consider the following from Lea Brilmayer:

> A sovereign (or quasi-sovereign, in the case of a state) has a recognized interest in regulating conduct within its borders. It reflects the state's obligation to protect its citizens and their interests within the state. These factors come together to support the most recognizable form of personal jurisdiction exercised by states: jurisdiction over conduct of those within its territorial boundaries. They also form the core of the justification for a state's exercise of power over those who act outside of its boundaries, but whose conduct affects people present or residing there.

Lea Brilmayer, *A General Look at Specific Jurisdiction: Towards a Unified Theory of "Arising Out of" or "Related to" Jurisdiction Where the Defendant's Forum Conduct Contributed to the Plaintiff's Claims*, 42 YALE J. INT'L L. ONLINE 1, 14 (2017). Here, Brilmayer insightfully notes the state's protective role and its relevance to jurisdiction. However, she assumes that this role extends only to "citizens and their interests within the state." *Id*. Why? Why does the state's protective mission necessarily end at its borders? Then, she posits that this protection role justifies jurisdiction over all "conduct within its borders," including activity injurious solely to noncitizens. *Id*. Why would the sovereign's mission, as defined by Brilmayer, license jurisdiction completely within state borders? The answer appears to be Westphalian: Brilmayer adds that foreigners "are subject to jurisdiction in such cases only where territorial sovereignty interests are at stake." *Id*. The introduction of territoriality at each stage of the analysis thus seems to produce a tangle of protective and Westphalian ideas of sovereignty—one that generates confusion and that artificially inhibits the possibilities inherent in the pivot to a protective sovereignty thesis.

Shoe plainly turned away from the territorial definition of the sovereign state that, previously, it had embraced in *Pennoyer*. On the other hand, the Court suggested in *Shoe* that a defendant's physical presence within state borders remained a fact of consequence to jurisdictional analysis.[255] As a result, there has been a fair amount of confusion about the extent to which territorial boundaries remain relevant under the minimum contacts test—and about whether, to the extent these boundaries do remain relevant, it shows that the Westphalian sovereignty thesis survives into modern-day jurisdictional doctrine.[256]

When *International Shoe* is understood as re-orienting personal jurisdiction around a protective sovereignty thesis, however, this confusion can be dispelled. According to this understanding, territorial boundaries do remain relevant to the jurisdictional inquiry—but their relevance derives from a new source. No longer are these boundaries important simply because they are viewed as providing the inherent limits of sovereign power. Rather, they are relevant because there is an American constitutional tradition—realized under the Fourteenth Amendment—of using sovereign boundaries to demarcate and define the sovereign community that, under a protective sovereignty thesis, the sovereign must work to protect.

It would be extremely beneficial for the Court to clarify this role that territorial boundaries now perform in jurisdictional analysis. Legally, of course, it would have the benefit of removing lingering confusion in personal jurisdiction doctrine. At the same time, this

255. *See Int'l Shoe*, 326 U.S. at 319 (suggesting that a factor of continued relevance was "the extent that a corporation exercises the privilege of conducting activities within a state").

256. *Compare* Parrish, *supra* note 69 ("If territorial sovereignty was the governing paradigm for cases before *International Shoe*, due process and its focus on the individual litigant was the one for the cases that followed."), *and* Rex R. Perschbacher, *Foreword*, 28 U.C. DAVIS L. REV. 513, 513 (1995) ("At the time, and for at least the next thirty years, the 'minimum contacts' doctrine announced in *International Shoe* seemed the right vehicle to replace the rigid and outdated territorial power theory of *International Shoe*'s discredited antecedent, *Pennoyer v. Neff*."), *with* Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 121 (2015) ("*International Shoe*, however, presents two faces—one forward-looking face, based on language that speaks in terms of reasonableness or fairness of the forum based on the litigation at issue, and a second, backward-looking face that privileges *Pennoyer*'s premise that state territorial authority must be respected."), *and* Martin H. Redish & Eric J. Beste, *Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries*, 28 U.C. DAVIS L. REV. 917 (1995) (arguing that *International Shoe* supports territorial jurisdiction), *and* Stein, *supra* note 62, at 698–99 (arguing that *International Shoe* contained an effort to extend *Pennoyer*'s focus upon Westphalian sovereignty).

clarification also would serve valuable expressive benefits in the current political moment. In America, territory-based definitions of the sovereign community have been embraced for a specific reason: namely, because they operate as an antidote to race- or ethnicity-based theories of community. As the architects of the Civil War Amendments sought to leave behind a history of racially-defined sovereign communities (at both the federal and state levels), they turned to territory as providing an alternative, race-neutral means of demarcating the community that sovereigns must work to protect—and to protect equally.[257] Through the Fourteenth Amendment, therefore, territorial boundaries were weaponized as engines of racial and ethnic equality in America.[258]

In American political culture over the past few years, there has been an insidious resurgence of rhetoric positing that territorial boundaries should serve precisely the opposite function. Under these accounts, boundaries are useful instead because they might demarcate and preserve an ethnically homogeneous community. From President Trump's calls to build a wall along the American border with Mexico,[259] to chants of "blood and soil" in Charlottesville,[260] there has been a disturbing return in American public discourse to the idea that territorial boundaries and attachments can, should, or do protect ethnic homogeneity. In light of the troubling recent surge in public rhetoric that has promoted and relied upon this conception, there would be significant expressive value in a Court opinion that firmly articulated the contrary vision: a vision of America where sovereign boundaries are employed precisely because, under a protective sovereignty thesis, they provide an equality-oriented method of defining the community that the state must work to protect. In the aforementioned

257. For just a few examples of this pre-Civil War history, see, for example, ARTICLES OF CONFEDERATION of 1781, art. IV which states that only "the free inhabitants of each of these States" are entitled to the privileges and immunities of the other states (and with additional exceptions); and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (construing the term "citizen" as excluding emancipated slaves), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. *See also* DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868, at 77–102 (1979) (on the "Black Codes" of the immediate post-Civil War period).

258. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 380–95 (2005).

259. *See* Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html [https://perma.cc/5SEB-45PB].

260. *See* Meg Wagner, *"Blood and Soil": Protesters Chant Nazi Slogan in Charlottesville*, CNN (Aug. 12, 2017, 7:10 PM), https://www.cnn.com/2017/08/12/us/charlottesville-unite-the-right-rally/index.html [https://perma.cc/7FAH-GGMJ].

words of Franklin Roosevelt, it would afford the Court an opportunity to reassert that: "[O]ur national policy in internal affairs has been based upon a decent respect for the rights and the dignity of all our fellow men within our gates."[261]

In a future article, I plan to explore this point in greater detail. For now, however, it may suffice to note that a return to *Shoe's* theory of sovereignty would provide the Court with an opportunity to reassert this fundamental American vision of the sovereign community—and to do so at a time when that vision could use bolstering in our public discourse.

CONCLUSION

Conflicts of Law is a field that, as much as any field in the law, has been shaped by a widespread understanding of a single, central event. According to that understanding, the Conflicts revolution pivoted the field away from jurisdictional and choice-of-law tests anchored in any theory of sovereignty, and instead embraced more pragmatic tests focused on flexibility, fairness, and convenience. It is time to recognize, however, that this interpretation is fundamentally incorrect. The Conflicts revolution plainly was a continuation of the Court's tradition of relying upon sovereignty-based tests, not a repudiation of that tradition. The unappreciated triumph of the Conflicts revolution, in reality, was to anchor American Conflicts of Law in an alternate theory of sovereignty. This Article has set out to explain this alternate theory—referred to as the protective sovereignty thesis—and to chronicle its appearance in (and implications for) personal jurisdiction doctrine. In so doing, it hopefully has begun to illustrate the many benefits that can accrue from a corrected understanding of the Conflicts revolution—an understanding that recognizes its key innovation of re-orienting the field around a protective sovereignty thesis.

261. Four Freedoms, *supra* note 151.