THE LOST STORY OF NOTICE AND PERSONAL JURISDICTION

*ROBIN J. EFFRON**

Notice and personal jurisdiction have long been closely-tied procedural law concepts because of their common origins in the mechanics of service of process and their shared due process ancestor in Pennoyer v. Neff. *Notice was once a reliable feature of personal jurisdiction jurisprudence, but slowly faded from prominence in personal jurisdiction analysis after the* International Shoe *and* Mullane *decisions, and then fell away almost completely in the post-*Asahi *era.*

*Once the Supreme Court tied personal jurisdiction to due process, notice was critical in shaping the direction of jurisdictional doctrine. Its role extended beyond that of a mere instrument of doctrinal development. The use of notice was integral to the mode of legal reasoning that the Court employed in its personal jurisdiction journey. Notice, with its tangibility and dependence on mechanical service of process, allowed the Court to navigate the strict formalism of the pre-*International Shoe *era and the Court's many returns to formalism in the era of minimum contacts. Moreover, when the Court wanted to engage in a more functional mode of analysis, notice allowed the Court to continually tie personal jurisdiction to due process because of the intuitive fairness appeal of the ideas of notice and opportunity to be heard. When the Court made several efforts to limit the scope of personal jurisdiction between* International Shoe *and the early 1990s, the Court seized upon a different but related concept of notice—notice of jurisdiction—as a due process justification for restricting personal jurisdiction.*

This Article advocates for a "notice-inclusive approach" to personal jurisdiction. It focuses on reestablishing comfort with the inclusion of easily-satisfied due process considerations while also stressing that constitutional notice doctrine itself might be strengthened in small but strategic ways, thus adding some additional due process protections both to notice and to personal jurisdiction.

---

* Professor of Law, Brooklyn Law School. Thanks to Alexandra Lahav, Jonathan Remy Nash, Zach Clopton, Pam Bookman, Brooke Coleman, Linda Silberman, the Hon. Andrew Effron, David Noll, Allan Stein, Rick Swedloff, John Leubsdorf and participants at the Third Annual Constitutional Law Scholars' Conference, the Fourth Annual Civil Procedure Workshop, and the Rutgers-Newark Faculty Workshop. Nathalie Gorman, David Moosmann, and Sander Saba provided exceptional editorial and research support throughout this process. Thanks also to Dean Maryellen Fullerton for support from the Dean's Summer Research Fund.

INTRODUCTION

This Article examines the curious doctrinal journey of two procedural lynchpins of due process: personal jurisdiction and notice. For the past several decades, they have been treated as more or less separate doctrines. But that was not always the case, and there are still shadowy remnants of each doctrine that remain in the case law and analysis of the other. This Article attempts to answer a few important but surprisingly overlooked questions, namely: when and why did notice break off from personal jurisdiction? And why, despite decades of nearly constant hand-wringing about confusion and chaos in personal jurisdiction, did so few commentators or jurists seem to take note of this development?

The link between personal jurisdiction and notice is mechanical and conceptual. Both doctrines have common roots in the mechanics of service of process. The reason for this is fairly evident in the case of notice; service of process is the means by which a party is apprised of the pendency of an action. Constitutionally sufficient notice depends on the proper execution of service of process that is "reasonably calculated under the circumstances"[1] to apprise a party of an action. The connection between the mechanics of service of process and personal jurisdiction is less obvious. In the American system, service of process is the means by which personal jurisdiction is acquired or "perfected."[2] In other legal regimes, personal jurisdiction is not directly connected to the question of how—and whether and when—a party should be served with process[3] and thus notified of the pendency of an action. But

1. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

2. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444-45 (1946)) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the party being served.").

3. *See, e.g.*, Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 Am. J. Comp. L. 121, 135 (1992) (criticizing the United States' use of service of process as a basis for personal jurisdiction and noting that the Brussels Convention outlaws "such exorbitant devices").

in the United States, the procedures for service of process undergird both notice and personal jurisdiction.

A "problem" with service of process could actually be any one of three distinct problems: a problem with the mechanics of service, a problem with notice, or a problem with personal jurisdiction. Both federal and state courts have distinct motions and procedures for redressing problems with each.[4] In practice, courts do not usually dwell on missteps in the formal delineation of a motion regarding a problem related to service of process.[5] This means that arguments and concepts about all service of process problems—mechanics, notice, and personal jurisdiction—bleed into each other. Looking at the trajectory of personal jurisdiction doctrine and notice doctrine over the past 150 years, the concepts and arguments associated with each can get tangled together. Sometimes the doctrines seem to merge or look as if one will subsume the other. At other times, the doctrines and arguments drift apart.

Requirements for proper notice and lawful personal jurisdiction predate the passage of the Fourteenth Amendment. In 1877, the Supreme Court used the due process clause to elevate both doctrines to constitutional status.[6] Since then, the Court has struggled to make sense of notice and personal jurisdiction, both in providing an internally coherent account of each doctrine, and also in explaining the due process basis for each as a constitutional right.[7] Personal jurisdiction has unquestionably been the more difficult and problematic due process doctrine, and as such, it is around personal jurisdiction that this Article is framed.

Personal jurisdiction encompasses doctrines and concepts that are not natural or obvious fits with due process.[8] To the extent that

4. *See* Fed. R. Civ. P. 12; N.Y. C.P.L.R. § 3211 (Consol. 2012); CAL. CIV. PROC. CODE § 418.10 (Deering 2002); Del. Super. Ct. Civ. R. 4(j).

5. *See* 62B AM. JUR. 2D *Process* § 99 (2018). However, unless the effect of a motion practice mistake results in the waiver of the ability to raise a defense like personal jurisdiction, the choice of device rarely has much practical significance.

6. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

7. *See* RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 63–161 (2004) (history and status of due process doctrine for notice and opportunity to be heard); *id.* at 207–61 (history and status of due process doctrine for personal jurisdiction).

8. *See generally* Jay Conison, *What Does Due Process Have to Do with Jurisdiction?*, 46 RUTGERS L. REV. 1071 (1994). *See also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. HASTINGS L. REV. 19, 20 (1990) ("[T]he Court should . . . abandon the notion that state court personal jurisdiction is a matter of constitutional law."); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1252 (2017) (arguing against "the main holding of *Pennoyer*: that the Fourteenth Amendment's Due Process

personal jurisdiction has at least some of its pre-*Pennoyer* origins in the international and general law doctrines of territoriality, sovereignty, comity, and federalism, it has been difficult to square with an individual liberty-based understanding of due process—even accounting for the fairness rationales that emerged from the minimum contacts approach that the Court eventually established in *International Shoe*.[9] Notice doctrine, on the other hand, has always fit more comfortably with individual liberty and due process because of the emphasis on ensuring that a party is aware of a pending action so that she may participate and defend or vindicate her rights before a court issues a binding judgment.[10]

Notice and personal jurisdiction share common origins in the mechanics of service of process and the due process ancestor in *Pennoyer*. Both are due process rights that litigants can waive.[11] But it is not enough to casually observe the parallel development of the doctrines: notice and personal jurisdiction have a tangled history that is more than just a historical quirk. Notice was once a reliable

---

Clause . . . imposes rules for personal jurisdiction."); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 694 (1987) ("*Pennoyer*'s linkage of due process and jurisdictional theories outside the due process clause provoked reams of scholarly criticism, focusing primarily on the absence of any federalism component of the fourteenth amendment."). *But see* Kenneth J. Vandevelde, *Ideology, Due Process and Civil Procedure*, 67 ST. JOHN'S L. REV. 265, 274–77 (1993) (due process formulation of personal jurisdiction in *Pennoyer* was consistent with the Supreme Court's broader conservative due process ideology of the era).

9. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). *But see* Charles W. "Rocky" Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 567 (2007) ("This Article defends–against numerous critics–the view that constitutional limits on personal jurisdiction arise from basic substantive due process principles.").

10. *See* WASSERMAN, *supra* note 7, at 207 (describing notice as one of the "principal procedural protections afforded by due process" and personal jurisdiction as an "important corollary."). *See also* 4A CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE, § 1074 (4th ed. 2018).

11. Personal jurisdiction can be waived by consenting to the forum, either through a forum selection clause or by failing to raise a timely jurisdictional objection. *See* 4A CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE AND PROCEDURE § 1067.3 (4th ed. 2018) ("[P]ersonal jurisdiction can be based on the defendant's consent to have the case adjudicated in the forum, or the defendant's waiver of the personal jurisdiction defense."). Notice, in many circumstances, can also be waived, such as through a "cognovit" note in which a party agrees in advance to forego ordinary notice and service of process in a debt action. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 176 (1972).

feature of personal jurisdiction jurisprudence,[12] but slowly faded from prominence after the *International Shoe* and *Mullane* decisions, and then fell away almost completely in the post-*Asahi* era.

At a superficial level, the due process story of personal jurisdiction and notice is a tale of historical accident and doctrinal path dependence. Perhaps the decision to drop notice from personal jurisdiction was not a conscious choice, but rather, the side effect of an emphasis on other jurisdictional values and the result of benign neglect. A closer look, however, reveals a more nuanced story. Once the Supreme Court tied personal jurisdiction to due process, notice was critical in shaping the direction of jurisdictional doctrine. Its role extended beyond that of a mere instrument of doctrinal development. The use of notice was integral to the mode of legal reasoning that the Court employed in its personal jurisdiction journey. This was on account of two key attributes of notice. First, notice, with its tangibility and dependence on mechanical service of process, allowed the Court to navigate the strict formalism of the pre-*International Shoe* era and the Court's many returns to formalism in the era of minimum contacts. Second, when the Court wanted to engage in a more functional mode of analysis, notice allowed the Court to continually tie personal jurisdiction to due process because of the intuitive fairness appeal of the ideas of notice and opportunity to be heard. Thus, the Court could lean on notice to provide a veneer of fairness and process, even while supposedly privileging arguments about sovereignty and territoriality. Finally, when the Court made several efforts to limit the scope of personal jurisdiction between *International Shoe* and the cases of the early 1990s, the Court seized upon a different but related concept of notice, notice of jurisdiction, as a due process justification for restricting personal jurisdiction.

This Article proceeds in five parts. Part I recounts the relationship of personal jurisdiction and notice from its roots in the pre-*Pennoyer* and due process era through the Court's slow evolution of personal jurisdiction doctrine that laid the groundwork for the modern minimum contacts test. Part II reconsiders the conventional wisdom of *International Shoe* and *Mullane*, arguing that these cases each analyze personal jurisdiction and notice in a way that had lasting consequences for personal jurisdiction doctrine and analysis. Part III traces the continued use of notice in personal jurisdiction analysis in the first five decades after *International Shoe*, dem-

12. *See* WRIGHT ET. AL., *supra* note 10, at n.2 ("As the discussion of *Pennoyer v. Neff* . . . reveals, the Supreme Court has long regarded 'notice' and 'power' as inseparable aspects of the due process restrictions on state court jurisdiction.").

onstrating that notice was used as a tool to expand personal jurisdiction by providing reassurances of fairness, and as a tool to restrict jurisdiction by appealing to evolving notions of due process and the role of notice therein. This was an era in which reliance on notice to quietly bolster doctrinal changes allowed the Court to plaster over an increasing incoherence in personal jurisdiction doctrine and reasoning.

Part IV examines the Court's latest round of personal jurisdiction cases in which notice has all but disappeared from the Court's menu of doctrines and values that support jurisdictional decisions. This absence lays bare the consequences of the evolution in the decades-long relationship between personal jurisdiction and notice. Notice had long been a fundamental yet little recognized partner in constitutional personal jurisdiction analysis. It helped paper over some of the difficult doctrinal inconsistencies in personal jurisdiction analysis, particularly concerning the nature of personal jurisdiction as a due process right. It propped up doctrinal innovation, sometimes to expand jurisdiction and sometimes to restrict it. When notice disappeared, the already apparent incoherence and inconsistencies in personal jurisdiction doctrine only became more obvious.

Finally, in Part V, I argue that restoring notice to personal jurisdiction might be a small yet helpful part of a strategy to impose normative and doctrinal order on personal jurisdiction chaos. This "notice-inclusive approach" has four distinct components. The first component focuses on reestablishing comfort with the inclusion of easily-satisfied due process considerations in personal jurisdiction analysis and treating these considerations as meaningful or even dispositive under appropriate circumstances. The second component suggests, in turn, that constitutional notice doctrine itself might be strengthened in small but strategic ways, thus adding some additional due process protections both to notice and to personal jurisdiction. The third component is to reincorporate notice as a factor in specific jurisdiction analysis, thus broadening the doctrine and sharpening its boundaries by refocusing analysis on the relationship between personal jurisdiction and other procedural protections with a due process component. The fourth component is to return notice to personal jurisdiction which might pave the way for a less restrictive, yet still appropriately constrained, approach to general jurisdiction.

I.
NOTICE AND PERSONAL JURISDICTION FROM *PENNOYER* THROUGH *INTERNATIONAL SHOE* AND *MULLANE*

A. The Relationship of Personal Jurisdiction and Notice Prior to Pennoyer

The story of personal jurisdiction and notice begins long before *Pennoyer v. Neff*[13] constitutionalized both doctrines. In the pre-*Pennoyer* legal landscape, courts viewed personal jurisdiction primarily—although not exclusively—as a limit on the authority of a given tribunal, an authority that was first and foremost grounded in notions of territoriality. Notice, on the other hand, was viewed primarily as an issue of fairness and justice to a party, usually a defendant, whose rights were to be adjudicated before a given tribunal. Courts used an amalgam of "natural justice"[14] principles, the so-called "general law," and the international law principle of comity[15] to develop limits on the exercise of personal jurisdiction. Courts also employed the Full Faith and Credit Clause[16] as a constitutional basis for refusing to enforce judgments of other state courts that purportedly lacked personal jurisdiction.[17] As for notice, much of the doctrinal pronouncements came in *in rem* actions, but courts "rarely had occasion to discuss the form that notice had to take in *in personam* actions . . . because [their] personal jurisdiction jurisprudence . . . ensured, as a practical matter, that defendants in such actions received notice through personal service of process."[18]

There was always some shared space between personal jurisdiction and notice, in particular, the appeals to natural justice and fair-

13. 95 U.S. 714 (1877).

14. *See* Conison, *supra* note 8, at 1097–1103 (natural justice basis for notice as well as personal jurisdiction limitations both before and after *Pennoyer*).

15. *See* Conison, *supra* note 8, at 1104–11; Sachs, *supra* note 8, at 1270 ("Early American courts applied what they saw as rules of general and international law to determine whether foreign judgments deserved any respect."); WASSERMAN, *supra* note 7, at 208–09 (pre-*Pennoyer* limitations on personal jurisdiction were "derived from international law.").

16. U.S. CONST. art. IV, § 1 ("Full faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."). *See* 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) ("The pre-*Pennoyer* case law that incorporated those principles consequently arose entirely as a problem of the *interstate* recognition of judgments under the Full Faith and Credit Clause and statute.").

17. WASSERMAN, *supra* note 7, at 208–09.

18. *Id.* at 130.

ness. For example, in the leading pre-*Pennoyer* case of *Lafayette Ins. Co. v. French,* the Supreme Court recognized "that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; [and] those rules of public law which protect persons and property within one State from the exercise of jurisdiction over them by another."[19] Courts periodically cited *Vallee v. Dumergue*, an 1849 English Exchequer case upholding personal jurisdiction where it was supported by "natural justice."[20] State courts similarly included appeals to principles of fairness and natural justice, and some of these decisions found their way into Justice Field's *Pennoyer* decision.[21]

The strongest link between personal jurisdiction and notice was not conceptual, but mechanical. The procedures of service of process were, and are, simultaneously the method for notifying a party of the pendency of an action and the procedure by which personal jurisdiction is "perfected."[22] This link between notice and service of process was always apparent: courts and lawmakers needed some way of dictating and then measuring how service of process should be accomplished and whether such methods were sufficient.

The link between personal jurisdiction and service of process is more a quirk of historical path dependency than one of conceptual

---

19. Lafayette Ins. Co. v. French, 59 U.S. 404, 406 (1855). This case also played a prominent role in the introduction of the theory that jurisdiction could be acquired by "implied consent." *See* Patrick J. Borchers, *One Step Forward and Two Back: Missed Opportunities in Refining the United States Minimum Contacts Test and the European Union Brussels I Regulation*, 31 Ariz. J. Int'l & Comp. L. 1, 7 (2014) (in *Lafayette*, "the Supreme Court invented the fiction that a corporation doing business in the forum had implicitly consented to jurisdiction there."); Charles W. "Rocky" Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study in the "Generally" Too Broad but "Specifically" Too Narrow Approach to Minimum Contacts*, 57 Baylor L. Rev. 135, 142 (2005) (citing *Lafayette* as a pre-*Pennoyer* historical precedent for consent in personal jurisdiction).

20. Vallee v. Dumergue (1849) 154 Eng. Rep. 1221; 4 Exch. 290. Even after *Pennoyer*, some courts continued to cite the early common law origins of notice and personal jurisdiction doctrines. *See* Gilmore v. Sap, 100 Ill. 297, 302 (1881) (justifying the validity of a substituted service statute by harkening back to the common law in the time of Richard II).

21. *See* Pennoyer v. Neff, 95 U.S. 714, 731–32 (1877). *See also* Gillespie v. Commercial Mut. Marine Ins. Co., 78 Mass. 201, 201 (1958) (upholding in-state service of process on a non-resident defendant).

22. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444–45 (1946)) ("'[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the party being served.'").

necessity. At common law, as received from England, the sheriff would physically arrest the defendant pursuant to the writ of *capias ad respondendum*,[23] meaning that "service of civil process did not differ materially from what we know today as criminal arrest. The sheriff physically restrained the person served, and then jailed him or her while he or she awaited disposition of the action."[24] The act of physically restraining and confining the defendant was intimately connected to the idea that the state was exerting physical control over a person within its territory.[25] Thus the fact that the state *did* control and confine a defendant within its jurisdiction became the one of the foundations for the idea that the state *could* exert adjudicational authority over persons and property within its boundaries.[26] The *capias* was eventually replaced in the mid-eighteenth century by service of process so that by the time of the founding in 1787, "lawyers in England and America had been required to use the summons as the tool for starting suit for more than sixty years; arrest was no longer a tool for commencing suit in most civil actions."[27] Thus, personal jurisdiction and notice were already on paths sometimes parallel, sometimes intertwined, long before the full constitutionalization in *Pennoyer*.

---

23. *Capias*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining capias ad respondendum as "[a] writ commanding the sheriff to take the defendant into custody to ensure that the defendant will appear in court.").

24. John Martinez, *Discarding Immunity from Service of Process Doctrine*, 40 OHIO N.U. L. REV. 87, 90 (2013). *See also* Donald E. Wilkes, Jr., *Habeas Corpus Proceedings in the High Court of Parliament in the Reign of James I, 1603–1625*, 54 AM. J. LEGAL. HIST. 200, 218 (2014) ("In seventeenth century England, unlike today, civil arrest process was an integral part of civil procedure."). For a detailed history of the development and decline of the *capias*, see Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L. J. 52 (1978).

25. *See* RICHARD D. FREER, CIVIL PROCEDURE 45 (4th ed. 2017) ("[The capias] was a stark reminder that the jurisdiction was being exercised *in personam*, because it actually resulted in taking the defendant into the custody of the government.").

26. *See* Levy, *supra* note 24, at 94 ("The common law courts neither exercised nor believed they could exercise jurisdiction in personal actions without either physical custody of the defendant or an appearance by him."). *But see* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 297 (1956) ("Even when [English courts] began to base [their] personal jurisdiction upon the physical arrest of the defendant, actual physical power over the defendant was not invariably required.").

27. Bradford E. Biegon, Note, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History, and Blackstone's,* 82 VA. L. REV. 677, 682 (1996).

B. Personal Jurisdiction and Notice in Pennoyer

Personal jurisdiction and notice were at the heart of *Pennoyer*,[28] the seminal civil procedure due process case known to (and perhaps dreaded by) all law students over the past century.[29] Although the *Pennoyer* story has been told and retold in many a scholarly commentary, it's worth rehearsing the facts again here to emphasize the juxtaposition of personal jurisdiction and notice. *Pennoyer* concerned a plaintiff, Mitchell, who wanted to sue Neff for unpaid legal fees in Oregon state court. Neff, no longer a resident of Oregon, was residing in California, although he still owned land in Oregon (the land which was, in fact, the subject of the legal advice that Mitchell had tendered). Mitchell served Neff under an Oregon statute that permitted service on an out-of-state defendant via publication for six successive weeks in a newspaper.[30] The Supreme Court, in an opinion by Justice Field, held that service by publication on an out-of-state defendant was insufficient to establish *in personam* jurisdiction over the defendant because the defendant was not notified of the lawsuit and thus unable to defend himself before the entry of a default judgment.[31]

Although the case stands primarily for the proposition that personal jurisdiction is a Fourteenth Amendment due process right, it is also the genesis of locating the right of notice and opportunity to be heard in the due process clause of the Fourteenth

---

28. 95 U.S. 714, 733 (1877) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."). *See also* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 4 (2006) ("In at least one respect, the doctrinal formulation is thus unmistakable: due process is the starting and ending point to any personal jurisdiction analysis.").

29. *See* Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 33–34 (1978) (recalling an encounter with a "derelict" in Washington Square Park who proved himself an erstwhile law student by shouting, "Pennoyer!" and recounting the facts and holding of the case).

30. Pennoyer v. Neff, 95 U.S. 714, 720, 736 (1877).

31. *Id*. at 727, 733–34. *See also* Charles W. "Rocky" Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV. 387, 434 n.283 (2012) ("The problem with *Pennoyer* from a modern perspective was not that Neff should not have been subject to jurisdiction in Oregon . . . but that the notice given was not reasonably calculated to inform him of the suit.").

Amendment.[32] After all, what had "gone wrong" in the original *Mitchell v. Neff* action was a problem with service of process. The *Pennoyer* decision affected both doctrines that service of process underlies: personal jurisdiction and notice.

Courts passing on pre-*Pennoyer* cases had not taken care to erect a strong or formal distinction between personal jurisdiction and notice. While the doctrines were not identical or interchangeable, there was a certain fluidity in how courts handled problematic service of process issues that sometimes implicated jurisdictional concerns, sometimes notice concerns, and sometimes both. *Pennoyer* itself has this character. Justice Field unquestionably placed power, territoriality, and sovereignty at the center of personal jurisdiction.[33] Fairness and natural justice, however, were not absent from the opinion. A natural fit, or even a proxy for the question of fairness, was to evaluate the actual or constructive notice that a given defendant had of a pending action. For Justice Field, notice implicated "that principle of *natural justice* which requires a person to have *notice* of a suit before he can be conclusively bound by its result."[34] Thus, the *Pennoyer* opinion cemented the Fourteenth

32. *See* Frank. R. Lacy, *Service of Summons and the Resurgence of the Power Myth*, 71 OR. L. REV. 319, 344 (1992) (calling personal jurisdiction "due process I" and notice "due process II"); Sachs, *supra* note 8, at 1300 ("[I]n 1908, the Supreme Court itself identified two requirements of procedural due process: that the court 'shall have jurisdiction' (for which it cited *Pennoyer*, among other cases), *and* that the parties be given 'notice and opportunity for hearing.'").

33. Justice Field opens his opinion by citing D'Arcy v. Ketchum, 11 How. 165, the canonical pre-*Pennoyer* case establishing the territorial limits on sovereign adjudication that the Court continued to cite well into the Twentieth Century in its personal jurisdiction decisions. *See, e.g.,* Shaffer v. Heitner, 433 U.S. 186, 198 n.15 (1977); Hanson v. Denckla, 357 U.S. 235, 255 (1958); Baker v. Baker, Eccles, & Co., 242 U.S. 394, 402 (1917); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 134 (1912); Hilton v. Guyot, 159 U.S. 113, 183 (1895). *See also* Rhodes, *supra* note 31, at 392 ("[The] power-based premise functioned reasonably well, at least for natural individual defendants, early in U.S. history. . . . Because travel was difficult, the parties or their property were often present in the forum where the dispute arose. Thus, courts rarely needed to consider the connection, if any, between an individual defendant and the litigation.").

34. *Pennoyer*, 95 U.S. at 730 (quoting Lafayette Ins. Co. v. French, 59 U.S. 404, 406 (1856)) (emphasis added). Indeed, the Court referred on several subsequent occasions to principles of "natural" justice when discussing notice. *See, e.g.,* Turpin v. Lemon, 187 U.S. 51, 57 (1902) ("[I]t would appear that the 14th Amendment would be satisfied by showing that the usual course prescribed by the state laws required notice to the taxpayer and was in conformity with natural justice."); Spencer v. Merchant, 125 U.S. 345, 358 (1888) (Matthews, J., dissenting) ("[Notice] is a rule founded upon the first principles of natural justice."); St. Clair v. Cox, 106 U.S. 350, 356 (1882) (citing the "principle of natural justice which requires notice of a suit to a party before he can be bound by it.").

Amendment as the location for the limits on personal jurisdiction and the minimum requirements of notice. Justice Field treated the Fourteenth Amendment foundation as completely mundane and obvious, when in fact it was both new and not a completely intuitive fit with the due process clause.[35]

Because the Court did not announce personal jurisdiction and notice as formal concepts or categories, the decision reads as one that is mainly about personal jurisdiction, but also maybe about notice, weaving the justifications for both throughout the opinion. Justice Field supported the notice requirement with the preexisting notions of "fairness" and "natural justice." Both the requirement of notice and the animating concepts behind it are used to support the Court's conclusions about personal jurisdiction. These notice principles would continue to accompany the development of personal jurisdiction in the decades between *Pennoyer* and *International Shoe* and into the modern era.

C. Personal Jurisdiction and Notice from Pennoyer *Through* International Shoe *and* Mullane

The *Pennoyer* personal jurisdiction regime lasted until 1945. Although much of the jurisdictional jurisprudence from this period has receded into distant memory, the period from 1877 to 1945 was actually a time of rich doctrinal exploration and growth. The Supreme Court and lower courts struggled within *Pennoyer*'s rigid territorial framework to develop a personal jurisdiction doctrine that kept pace with the fast-changing legal and economic landscape of the United States as it entered the twentieth century.[36]

---

35. *See* Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constiutional Remedies*, 93 COLUM. L. REV. 309, 317 (1993) ("[T]he Supreme Court has identified some substantive due process rights that it has not even tried to fit into a two-tiered model. For example, the 'minimum contacts standard[ ]' from personal jurisdiction.").

36. Other scholars have produced far more detailed histories of early personal jurisdiction doctrine. This Article highlights the intersection of personal jurisdiction and notice. For more thorough histories with a broader perspective, *see* Conison, *supra* note 8; Sachs, *supra* note 8. *See generally* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981) (discussing the history of the relationship between the Full Faith and Credit Clause from early English times up until *Pennoyer*); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 840 (1981) (examining the history of full faith and credit with due process from early English legal history through the American Civil War and the ratification of the Fourteenth Amendment).

This Section contains a brief summary of the doctrinal development in personal jurisdiction between *Pennoyer* and *International Shoe*. During this time, notice was a visible and regular feature of jurisdictional analysis, although courts were not consistent in their determinations as to when notice mattered and what difference it made in the ultimate outcome of a case.[37]

1. The *In Rem* Cases

Many of the cases in the first few decades after *Pennoyer* were dedicated to clarifying the scope of, and justification for, *in rem* jurisdiction.[38] These cases were fertile ground for the development of personal jurisdiction doctrine because *in rem* cases provided one of the few acceptable *Pennoyer* frameworks by which states could effectively assert control over non-resident defendants. These cases were also the location of significant doctrinal development of constitutional notice doctrine since, under *Pennoyer*, substituted service was permissible with respect to *in rem* actions.[39]

---

37. It was also a period in which courts took a few decades to consistently fix due process as the crucial (if still hazily defined) limitation on the exercise of personal jurisdiction. *See* Conison, *supra* note 8, at 1141 ("For nearly forty years, courts, including the Supreme Court . . . largely failed to treat *Pennoyer* as a constitutional decision. . . . It was not until the Supreme Court's decision in *Riverside & Dan River Cotton Mills v. Menefee* . . . that [*Pennoyer*'s] status as a constitutional decision was retroactively confirmed."). During these years, however, some lower federal courts and state courts did, from time to time, refer to the due process basis for personal jurisdiction. *See, e.g.*, Operative Plasterers' & Cement Finishers' Intl. Ass'n v. Case, 93 F.2d 56, 63 (D.C. Cir. 1937) ("[I]t is perfectly consistent with due process to provide that jurisdiction over an association doing business shall result from service upon one or more of its members."); Shambe v. Del. & H. R. Co., 135 A. 755, 757 (Pa. 1927) ("A state has no power to render a personal judgment against a foreign corporation not doing business within the state. A judgment so rendered was held a violation of the due process clause, and void.") (internal citations omitted).

38. For example, the Court decided [several] cases in which a case that had been styled *in rem* was actually *in personam* because the res at issued had changed hands or was no longer within the territory of the State in a way which would justify the operation of *in rem* jurisdiction. *See, e.g.*, Nat'l Exch. Bank v. Wiley, 195 U.S. 257 (1904) (bank notes not an appropriate res when they had been sold prior to the commencement of the suit); Sec. Sav. Bank v. California, 263 U.S. 282 (1923); Wilson v. Seligman, 144 U.S. 41 (1892) (judgment not binding against a stockholder because a proceeding against stockholders was *in personam*, not *in rem*, and stockholder had not received personal service of process as required by *Pennoyer*).

39. *See* WASSERMAN, *supra* note 7, at 130 ("During the nineteenth and early twentieth centuries, the Supreme Court rarely had occasion to discuss the form that notice had to take in *in personam* actions . . . because its personal jurisdiction jurisprudence . . . ensured, as a practical matter, that defendants in such actions received notice through personal service of process."). During this period, courts

In these cases, courts would dutifully point out that actual notice and personal service upon a defendant were not constitutionally required so long as the plaintiff followed the relevant niceties of attachment at the outset of the suit.[40] But the concern about notice was never far from judges' minds.[41] Many of these opinions contain passing references to the fact that a given defendant actually did have notice of the lawsuit,[42] or helpful reminders that ownership of property within the territory would usually give rise to some form of notice.[43] Courts often noted with respect to *in rem* cases that "seizure of the property . . . is a *species of notice* to the non-resident or

---

began filling in the due process elements of notice, namely that there were minimum constitutional standards for service of process, and that the content of the notice itself should sufficiently convey the relevant information regarding the pendency of the lawsuit.

40. *See, e.g., Sec. Sav. Bank*, 263 U.S. at 287 ("the essentials of jurisdiction over the deposits are that there be seizure of the res at the commencement of the suit, and reasonable notice and opportunity to be heard."); Grannis v. Ordean, 234 U.S. 385, 395–97 (1914) (in an *in rem* suit, notice by publication sufficient under *Pennoyer* notwithstanding a minor misspelling of the property owner defendant's name); Bower v. Stein, 177 F. 673, 677 (9th Cir. 1910) (service by publication for *in rem* suit not set aside despite an error in affidavit as to resident of defendant); Kirk v. United States, 137 F. 753, 755 (2d Cir. 1905) ("no man can be deprived of his property without due notice and opportunity to be heard."); Sutherland-Innes Co. v. Am. Wired Hoop Co., 113 F. 183, 187 (8th Cir. 1901) ("when resort is had to substituted service, there is always more or less danger that a judgment may be rendered without actual notice to the defendant"); Bailey v. Sundberg, 49 F. 583, 585 (2d Cir. 1892) (admiralty case addressing the notice requirements for an *in rem* [libel] of a ship noted that "notice is as indispensable as the arrest [of the ship] to confer jurisdiction."); Palmer v. McCormick, 28 F. 541, 544 (N.D. Iowa 1886) (clarifying standard for publisher's affidavit in constitutionally appropriate service by publication); Porter v. Duke, 270 P. 625, 629–30 (Ariz. 1928) (reciting the accepted justifications for notice by publication in *in rem* cases).

41. *See, e.g., Sutherland-Innes Co.*, 113 F. at 187 (value of notice sufficiently strong such that substituted service should be limited to situations "only as might be necessary to enable the courts of the state to effectually enforce . . . property [rights] within their jurisdiction.").

42. *See, e.g.*, Herbert v. Bicknell, 233 U.S. 70, 74 (1914) ("[I]t appears that the defendant had knowledge of the action . . . .").

43. *See, e.g., Herbert*, 233 U.S. at 73–74 (framing the question as "[r]eally the only matter before us that calls for a word is the decision that a judgment appropriating property within the jurisdiction . . . is not made bad by the short and somewhat illusory notice to the owner" and concluding that, under *Pennoyer*, the assumption that property is always in possession of the owner is sufficient); Oswald v. Kampmann, 28 F. 36, 38 (W.D. Tex. 1886) ("[I]f [plaintiff challenging a judgment] saw fit to abandon the country, and pay no attention to the property, she ought not be heard to complain if the law makes an exception to the general rule in her case."); Geary v. Geary, 6 N.E.2d 67, 72 (N.Y. 1936) (emphasizing actual notice in addition to the "possession of property" principle to justify jurisdiction).

his agent."[44] As Justice Bartholomew of the Supreme Court of North Dakota explained about notice and substituted service, service is "*not mere idle form*. It serves a substantial purpose. It is the theory of the law that notice of the pendency of the action is thus brought to the defendant. . . . It is the substituted service that gives notice of the pendency of the action, and that notice is a direct challenge to the defendant to appear and protect his property, if any he have in the jurisdiction."[45]

Notice, however, would never be taken so far as to overtake the *Pennoyer* barrier between *in personam* and *in rem* bases for jurisdiction. While notice could justify the exercise of jurisdiction over absent defendants in *in rem* cases, it could never, on its own, provide a basis for personal jurisdiction itself. For example, the Supreme Court of Michigan rejected a plaintiff's argument that an Illinois court had exercised valid *in personam* jurisdiction over the defendant because defendant had actual notice of the lawsuit.[46] Likewise, the concern that a vulnerable defendant might not have received meaningful notice of a lawsuit did not prevent the Ninth Circuit from upholding the exercise of *in rem* jurisdiction procured by attachment and substituted service by publication.[47] Other courts made similar findings, namely, that *Pennoyer*'s allowance of substituted service for *in rem* cases with absent non-residents constituted a constitutionally sanctioned carve-out to the requirement, or even concern, of actual notice.[48]

Although most of the major *in rem* cases involved tangible property located physically within the borders of a forum state, the problem of intangible property offered courts the opportunity to explore the possibilities for boundary pushing in personal jurisdiction.[49] *Harris v. Balk*[50] was one such case. The facts of *Harris* are

44. Dorr v. Gibboney, 7 F.Cas. 923, 925 (C.C. W.D.Va. 1878) (No. 4006).

45. Hartzell v. Vigen, 69 N.W. 203, 207–08 (N.D. 1896) (emphasis added).

46. *See, e.g.,* Stewart v. Eaton, 283 N.W 651, 657–58 (Mich. 1939).

47. Cohen v. Portland Lodge No. 142, B.P.O.E., 152 F. 357, 358–62 (9th Cir. 1907).

48. *See, e.g.,* Bower v. Stein, 177 F. 673, 676–77 (9th Cir. 1910). However, in one curious lower court case, a federal District Court in New York proclaimed a sort of exception to the seemingly universal rule from *Pennoyer* for an admiralty seaman's wages case in equity, finding no violation of due process when the defendant "had full actual notice of the suit on the day when it was instituted, though not legally served with process." The City of New Bedford, 20 F. 57, 60 (S.D.N.Y. 1884).

49. *See, e.g.*, McLaughlin v. Bahre, 35 Del. 446, 455–56 (Del. Super. Ct. 1933) (seizure of stock without other notice is sufficient under both *Pennoyer* and the common law customary principles that seizure of property constitutes constructive notice).

fairly straightforward: Harris owed a debt to Balk and Balk owed a debt to Epstein. Harris and Balk were both North Carolina residents. While Balk was on a trip to Baltimore, Epstein sued Balk *in rem*, attaching the debt owed from Harris. Neither Harris nor Balk appeared in the Maryland court, but upon his return to North Carolina, Balk arranged for payment to Epstein pursuant to an order of the Maryland court. Harris then sued Balk for the debt in North Carolina. The Maryland judgment would be valid if Maryland was the situs of Balk's debt to Harris.[51] The Supreme Court held the situs of the debt traveled with the debtor. This allowed the Maryland court to "reach" Harris, via the debt that he was owed, in North Carolina. The Court did not cite *Pennoyer*, nor did it linger much on the finer points of personal jurisdiction. Instead, the opinion centers on the debtor-creditor relationship, the situs of the debt, and the obligation of a garnishee to give notice to the creditor of the attachment.[52] The Court did, however, note with approval that Balk did in fact have notice of the attachment, both in fact and because the Maryland attachment procedure required such notice,[53] and the Court ended the opinion with dicta speculating that a failure by the garnishee to notify the creditor would deprive him of using the judgment in the first action as a bar to liability in a second action.[54] Once again, the fact of notice fortified the exercise of jurisdiction. The fairness of jurisdictional innovations was bolstered by the assurance that no one was (or should have been) surprised by jurisdiction nor deprived of the opportunity to be heard.[55]

2. The Marriage Exception Cases

Cases concerning the status of a marriage constituted one of the exceptions to *Pennoyer*'s requirement of territorial service, and thus provided another opportunity for doctrinal development. Courts would stress the importance of a state being able to adjudicate the status of a marriage within the state,[56] but then temper that blunt exercise of power with the assurance that, for example, "the

50. 198 U.S. 215 (1905).

51. *Id.* at 221–22.

52. *Id.* at 227.

53. *Id.* at 227–28.

54. *Id.* at 228.

55. *Cf. id.* (noting that the creditor would have had "the opportunity to defend himself" in the Maryland lawsuit).

56. *See, e.g.*, Haddock v. Haddock, 201 U.S. 562, 572 (1906) ("[N]o question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by

wife [had] actual notice of the suit."[57] And when a party did not have notice of the suit, a lower court might opt for the most narrow reading of *Pennoyer*'s marriage status exception that emphasized the strength of the power/sovereignty theory as a justification for allowing limited substitute service to out-of-state defendants.[58] Curiously, the Supreme Court used the matrimonial cases as an opportunity to draw a post-*Pennoyer* wedge between the Full Faith and Credit Clause and the Fourteenth Amendment constitutionality of personal jurisdiction itself. In *Haddock v. Haddock*, the Court held that constructive service pursuant to a Connecticut statute on a non-resident spouse was sufficient for a divorce decree to be enforceable *within* Connecticut. Another state would be *permitted* to enforce the decree on public policy grounds if it so chose, but other states were not *required* to enforce such a decree as a matter of Full Faith and Credit because this would create a sort of "race to the bottom" in which states with lax residency laws for divorce would attract ill-motivated spouses seeking to abandon their marriages and obtain a divorce decree in a favorable jurisdiction.[59] This was likely part of a larger project in which the Court was loath for the federal courts to get too involved in questions of the state law of domestic relations,[60] and thus can been seen as a (perhaps unprincipled) exception to full faith and credit, more than as a case of the Court making inconsistent decisions about personal jurisdiction over a defendant based on whether enforcement was sought within the state or extraterritorially.[61]

---

the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State.").

57. Atherton v. Atherton, 181 U.S. 155, 172 (1901).

58. *See* De la Montoya v. De la Montoya, 44 P. 345, 348 (Cal. 1896) ("The idea that domicile determines jurisdiction in divorce rests upon the assumption that *status* depends on domicile, and is of interest there only. Judge Field could not have had this in mind in *Pennoyer v. Neff* . . . when he speaks of 'absent defendants' he cannot mean those not domiciled within the state, but must have meant simply those physically absent, and upon whom, therefore, personal service of process could not be made.").

59. 201 U.S. at 575–77. *See also* Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 129–60 (1990) (detailing the history of the cases and history leading to *Haddock v. Haddock*).

60. See the domestic relations exception to subject matter jurisdiction, which "divests the federal courts of power to issue divorce, alimony, and child custody decrees." Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992).

61. *See* Feigenson, *supra* note 59, at 125–29.

3. Corporations and Consent Cases

The cases about service on an out-of-state corporation formed an important bridge between the territorial rigidity of the *Pennoyer* holding and the more abstract regime to come in *International Shoe*. As we shall see, expanding the viability of implied consent to jurisdiction was a major procedural innovation that ultimately culminated in the minimum contacts test, and the corporations cases were key in developing the doctrinal prerequisites to thinking broadly about the role of consent. Corporations were useful tools of jurisdictional expansion because if a business registered or otherwise affiliated itself with the forum state in a statutorily prescribed manner, "the state official was considered the corporation's agent, [and] in-state service on the official was deemed valid service on the defendant, regardless of whether the official or the plaintiff made any attempt to notify the corporation itself."[62]

In *St. Clair v. Cox*,[63] the Supreme Court held that a state could exercise personal jurisdiction over foreign corporations when jurisdiction was secured by service of process on designated agents of the corporation. Before *International Shoe* introduced minimum contacts as the constitutionally acceptable substitute for fictive corporate "presence" within a state, *St. Clair* stood for the proposition that when one serves a corporation's authorized agent within the state, the corporation must also be doing business within the state.[64] Justice Field, who also penned *Pennoyer*, cautioned that this exercise of jurisdiction "must not . . . encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it"[65] and the notice itself "must be reasonable."[66]

---

62. Rhodes, *supra* note 31, at 394.

63. 106 U.S. 350 (1882).

64. *See, e.g.,* Frawley, Bundy & Wilcox v. Penn. Cas. Co., 124 F. 259, 263 (C.C.M.D. Pa. 1903) (citing *St. Clair v. Cox* for the proposition that "it is essential in every case in which personal jurisdiction over such a corporation is claimed that there shall have been an actual and substantial transacting of business by it within the state."). *See also* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 193–94 (1915); Hazeltine v. Miss. Valley Fire Ins. Co., 55 F. 743, 745 (C.C.W.D. Tenn. 1893); United States v. Am. Bell Tel. Co., 29 F. 17, 35 (C.C.S.D. Ohio 1886); Davidson v. Henry L. Doherty & Co., 241 N.W. 700, 703 (Iowa 1932) (upholding statute that allows substituted service on the agent of a foreign corporation as one that "meets every essential requirement of due process of law.").

65. St. Clair v. Cox, 106 U.S. 350, 356 (1882).

66. *Id.* Some courts issued opinions that read like the forerunners of post-*International Shoe* jurisprudence, such as the Sixth Circuit's decision in *Smith v. Farbenfabriken of Elberfeld Co.*, 203 F. 476 (6th Cir. 1913) which upheld service in patent infringement actions under a federal statute that allowed service on a business's agent "conducting business" within the state. In finding both the statute

At times, the Court lapsed back into formalism, holding that strict compliance with a statute that allowed for substituted service of a corporation on a Secretary of State was sufficient, even when the state official did not provide any further notice of the pendency of an action to the defendant itself.[67] This pattern would repeat itself many times in the subsequent decades: having used notice as a functional due process crutch for creating a jurisdictional innovation, the Court would then treat the new rule as one with its own formal identity and justification, sometimes unmooring it from the original justification or connection to due process.[68]

Hess v. Pawloski[69] is often cited as a case that marks the beginning of the transition to the modern era of personal jurisdiction.[70] In *Hess*, the Court approved the use of non-resident motor vehicle statutes as a method of securing jurisdiction over out-of-state defendants on a theory of implied consent.[71] Much of the commentary on *Hess* focuses on how the Court stretched consent, which had always been a common law basis for exercising jurisdiction,[72] as a means to begin building a bridge between the strict territorial regime of *Pennoyer* to the permissibility of more modern long-arm

---

and its application valid, the court rehearsed a list of the business's contacts in the state of Michigan and found that service upon an agent pursuant to the federal statute fell unquestionably within the boundaries of *Pennoyer*.

67. Washington *ex rel.* Bond & Goodwin & Tucker, Inc. v. Superior Court of Washington, 289 U.S. 361 (1933).

68. *See infra* Part III.B.

69. 274 U.S. 352 (1927).

70. *See, e.g.*, Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 440 (2017) (noting that non-resident motor vehicle statutes such as the Massachusetts statute in *Hess* "began pushing the common law's jurisdictional bounds."); Rhodes, *supra* note 31, at 393; Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1149 (1966) (citing *Hess* as a "seminal" case in the modern jurisdictional era). Prior to *Hess*, the Supreme Court and some lower courts had tied jurisdiction via consent to the fact that a party could consent to notice by substituted service such as an agent or by publication. *See, e.g.,* Lafayette Ins. Co. v. French, 59 U.S. 404, 408 (1855) (service on an agent in a state "foreign" to the "company's creation" is permitted); Michigan Tr. Co. v. Ferry, 175 F. 667, 673 (8th Cir. 1910) (becoming an executor of an estate was an "office tendered on [the defendant] on the condition imposed by these statutes that the probate court should have the power to call him before it . . . without other warning than a notice published in a newspaper.").

71. 274 U.S. at 357 ("in advance of the operation of a motor vehicle on its highway by a nonresident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use.").

72. *See* Hill v. Mendenhall, 88 U.S. 453 (1874) (pre-*Pennoyer* case holding that voluntary appearance in an action confers personal jurisdiction on a court).

statutes.[73] But, although consent formed an important doctrinal foundation, the value of notice was not far behind. The Court took care to note that under the Massachusetts statute, "[i]t is required that [the defendant] shall *actually receive* and receipt for notice of the service and a copy of the process."[74] Echoing the "opportunity to be heard" aspect of notice, the Court noted with approval that the statute "contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense."[75] In other words, although the Court did not yet make explicit appeals to "fairness" or "reasonableness," such equitable concerns were clearly at the forefront of the move to expand jurisdiction over absent defendants, and notice was a central value.[76]

4. The End of the Journey to *International Shoe*

Milliken v. Meyer[77] is our last stop on the journey from *Pennoyer* to *International Shoe*. Milliken served Meyer, a Wyoming resident, with process in Colorado under a Wyoming statute that permitted out-of-state service on Wyoming residents. The Supreme Court upheld the constitutionality of this *in personam* out-of-state service on the theory that "[d]omicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."[78] It is in this case, just before the watershed of the

73. *See, e.g.,* Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. Rev. 1251, 1269 (2018) (*Hess* was one of the "legal fictions to accommodate the *Pennoyer* regime to modern problems" which "the Supreme Court seemingly abandoned in 1945 with *International Shoe*."); Rhodes, *supra* note 19, at 144–45 (*Hess* and other implied consent cases as a part of the evolution of jurisdiction over out of state defendants from *Pennoyer* to *International Shoe*); Verity Winship, *Jurisdiction Over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. Ill. L. Rev. 1171, 1187 (2013) (implied consent broadened jurisdiction after *Pennoyer* but was mostly abandoned as unnecessary after *International Shoe*).

74. *Hess*, 274 U.S. at 356.

75. *Id.*

76. The fact that a defendant had been notified pursuant to service on the secretary of state was also integral to the Supreme Court's holding in Wuchter v. Pizzutti, 276 U.S. 13 (1928).

77. 311 U.S. 457 (1940).

78. *Id.* at 462. Although in hindsight it might seem like an obvious and foregone conclusion that domicile was a common law and thus *per se* constitutional basis of personal jurisdiction, this was not necessarily understood to courts or jurists pre-*Milliken*. For example in 1896, Justice Temple of the Supreme Court of California declared that "[d]omicile has never, so far as I am aware, been made the test of jurisdiction to render a personal judgment." De la Montoya v. De la Montoya, 44 P. 345, 346 (Cal. 1896). *See also* Raher v. Raher, 129 N.W. 494, 499 (Iowa

minimum contacts era, that the Court set forth one of its strongest ties between notice and the due process basis for personal jurisdiction:

> Its adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied.[79]

This passage is rather amazing in hindsight. Because it is *this very passage* that sets up the magic "fair play and substantial justice" words that formulate the minimum contacts test in *International Shoe*. Here, in *Milliken*, notice and opportunity to be heard forms the heart of the fairness argument that justifies the extension of *in personam* jurisdiction to the exercise of a long-arm statute. The appeal to due process fairness is not the only basis for the Court's decision. Justice Douglas stressed that the "authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state."[80] But even this pronouncement is eventually capped by a reference back to notice. After noting that power over domiciliaries is "not dependent on continuous presence in the state," Justice Douglas approved the use of out-of-state service "where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him."[81]

The cases I have summarized in this section show that notice played a quiet but relatively consistent role in pushing personal jurisdiction doctrine forward from the rigid formalism of *Pennoyer* to the modern functionalism of *International Shoe*. It remained the case, however, that the main animating theories behind *Pennoyer*—

1911) (finding as to cases involving residents served outside of the state that "in many cases . . . are to be found unqualified statements that the laws of the state have no extraterritorial force, and that process served outside the state will not give the court jurisdiction."). The Supreme Court of Arizona characterized *Milliken* as a case in which the U.S. Supreme Court "receded from some of the implications of *Pennoyer v. Neff*." D.W. Onan & Sons v. Superior Court, 179 P.2d 243, 262 (Ariz. 1947).

79. *Meyer*, 311 U.S. at 463. The Court went on to assure the reader that Meyer did, in fact, receive actual notice of the lawsuit.

80. *Id.* ("[T]he authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.").

81. *Id.* at 464.

power, sovereignty, and territoriality dominated most of the analysis. This Article does not suggest otherwise. However, even cases that have come to stand for the strongest foundations of the power theory may not be so clear cut. Consider the 1917 Justice Holmes decision in *McDonald v. Mabee*.[82] The lawsuit at issue was filed in Texas, and the defendant was domiciled in that state at the outset of the suit. After drifting in and out of the state for a bit, the defendant finally established a new domicile in Missouri. The plaintiffs served the defendant under a Texas statute that permitted service on an absent defendant for four successive weeks in a newspaper. The Supreme Court had not yet affirmatively held that a state could exercise personal jurisdiction over an absent domiciliary,[83] so service was necessary as a predicate both for notice and for personal jurisdiction. The *McDonald* opinion is but five paragraphs long, but it contains all of the confusion of the past and future of personal jurisdiction regarding its theoretical bases. Justice Holmes declared that "[t]he foundation of jurisdiction is physical power,"[84] but the decision is riddled with concerns about notice. The Court found that, as far as the due process considerations of service were concerned, perhaps "a summons left at his last and usual place of abode would have been enough."[85] This sentiment was preceded by a conspicuous notation that the defendant still had family in the state, thus implying that the defendant would be more likely to learn of the suit. Holmes quickly returned to tying power together with notice: "We repeat, also, that the ground for giving . . . effect to a judgment is that the court rendering it had acquired *power* to carry it out; and that it is going to the extreme to hold such power gained even by *service* at the last and usual place of abode."[86]

Beyond emphasizing sovereignty and territoriality, the Court did not always treat notice and personal jurisdiction as identical or

82. 243 U.S. 90 (1917). Scholars frequently cite this case because of Holmes' famous formulation that "the foundation of jurisdiction is physical power." *See, e.g.,* Rhodes, *supra* note 19, at 143; Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 283 (1983); Debra Windsor, *How Specific Can We Make General Jurisdiction: The Search for a Refined Set of Standards*, 44 BAYLOR L. REV. 593, 595 (1992).

83. That decision would not come until 1940 in *Milliken v. Meyer*. 311 U.S. 457 (1940).

84. *McDonald*, 243 U.S. at 91.

85. *Id*. As one scholar has noted, however, it is unclear exactly what Holmes meant to endorse here in terms of the specifics of service. See Arthur F. Greenbaum, *The Postman Never Rings Twice: The Constitutionality of Service of Process by Posting After Greene v. Lindsey.*, 33 AM. U.L. REV. 601, 614 (1984).

86. *McDonald*, 243 U.S. at 91 (emphasis added).

interchangeable as a matter of due process and in the underlying appeals to natural justice. In *Baker v. Baker, Eccles & Co.*,[87] for example, the Court stressed the concept of notice as fundamental to the elevation of both personal jurisdiction and notice to constitutional due process values, noting that "[t]he fundamental requisite of due process in judicial proceedings is the opportunity to be heard. To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice."[88] However, the Court went on to clarify that personal jurisdiction did have a due process foundation independent of the notice and opportunity to be heard justification: "to assume that a party resident beyond the confines of a state is required to come within its borders and submit his personal controversy to its tribunals *upon receiving notice* . . . is a futile attempt to extend the authority and control of a state beyond its own territory."[89] In *Baker*, it appears that the defendant in the original action—a bereaved mother who would later claim an entitlement to shares of her deceased son's business—was not served with notice, and the lack of actual notice clearly vexed the Court. Nonetheless, it is significant that Justice Pitney took pains to note that, while "opportunity to be heard" appears to be at the heart of due process, the territorial concerns had their own jurisdictional merit.

As this Part has shown, the law of personal jurisdiction and notice went through a great deal of doctrinal development from the time prior to *Pennoyer* up through the era directly preceding *International Shoe*. Not only did the doctrines grow and change, but also there was a good deal of variation and inconsistency among the cases, given that the era was one of supposedly "strict" rigidity.

That being said, there is one generalization worth making about the law during this period about the development of notice doctrine. This was an era in which two eventually-distinct concepts of notice were merged: the concept of notice of suit and notice of jurisdiction. To the extent that courts were concerned at all with notice during this period,[90] they were primarily focused on actual or constructive notice of a pending lawsuit. Notice of jurisdiction was subsumed into the concept of notice of suit because of the joint

87. 242 U.S. 394 (1917).

88. *Id.* at 403.

89. *Id.*

90. *See* WASSERMAN, *supra* note 7 (noting that even cases of notice of suit were limited during this period because *Pennoyer*'s in-hand service requirement ensured that questions of notice only came up in the cases that fell into *Pennoyer*'s exceptions).

structure of personal jurisdiction and notice. The foundational rule was that, in most cases, personal jurisdiction was perfected by in-hand personal service within the territory of the forum state. It would not have occurred to people at that time to add an element of notice of jurisdiction to this scheme—they would have assumed that people understood that physical presence in the territory of the forum state was sufficient to subject them to the jurisdiction of that state in at least a limited fashion. Thus, additional "notice" of jurisdiction would have been redundant.

The same can be said of *in rem* jurisdiction—ownership of property within the forum state was itself notice that the state had jurisdiction over said property. This is why the primary question about jurisdiction over property was with notice of suit—the concern was that absent property owners might not learn of a pending action. The conclusion that property owners could or should be aware of the status of their property and thus be aware of any seizures or notices was almost always sufficient to satisfy the due process components of personal jurisdiction and notice.

The other possibilities for jurisdiction over out-of-state defendants were similarly constructed to include an element of notice of jurisdiction. The marriage and corporate status exceptions shared with *in rem* the conceptual foundations of adjudicative power and jurisdiction. The concepts of consent, both express and implied, have an even stronger link—that notice of jurisdiction is bound up with the act giving rise to consent. Personal jurisdiction over absent domiciliaries was analogous to in-hand service within the territory; it was simply assumed that a person domiciled within a state would understand that she was subject to its jurisdiction.

This, then, was the hierarchy of personal jurisdiction and notice prior to *International Shoe*. Personal jurisdiction took center stage, since the doctrine greatly restricted the availability of substituted service or service outside of the forum state. And notice doctrine was concerned almost entirely with notice of suit rather than notice of jurisdiction because personal jurisdiction itself was constructed so that notice of jurisdiction was nigh synonymous with its exercise. It is with this doctrinal backdrop in mind that I turn to the beginning of the modern era of personal jurisdiction and notice.

II.
PERSONAL JURISDICTION IN *INTERNATIONAL SHOE* AND *MULLANE*

The decisions in *International Shoe* (1945)[91] and *Mullane v. Central Hannover Bank & Trust Co.* (1950)[92] came during a larger era of major procedural change in American jurisprudence.[93] *International Shoe* ushered in the modern era of personal jurisdiction jurisprudence by actively unchaining *in personam* jurisdiction from the rigid territorial sovereignty regime of *Pennoyer*.[94] *Mullane* marked the beginning of the modern era of notice jurisprudence by articulating that the due process right of "notice and opportunity to be heard" requires notice that is "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[95]

A. International Shoe *and the Alternative History of a Minimum Contacts Test for Notice*

International Shoe broke personal jurisdiction free from the *Pennoyer* framework where jurisdiction was tightly bound to notions of territoriality and sovereignty.[96] The Court held that Washington

91. Intl. Shoe Co. v. Washington, 326 U.S. 310 (1945).

92. 339 U.S. 306, 314 (1950)

93. 1938 saw the introduction of the Federal Rules of Civil Procedure and the famous *Erie* case. 1940 ushered in the era of modern class action jurisprudence with *Hansberry v. Lee*, 311 U.S. 32, (1940) and modern forum non conveniens doctrine was born in 1947 in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), a case which led to the codification of transfer of venue within the federal court system.

94. *See, e.g.*, Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended the Limits of Due Process*, 84 B.U. L. Rev. 491, 492–93 (2004) (*International Shoe* "transformed" personal jurisdiction analysis); William M. Richman, *Understanding Personal Jurisdiction*, 25 Ariz. St. L. J. 599, 599 (1993) ("in *International Shoe Co. v. Washington,* the Court rejected the rigid territorialism of *Pennoyer v. Neff*"); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. Rev. 1, 37 (1992) ("While *Pennoyer* cast the due process question of jurisdiction in terms of territorial power by asking, 'is the defendant there?,' *International Shoe* changed the question to, "is it fair?").

95. *Mullane*, 339 U.S. at 314.

96. *See, e.g.*, Donald L. Doernberg, *Resoling International Shoe*, 2 Tex. A&M L. Rev. 247, 260 (2014) (describing how *International Shoe* broke personal jurisdiction from the *Pennoyer* mold). *But see* Rhodes, *supra* note 31, at 390 (contesting "the familiar story . . . that *International Shoe* . . . wrought a fundamental change" in personal jurisdiction doctrine.); Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 Alb. L. Rev. 1237, 1250-51 n.70 (1998) ("The Supreme Court formally brought an

State could exercise personal jurisdiction over the Missouri-headquartered Delaware corporation because "due process requires only that . . . if [the defendant] be not present within the territory of the forum, he have certain minimum contacts with it."[97]

Justice Stone traced the history by noting that—

> [h]istorically the jurisdiction of the courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process," only minimum contacts with the forum state are required.[98]

This passage offers the first clue into the future detachment of notice from personal jurisdiction. The Court portrays personal service and "other forms" of notice as mechanisms that exist apart from due process, or certainly apart from the due process considerations of personal jurisdiction. One mechanism, the "capias ad respondendum," simply gave way to new mechanisms. The focus of due process analysis would no longer be on the mechanism, but on presence and its newfound alternative: minimum contacts.

This is the very paragraph in which the Court introduces its enduring formulation of minimum contacts; that minimum contacts are "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[99] But, we have already seen the origin of this language. It comes from *Milliken* where the Court's assessment that jurisdiction did meet the "traditional notions of fair play and substantial justice" emerged from its explicit satisfaction that the defendant had actual notice of the lawsuit and that the Wyoming statute provided for adequate notice.

In *Milliken*, the Court wove its discussion of notice directly into the conclusion that Wyoming could exercise personal jurisdiction over a domiciliary served out of state.[100] In *International Shoe*, however, Justice Stone took up notice as a due process issue distinct from personal jurisdiction. Having finished the explanation of min-

---

end to the era of territorial jurisdiction when it explicitly articulated the new minimum contacts standard for asserting personal jurisdiction in the case of *International Shoe Co. v. Washington*.").

97. Intl. Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

98. *Id.*

99. *Int'l Shoe Co.,* 326 U.S. at 316 (quoting Milliken v. Meyer, 341 U.S. 457, 463 (1940)).

100. *See supra* notes 77-81 and accompanying text.

imum contacts, he wrote that the Court is "*likewise* unable to conclude that the service of process . . . was not sufficient notice of the suit."[101] If anything, it is personal jurisdiction that supports the conclusion that notice was sufficient under the due process clause, rather than relying on the fact of notice to support personal jurisdiction. In upholding service of process by registered mail, the Court opined that the lawsuit was sufficiently related to [the defendant's] activities," such that it "rendered International Shoe's agent an appropriate "vehicle for communicating the notice."[102]

Justice Stone further remarked that "[i]t is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual."[103] This is, in retrospect, a remarkable sentence, for it contains the seeds of what might have been, in another world, the new test for notice.

One can imagine an alternate history in which *International Shoe* set out the minimum contacts test which would be used both for personal jurisdiction and for notice.[104] This would have offered some continuity with *Pennoyer* in which a single mechanism (in state personal service) fulfilled the due process requirements for both *in personam* jurisdiction and notice.

In this alternate world, courts would have operated under the assumption that due process sets the floor for personal jurisdiction and notice, and that both are governed by a minimum contacts test as set out in *International Shoe*. Much ink might have been spilled in parsing the difference for what "personal jurisdictional minimum contacts" means or requires versus "notice minimum contacts." Of course, that world never unfolded. The parsing of minimum contacts has indeed been robust, but it is confined to personal jurisdiction. Notice remained, for the most part, disconnected from minimum contacts, and soon found its own test, and its own path, cemented five years later in *Mullane*.

For now, it is enough to see that *International Shoe* was a remarkable inflection point in the doctrinal journal of personal jurisdiction and notice. The Court spoke directly to the issue of notice of suit, passing favorably on that fact both in terms of the lawsuit at

101. *Int'l Shoe*, 326 U.S. at 320 (emphasis added).

102. *Id.*

103. *Id.*

104. At least one State Supreme Court, three years after *International Shoe*, characterized the historical development of jurisdiction from *Pennoyer* to *International Shoe* as one that was intimately bound up with the due process requirements of notice. *See* Wein v. Crockett, 195 P.2d 222 (Utah 1948).

hand and the Washington state statute that authorized out-of-state service. The Court also connected minimum contacts to the idea of notice of jurisdiction, thus foreshadowing how the due process focus on notice in personal jurisdiction would slowly shift from notice of suit to notice of jurisdiction. Finally, the Court wrote about notice as a concept that was integral to the due process inquiry of personal jurisdiction, but also characterized notice as a due process doctrine that is separate from personal jurisdiction. Although other pre-*International Shoe* cases show a similar ambivalence about the relationship, the separation in *International Shoe*, however casual, was a sign of the more formal split to come.

B. Mullane *and the New Trajectory of a Distinct Standard for Due Process in Notice*

Just five years after *International Shoe*, the Supreme Court issued its decision in *Mullane*,[105] the seminal notice case of the modern era. A trust company for a common trust fund brought an action for a judicial accounting mandated under New York banking law that provided for notice to the beneficiaries via publication for four successive weeks in a newspaper. The Supreme Court held that service by publication was insufficient for the known beneficiaries of the trust but was sufficient for the unknown beneficiaries who could not be found.[106]

Mullane was an ideal case for the Court to establish a reasonableness standard for notice because, in one fact pattern, it allowed the Court to compare and contrast differently situated parties affected by a legal proceeding and delineate the due process floor for each of them. Service by publication to all beneficiaries would not be "a reliable means of acquainting interested parties"[107] of the pendency of an action, but requiring personal service to all beneficiaries including the unknown beneficiaries "would place impossible or impractical obstacles"[108] to maintaining the lawsuit. Additionally, service by publication to the future or unknown beneficiaries was sufficient under these particular circumstances because

105. 339 U.S. 306 (1950).

106. *Id.* at 317. The Court here spoke both of beneficiaries who could not be found with reasonable due diligence, as well as beneficiaries with "conjectural or future" interests whose whereabouts might be required to be ascertained under other circumstances.

107. *Id.* at 315; *id.* at 318 ("Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to a means less likely than the mails to apprise them of [the action's] pendency.").

108. *Id.* at 314.

the beneficiaries shared common interests, and thus it was reasonable to believe that the known beneficiaries could "safeguard the interests of all."[109]

Even though *Mullane* is primarily a decision about notice, it is important to remember that the Court also passed on questions of personal jurisdiction because Mullane challenged the jurisdiction of the New York court to hear the action and issue a binding judgment as to all of the beneficiaries. Like the defendant in *Pennoyer*, Mullane made constitutional objections both to the exercise of power and to the mechanism of service. But unlike *Pennoyer*, the Court had little problem disposing of the jurisdictional issue. The Court acknowledged that there was some uncertainty over whether the action was *in rem* or *in personam*, but that, regardless of the classification, a judgment would bind known and unknown beneficiaries, many of whom were outside the state of New York and were not served within the state.[110] Justice Jackson breezily dispensed with the jurisdictional question, holding that states had an interest in providing for such accounting proceedings, and that it is "beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to be heard."[111] In other words, the power of the court wasn't the *real* question, or a close call. The real question here was notice.

To appreciate *Mullane*'s place in the shared genealogy of personal jurisdiction and notice, it is useful to investigate the authority that Justice Jackson cites—and that which he omits—following the famous "reasonably calculated under the circumstances" language. He first cites *Milliken*, the very same case that lent the words "traditional notions of fair play and substantial justice" to *International Shoe*'s minimum contacts standard.[112] It seems unlikely that the *Milliken* Court itself thought of *Milliken* as a major notice case. The service of process in *Milliken* was quite ordinary—personal service on the defendant.[113] The only wrinkle was that the Wyoming resident was served outside of the borders of Wyoming.

Milliken was not a case about the adequacy of notice. No one was wondering in that case whether the defendant was actually ap-

109. *Id.* at 319.
110. *Id.* at 312–13.
111. *Id.* at 313.
112. *Id.* at 314.
113. Milliken v. Meyer, 311 U.S. 457, 459 (1940) ("Meyer, who was asserted to be a resident of Wyoming, was personally served with process in Colorado pursuant to the Wyoming statutes.").

prised of the action. Both the facts of the case and the logical inferences about personal service made that clear. *Milliken* was about power, pure and simple, and about whether it was a violation of due process for the state to exercise jurisdiction over a domiciliary, even if service occurred outside of the state borders. But *Milliken* did not really add anything interesting to the law of notice itself. It does not seem that there was any confusion prior to *Milliken* vis-à-vis notice doctrine about whether in-hand service was an adequate mechanism for apprising a defendant of an action, nor did there appear to be concerns with whether personal service outside of a state was somehow less likely to apprise a party of an action than process served personally within a state's borders. Outside of its personal jurisdiction holding, *Milliken* simply stands for the proposition that notice and opportunity to be heard is a crucial part of due process. After *Milliken*, Justice Jackson supported the notice formulation with more traditional cases like *Grannis v. Ordean*[114] and *Roller v. Holly*,[115] cases that in turn grounded the due process notice right in *Lafayette Insurance Company v. French*, the same pre-*Pennoyer* case that located notice and jurisdiction in principles of "natural justice."[116]

Justice Jackson also cited *Hess v. Pawlowski*, as a favorable example of a method of service "that is in itself reasonably certain to inform those affected."[117] Recall that *Hess* occupied a more controversial space regarding notice than did *Milliken*, belonging to the group of cases in which the Supreme Court found and then reaffirmed that substituted service on a state officer, who would then attempt to find and serve the relevant defendant, did indeed give sufficient notice to defendants such that they did not lose the ability to appear and defend themselves in a proceeding.[118]

It is important to observe that the Court did *not* cite *International Shoe*. In fact, the Court actually cited no authority at all for its personal jurisdiction holding. It rejected the strict framework of *Pennoyer* without identifying *International Shoe* as the recent source of that rejection. Justice Jackson then asserted, citing no authority at all, that personal jurisdiction is primarily justified on the State's interest. The omission is all the more puzzling considering that the *International Shoe* Court nodded in the direction of recognizing the interests of the forum state via the observation that "sufficient contacts or ties with the state of the forum to make it reasonable and

114. 234 U.S. 385 (1914).
115. 176 U.S. 398 (1900).
116. *See supra* note 19 and accompanying text.
117. *Mullane*, 339 U.S. at 315.
118. *See supra* Part I.C.3.

just . . . to permit the state to enforce the obligations which appellant has incurred there."[119] It would not have been a stretch to reinforce the importance of New York's interest in adjudicating the rights of absent beneficiaries with a comparison to Washington state's adjudicational interest in *International Shoe*, particularly because the *International Shoe* Court used minimum contacts to support its holding that Washington state could levy the unemployment tax in addition to its holding regarding personal jurisdiction.[120] *International Shoe*'s absence in *Mullane* is also notable considering that the *International Shoe* Court's discussion of notice implied that minimum contacts might provide the constitutional standard for evaluating whether notice comports with due process.[121]

It is understandable, however, why the Court did not return to the minimum contacts concept here to provide a standard. It would have been quite a leap to go from the "systematic and continuous activities" of a large corporation selling shoes in the forum state to the contacts of beneficiaries, many of them unknown, to a common trust fund. The Court would need more sophisticated jurisdictional tools to give a fuller explanation of personal jurisdiction over absent claimants or beneficiaries, tools that would develop in tandem with the growth of class and other mass actions, and standards that have resurfaced as difficult and contested in the Court's newest round of personal jurisdiction cases.[122]

International Shoe and *Mullane* were not only the launching pad for the modern era of personal jurisdiction and notice; they form an inflection point in the parallel development of the two doctrines. Despite the evident relationship of personal jurisdiction and notice in *Hess* and *Milliken*, the *International Shoe* Court took care to segregate its discussion of notice from that of personal jurisdiction. And *Mullane* took no note of *International Shoe* at all, despite the shared doctrinal history and the presence of a personal jurisdiction issue in that case. Having used notice to gently prod personal jurisdiction toward a place where courts could consider issues of fairness and convenience, the Court used *International Shoe* and *Mullane* as the occasion to begin the process of breaking apart the shared space of these two doctrines.

---

119. Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

120. *Id.* at 321 ("The activities which establish its 'presence' subject it alike to taxation by the state and to suit to recover the tax.").

121. *See supra* notes 103-104 and accompanying text.

122. *See* Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017); *infra* at notes 246-254 and accompanying text.

III.
THE SHIFTING AND FADING ROLE OF NOTICE IN PERSONAL JURISDICTION FROM *INTERNATIONAL SHOE* AND *MULLANE* THROUGH *ASAHI*

In the decades after *International Shoe*, the Supreme Court embarked on its long (and still unfinished) project of defining the constitutional limits on personal jurisdiction, a time marked by bursts of judicial activity followed by long periods of silence on the matter.[123] The minimum contacts test occupied the central, but certainly not the only, space in the due process analysis. Along the way, various theories rose and fell in prominence: the power and sovereignty theories;[124] the respective interests of the defendant (in particular, the convenience interests of the defendant),[125] the plaintiff,[126] and the forum state;[127] and general notions of fairness,[128] the question of whether any or all of these considerations form a part of the minimum contacts test or exist outside of it as an additional constitutional check.[129] Many of these ideas had already begun to gain traction in the pre-*International Shoe* era, and some of them even predated *Pennoyer*.

Today, the Supreme Court continues to grapple with all these theories and clearly favors some more than others. But even the disfavored theories and considerations are still part of the jurisdic-

123. The longest period of inactivity was the more than twenty-year gap between the *Asahi* and *Burnham* decisions of the late 1980s and early 1990s, and the renewed interest in personal jurisdiction kicked off by *J. McIntyre* and *Goodyear* in 2011. *See* Bradt & Rave, *supra* note 73, at 1272.

124. *See, e.g.*, Michigan Trust Co. v. Ferry, 228 U.S. 346, 353 (1913) ("Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure.").

125. *See*, Arthur Taylor von Mehran, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. Rev. 279, 306-10 (1983).

126. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

127. Int'l Commercial Dispute Comm. Assn of the Bar of N.Y.C., Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards, 15 Am. Rev. Int'l Arb. 407, 427 n.78 (2004) ("Convenience of the forum may be, in some instances, a factor in determining whether the assertion of jurisdiction comports with due process. *See, e.g.*, Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).").

128. von Mehran, *supra* note 125.

129. *See, e.g.*, Simpson v. Quality Oil Co., 723 F. Supp. 382, 388 (S.D. Ind. 1989) ("I believe that the question of 'relatedness' must ultimately turn upon a consideration of constitutional due process, and that the Constitution limits 'relatedness' to substantive relevance. Although 'relatedness' can be initially defined by state statute (just as 'minimum contacts' are now defined in state long-arm statutes), the Constitution is the final check on these state statutes.").

tional discourse. Somehow, only notice has slipped away. This Section traces the role of notice in personal jurisdiction analysis in the post-*International Shoe* and *Mullane* era.

These two doctrines—personal jurisdiction and notice—had always been intertwined, joined by the mechanical device of service of process and a common due process constitutional ancestor in *Pennoyer*, and *Pennoyer*'s conceptual forerunners. But things began to change after *International Shoe* and *Mullane*. Courts encountering personal jurisdiction questions had once turned routinely to the fact and concept of notice, or lack thereof, to supplement their reasoning behind the grant or denial of personal jurisdiction. In the decades after *International Shoe* and *Mullane*, notice was still used as a doctrinal tool for jurisdictional innovation, but its role evolved and ultimately faded.

As for the due process analysis related to notice itself, once the Supreme Court set the constitutional floor for the sufficiency of notice at the very liberal *Mullane* level, due process challenges to the mechanics of service of process were rare,[130] although the advent of new technology and social media has generated some new questions about the constitutionality of service via electronic means.[131]

130. The Court has occasionally heard cases about service and actual notice. *See* U.S. Aid Funds Inc. v. Espinosa, 559 U.S. 260 (2010) (defect in service was not a basis upon which to void a bankruptcy court's judgment because the party received actual notice of the debtor's plan and failed to object); Jones v. Flowers, 547 U.S. 220, 220 (2006) (while actual notice was not required, the State was required to take additional steps when notice by certified mail returned unclaimed); Dusenbery v. United States, 534 U.S. 161, 172–73 (2002) (actual notice to prisoner in a forfeiture proceeding not required when process sent by certified mail); Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 791 (1983) (publication, posting, and mailed notice to the property owner are insufficient means of informing a mortgagee of a tax sale); Robinson v. Hanrahan, 409 U.S. 38 (1972) (notice by mail sent to home address of property owner insufficient in forfeiture proceeding where State knew property owner was in jail); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (notice by newspaper publication alone insufficient in condemnation proceeding where city knew property owner's name). These occasional forays back into the due process requirements of service pale in comparison to the number and detail of personal jurisdiction cases that the Court has heard since *International Shoe*. Instead these cases center primarily around statutory, rule, and treaty interpretation.

131. *See, e.g.*, Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002) (authorizing service of proves by email); MEMO ENDORSED ORFER granting 419 Motion to Serve Wikileaks by Twitter & Mail on 148 NOTICE of Motion. Democratic National Committee v. Russian Fed'n, No. 18-cv-3501-JGK) (S.D.N.Y. June 21, 2018),(granting motion to serve Wikileaks by Twitter); FTC v. PCCare247 Inc., 2013 U.S. Dist. LEXIS 31969, at *16–17 (S.D.N.Y. Mar. 7, 2013) (authorizing service by email and Facebook); Qaza v. Alshalabi, 43 N.Y.S.3d 713, 716 (Sup. Ct. 2016) ("[P]laintiff has not demonstrated that, under the facts presented

The locus of due process notice doctrine shifted to questions of which proceedings required notice at all[132] and what sort of a proceeding would satisfy the requirement of the "opportunity to be heard."[133]

A. Early Jurisdictional Expansion in Perkins *and* McGee*: Continued Use of Notice as a Fairness and Due Process Crutch*

In the first years after *International Shoe*, the Court issued two expansive personal jurisdiction decisions. In each case, the Court's use of notice echoed the reasoning in key pre-*International Shoe* decisions. The fact of actual notice allowed the Court to create a cushion of fairness and a reassurance of due process that aided jurisdictional innovation.

The Court's first major move after *International Shoe* was to lay a capacious foundation for the exercise of general jurisdiction. In *Perkins v. Benguet Consolidated Mining Company*[134] the Court had to jus-

---

here, service by Facebook is reasonably calculated to apprise defendant of the matrimonial action."); St. Francis Assisi v. Kuwait Fin. House, No. 17-cv-07203-PJH, 2016 U.S. Dist. LEXIS 136152 (N.D.Cal.) (authorizing service by Twitter to Kuwaiti national when plaintiff unable to determine his location).

132. *See, e.g.*, Kaley v. United States, 571 U.S. 320 (2014) (notice not required for pre-trial restraining orders to preserve potentially forfeitable assets in criminal proceedings); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ("[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."); United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) ("[T]he seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."); Mathews v. Eldridge, 424 U.S. 319 (1976) ("[A]n evidentiary hearing [and, therefore, notice] is not required prior to the termination of [Social Security] disability benefits.").

133. *See, e.g.,* Connecticut v. Doehr, 501 U.S. 1 (1991) (procedure that allowed prejudgment attachment of real property without notice, hearing, or showing of extraordinary circumstances violates due process); N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (finding Georgia procedure that allowed plaintiffs to secure a garnishment from a court clerk without involvement of a judge or an early hearing unconstitutional under the Fourteenth Amendment); Fuentes v. Shevin, 407 U.S. 67 (1972) (holding Florida and Pennsylvania prejudgment replevin provisions as violating due process "insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor."); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 339–40 (1969) ("[A]bsent notice and a prior hearing, this prejudgment garnishment procedure violates the fundamental principles of due process.") (internal citations omitted).

134. 342 U.S. 437 (1952).

tify Ohio's exercise of personal jurisdiction over a Filipino corporation for a lawsuit that was unrelated to any of its activities in Ohio.[135] The Court held that Benguet's Ohio activities were sufficiently substantial in nature so as to constitute the sort of minimum contacts that could serve as the fictive "presence" contemplated in *International Shoe*.[136] *Perkins* was such a large factual and doctrinal leap that it has been largely criticized by later jurists and commentators, and courts have narrowed its holding by limiting the decision to its somewhat unique facts.[137] But the decision remains relevant for our story because of the prominence of notice in the Court's analysis.

Like *International Shoe* and *Milliken* before it, the *Perkins* Court used the language of fairness to justify its decision. Echoing these earlier cases, the Court folded discussions of notice and service of process into its appeal to principles of fairness. The Court even characterized the question presented as "whether the state courts of Ohio are open to a proceeding *in personam* against an *amply notified* foreign corporation."[138] While much of the fairness analysis concerned Benguet's contacts with Ohio,[139] the Court found "no unfairness" where the corporation was carrying on such "activities appropriate to *accepting service* or *receiving notice* on [the corporation's] behalf."[140] Moreover, the Court criticized the Ohio Supreme

135. *Id.* at 438 (holding that a Philippines corporation could be sued *in personam* in Ohio for suit that "did not arise in Ohio and [did] not relate to the corporation's activities there.").

136. *Id.* at 447–48.

137. *See* BNSF Ry. v. Tyrrell, 137 S. Ct. 1549, 1561–62 (2017) (Sotomayor, J., concurring in judgment); L. D. Reeder Contractors v. Higgins Indus., Inc., 265 F.2d 768, 775 (9th Cir. 1959) ("We realize that [*Perkins*] is authority for the theory that the cause of action need not arise out of the activity of the nonresident within the forum state. But this was an earlier case than either McGee or Hanson, and rests upon its own peculiar facts."). Note, however, that *Perkins* is commonly invoked by commentators and even courts seeing to promote jurisdictional expansion. *See, e.g.*, 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, 156 (2012) ("[I]t can be hoped that somewhere in the future, a majority of the Court will, at a minimum, recognize a more expansive view of general jurisdiction than that of *Perkins*.").

138. 342 U.S. at 440 (emphasis added).

139. *Id.* at 447–48.

140. *Id.* at 445 (emphasis added). The Court also explicitly rejected the idea that the defendant could make a specific due process challenge based on a lack of notice, noting that "[a]ctual notice of the proceeding was given to the corporation . . . through regular summons upon its president while he was in Ohio acting in that capacity. Accordingly, there can be no jurisdictional objection based on a lack of notice to a responsible representative of the corporation." *Id.* at 439–40.

Court for relying on two older U.S. Supreme Court cases that, aside from predating *International Shoe*, were instances in which "no actual notice of the proceedings was received" by the foreign corporation or its representative.[141] Notice was a due process link that provided continuity between pre- and post-*International Shoe* cases. Where notice once bolstered expansive claims about a corporation's literal presence in the forum state, it could now be deployed to rationalize the fairness of corporate contacts with the forum state.

The Supreme Court also addressed specific jurisdiction during this period in *McGee v. International Life Insurance Company*.[142] There, the Court held that a single contact with a forum state could be enough to support personal jurisdiction in a lawsuit arising from that contact.[143] The Court grounded its jurisdictional expansion by echoing *International Shoe*'s appeals to changes in the nationalizing economy[144] but also with appeals to fairness that loosely accounted for the interests and conveniences of the plaintiff, the defendant, and the forum state.[145] The Court punctuated its assessment of the fairness of exercising jurisdiction on the basis of a single contact by observing that "[t]here is no contention that respondent did not have *adequate notice* of the suit or sufficient time to prepare its defenses and appear."[146]

There is a subtle difference in how the Court used notice in *McGee* compared with *Perkins*. The *Perkins* Court assessed the activities of the corporate defendant and drew a direct link between the fact that these activities were minimum contacts that mimicked the older need to establish territorial jurisdiction through presence in the forum, and the fact that some of these activities specifically enabled service and ensured notice. The *McGee* Court's treatment of notice is more ambiguous. It is possible to read the Court's sentence about notice as a cursory, pro forma statement that is ap-

141. *Id.* at 443–44.

142. 355 U.S. 220 (1957).

143. *Id.* at 221 (upholding a California long-arm statute that "subject[ed] foreign corporations to suit in California on insurance contracts with residents of that State."). *See also* Rhodes, *supra* note 19, at 196.

144. *Id.* at 222 (focusing primarily on the insurer's tight connections to the insured in California which it portrayed as a feature of the "fundamental transformation of our national economy over the years.").

145. *Id.* at 224 (plaintiffs might be "at a severe disadvantage if they were forced to follow the insurance company to a distant State," whereas the burden to the defendant might be an "inconvenience . . . but certainly nothing which amounts to a denial of due process.").

146. *Id.* at 224 (emphasis added).

pended to a discussion about personal jurisdiction, which is another topic entirely. The Court simply meant to dispense with any lingering questions that there might be *other* due process objections in the case *outside* of the jurisdictional challenge. On the other hand, the Court does little to signal that concerns about notice must be limited to separate and formal challenges to a due process notice deficiency. The observation about notice is part of the core paragraph in which the Court described due process limitations on personal jurisdiction. Given the history of connecting the fairness or even "natural justice" entitlements of notice and opportunity to be heard to personal jurisdiction, Justice Black might have assumed that readers would expect a nod to notice within personal jurisdiction even though litigants could make a separate challenge to a failure of notice. This would be no different than his emphasis on convenience despite the existence of separate judicial doctrines and remedies for inconveniently located adjudication.[147]

Curiously, the *McGee* sentence about notice is the only sentence in the due process paragraph that does not have a citation. Had the Court wanted to delineate notice as a separate due process doctrine or challenge to be made in a case like *McGee*, Justice Black might have punctuated this sentence with a cite such as "cf. *Mullane*," reinforcing the idea that notice now had its own due process life aside and apart from personal jurisdiction. But the Court's statement about notice is the only sentence in the paragraph unsupported by any authority. While it is possible that this was a deliberate attempt to obscure the relationship of personal jurisdiction and notice within due process, the more likely explanation is that it is indicative of the justices' own muddled thinking about the two. As we have seen, the formal detachment of notice from personal jurisdiction in *Mullane* was not inevitable, nor was it entirely clear that a formal separation was what the Court meant to achieve in the *International Shoe* and *Mullane* sequence.[148]

The *McGee* Court did not center or emphasize notice to the same extent that the *Perkins* Court did, but the *McGee* opinion demonstrates some discomfort with the idea of jurisdictional innovation unsupported by an affirmative showing of notice and opportunity to be heard. *Perkins* and *McGee* together suggest that, although *International Shoe* and *Mullane* signaled a shift toward a new framework for evaluating the due process merits of personal jurisdiction and

147. *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 429 (2017) (suggesting that forum non conveniens is redundant with several existing doctrines including personal jurisdiction).

148. *See supra* note 122 and accompanying text.

notice, the Court still considered notice to be a relevant touchstone of due process as it applied to personal jurisdiction.

B. From Notice of Suit to Notice of Jurisdiction: Transforming Notice from a Tool of Jurisdictional Expansion to a Tool of Due Process Expansion

Just one year after *McGee*, the Supreme Court began a slow shift in its use, and ultimately its disregard, of notice in personal jurisdiction cases. In the following decades, the Supreme Court took two concepts of notice, notice of suit and notice of jurisdiction, and separated them for doctrinal and analytic purposes. Prior to *International Shoe*, these concepts were merged because of the strict requirements of territoriality and in-hand service. But after the Court replaced the *Pennoyer* regime with minimum contacts in *International Shoe* and relaxed the constitutional requirements for notice in *Mullane*, notice of jurisdiction emerged as a problem. If a mélange of activities could subject an out-of-state defendant to jurisdiction in the forum state, and that defendant could be served by substituted service, how could these defendants assure themselves that they would or would not be subject to the jurisdiction of the forum state? And did such notice of jurisdiction matter? The answer that the Court would consistently give over the next half century was yes. Notice of jurisdiction is a constitutionally relevant concept, and the farther that personal jurisdiction analysis pulled away from the more traditional Fourteenth Amendment concept of notice of suit, the tighter the Court would cling to the importance of notice of jurisdiction. This shift was neither doctrinally consistent nor unproblematic, as the exploration of the following cases will show.

The Court first signaled this shift in *Hanson v. Denckla*,[149] in which it held that a Florida court could not exercise personal jurisdiction over a Delaware bank.[150] The Court took care to sever the issue of notice from personal jurisdiction, beginning its analysis by setting the issue of notice aside entirely, noting that "[t]here is no suggestion that the [Florida] court failed to employ a means of notice reasonably calculated to inform nonresident defendants of the pending proceedings, or denied them an opportunity to be heard in defense of their interests."[151] By fronting the issue in a curt and

149. 357 U.S. 235 (1958).

150. *Id.* at 253–54 (holding that the Florida court did not have jurisdiction over the Delaware bank because the only contacts that the bank had with Florida were due to the unilateral actions of a third party (the settlor of the trust)).

151. *Id.* at 245.

cursory manner, Chief Justice Warren severed it from the analysis that would affect its view of jurisdiction. Contrast this with the approach from *McGee* where the observation about notice at the end of the personal jurisdiction discussion tied notice to the Court's holding and offered a reassurance of due process fairness and reasonability. Here, the up-front and summary dismissal of the notice issue signaled the Court's desire to turn to the "real" business of personal jurisdiction. This difference in approach from *Perkins* and *McGee* was not necessarily a new phenomenon. As I documented in Part I, courts in the pre-*International Shoe* era often treated notice as integral to personal jurisdiction analysis, but sometimes analyzed or mentioned it as a separate doctrine.[152] In this regard, the Court's rhetorical choice is not surprising. Since the Court held that the Florida court did not have personal jurisdiction, the Court's jurisdictional innovations in *Hanson* were not expansionist. The Court did not need to highlight the fact of notice to underscore fairness to the defendant or a solid foundation of due process. Instead, it needed to segregate notice as a due process issue which, when satisfied, did not preclude a separate finding of a personal jurisdiction due process violation.

Chief Justice Warren's citations confirm this rhetorical stroke. He cited *Mullane* along with two other cases to support his assertion that notice met due process standards, whereas Justice Black's *McGee* made no such citation.[153] Justice Black, for his part, dissented in *Hanson*, noting in his argument in favor of the Florida court's jurisdiction that the bank "had timely notice of the suit and an adequate opportunity to . . . appear." This statement had some of the same ambiguity that I noted in *McGee*; it is unclear whether this statement was tied to his subsequent discussion of fairness, convenience, and litigant and forum state interest, or if it was a prefatory comment meant to clear the way for the "real" personal jurisdiction analysis.[154] Thus the majority opinion and arguably the dissent in *Hanson* demonstrated the Court's movement towards a firmer delineation of due process notice from due process personal jurisdiction.

Hanson also contained the seeds of another transformation—the shift from emphasizing notice as a consideration linked to service of process and notification of the actual proceeding, to notice

152. *See supra* Part I.C. Sometimes notice was invoked to support a jurisdictional holding, sometimes it was treated as a separate issue, sometimes it was not mentioned at all.

153. 357 U.S. at 258 (Black, J., dissenting).

154. Interestingly, Justice Black cites *Mullane* here, but for its personal jurisdiction holding, and not for notice. *Id.* at 260–61.

as a more abstract idea of foreseeability. *Hanson* famously introduced the idea that unilateral activity by the plaintiff could not create contacts in the forum state which would be imputed to the defendant.[155] Justice Warren's discussion of unilateral activity in *Hanson* was not tied to notice or foreseeability, but to the idea that the defendant had not "purposefully availed" itself of the forum.[156] In the coming years, the Court would combine the new idea of purposeful availment with the older idea of notice to create a new and controversial factor in personal jurisdiction analysis: foreseeability, which would toggle between foreseeability of effect or harm, and foreseeability of jurisdiction.

An early case to presage this move came not from the U.S. Supreme Court, but from the Illinois Supreme Court in *Gray v. American Radiator & Sanitary Corp.*[157] The opinion followed in the *Hanson* model of formalizing different due process "tracks" for personal jurisdiction and notice. It delineated two questions, "first, whether [the defendant] has certain minimum contacts with the State . . . and second, whether there has been a reasonable method of notification,"[158] citing *International Shoe* separately for each of those propositions. The court made the perfunctory observation that the Illinois long-arm statute made adequate provisions for notice and that the plaintiff followed these provisions. Thus, the "real" work to be done was in assessing whether the defendant had minimum contacts with the state to justify the exercise of jurisdiction.[159]

Justice Klingbiel reiterated the division of the two due process doctrines by opining that "the trend in defining due process of law is away from the emphasis on territorial limitations and toward emphasis on providing adequate notice and opportunity to be heard: from the court with immediate power over the defendant, toward the court in which both parties can most conveniently settle their dispute."[160] In this view, the trajectory of due process jurisprudence was one in which rigid rules of territoriality and forms of service had given way to standards of reasonableness or fairness for both

155. *Hanson*, 357 U.S. at 253.

156. *Id.*

157. 176 N.E.2d 761 (Ill. 1961) (Illinois State Supreme Court case that entered the modern personal jurisdiction canon because of its early and formative treatment of the idea that a product manufactured or sold outside of the forum state and put in the "stream of commerce" could serve as a sufficient minimum contact).

158. *Id.* at 763.

159. *Id.*

160. *Id.* (citing Smyth v. Twin State Improvement Corp., 80 A.2d 664 (Vt. 1951)).

personal jurisdiction and notice, and these standards operated independently and should be separately evaluated. Whereas earlier courts, such as the *Hess* and *Milliken* courts, had grounded the fairness of expanding jurisdiction at least in part on the fact of reasonable notice, courts pioneering the *Gray* model treated notice as a necessary co-requisite for due process, and emphasized how a manufacturer of a product sold in the forum has purposefully availed itself of that state. While Justice Klingbiel stopped short of using the term "foreseeable," the stream-of-commerce groundwork had been laid and the due process division of notice and personal jurisdiction was further entrenched.

The Supreme Court echoed this bifurcated structure in *World-Wide Volkswagen v. Woodson*,[161] with its holding that "due process requires that the defendant be given adequate notice of the suit, and be subject to the personal jurisdiction of the court." The Court quickly set aside notice because it was "not contended that notice was inadequate; the only question is whether these particular petitioners were subject to the jurisdiction of the Oklahoma courts."[162] But where the Illinois Supreme Court cited *International Shoe* for both notice and personal jurisdiction, Justice White cited *Mullane* for notice and *International Shoe* for personal jurisdiction, further cementing the separate due process tracks for each. *World-Wide Volkswagen* is the Court's first major introduction of foreseeability into the mélange of personal jurisdiction due process factors. The Court took care to distinguish two types of foreseeability. "[T]he foreseeability that is *critical to due process analysis* is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[163]

---

161. 444 U.S. 286 (1980). The Court had also used the bifurcated structure two years earlier in Kulko v. Superior Court of California, 436 U.S. 84, 91 (1978) ("the presence of reasonable notice to the defendant that an action has been brought" and minimum contacts that ensure that it would be "fair to require defense of the action in the forum."). The balance of *Kulko* examined personal jurisdiction from several angles: the nature of the contacts that the defendant had with California, fairness, reasonableness, the relevance of the interests of the plaintiff and defendant, and the interests of the forum. While the Court discussed whether the defendant could foresee that his actions would have consequences in the forum state, it notably omitted a discussion of whether the defendant could have foreseen jurisdiction itself.

162. *Id.* at 291.

163. *Id.* (emphasis added).

The real innovation in *World-Wide Volkswagen* was to harness the older doctrines of notice and purposeful availment to create the malleable and controversial personal jurisdiction factor of foreseeability of jurisdiction. Instead of pointing to the adequacy of notice of the pendency of the action at hand, the Court addressed a different sort of notice, notice of jurisdiction:

> When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear *notice* that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.[164]

The Court did not deploy the word "notice" here by accident. It reflects the longer tradition, outlined earlier, of using notice as a factor in the due process analysis of personal jurisdiction and that notice of jurisdiction had always been an implicit part of notice of suit because of the doctrinal and historical tie to personal jurisdiction via due process.

World-Wide Volkswagen's introduction of notice of jurisdiction has been roundly (and rightly) criticized as an amorphous and circular standard.[165] Its status among the other personal jurisdiction factors is still unsettled as a matter of Supreme Court jurisprudence. Notice of jurisdiction also featured prominently in the later "stream of commerce" cases. Several years after *World-Wide Volkswagen*, the Supreme Court issued its split plurality decision in *Asahi*

---

164. *Id.* at 297 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

165. *Id.* at 311 n.18 (Brennan, J. dissenting). *See* Borchers, *supra* note 8 at 94 ("the 'jurisdictional surprise' argument is circular. Any expectation that the defendant has of avoiding an out-of-state court is a function of the jurisdictional rules themselves"); Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open By* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C. L. Rev. 617, 623 (2012) ("[T]he problem with expectations is that it has too little semantic content and uniformly results in circularity."); Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 Wm. & Mary L. Rev. 385, 430 (2015) ("the anticipation test is circular"); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U. L. Rev. 1112, 1134 (1981) ("in a sense, such an argument is circular, since a potential defendant can only have such an expectation because the law so provides."); Stein, *supra* note 8 at 701 ("expectation is defined largely by the courts' ruling on the subject" and "is therefore circular"). *But see* Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, but Is It Constitutional?*, 48 Case W. Res. L. Rev. 559, 589–90 (1998) (addressing the circularity problem by distinguishing legal consequences and factual consequences of defendants' actions).

Metal Industries v. Superior Court.[166] The question in *Asahi* was whether a California court could assert personal jurisdiction over a Japanese manufacturer of tire valves that it sold to a Taiwanese tire manufacturer, who in turn sold its tires world-wide. The plaintiff sued both manufacturers over a motorcycle accident in California, alleging defects in the tire and valves.[167] The Justices were unanimous in the judgment: California did not have personal jurisdiction over Asahi, but they split sharply over the reasoning. Justice Brennan argued that Asahi did have minimum contacts with California, but that it would be unreasonable as a matter of due process to exercise jurisdiction over the company.[168] Justice O'Connor led a four-justice plurality and argued that Asahi did not have the requisite minimum contacts with California.[169] These two positions have come to be known as the "stream of commerce" and "stream of commerce plus" theories, respectively. Although the Court has, as of late, indicated a preference for the "stream of commerce plus" theory,[170] the question of which test applies remains open.[171] Notable for our purposes is the extent to which the justices agreed on the role of foreseeability of jurisdiction.

Justice Brennan's stream of commerce theory rested, in part, on his belief that litigation in California would be foreseeable to a manufacturer whose products arrive in a forum state as part of the

166. 480 U.S. 102 (1987).

167. *Id.* at 107–08.

168. *Id.* at 119–20.

169. *Id.* at 116. For extensive commentary on the *Asahi* opinion and stream of commerce, see Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 207–28 (2011); Allan Ides & Simona Grossi, *The Purposeful Availment Trap*, 7 FED. CTS. L. REV. 113, 118–19 (2014); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 348–49 (2013); Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 522 (2015).

170. *See* J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873, 883 (2011).

171. Roger W. Hughes, *Personal Jurisdiction: Selected Current Issues*, 80 THE ADVOC. (TEX.) 63, 67 (2017) (discussing the "unresolved stream-of-commerce dispute" and different jurisdictions' varying approaches); Patrick J. Borchers, *How "International" Should a Third Conflicts Restatement be in Tort and Contract?*, 27 DUKE J. COMP. & INT'L L. 461, 467 (2017) ("After *Asahi*, predictable confusion reigned among lower courts as to which version of the stream-of-commerce test to apply - Justice O'Connor's or Justice Brennan's. Courts divided as to which to follow, and others hedged their bets by concluding that the result would be the same under either test."); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 325 (2012) ("[A]fter waiting twenty years to hear a personal jurisdiction case and taking a case that squarely presented the stream-stream-plus divide, the Court still left the issue unresolved.").

"regular and anticipated flow of products."[172] In these circumstances, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the *possibility of a lawsuit* there cannot come as a surprise."[173] To support this position, Brennan quoted extensively from *World-Wide Volkswagen* and *Gray*. For Brennan, the foreseeability of the results of the stream of commerce were sufficient to put the defendant on notice that it might be sued in the forum. Brennan viewed foreseeability of lawsuits in the forum state as a due process matter, a position he had already stated in *Burger King v. Rudzewicz*.[174] But while Brennan's *Asahi* opinion stressed that this sort of foreseeability can count as a minimum contact per *International Shoe*, he was adamant that other due process considerations such as convenience, burdens to the defendant, and the relative interests of the plaintiff and the forum state can override minimum contacts and provide an alternative due process barrier to the exercise of jurisdiction.[175]

Justice O'Connor disagreed with Brennan, contending that products placed in the stream of commerce cannot alone constitute a minimum contact, in part, because the stream of commerce itself is insufficient as a mechanism for predicting the possibility of a lawsuit in the forum. The "stream of commerce plus" approach requires that the defendant engage in other activities that demonstrate that it was targeting the state. The emphasis on purposeful availment goes far beyond notice of potential lawsuits. Purposeful engagement with the forum meshes well with notions of consent, reciprocity, and even territoriality and sovereignty.[176] But notice undoubtedly motivated O'Connor's formulation of stream of commerce plus. She favorably cites the *World-Wide Volkswagen* and *Hanson* notice of jurisdiction language, that purposeful availment is

172. 480 U.S. at 117.

173. *Id.* (emphasis added).

174. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) ("By requiring that individuals have fair warning that a particular activity may subject (them) to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

175. *Asahi*, 480 U.S. at 116-21 (Brennan, J., concurring in part).

176. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018); Robin J. Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. ONLINE 123 (2018); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006).

evidence that the defendant "'has clear notice that it is subject to suit there.'"[177]

In other words, Brennan and O'Connor disagreed on a number of issues, including whether placing an article in the stream of commerce is sufficient to constructively notify the defendant of possible jurisdiction. But what is clear is that by the time *Asahi* was decided, all the Justices were operating under the assumption that one of the functions of minimum contacts was to provide constructive notice of jurisdiction to defendants. In other words, if minimum contacts were to serve as a workable framework, it had to do more than act as a modern substitute for physical presence in the forum state. It also had to provide the notice of jurisdiction that had always been implicit in the pre-*International Shoe* understanding of service of process and personal jurisdiction. The Justices simply disagreed about what sort of conduct could be reasonably understood to provide such advanced warning. As we shall see, this assumption would not last. By the time the Court heard *J. McIntyre v. Nicastro*, Justice Kennedy would opine that "foreseeability is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, *not his expectations*, that empower a State's courts to subject him to judgment."[178]

A few years after *World-Wide Volkswagen*, the Supreme Court used notice of jurisdiction to support personal jurisdiction over defendants in two intentional tort cases, *Calder v. Jones*[179] and *Keeton v. Hustler*.[180] In *Calder*, the writer and the editor of the *National Enquirer*, both Florida residents, had only sporadic contacts with the state of California where the plaintiff filed her lawsuit. However, the Court upheld personal jurisdiction on the basis that the defendants' "intentional, and allegedly tortious, actions were expressly aimed at California."[181] Such purposeful conduct, combined with the defendants' knowledge that the plaintiff lived in California where the paper had a large circulation, led the Court to conclude that the defendants "must 'reasonably anticipate being haled into court [in California]' to answer for the truth of the statements

177. *Asahi*, 480 U.S. at 110 (citing Hanson v. Denckla, 357 U.S. 235, 297 (1958)).

178. J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 883 (2011).

179. 465 U.S. 783 (1984).

180. 465 U.S. 770 (1984).

181. *Calder*, 465 U.S. at 789.

made in their article."[182] In *Keeton*, the defendant was the magazine itself. Although the plaintiff had no connection to the forum state, the Court held that when the defendant "has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine."[183] Neither *Calder* nor *Keeton* mentioned notice of suit specifically, and the foreseeability point is more of a perfunctory observation rather than the key compelling factor driving the Court toward jurisdictional expansion. Comparing this to the more detailed (if also more circular and confusing) arguments in *World-Wide Volkswagen* and other stream of commerce cases, it appears that the Court was more interested in notice of jurisdiction discourse as a method of pressing forward due process expansion rather than jurisdictional expansion.

During the era of *World-Wide Volkswagen* and *Asahi,* the concept of notice of jurisdiction exerted a powerful influence over the due process analysis of personal jurisdiction. These cases, with their varying deployment of "foreseeability" show a refashioned attentiveness to the due process consequences of notice; notice of jurisdiction had become a "New Notice" doctrine for the post-*International Shoe* and *Mullane* era. By the time of *World-Wide Volkswagen* and subsequent cases, notice of suit was relatively easy to establish. Particularly with the advent of a more connected society and better modes of communications, giving actual, or even constructive, notice of a lawsuit just was not that difficult.

The relative ease of executing notice of suit provided the Court with a soothing due process cushion from which it expanded the reach of constitutionally permissible personal jurisdiction in the first half of the twentieth century. Halting the growth of personal jurisdiction, however, required an expansion of due process. Notice, in the form of notice of suit, had served as a useful due process hook throughout the early growth of constitutional personal jurisdiction doctrine. It was only natural that the Court would again rely on notice, this time in the form of notice of jurisdiction, as a tool for doctrinal expansion, but this time, expanding due process as a means of restricting personal jurisdiction.

This "new notice" was complex; a vague, circular standard with ever-changing goal posts of which contacts would suffice as "purposeful availment." It provided the Court with a useful barrier to

182. *Id.* at 790 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

183. *Keeton*, 465 U.S. at 781 (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98).

the exercise or expansion of state jurisdictional power. By linking purposeful availment and notice, the Court could maintain the connection between personal jurisdiction and an intuitive due process value—the personal liberty interest in receiving notice of a lawsuit. Shifting the locus of notice from the pendency of an extant suit to notice of jurisdiction ensured continuity of due process values in a doctrine that began its life on shaky due process grounds and was becoming increasingly distant from due process.

Notice of jurisdiction also differed significantly from notice of suit in that it made passive what had once been active. Notice of suit involved concrete delivery methods that the forum state and the plaintiff could together accomplish to perfect notice. The state was responsible for promulgating long-arm statutes with prescribed methods of personal or substituted service. These would be constitutional so long as they were designed to apprise the defendants of the pendency of the action. Plaintiffs were tasked with actually serving (or attempting to serve) the defendants pursuant to that statute. So long as the state rules were reasonably calculated under the circumstances to apprise defendants of the action and so long as the plaintiff followed those rules, courts were more or less comfortable with assuming that the due process requirements of notice under *Mullane* had been met. Generalized worries that defendants would not learn of lawsuits had long faded from the judicial horizon, punctuated only by isolated instances of problematic service of process on idiosyncratically situated parties.[184] In other words, notice of suit provided states and plaintiffs with relatively concrete rules and steps that could be taken to ensure that a lawsuit would not interfere with a defendant's due process liberty interest, and this supported the Court's earlier intuition that state jurisdictional power could be expanded beyond *Pennoyer*'s rigid confines.

It is not surprising, then, that the due process tool the Court had once used to expand personal jurisdiction could be refash-

184. *See, e.g.*, Nelson v. Adams USA, Inc., 529 U.S. 460 (2000) (requiring notice when amending judgment to simultaneously add a third party defendant not previously named in lawsuit); Volkswagenwerk A.G. v. Schlunk, 486 U.S. 694 (1988) (reviewing the applicability of the Hague Service Convention to service of process on a foreign corporation's domestic subsidiary); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (considering notice requirements for absent class members in a Rule 23(b)(3) class action suit). *But see* Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813, 816 (2018) ("Unreliable and unfair service practices are a national problem."). As noted earlier, the bulk of constitutional notice doctrine shifted to the question of what sort of proceedings trigger a notice requirement at all, and what sort of hearing or process satisfies the constitutional requirement. *See supra* notes 132-133.

ioned into a limiting device. Notice of suit was, in a sense, too easy to satisfy. Since nearly every plaintiff with reasonable diligence and the right resources could meet the basic requirements, it no longer did enough "work" in the personal jurisdiction calculus. Problems with notice of suit no longer looked like jurisdictional issues, but as separate problems to be solved with reference to *Mullane* and perhaps interpretation of a state or federal statute.

But notice of jurisdiction was different. It clothed minimum contacts in familiar language that had a much more intuitive connection to a litigant's personal liberty due process interest. And since notice of jurisdiction was conveniently circular, it was always up for redefinition by reference to other jurisdictional values, none of which had a particularly compelling connection to due process. This had consequences for both jurisdictional expansionists and jurisdictional contractionists. Jurisdictional expansionists advocated for a frank recognition that foreseeability was not about notice and advocated for its use as a broad, independently justified concept that concerned minimum contacts by the defendant with the forum state and the concomitant justification of the exercise of state power. Jurisdictional contractionists used notice of jurisdiction foreseeability as a bridge between old notice and purposeful availment to create the "stream of commerce plus" test.

C. A New Use for Notice in a New World of In Rem *Jurisdictional Problems*

Shaffer v. Heitner[185] was the first *in rem* jurisdictional case post-*International Shoe*. The Court used this occasion to hold that the Fourteenth Amendment applied to a much larger universe of cases than had been previously considered. *Shaffer* was a shareholder derivative action against Greyhound, a Delaware corporation, and several of its directors and officers. The plaintiff filed the lawsuit in Delaware where it seemed unlikely that the court would have *in personam* jurisdiction over 21 of the directors and officers. The plaintiff used Delaware's sequestration statute to seize the defendants' property—stock in the Greyhound corporation, the situs of which was Delaware, as a basis for *quasi in rem* jurisdiction.[186] The lower courts had been operating under the assumption that under *Pennoyer*, a forum state had power over all property within its borders, rendering a due process minimum contacts inquiry irrelevant

185. 433 U.S. 186 (1977).

186. *Id.* at 190–91.

to this exercise of jurisdiction.[187] The Supreme Court reversed, holding that the due process clause applies to exercises of *in rem* jurisdiction. Thus, post-*Shaffer*, out-of-state defendants must have the requisite minimum contacts with the forum state, regardless of whether the jurisdictional predicate is *in personam* or *in rem*.

Extending the minimum contacts test to the *in rem* jurisdiction cases required some significant justification by the Court, including a detailed effort to explain that the *Shaffer* decision would, in practice, only change the outcome in a small number of cases, primarily involving intangible property whose situs in a forum was dictated by statute.[188] Justice Marshall noted *Pennoyer*'s focus on notice, but argued that this was clearly subordinate to the concerns for state power and sovereignty. While the Court could question the sufficiency of notice within a state's borders, and seizure of property was considered adequate in most cases,[189] due process in terms of notice of suit was simply irrelevant to *in rem* jurisdiction when the property owner was outside of the state.[190] Justice Marshall did not discuss the role of notice as a due process vehicle for advancing jurisdictional expansion between *Pennoyer* and *International Shoe*. Nevertheless, he used the concept of notice to expand doctrine, here the due process protection to the *in rems*, prefiguring what the Court would soon do with *World-Wide Volkswagen* and *Asahi*.

After summarizing the historical development of *in personam* jurisdiction into minimum contacts, he noted that "[n]o equally dramatic change has occurred in the law governing jurisdiction in rem."[191] In building the bridge from *International Shoe* to the *in rem* cases, Marshall cited lower court and scholarly sources advancing arguments for applying minimum contacts. But his primary appeal to Supreme Court precedent was to note that "we have held that property cannot be subjected to a court's judgment unless reasonable and appropriate efforts have been made to give the property owners *actual notice* of the action. . . . This conclusion recognizes, contrary to *Pennoyer*, that an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court."[192] In other words, notice doctrine was one of the

187. *Id.* at 192.

188. *See id.* at 208–12.

189. *See supra* Part I.C.1.

190. 433 U.S. at 200 ("since a State's process could not reach beyond its borders, this Court held after *Pennoyer* that due process did not require any effort to give a property owner personal notice that his property was involved in an in rem proceeding.").

191. *Id.* at 205.

192. *Id.* at 206 (emphasis added).

doctrinal keys to unlocking an expansion of due process, just as notice had been a comfortable cushion to soften the reach of personal jurisdiction itself.[193]

Justice Marshall seemed concerned that if *in rem* actions were exempted from minimum contacts scrutiny, courts would be trapped in a *Pennoyer*-era world of rigid assumptions about notice. If notice matters as a due process consideration, courts should be able to account for notice (or its absence) functionally as a matter of minimum contacts. Marshall rejected the *Pennoyer*-era polarized thinking about notice, in which courts were to assume that attachment of property would almost always provide requisite notice for *in rem* actions, but anything short of personal service was likely deficient in notifying parties of *in personam* actions. What had changed between *Pennoyer* and *Shaffer* was a more relaxed sense of the sufficiency of substituted service, but also the increasing ubiquity of intangible property and the growth of interstate commerce.[194]

The opinions reflect a real division among the judges as to the role of notice in personal jurisdiction. Justice Stevens wrote a short concurring opinion to stress that notice should have been at the heart of the Court's concern about the Delaware statute, thus centering both notice of suit and notice of jurisdiction. He opened with the declaration that "[t]he Due Process Clause affords protection against 'judgments without notice,'"[195] and then emphasized the constitutional requirements for sufficient substituted service of process.[196] Justice Stevens then pivoted to notice of jurisdiction, opining that "[t]he requirement of fair notice also, I believe, includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign,"[197] and detailed the sort of conduct that might have alerted Greyhound's directors and officers to the possibility that they could be subject to suit in Delaware. His argument is pure assertion—he cites no authority for this proposi-

193. Also interesting is that Justice Marshall turned to *Mullane* for its holding that 14th amendment rights cannot be divided based on a classification as *in personam* or *in rem*. *Id.*

194. *See also* Rush v. Savchuk, 444 U.S. 320 (1980) (no minimum contacts with a forum state when jurisdiction is based on *quasi in rem II* attachment of an automobile liability insurance policy in a state in which the defendant otherwise had no other contacts).

195. *Id.* at 217.

196. *Id.* at 217–18. Curiously, Stevens cited *McDonald v. Mabee* rather than *Mullane* for the due process standards of notice via service of process. This is perhaps because *McDonald* is a far stronger statement about the need for service that is likely to reach the defendant than the language in *Mullane*.

197. *Id.* at 218.

tion, although it does presage the more formal advent of notice of jurisdiction in *World-Wide Volkswagen* three years later.[198]

D. Jurisdiction Over Plaintiffs and the Return to the Touchstone of Notice of Suit

In 1985, the Supreme Court was presented with a new opportunity to engage in an extended treatment of notice and personal jurisdiction. *Phillips Petroleum Co. v. Shutts*[199] was a class action filed in Kansas state court by nearly 28,000 natural gas royalty owners who were residents of all 50 states, D.C., and several foreign countries. Phillips did not challenge whether it was subject to the personal jurisdiction of the Kansas court. Rather, it challenged the court's jurisdiction over the absent class members by linking an alleged problem with notice to a lack of jurisdiction. The notice to the absent class members required an affirmative response in order to opt out of the action, and Phillips argued that this was constitutionally deficient.[200]

The Supreme Court had not confronted a major substantive challenge to both notice and personal jurisdiction in the same case since *Mullane* and some of the pre-*International Shoe* cases such as *McDonald v. Mabee*.[201] Evaluating jurisdictional and notice challenges side-by-side forced the Court to reckon with the relationship between them in a more concrete way than it had done in decades. Although the Court did not announce an explicit holding or theory linking the two doctrines, the *Shutts* opinion shed some light about what role notice plays in post-*International Shoe* personal jurisdiction analysis.

As a general Fourteenth Amendment matter, the Court held that a claimant has a due process right in her claim which is a "chose in action."[202] Thus, it was appropriate for the Court to consider whether Kansas did, in fact, have personal jurisdiction over the absent class members and whether notice satisfied the requirements of due process.[203] On the substantive notice issue, the Court held that the opt-out notice satisfied the *Mullane* standard, both in its contents (which Justice Rehnquist described as "fully descrip-

198. *See supra* notes 161-165 and accompanying text.

199. 472 U.S. 797 (1985).

200. *Id.* at 799–802. Phillips also raised significant choice-of-law issues, and *Shutts* therefore stands for several important procedural issues in class action litigation.

201. *See supra* note 82 and accompanying text.

202. *Shutts* at 807.

203. *Id.* at 807–08.

tive")[204] and its delivery. Grafting an "opt-in" requirement for class actions onto due process "would probably impede the prosecution of those class actions involving an aggregation of small individual claims."[205]

Turning to personal jurisdiction, the Court openly acknowledged that the absent non-resident class members did not have minimum contacts with Kansas. A defendant in the same position as the claimant royalty owners would not be subject to personal jurisdiction in Kansas. This did not matter, however, because procedurally, "[a] class-action plaintiff . . . is in quite a different posture."[206] Justice Rehnquist described the litigation burdens on defendants as far greater than those on absent plaintiffs. He stressed that the consequences of a default judgment for a defendant are more severe than the res judicata effects of a judgment on an absent plaintiff. He also detailed the many procedural protections that class action procedures put in place to protect absent plaintiffs—procedures that do not exist to protect the interests of no-show defendants.[207] The Court concluded with the following pronouncement:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'[208]

Observe what the Court is saying here: it is possible, for some litigants, that personal jurisdiction consists *entirely of notice* and does not require *any* of the other considerations that personal jurisdiction doctrine had accrued over the years.[209]

---

204. *Id.* at 812.
205. *Id.* at 813.
206. *Id.* at 808.
207. *Id.* at 808–13.
208. *Id.* at 811–12.
209. An alternative reading of this passage would be to say that absent class members do not have a specific due process right to resist personal jurisdiction, and may challenge due process on notice grounds. However, this would be contrary to the language of the Court earlier in the opinion which speaks directly to plaintiffs' due process rights in personal jurisdiction. Moreover, subsequent cases and scholarship all treat *Shutts* as standing for the proposition that courts have personal jurisdiction over absent class members, and not simply that absent class members have notice rights. Even *Bristol-Myers Squibb*, which largely undid the

That is a rather astonishing conclusion hiding in plain sight, that personal jurisdiction could be supported entirely on the basis of constitutionally sufficient notice, just as it could be supported entirely on the basis of consent to jurisdiction.[210] Even property located within the jurisdiction had been subject to minimum contacts in *Shaffer*. But the *Shutts* Court placed class action plaintiffs on the periphery of the world where minimum contacts governs, holding that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over the defendant."[211]

Shutts opened the door to the idea that notice is not simply a due process fellow traveler with personal jurisdiction, nor is it just a consideration that can be invoked at a court's convenience to justify jurisdictional expansion or jurisdictional contraction via due process expansion. It could be, in at least some instances, synonymous with personal jurisdiction itself.

Under this aggressive reading of *Shutts*, one could imagine a world in which a set of procedural protections for *defendants*, if crafted and implemented correctly, could satisfy all of Justice Rehnquist's concerns. In this world, the minimum contacts test would not only provide the legal fictional substitute for presence in the forum state, but would also act as a proxy for additional procedural protections for the defendant. In this alternative world, the demand for minimum contacts would wane in relationship, to the extent that other procedural mechanisms provided the protections that minimum contacts would otherwise cover. For example, a court might point to the rules of venue, transfer, or forum non conveniens to show that minimum contacts are not needed to protect a defendant's interest in avoiding litigation in an inconvenient or burdensome forum. The only personal jurisdiction concerns that could not be meaningfully addressed by adequate procedural protections for defendants would be sovereignty and territoriality. It is

---

holding of *Shutts*, did not disturb that premise. *See* Bristol-Myers Squibb, 137 S. Ct. 1773, 1782-83 (2017) (clarifying that the Court's holding did not disturb the applicability of *Shutts* to the notice and personal jurisdiction requirements for absent class members).

210. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (forum-selection clause); Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (forum-selection clause); Hess v. Pawloski, 274 U.S. 352 (1927) (non-resident motor vehicle statute). *See generally* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015).

211. 472 U.S. at 811.

no surprise that they are also the concerns that are the most awkward fit with due process.[212]

We have already peeked into an alternative universe in which minimum contacts is a unified—if flexible—standard that serves both personal jurisdiction and notice. This was the alternate universe that I proposed as a plausible reading of the treatment of notice in *International Shoe* and the treatment of personal jurisdiction in *Mullane*.[213] As the subsequent cases have shown, the Court never really pursued that path, choosing instead to use the concept of notice, sometimes of suit, sometimes of jurisdiction, as a due process crutch rather than as an explicit and fully realized part of constitutional personal jurisdiction analysis. *Shutts* shows that this link was still lurking in the doctrinal background; that a more direct connection between these two due process doctrines might lend greater clarity to the due process contours of personal jurisdiction than the practice of justifying evolutions in the minimum contacts standards with passing reference to an ever-shifting concept of notice.

While this "additional procedural protections for defendants" approach is a tenable if bold inference one can draw from the logic of the *Shutts* opinion, it is clear that the Court did not approve of this approach, even at the time. Rules for venue, transfer, and forum non conveniens that could easily serve as "additional procedural protections" were just as alive and well in 1985 when the Rule 23 procedures that the Court cited as ensuring fair treatment of absent class members. Rehnquist contrasted absent class members to ordinary *in personam* defendants for whom the minimum contacts test still applied, thus showing a tacit belief that that rule or statute-based procedural protections for defendants are not to be trusted at a constitutional level, and the due process backstop ought to remain.

Two years after *Shutts*, the Court reiterated its reluctance to create or infer procedural protections for defendants in the absence of affirmative state or federal rules. In *Omni Capital International v. Rudolf Wolff & Co.*,[214] the Court considered the following puzzle: the plaintiffs sued English defendants in Louisiana federal court alleging violation of federal commodities laws and related

212. *See* Whitten (Part Two), *supra* note 37 at 808; Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 510-18 (examining and questioning the link between due process and several putative interests addressed by personal jurisdiction doctrine).

213. *See supra* note 104 and accompanying text.

214. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987).

state law causes of action. The defendants did not fall within the terms of the Louisiana long-arm statute and the federal commodities law was silent as to service of process. The defendants almost certainly had minimum contacts with the United States as a whole.[215] The Supreme Court held that neither the Louisiana long-arm statute, nor Federal Rule of Civil Procedure 4 authorized service of process on the English defendants. The Court noted that it was "unclear . . . whether it is open to us to fashion a rule authorizing service of process,"[216] that it would be "unwise for a court to make its own rule authorizing service of summons" and that "federal courts cannot add to the scope of service of summons Congress has authorized."[217] If the relevant sovereign has not designated a method for service of process on a particular type of party, then there is no procedure for ensuring that their due process right of notice *or* personal jurisdiction is met. And the Court will be parsimonious in fashioning such a rule.

Observe how *Omni Capital* allowed the Court to double down on "procedural protections" as a jurisdictional limiting device, rather than as an invitation to innovate due process solutions. The Court observed that the defendants could not be served with process, refused to fashion a rule that would permit service, and, finally, commented that the defendants were unreachable.[218] One could imagine that the upshot of situations like *Shutts* and *Omni Capital* would be to highlight the precise types of procedural protections that help ensure due process, and then demand that courts interpret and apply personal jurisdiction and notice doctrines in a manner that encourages procedural protections. The due process right, then, seems not to be the procedural protections themselves, but simply the right for parties to fortuitously be in a forum where such protections already exist.

Omni Capital simultaneously centers a party's due process right to notice and then subordinates that right to the authority of the relevant sovereign to craft the mechanics for such notice. It is a reminder that notice is the concept that conveniently aligns with intuitive notions of the liberty interest that the due process clauses

215. *Id.* at 100–02. The Supreme Court accepted the finding of the lower courts that service was not authorized under the Louisiana long arm statute, and therefore did not fully analyze whether personal jurisdiction in Louisiana would be unconstitutional. One may infer from the opinion that the question of minimum contacts with Louisiana was, at best, a close call.

216. *Id.* at 108.

217. *Id.* at 109.

218. *Id.*

protect, but that the sovereign authority of the forum will almost always take precedence. Notice and the attendant mechanics of service process are as much about due process window dressing as they are about aggressively pursuing procedural protections for parties before a court.

Beyond the question of additional procedural protections for parties to an action, *Shutts* also sheds some light on the phenomenon of notice of jurisdiction described in the previous section. Circular as it is, notice of jurisdiction was a concept born of the intuition that personal jurisdiction and due process could provide procedural protections to absent defendants. Notice of jurisdiction is the *in personam* analog of an "opt-in" class. It posits that defendants should have to do things that affirmatively "choose" a forum, that such a choice will prepare a defendant for litigation, and that appearing in a forum will be neither surprising nor particularly burdensome. Notice of jurisdiction can be seen as central to Justice Scalia's plurality opinion in *Burnham* in which he reasoned that "tag jurisdiction" is constitutional without regard to minimum contacts because in state personal service had always been an accepted basis for jurisdiction, and this long-standing historical fact is *itself* sufficient notice of a circumstance under which one might be haled into court to defend a lawsuit.[219] In other words, Justice Scalia advocated for another scenario in which notice (here, notice of jurisdiction) could itself be an "additional procedural protection" that obviated the need for minimum contacts.

None of this solves the circularity problem of foreseeability as notice of jurisdiction, and circularity is one of the biggest problems with using this instantiation of notice as a genuine procedural protection. However, the "additional procedural protection" justification rounds out the story of how the Supreme Court landed on this oddly circular formulation of the minimum contacts test. For decades, notice had played a quiet supporting role in the doctrinal development of personal jurisdiction. While it never stole the spotlight from other prominent considerations, such as state power and sovereignty, fairness and reasonableness, and convenience, it was undeniably in the mix of considerations and values that the Court turned to in defining the constitutional scope of personal jurisdiction.

219. Burnham v. Superior Court of Cal., 495 U.S. 604, 618–19 (1990).

IV.
WHITHER NOTICE?

From the pre-*Pennoyer* era through the first four decades after *International Shoe*, notice had been a fairly regular, if underappreciated, factor in personal jurisdiction analysis. Although notice did not feature in every single personal jurisdiction case, it reliably appeared at most of the key inflection points in the development of personal jurisdiction analysis, sometimes used to justify a jurisdictional expansion, and sometimes used to mold new doctrinal frameworks for due process expansion. But starting in the 1980s, notice began to fade away. By the post-*Asahi* era of Supreme Court jurisprudence, notice had vanished altogether.

A. Notice Vanishes from General Jurisdiction. . .

As detailed in the previous sections, several cases in the 1980s had a significant notice element, from the stream of commerce cases, to the *in rem* and class action cases, and even smaller mentions in cases like *Burger King*. But alongside these jurisdictional innovations, in 1984 the Court revisited general jurisdiction for the first time since *Perkins* in 1952. It is here that we see the first signs that notice would fade away.

The plaintiffs in *Helicopteros Nacionales de Colombia v. Hall* (*Helicol*),[220] filed a lawsuit in Texas against Helicol, a Colombian company, for damages arising out of a helicopter crash in Peru. Helicol had assorted business dealings with persons and companies in Texas, some of them related to purchase and operation of the ill-fated helicopter.[221] In finding the exercise of general jurisdiction under these facts unconstitutional, the Court stressed that the defendant's sporadic business dealings with Texas did not rise to the level of systematic and continuous contacts that would justify the exercise of jurisdiction over Helicol for any and all claims brought against it.[222] While the Court invoked the language of unilateral activity and purposeful availment, it did not discuss how or whether the defendants received actual notice of the lawsuit, nor did it discuss the relevance of foreseeability of lawsuits in the forum. It was enough for the Court to detail the defendant's sporadic contacts,

220. 466 U.S. 408 (1984).

221. Because the plaintiffs had sued under a general jurisdiction theory, the Court evaluated the contacts on that basis and did not consider the relationship of the contacts to the cause of action. *Id.* at 415 ("[A]ll parties . . . concede that respondents' claims against Helicol did not 'arise out of' and are not related to Helicol's activities within Texas").

222. *Id.* at 414–18.

assess them against language of systematic and continuous activity, and draw conclusions about sufficient minimum contacts for personal jurisdiction.

Recall that in *International Shoe*, the Court twice connected the idea of "systematic and continuous" contacts with the concept of notice; first with notice of suit and then again with notice of jurisdiction.[223] The term "systematic and continuous" was not only about creating a new doctrine that would stand in for physical presence in the forum state, but was also about capturing other due process values inherent in personal jurisdiction. In *Helicol*, the Court did address the question of fairness, but the metric for fairness was almost entirely that of the degree of presence in the state. When Court addressed general jurisdiction in *Perkins*, the evaluation of systematic and continuous contacts included notice.[224] In *Helicol*, the Court aligned fairness almost exclusively with the extent of the defendant's presence in the state. Disconnecting fairness in personal jurisdiction from notice would be the canary in the coal mine signaling that the Court would eventually abandon "systematic and continuous" almost altogether nearly thirty years later.

After more than two decades of silence, the Supreme Court returned to personal jurisdiction in 2011 addressing both general and specific jurisdiction. The unanimous *Goodyear v. Brown*[225] decision drastically narrowed and reformed general jurisdiction, discarding the old assumption that companies with large and consistent retail or commercial activity in a state were subject to general jurisdiction[226] in favor of a standard in which only defendants who are "essentially at home" in the forum state are subject to general jurisdiction.[227] The opinion makes no mention of notice, foreseeability, or even the general expectations of the parties. Pur-

223. *See supra* Part II.A.

224. *See supra* notes 134-141 and accompanying text.

225. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011).

226. *See, e.g.,* Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 217-18 (explaining that *Goodyear* and *Bauman* effectively eliminated general "doing business" jurisdiction, replacing it with the "essentially at home" test); Allan R. Stein, *The Meaning of "Essentially at Home" in* Goodyear Dunlop, 63 S.C. L. REV. 527, 532 (2012) "(stating that the "essentially at home" standard is new and "does not appear in any prior federal or state judicial decision.").

227. *Goodyear Dunlop Tires Operations*, 564 U.S. at 919. Although the Court stopped short of saying that a company could only have one "jurisdictional home" analogous to the single "principal place of business" from diversity jurisdiction, the Court's definition of "essentially at home" limited a defendant's exposure to general jurisdiction to very few states. *See* Tanya J. Monestier, *Where is Home Depot at Home?:* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 HASTINGS

poseful availment is invoked only for its role in highlighting the benefits and privileges that a defendant gets from being "essentially at home" in a forum.[228] *Helicol* had already set the precedent for ignoring any role of notice in evaluating the constitutionality of general jurisdiction. *Goodyear* followed suit. While the absence of notice in *Helicol* provides some continuity with the similar absence in *Goodyear*, *Goodyear* is probably better grouped with the new round of cases in which notice is absent.

Notice, and even any mention of foreseeability or notice of jurisdiction, appears neither in the majority nor the dissenting opinions in *Daimler AG v. Bauman*[229] and *BNSF Railway Co. v. Tyrrell*,[230] both general jurisdiction cases. General jurisdiction was, thus, the first realm of personal jurisdiction analysis in which the Court extinguished notice as a part of jurisdictional discourse. Notice had once been a helpful due process concept that propped up the exercise of general jurisdiction. By *Daimler*, notice had become either superfluous or an actual barrier to jurisdictional contraction. In specific jurisdiction, the Court had harnessed the concept of notice, seizing on notice of jurisdiction as a useful due process justification for limiting personal jurisdiction. However, general jurisdiction had become problematic. Any defendant large enough to have even been considered a meaningful candidate for general jurisdiction within a forum state would be easy to find and easy to serve with process. Since the Court was not interested in jurisdictional expansion, the concept of notice was of little use. But drawing attention to notice would raise the inconvenient proposition that a broad scope of general jurisdiction really could exist comfortably within the bounds of due process to the extent that due process is bound up with notice.

Thus, the Court used *Daimler* to put even more distance between the "systematic and continuous" standard and the aspects of fairness and reasonableness that courts had previously found were central to procedural due process. According to Justice Ginsburg, the only "continuous and systematic" contacts that are strong enough to make a defendant subject to general jurisdiction are those that render the entity "essentially at home" in the forum state, thus collapsing it almost entirely back into a proxy for territorial presence.[231] Under the pre-*Goodyear* and *Daimler* regime, the pre-

L.J. 233, 235-36 (2014) (summarizing the change from general "doing business" jurisdiction to the "essentially at home" standard).

228. *Id.* at 924.

229. 571 U.S. 117 (2014).

230. 137 S. Ct. 1549 (2017).

231. 571 U.S. at 127.

vailing thought was that a large company might be subject to general jurisdiction in many states because in each relevant state, its activities were so thorough and pervasive that they were functionally indistinguishable from local businesses.

This analogy to local businesses should be about the *totality* of circumstances that make it constitutionally permissible to sue a defendant on a general jurisdiction theory.[232] Not only does a high volume of systematic and continuous activity ensure that a non-natural defendant has something approximating the physical presence in a jurisdiction that would justify the exercise of sovereign and territorial power, but it is a proxy for the other due process values as well, such as the relative burden of litigating in a distant jurisdiction, the relevance of reciprocal benefits and burdens of operating within the forum state, and, yes—the fact that a defendant with a strong local presence is easy to notify.

Thus, in hindsight, the little-noticed abandonment of notice in *Helicol* was an early sign that the Court would soon retreat from other due process values as well in general jurisdiction analysis, collapsing the whole enterprise back into a question foremost about the sort of presence that one associates with sovereignty and territoriality, and not the sort of presence that could, taken holistically, justify the exercise of personal jurisdiction under a number of due process justifications. And where general jurisdiction led, specific jurisdiction would soon follow.

B. . . . And Then Notice Disappears from Specific Jurisdiction

Considering the steady presence of notice, both notice of suit and notice of jurisdiction, in specific jurisdiction jurisprudence through *Asahi,* the absence of notice discourse in the Supreme Court's latest round of specific jurisdiction cases is startling. The plaintiff in *J. McIntyre Machinery, Ltd. v. Nicastro*[233] was injured at work in his home state of New Jersey by a metal shearing machine that a British manufacturer sold through an American distrib-

232. *Cf.* Lea Brilmayer et. al, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721 (1988) (discussing unique and non-unique forum affiliations that form the basis for general jurisdiction). Justice Ginsburg cites this article in *Daimler* for the proposition that a defendant must be like a local business in order to be subject to general jurisdiction and uses this idea to support her "essentially at home" test. *Daimler*, 571 U.S. at 151-52. But the Brilmayer et al. article says no such thing – although the authors cite the "unique" affiliations of domicile, prinicipal place of business, and state of incorporation as the "paradigm" bases of general jurisdiction, they explicitly identify "nonunique" bases of jurisdiction as bases that courts "have properly relied on . . . for general jurisdiction." *Id.* at 735.

233. 564 U.S. 873 (2011).

uter.[234] The litigants and judges appeared to agree that J. McIntyre could foresee that its product would end up in New Jersey and cause injury there. The company used its distributer to sell its products in the U.S. market, attended trade shows in several states, and knew that possible buyers and users existed across America including New Jersey. The case presented the possibility of resolving the persistent "stream of commerce" debate that *Asahi* left unresolved. Is "mere foreseeability" that a product would reach the forum state a sufficient minimum contact, albeit one still subject to due process considerations of fairness and reasonableness? Or do minimum contacts require additional purposeful or targeted activity in the forum state beyond the foreseeability of a regular stream of commerce?

The Court was unable to generate a majority opinion that settled the "stream of commerce" issue, instead granting judgment in favor of J. McIntyre and issuing two plurality opinions and one dissent. Justice Kennedy wrote for a four-justice plurality. His *J. McIntyre* opinion is famous for its full-throated defense of the power theory of jurisdiction,[235] stressing throughout the opinion that any exercise of personal jurisdiction by New Jersey under these facts would violate jurisdictional principles of sovereignty and territoriality.[236] Justice Breyer, joined by Justice Alito, declined to sign on to Justice Kennedy's reasoning, but agreed that New Jersey could not exercise jurisdiction over the manufacturer. Justice Breyer argued that the Court need not break new doctrinal ground to do so[237] and expressed a general frustration that the case was not about the Internet, the realm in which he believed doctrinal innovation should take place.[238] Justice Ginsburg's dissent stressed that New Jersey was part of a national market that J. McIntyre targeted in its sales and marketing efforts, criticized Kennedy's heavy conceptual reliance on sovereignty, presence, and consent, and emphasized the ways in which subjecting the manufacturer to suit in New Jersey

234. *Id.* at 878-79.

235. *See, e.g.*, Patrick Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1255-56 (2011) (analyzing the plurality's emphasis on power and sovereignty); Glenn S. Koppel, *The Functional and Dysfunctional Role of Formalism in Federalism:* Shady Grove *Versus* Nicastro, 16 LEWIS & CLARK L. REV. 905, 961 (2012) (describing the plurality's "strict adherence to state forum-focused sovereignty."); Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1198-1200 (2013) (exploring Justice Kennedy's "focus on power.").

236. *J. McIntyre*, 564 U.S. at 879–82.

237. *Id.* at 887–89 (Breyer, J., concurring).

238. *Id.* at 890 (Breyer, J., concurring).

would not be unconstitutionally burdensome, inconvenient, or unfair.[239] None of the opinions made even a glancing reference to notice.

And yet, few if any commentators have remarked upon the absence of notice as a due process consideration in *J. McIntyre*.[240] Notice had long been more or less absent from personal jurisdiction commentary, but as we have seen, notice itself persisted for over 100 years after *Pennoyer* as part of personal jurisdiction jurisprudence. Consider the role that notice played in the long doctrinal journey from *Pennoyer*, where notice and service of process shaped Justice Field's conceptions of sovereignty and territoriality, to the use of notice at nearly every doctrinal inflection point to offer reassurances of due process compliance, or to push for due process expansion. Notice had once been closely tied to the notions of sovereignty and territoriality upon which Kennedy centered his opinion, and notice had once been a part of the conceptual foundation that fueled the development of stream of commerce doctrine in the first place. But by *J. McIntyre*, the Court seemed entirely uninterested in implications of whether the defendant had been duly notified of the lawsuit, nor in the question of whether the reasonableness aspect of due process should account for the expectations of parties, that is, whether J. McIntyre's conduct could or should have put it on notice that it might be sued in any American jurisdiction where its products were sold.

The disinterest continued in the new spate of Supreme Court personal jurisdiction cases. *Walden v. Fiore*,[241] the Court's latest statement on personal jurisdiction over parties alleged to have committed intentional torts, did not mention notice directly. However, Justice Thomas, writing for a unanimous Court, did discuss the relevance of whether a defendant could foresee harm in the forum state. Unlike the Court's reasoning in *Calder* and *Keeton*, Thomas did not extend foreseeability of harm in the forum state to notice of jurisdiction in terms of amenability to suit in the forum. In one way, dropping notice of jurisdiction from personal jurisdiction analysis is a step forward in making more sense out of personal jurisdiction doctrine. A party's ability to foresee being haled into court in the

239. *Id.* at 893–910 (Ginsburg, J., dissenting).

240. I count myself among those who paid little attention to this phenomenon, having already written three times about personal jurisdiction since *J. McIntyre* and *Goodyear*. Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 Lewis & Clark L. Rev. 867 (2012); Effron, *supra* note 176, at 123.

241. 571 U.S. 277 (2014).

forum state had always suffered from a circularity problem, undermining the very predictability it was meant to create.[242]

Reducing foreseeability to foreseeability of harm only, and not notice of jurisdiction, exposes the whole concept of foreseeability as irrelevant to the question of jurisdiction. Much of the *Walden* opinion is devoted to the idea that the defendant's contacts with the forum must amount to more than mere knowledge or awareness of the *plaintiff's* contacts with the forum.[243] If the defendant's conduct is directed at the plaintiff, then contacts with the forum state are incidental to that targeting. *Walden* demands that the defendant establish minimum contacts with the forum state that operate independently of the plaintiff's fortuitous, and even predictable, presence in the state. This argument, though, reveals the work that notice of jurisdiction had been doing in foreseeability analysis. Recall that notice of jurisdiction grew out of the tradition of using notice to offer reassurances of the presence of due process, or to question whether an assertion of jurisdiction met the requirements of due process. Notice of jurisdiction was *itself* a contact with the forum state. It was the connection between the happenstance of harm to a plaintiff and the location of the plaintiff herself. Notice is as much about the forum as it is about the plaintiff because, while *harm* to the plaintiff might be incidental to the plaintiff's location, the prospect of a legal proceeding is always tied to a particular and theoretically foreseeable forum. With close connection between notice and service of process, notice had always included an important element of state power alongside the age-old intuitions about fairness and due process. The innovators of notice of jurisdiction harnessed this connection as a conceptual basis for foreseeability.

Notice of jurisdiction and foreseeability had always been doomed as a viable conceptual basis for minimum contacts because of the incoherence borne of the circularity problem. But taking away notice of jurisdiction might have doomed foreseeability in its entirety because it robbed foreseeability of the connection to the forum upon which the concept was once based. *Walden* provides a good encapsulation of the story of notice in personal jurisdiction. In the post-*International Shoe* era, the presence of notice helped to create a vague and unstable doctrine: foreseeability of litigation in the forum. In the post-*Asahi* era, the absence of notice only muddled things further.

242. *See supra* note 165 and accompanying text.
243. *Walden*, 571 U.S. at 283–85.

The last case in the doctrinal odyssey from *Pennoyer* to the present is *Bristol-Myers Squibb v. Superior Court*.[244] As of this writing, it is the latest word on personal jurisdiction. It is also, perhaps, the final nail in the coffin of the relationship between personal jurisdiction and notice. The plaintiffs in *Bristol-Myers Squibb* (BMS) were a group of over 600 persons who sued BMS in California state court alleging injuries from BMS's drug Plavix. Eighty-six plaintiffs were California residents, and the rest were residents of 33 other states. BMS could not argue that California lacked jurisdiction over the plaintiffs—each plaintiff had sued individually, thus consenting to the jurisdiction of the court. Moreover, *Shutts* all but foreclosed the idea that courts could meaningfully question personal jurisdiction over aggregated claimants.[245] So instead, BMS argued that California lacked jurisdiction over BMS for the claims brought by non-residents. The Supreme Court agreed, holding that California lacked personal jurisdiction over the claims of plaintiffs who "did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California."[246]

Justice Alito wrote for himself and seven other justices; only Justice Sotomayor dissented. Other commentators have already begun the scholarly debate over the merits of the opinion and the holding itself.[247] For our purposes, what is striking about the opinion is the absence of any mention of notice in a case where notice once might have figured in the due process analysis. The opinion builds on Justice Kennedy's rhetoric from *J. McIntyre* and firmly centers federalism, sovereignty, and power as the doctrinal north star for personal jurisdiction analysis.[248] But *Pennoyer* itself and the decisions in the decades following routinely discussed notice alongside the application of the power and sovereignty principles at the heart of the *Pennoyer* framework. As we have seen, notice was one of the crucial links between the structural doctrines of sovereignty and territoriality, and the justice-based due process ground that *Pennoyer*

244. 137 S. Ct. 1773 (2017).

245. *See supra,* note 203 and accompanying text.

246. Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1778 (2017).

247. *See, e.g.*, Bradt & Rave, *supra* note 73; Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 FLA. L. REV. 499 (2018); Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. (forthcoming 2019), available at https://ssrn.com/abstract=3228023.

248. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 ("restrictions on personal jurisdiction are . . . a consequence of territorial limitations on the power of the respective states."). *See also*, Hoffheimer, *supra* note 247.

claimed as the primary constitutional grounding for the right to resist personal jurisdiction.

Although the *Bristol-Myers Squibb* decision sets forth a forceful recapitulation of sovereignty and territoriality, the Court did not jettison due process.[249] Justice Alito's opinion, however, shows just how awkward the fit between personal jurisdiction and due process had become. This is most evident in Part II.B of the opinion in which Justice Alito addresses the "variety of interests"[250] that a court must consider in assessing whether the exercise of personal jurisdiction is unconstitutional. He begins with a mention of the interests of the forum state and the plaintiff, but dismisses these without any analysis before turning to "the primary concern" which is "the burden on the defendant."[251] He acknowledges that this burden "obviously requires a court to consider the practical problems resulting from litigating in the forum"[252] but does not examine what such problems might be in this case. And this is probably because there is little that he could say—BMS was *already* in the forum state defending *nearly identical claims*, so that the usual jurisdictional bugaboos about distance, convenience, familiarity with the legal system, and other practical burdens would have made little sense in this situation.

Thus, Justice Alito refashioned the burden to "encompass[ ] the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[253] Stated differently, Justice Alito added a new "burden" that a defendant might bear—the psychic burden of an alleged violation of state sovereignty. This possibility had lurked in the shadows of personal jurisdiction analysis for decades, and he quoted *World-Wide Volkswagen*'s admonition that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment"[254] to support the claim that state sovereignty can be folded into considerations of the burden on the defendant in order to shoehorn a federalism argument into a due process framework.

This part of the Court's opinion is the natural result of the Court's insistence on doctrinal formalism regardless of whether the

249. 137 S. Ct. at 1779 ("It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts.").

250. *Id.* at 1780.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

results of that formalism had any relationship to how plaintiffs and defendants actually encounter the world or the forum state. Sotomayor's dissent is a plea to apply common sense to the *International Shoe* framework of traditional notions of fair play and substantial justice. For decades, notice had provided the connection between due process formalism, the intuitions of fair play and substantial justice, and the exercise of authority over out-of-state defendants. Stripped of notice, the Sotomayor dissent in *Bristol-Myers Squibb* and the Ginsburg dissent in *J. McIntyre* stand as simple pleas for the constitutional law of personal jurisdiction to conform to modern realities of commerce and contact. With one of the natural pillars of due process gone, the remaining generalized appeals to considerations of reasonableness in light of the relative interests of the defendant, plaintiff, and forum state fell on increasingly deaf ears. The due process innovations of *International Shoe* had finally collapsed back into the world of *Pennoyer*, and the only remaining task was to sort out the formal boundaries of minimum contacts. The task of relating such an inquiry to other due process values had been set aside.

V.
NOTICE RESURRECTED

The primary focus of this Article has been devoted to the explanatory project of demonstrating that the history of constitutional personal jurisdiction doctrine is incomplete without a thorough account of how notice has aided the development, maintenance, and evolution of personal jurisdiction as a due process doctrine. The story illuminates a history that has been hiding in plain sight. But beyond that, it gives a more satisfying answer to the question of why the Court has been able to so deftly drop core due process concerns from personal jurisdiction analysis by neatly redefining each in terms of the older *Pennoyer*-style justifications. The evolution of notice of jurisdiction from notice of suit had provided a template for refashioning individual liberty concerns into sovereignty and territoriality arguments. And the eventual absence of notice at all provided the warning signal that the Court was willing to drop some due process concerns altogether.

In this Part, I sketch a path forward for reviving notice as a due process concern in personal jurisdiction analysis. Resurrecting notice would help to construct a broad personal jurisdiction doctrine. Court access for plaintiffs could be re-elevated as a core justice and due process concern. It is easier to embrace a personal jurisdiction doctrine that includes plaintiff or forum-focused analyses if courts

can reassure themselves that a core component of the defendant's personal jurisdiction due process rights has been satisfied.

That being said, personal jurisdiction cannot completely collapse back into notice. The two doctrines were never synonymous nor interchangeable. It would be strange to suggest that a return to notice would entail having notice swallow personal jurisdiction in its entirety. Rather, notice should be a meaningful factor in personal jurisdiction analysis. Such a resurrection would be tricky. For one thing, doing so is hardly a guarantee of clarity or consistency in personal jurisdiction doctrine. Constitutional personal jurisdiction doctrine has been plagued by such problems since *Pennoyer*, meaning that there is no magical point in time to which we could set back the clock and discover the "perfect" use of notice in an elegantly logical personal jurisdiction doctrine.

How, then, should notice be marshaled in service of a better and broader personal jurisdiction doctrine? *International Shoe* provides the first clue. Notice would allow the Court to resurrect a broader general jurisdiction theory. The mistake that the Supreme Court made in the post-2011 cases was to focus almost exclusively on how minimum contacts are a proxy for presence at the expense of other core due process values. The problem is that *International Shoe*'s minimum contacts language was never *just* about presence and the power that a forum may exercise over non-natural persons. The requirement of systematic and continuous contacts ensures that a forum will not exercise jurisdiction over a defendant who is unlikely to anticipate jurisdiction or hear of a pending lawsuit. It is possible to repackage both of these notice-related concerns in service of a new, notice-inclusive approach.

Briefly stated, the notice-inclusive approach to personal jurisdiction has four components: (1) Establishing comfort with a broadly available and easily-satisfied jurisdictional standard; (2) Recommitting to a deeper constitutional examination of notice and service of process; (3) Using specific jurisdiction as a doctrine that provides constitutionally required "additional procedural protections" for defendants who are not subject to general jurisdiction, but nevertheless have a connection with the forum in which that personal jurisdiction may be constitutionally appropriate; (4) Refashioning general jurisdiction on systematic and continuous contacts that represent presence and notice while limiting its scope by reference to constitutional concerns such as burden and convenience. I shall address each of these in turn.

A. Establishing Comfort with Easily-Satisfied Due Process Criteria

Scholars have routinely tied the transformation of personal jurisdiction doctrine in *International Shoe* to the growth of a larger and more complex national economy from the late Nineteenth Century through World War II.[255] These changes in commerce certainly necessitated a more capacious personal jurisdiction doctrine that accounted for an economy that operated seamlessly across state borders. But this era brought another change as well. As the economy grew and became more interconnected, so too did the modes of communication and transportation that eased the burdens and uncertainties of service of process. The due process entitlement to be notified of a pending action was one that courts could not assume would always be easily satisfied. Thus, constructing rules that ensured actual or constructive notice of a lawsuit was a crucial feature of the exercise of state power over a defendant. Notice was not taken for granted, and many of the personal jurisdiction decisions of the pre-*Pennoyer* and pre-*International Shoe* era reflect this concern. Notice, along with other due process and sovereignty considerations, was part of a system of actively policing the boundaries of state territorial power.

In erecting and maintaining personal jurisdiction barriers, there seems to be an unspoken norm that personal jurisdiction should be *hard*. Perhaps it was this subconscious realization that caused the Court to slowly abandon notice in personal jurisdiction analysis. An admission that a core due process value of personal jurisdiction, notice, is quite easily satisfied would make personal jurisdiction itself too easy. Rather than make the self-congratulatory admission that modern commerce and communications have relegated the centuries-old concerns about notice somewhat obsolete, the Court quietly turned to the other concerns. It is as if the criteria for centering a personal jurisdiction rationale focus on whether that doctrine will be hard to satisfy, and not whether the doctrine itself is a good fit for either due process or common-sense boundaries on jurisdiction. Thus, the Court slowly let go of a due process

255. *See, e.g.*, Damon C. Andrews & John M. Newton, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 336 (2013) ("The Supreme Court's adoption of the 'minimum contacts' standard in International Shoe was a reaction to the evolving methods by which business was conducted in the twentieth century."); Douglas D. McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 753 (2003) (After *Pennoyer*, "courts struggled with application of [*Pennoyer*'s] rigid principle to an expanding and increasingly mobile economy, and to a new type of defendant, the corporation.").

rationale that could have resulted in far more defendants subject to suit in many more states.

It is time to let go of this chain of logic. A recognition that most defendants are easily reachable by in-hand service either in or out of state, by reliable public and private mail delivery services, or by reliable electronic means should be an opportunity for the Court to acknowledge that the baseline of acceptable jurisdiction can move accordingly. If it is true that many more defendants can be notified of a lawsuit in a manner consistent with due process, courts should accept this happy reality, rather than constantly recalibrating personal jurisdiction doctrine so that it continues to be "hard enough" to exclude some vaguely unspecified quantum of out-of-state defendants.

This recognition should extend to due process values beyond notice. For example, the acknowledgement that defending a lawsuit in a geographically distant state is, for many defendants, not terribly burdensome or inconvenient in the modern economy should encourage greater comfort with a broader scope of personal jurisdiction. It should not prompt the Court to discard burdens and inconvenience as a meaningful factor in personal jurisdiction analysis or to completely retrofit the concept so as to equate it with a "harder" standard like territoriality as the Court did in *Bristol-Myers Squibb*.[256] Instead, the Court should take up the invitation to *recalibrate* due process concerns rather than discard them in favor of searching for the criteria that will be the most limiting of personal jurisdiction.

B. Pressing for Deeper Constitutional Scrutiny of Notice and Service of Process Practices

A willingness to accept easily-satisfied due process criteria such as notice as meaningful indicia of constitutionality should not encompass an unexamined acquiescence to current constitutional notice doctrine. Sustained constitutional examination of notice doctrine as it relates to notice and service of process itself has been thin and sporadic in the decades since *Mullane*.[257] A more searching approach to notice might bring some added due process heft to the role that notice might play in personal jurisdiction.

While it is beyond the scope of this Article to develop and suggest comprehensive changes in constitutional notice doctrine, it is worth sketching a few avenues for exploration that would fit com-

256. *See supra* notes 250-254 and accompanying text.
257. *See supra* notes 130-133 and accompanying text.

fortably within *Mullane*'s "reasonably calculated under the circumstances" standard.[258]

Defendants from vulnerable or underrepresented populations might benefit from more robust constitutional notice protections. These would be, by and large, individual persons or small, local non-natural defendants who lack access to retained or in-house counsel that might provide them with internal systems for accepting service of process and making sense of a summons and complaint. Because most individuals are at least theoretically reachable by a process server, first class mail, or reliable electronic means,[259] it is unlikely that the Court would need to make serious changes to the delivery aspect of service of process. That being said, there could be room for taking seriously the service problems when vulnerable populations are involved, such as persons who lack a steady, fixed address or whose residential or work environments make receipt of service of process less of a certainty, even in the modern economy.[260]

Beyond the mechanics of service of process itself, there is a real opportunity for examination of the constitutional sufficiency of the content of summonses, complaints, and other notices such as the notices sent to absent class members. Constitutionally sufficient notices often involve documents with small print[261] or written in legalese or other inscrutable language.[262] While this poses little problem to well-heeled defendants with reliable access to legal counsel, it can present a real barrier to a natural lay person defen-

258. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

259. *See* Christine P. Bartholomew, *E-Notice*, 68 Duke L.J. 217 (2018) (empirical study of electronic notice in class actions); Philip P. Ehrlich, *Comment: A Balancing Equation for Social Media Notice*, 83 U. Chi. L. Rev. 2163 (2016) (discussing current issues with electronic forms of notice).

260. *See* Gottshall, *supra* not 184, at 814 (arguing that "[t]raditional methods of service, which lack reliable verifications, are not reasonably calculated to provide constitutionally adequate notice. The technological advancements that have occurred in the decades following *Mullane*, provide new and better circumstances under which notice must be provided.").

261. Shannon R. Wheatman & Terry R. LeClercq, *Majority of Class Action Publication Notices Fail to Satisfy Rule 23 Requirements,* 30 Rev. Lit. 53, 58 (finding in a study of securities class action notices that "over 60% of notices were written in less than an 8-point font.").

262. Todd B. Hilsee, Shannon R. Wheatman, & Gina M. Intrepido, *Do You Really Want to Me to Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language*, 18 Geo. J. L. Ethics 1359 (2005) (describing problems with plain language usage in class action notices).

dant who might need extra time and resources to decode a summons or class action notice.[263]

In the end, a focus on aspects of notice might provide a means to address an important distinction among defendants that has vexed some members of the Court in recent years. Consider the Appalachian potter that caused Justice Breyer such concern in *McIntyre*:

> What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii).[264]

Justice Breyer's example is focused on the purposefulness of the seller-defendant. This is unsurprising given the long doctrinal emphasis on purposeful availment and targeting of the forum that has driven much of personal jurisdiction analysis since *World-Wide Volkswagen*. But perhaps the obsessive search for the line between targeting an in-state market versus a region versus the nation as a whole obscures other distinctions that are just as relevant from a due process perspective. We might be just as concerned with the fact that a sole proprietor artisan might be significantly less equipped to respond to a legal notice than a large corporation, just as the ability of such a defendant to retain and manage local counsel in a far-flung jurisdiction is quite different from the ability to do so by a big company with its own legal department.

Beefing up constitutional notice doctrine is unlikely to radically redefine personal jurisdiction analysis. The *Mullane* bar is rela-

---

263. *See* Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 B.Y.U. L. Rev. 1079, 1115 ("[T]he nature of the claims in many class actions often renders notice by publication necessary, despite its notorious ineffectiveness."); Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 Notre Dame L. Rev. 1787, 1811-12, 1815-17, 1823 (2004) (describing problems with the content of class action notices); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2075 (2008) ("Absent class members . . . generally do not receive any form of notice regarding the proceeding [denying certification], and certainly not the individual notice and opportunity to opt out that a 23(b)(3) action would require if certification were granted."). *See generally* Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. Rev. 1781 (2014) (describing the relationship between problems with class action notice, class members' responses to notice, and the presumption of consent to personal jurisdiction).

264. J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 891-92 (2011).

tively low, and while there are good reasons to reinvigorate parts of that doctrine, there is great utility in keeping the due process notice requirement relatively easy to satisfy. It allows courts and legislatures to fashion manageable means of allowing lawsuits and other proceedings to go forward without cutting off a plaintiff's ability to pursue a remedy, or making service of process so onerous that it creates a serious access to justice issue. Nevertheless, treating notice doctrine as a constitutionally significant and live issue ensures that it will not be an immutably easy constitutional hurdle. It is easier to demand comfort with a relatively low constitutional bar when that bar is periodically recalibrated to reflect the underlying due process concerns at hand.

C. Sharpening Specific Jurisdiction with an "Additional Procedural Protections" Approach

The Supreme Court has restricted the scope of specific jurisdiction over the past decade. It has accomplished this contraction by focusing heavily on the sovereignty and territoriality concerns. Other due process values have either been discarded, devalued, or refashioned as concerns that are subsumed by sovereignty and territoriality. A notice-inclusive approach to personal jurisdiction could restore a broader due process basis to personal jurisdiction analysis, thus broadening specific jurisdiction's scope.

The minimum contacts standard was never meant to be an exclusive proxy for presence. A close reading of *International Shoe* demonstrates that minimum contacts are meant to provide an assurance that other due process values like notice are protected.[265] The key to unlocking a broader scope of specific jurisdiction is to recognize when a core due process value to personal jurisdiction has been satisfied. If it has not, a court might then look to see if additional procedural protections can or would make up for this deficit. The greater assurance a court has that a defendant has actual or constructive notice of a lawsuit, the more diminished the need to grasp tightly to fictive presence as a value that supersedes all others.

A notice-inclusive approach is, in some senses, a version of the dreaded "sliding scale" of contacts and relatedness that the Supreme Court rejected in *Bristol-Myers Squibb*.[266] Notice is a due pro-

265. *See supra* notes 100-102 and accompanying text.

266. Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1778-89 (2017) (rejecting California's sliding scale approach to specific jurisdiction in which a wider range of general contacts with the forum state compensate for fewer dispute-related contacts with the forum state).

cess concern that provides a meaningful link between wide-spread forum contacts that fall short of general jurisdiction and dispute-related contacts that fall short of the tight relationship between plaintiff, claim, and defendant required by current specific jurisdiction doctrine. A notice-inclusive approach to personal jurisdiction anchors this type of holistic analysis in the due process heart of *International Shoe*'s minimum contacts standard. A few examples illustrate this approach.

1. Specific Jurisdiction in Mass Actions and Class Actions

In the wake of *Bristol-Myers Squibb*, some commentators have worried that the Supreme Court has opened up personal jurisdiction as yet another tool for defendants to break apart mass actions and possibly class actions as well. Plaintiffs must now show that a court has jurisdiction over a defendant in each plaintiff's individual claim in a class action. Lower courts are split on whether and how this applies to class actions, with some courts holding that a court must have personal jurisdiction over the claims of all absent class members[267] and others holding that only the named representatives are considered for personal jurisdiction purposes.[268]

Bristol-Myers Squibb is the logical end of a personal jurisdiction journey in which the Court has been quietly dropping and diluting core due process values from personal jurisdiction analysis, leaving only a skeleton of purposeful availment, sovereignty, and territoriality.[269] Even purposeful availment has lost its early robust dimension. The point of purposeful availment seems only to be a means of strengthening the end conclusions regarding sovereignty and territoriality, rather than standing for larger due process values.

The mass action context has revealed the awkward due process architecture that the Court had constructed over the past two de-

267. *See, e.g.*, Practice Management Support Services, Inc. v. Cirque Du Soleil, Inc., 301 F. Supp. 3d 840, 861 (N.D. Ill. 2018) ("It [is] not clear how Practice Management can distinguish the Supreme Court's basic holding in Bristol–Myers simply because this is a class action."); Wenokur v. AXA Equitable Life Ins. Co., 2017 WL 4357916 at *4 n.4 (D. Ariz. 2017) ("The Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.").

268. *See* Knotts v. Nissan North America, Inc., 2018 WL 4922360 (D. Minn. 2018) (summarizing district court decisions in "California, Louisiana, Florida, Georgia, Virginia, Texas, the District of Columbia, and even Illinois [that] have concluded that there are valid reasons for limiting BMS to named parties—particularly due to the material distinctions between mass tort actions and class actions.").

269. *See supra* notes 246-255 and accompanying text.

cades. While Justice Alito's eight-judge majority opinion was arguably a better fit with the most recent specific jurisdiction jurisprudence, Justice Sotomayor's lone dissent rightly called attention to the lack of a common-sense framework that the Court's decisions up to and including *Bristol-Myers Squibb* had produced.[270]

Notice, among other core due process concerns, might play a role in reviving a meaningful fairness inquiry to specific jurisdiction analysis in mass action cases. In fact, notice might be the missing link between the majority's strict formalism in its "relatedness" requirement for the non-residents' claims and the strained logic of concluding that it would really be contrary to the standards of "fair play and substantial justice" to require the defendant to defend "materially identical"[271] claims to those it is already defending in the forum state.

Observe the impasse here between Justice Alito and Justice Sotomayor: Justice Alito sees a bevy of claims that might look superficially as if they belong in California, but in fact the individual disputes have nothing to do with the state. Justice Sotomayor sees materially identical claims which all arise out of conduct that does relate to the "same essential acts" that included relevant forum conduct in California.[272] Much of Justice Sotomayor's argument hinges on a conviction that a nationwide course of conduct that includes the forum state should be sufficient to show purposeful availment of the forum state. That is a powerful argument in and of itself and one that I (among others) have defended on grounds unrelated to notice.[273]

But mass actions close the loop between purposeful availment and relatedness in an even more concrete way. The nationwide (or, in some cases, regional) course of action shows purposeful availment of the forum. In *Bristol-Myers Squibb*, for example, the defendant marketed and sold the drug at issue directly into California.[274] The existence of the California claims themselves provides an important type of notice. The defendant knows that it is being sued for injuries allegedly caused by Plavix. It knows that it is being sued in California. It is, thus, especially well-positioned vis-à-vis notice of jurisdiction (i.e., notice that a lawsuit about conduct related to this drug might be brought in a forum where it marketed the drug).

---

270. 137 S.Ct. at 1787 (Sotomayor, J. dissenting) ("[O]ur precedents do not require this result, and common sense says that it cannot be correct.").

271. *Id* at 1785.

272. *Id.*

273. *See* Dodge & Dodson, *supra* note 176; Effron, *supra* note 176.

274. 127 S.Ct. at 1778.

Such a defendant is also well-positioned vis-à-vis notice of suit. If it is constitutionally permissible to serve Bristol-Myers Squibb with a summons and complaint detailing allegations of Plavix injuries suffered by a patient in California, then the defendant has not just notice, but a sophisticated preview of the dimensions of the claims generally. The device of the mass action itself ties the generalized purposeful availment regarding forum-related conduct to the specificity of actual non-resident claims.

Aggregated litigation already has a host of additional procedural protections that are meant to buffer against due process problems for both plaintiffs and defendants in these actions. Class actions in particular have such structures, and this is what many lower courts have stressed when declining to extend *Bristol-Myers Squibb* to class actions.[275] There are vigorous debates about the scope of these protections in state and federal courts for both class actions and mass actions. A better personal jurisdiction debate would take seriously these additional procedural protections. Jurists should inquire whether these protections enhance a claim to personal jurisdiction, or, alternatively, whether they fall short of the Fourteenth Amendment protections that are core to personal jurisdiction in particular, and not due process generally. Due process problems with aggregation should be addressed directly, and not hidden beneath another due process doctrine.

2. Using Registration Statutes to Broaden the Availability of Specific Jurisdiction

States require out-of-state corporations to appoint an agent for service of process upon registration.[276] The jurisdictional effect of registration statutes is constitutionally uncertain, as the Court has not addressed them in the post-*International Shoe* era.[277] Thus, the relationship between registration, minimum contacts, and consent to jurisdiction is unclear. For many decades, registration statutes lurked in the background of personal jurisdiction doctrine because the broader availability of general jurisdiction over large companies made the use of such statutes mostly unnecessary. However, inter-

275. *See supra* notes 267-268 and accompanying text.

276. Matthew Kipp, *Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 REV. LITIG. 1, 1-2 (1990) (describing registration statutes and citing examples of state registration statutes).

277. *Id.* (describing the doctrinal puzzle of the pre-*International Shoe* case of *Pennsylvania Fire Insurance Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917), that appears to authorize personal jurisdiction on a registration statute alone, and *International Shoe* which imposed the minimum contacts test); Monestier, *supra* note 210, at 1361-62 (describing the academic discourse surrounding *Pennsylvania Fire*).

est in using registration statutes as a path to general jurisdiction has surged in the wake of the *Goodyear* and *Daimler* restriction.[278]

Most courts have continued to hold that registration statutes do not confer general jurisdiction on the forum state.[279] But general jurisdiction is not the only possibility. Courts in some jurisdictions have held that registration statutes are a form of consent to the specific jurisdiction of that forum "for causes of action arising from the business that it actually conducts in the state."[280] Registration statutes could be key to filling the gaps between a narrow general jurisdiction doctrine and the overly restrictive minimum contacts standard set in the post-2011 specific jurisdiction cases. Courts should use notice as part of the doctrinal justification for this move.

The cases in which registration statutes bolstered by notice doctrine might fill a void are those in which the defendant conducts business in the forum state that is related to the wrongdoing in a plaintiff's cause of action but might not be specifically related enough to that plaintiff's cause of action to support specific jurisdiction under *J. McIntyre* and *Bristol-Myers Squibb*. This would cover many large businesses with national sales, marketing, or employment schemes. A well-written registration statute might extend a forum's jurisdiction over all actions that are *related to* the corporation's business actions within the forum state. These claims need not *arise out* of those specific activities, so long as the claims are related to the same business activities that the defendant has conducted within the state.

Notice is the due process doctrine that closes the loop between the "arise out of" and "related to" concepts that Justice Alito broke apart in *Bristol-Myers Squibb*. If a defendant has consented to jurisdiction for claims *relating* to its business activities, it has notice of jurisdiction that it can be sued for precisely these activities. The additional element of purposeful availment connected to each and every plaintiff is less necessary. Moreover, registration statutes have the added bonus of ensuring an extra layer of comfort with regard

278. *See* Monestier, *supra* note 210, at 1358 ("Now that plaintiffs will have a much harder time establishing general jurisdiction over defendants in all but the most obvious of cases, a different ground of jurisdiction will most certainly take center stage: that of corporate registration.").

279. *See e.g.*, Brown v. Lockheed Martin Corp., 814 F.3d 619, 625-27 (2d Cir. 2016); Deleon v. BNSF Rwy. Co., 426 P.3d 1 (Mont. 2018); Amelius v. Grand Imperial, LLC, 64 N.Y.S.3d 855 (2018) (New York's registration statute does not confer general jurisdiction over foreign corporate defendant).

280. Monestier, *supra* note 210, at 1370.

to notice of suit via the mechanism of appointing an agent for service of process under the statutes.

If registration statutes are to be used in this manner, it would be part of a larger project of reinvigorating the core due process concerns of personal jurisdiction. For example, courts might use registration statutes to afford jurisdictions the ability to start with a *presumption* of notice in lawsuits related to business activities conducted within the state. But the presumption that due process has been satisfied largely through notice and consent could be overcome by a showing that other concerns are particularly present in a given case. Perhaps a small corporation has registered to do business in all 50 states in the hopes that it will one day be a national company, but only acts regionally. It has scattered business activities in a forum state where a plaintiff chooses to sue for similar conduct in another state. This might be a case in which the court looks to burdens, convenience, and reasonableness to find that specific jurisdiction is unavailable notwithstanding the corporate registration.

Philips Petroleum v. Shutts is the doctrinal ancestor of this approach. Recall that a plausible reading of this case was that, as a matter of due process, personal jurisdiction could be justified as almost completely synonymous with notice because of the architecture of the "additional procedural protections" that surround absent class members under Rule 23.[281] Registration statutes should be the analogue of sound class action procedures. They marshal the doctrinal due process resources of notice and associated procedures to enhance forum-related conduct that, in other contexts, might fall short of due process.

D. Restoring Notice to a Broader General Jurisdiction Doctrine

The collapse of a broadly available general jurisdiction doctrine was a seismic change in personal jurisdiction. Limiting the general jurisdiction of domestic defendants to just one or two states drastically changed the presumed access to courts that plaintiffs previously enjoyed against large companies with a hefty business presence in many or even all states. An explicit reincorporation of the concept of notice into general jurisdiction doctrine would allow the Court to return to a doctrine in which "systematic and continuous" contact with a forum state is sufficient for general jurisdiction without the straightjacket of a doctrinal category in which the only systematic and continuous contacts that matter are the decision to

281. *See supra* notes 202-213 and accompanying text.

organize under the laws of a state and the decision to locate headquarters in a forum.

To see how notice can nudge the doctrine back towards a more capacious definition of "systematic and continuous," we need only to return to the source of that phrase itself, *International Shoe*. Recall that notice had a dual significance to the systematic and continuous concept that *International Shoe* introduced. If a company like International Shoe had systematic and continuous contact with the forum, then the company would justifiably anticipate a lawsuit in the forum[282]—this was the genesis of the emphasis on notice of jurisdiction that would blossom in the late 1950's through 1980's. But more critical (and, perplexingly, mostly forgotten) was the Court's observation that "[i]t is enough that [the defendant] has established such contacts with the state that the particular form of substituted service adopted there gives *reasonable assurance that the notice will be actual*."[283]

Due process notice doctrine connected concerns about the constitutional viability of substituted service with concerns about asserting jurisdiction over entities that lacked the traditional indicia of physical presence within the territory of a forum state. The absence of notice from latter day personal jurisdiction analysis, then, is at least in part responsible for the constricted standard from *Goodyear* and *Daimler*. Notice had disappeared from personal jurisdiction analysis and, along with it, a central justification for valuing a "systematic and continuous" presence in the forum. This left the Court with precious few justifications for general jurisdiction aside from the power theories of sovereignty and territoriality. From this angle, it's easy to see how the Court came to view pre-*Goodyear* general jurisdiction as unwieldy and unfair. If territoriality were to mean anything, it had to mean something more than the idea that a powerful presence in a state could be sufficient for general jurisdiction, even if that strong presence were replicated across many or all states within the United States. For the post-*Goodyear* Court, the requisite minimum contacts for general jurisdiction must be such that only a few states could "claim" that entity as "belonging" to the jurisdiction.

But imagine if the Court were to bring back notice as a central due process value in personal jurisdiction. The question of power over a defendant was present in 1945 and it is still present today.

282. *See supra* note 103 and accompanying text.

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

Notice was never a substitute for concerns about the exercise of state power. But to ignore notice is to take away a central due process justification for constitutional limits on the exercise of jurisdiction; a connection that is arguably one of the best fits with the concept of due process in the first place. Taking pressure off the sovereignty/territoriality justification allows for a world in which it is utterly sensible and fair to understand that some entities are so big that they are, in fact, effectively "present" in a multitude of jurisdictions.

If, once upon a time, the fear had been that large and diffuse presence meant that the Court should be worried about the effectiveness of substituted service, this concern has largely disappeared. In 1945, it probably was still necessary for Justice Stone to explicitly reassure his readers that substituted service was reliable and that minimum contacts could be an indicium of that reliability. Today, the idea that a large corporation might not receive notice of a lawsuit is quaint.[284] So quaint, in fact, that one might balk at the idea of considering that to be a factor in personal jurisdiction analysis. After all, notice is almost too easily satisfied in most cases. In an odd reversal from the concerns at the forefront of the *Pennoyer* era, it is now *natural* persons and not non-natural persons over whom most of the concern about actual notice is focused. This is the role that minimum contacts would play in a notice-inclusive personal jurisdiction analysis: the stronger the defendant's connection is with the forum, the less one worries that the defendant cannot be found or adequately notified.

Under the notice-inclusive approach described above, the scope of general jurisdiction would be very broad. So broad, in fact, that it might exceed the reach of pre-*Goodyear* general jurisdiction, which was already criticized for its breadth.[285] But this would only be the case in a notice-*centered* approach, in which the fact of notice and service would be synonymous with personal jurisdiction. As has

284. When, from time to time, an administrative snafu leads to a defect in actual notice, it is a startling and headline-catching event. *See, e.g.*, Joyce v. Pepsico, Inc., 813 N.W.2d 247 (Wis. App. 2012) (an administrative assistant at Pepsi mishandled service forwarded from Pepsi's registered agent for service of process, Pepsi did not appear in the action and the trial court entered a $1.26 billion default judgment that it later set aside).

285. *See* Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (2001) (criticizing general jurisdiction doctrine under *Perkins* and *Helicol* as a doctrine that "do[es] not give clear legal rules for contacts-based general jurisdiction."); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 629 (1988) ("[C]ourts have no clear concept of what general jurisdiction is or how it relates to specific jurisdiction.").

already been noted, this was never the case in American jurisprudence, nor should it be. A notice-inclusive approach to general jurisdiction would be part of a larger project of reinjecting other core due process concerns into a general jurisdiction minimum contacts analysis. Some of these due process concerns, such as considering the burden and inconvenience to the defendant, have only fallen away in the post-2011 Supreme Court jurisprudence. Other values, such as taking seriously the interests of the plaintiff and the interests of the forum state, have been somewhat dormant for much longer.

One need not advocate for a broad general jurisdiction doctrine, or even a return to the pre-*Goodyear* and *Daimler* stasis, in order to take advantage of what notice has to offer. Justice Ginsburg, leaving small spaces in which to advance more capacious definitions of "essentially at home," stopped short of categorical definitions or categories of entity defendants in both *Goodyear* and *Daimler*. These are the spaces in which core due process concerns like notice might provide the content to broaden the scope of general jurisdiction in limited situations, such as when a company announces the formal existence of a second or even third location for corporate headquarters.[286]

CONCLUSION

As we have seen, notice had been a long-time procedural law traveler with personal jurisdiction, the two tied together by the mechanics of service of process and by their common and simultaneous elevation to due process doctrines under the Fourteenth (and later Fifth) Amendments to the U.S. Constitution.[287] Despite the role that notice played in shaping personal jurisdiction doctrine and bolstering the Supreme Court's analysis, it remained an underrecognized and under-theorized aspect of personal jurisdiction doctrine. At one level, this is not surprising. Nothing in this narrative should be mistaken for an argument that commentators have gotten personal jurisdiction jurisprudence "wrong" for the past century; that commentators have somehow overstated the role of forum contacts, purposeful availment and other purposeful con-

286. Laura Stevens, Keiki Morris, & Katie Honan, *Amazon Picks New York City, Northern Virginia for its HQ2 Locations*, WALL ST. J. (Nov. 13, 2018, 12:16 AM), https://www.wsj.com/articles/amazon-chooses-new-york-city-and-northern-virginia-for-additional-headquarters-1542075336.

287. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1191-92 (2018) (discussing the relationship between the 5th and 14th Amendments in personal jurisdiction due process analysis).

duct, reasonableness, fairness, convenience, the interests of the plaintiffs, and, of course, the interests of the forum state, most notably via sovereignty and territoriality. I am not arguing that these theories were all a mirage and that I am revealing a hidden-yet-unified grand theory of personal jurisdiction. Rather, what I hope to have shown is that notice has been crucial in doctrinal innovation, yet continually underappreciated by both courts and scholars. A notice-inclusive approach to personal jurisdiction could broaden the doctrine and ground personal jurisdiction in Fourteenth Amendment roots that fit better with the individual liberty core of due process itself.