

THE FUNCTIONAL AND DYSFUNCTIONAL ROLE OF
FORMALISM IN FEDERALISM: *SHADY GROVE* VERSUS *NICASTRO*

by
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In 2010 and 2011, a fractured Supreme Court handed down two consecutive decisions which, yet again, addressed, but did not resolve, perennially vexing questions about where to strike the balance in judicial federalism in both the intra-state Erie context—in Shady Grove Orthopedic Associates v. Allstate Insurance Co. (2010)—and the inter-state and international context of personal jurisdiction—in J. McIntyre Machinery, Ltd. v. Nicastro (2011). In each case, a plurality opinion pursued a rigidly formalist approach, a dissenting opinion adopted a functional approach, and a concurring opinion limited the precedential reach of the plurality's strictly formalist approach. These decisions are the latest in the Court's ongoing struggle to develop an approach to Erie and personal jurisdiction doctrine that is principled enough to provide guidance to practitioners and lower courts, yet flexible enough to adapt to changing social, political, and economic realities.

The parallel formalist–functionalist split in these two decisions offers a unique opportunity to contrast the functional and dysfunctional roles of formalism in calibrating the appropriate judicial balance of power in vertical and horizontal federalism and, most pertinent to this Symposium, to evaluate the Nicastro opinions through the formalist–functionalist prism. This Article seeks to demonstrate that formalism and functionalism are not mutually exclusive dogmas but represent complementary aspects of decision-making. Each approach, as well as a balanced blend of each that I call “modified formalism,” can offer something of value to the decision-making process in the appropriate doctrinal context. Shady Grove's formalist defense of rules uniformity offers an example of the functional use of formalism in federalism. Nicastro, by contrast, illustrates its dysfunctional use.

Since International Shoe, this formalist–functionalist tension has been played out in the Court's personal jurisdiction jurisprudence manifested in a series of decisions in which the Justices debate the relevance of state sovereignty versus fairness in “minimum contacts” analysis. Nicastro is the latest round in this duel between two jurisprudential perspectives set against the contemporary backdrop of global commerce. The Nicastro opinions, in the supreme courts of New Jersey and the United States, clash over the following question: Given the practical irrelevance of international borders in international trade and the Internet since International Shoe, what is

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their legal relevance in defining the limits of state court adjudicatory power over alien defendants?

This Article evaluates Nicaastro's opinions through the larger formalist-functional perspective that informs the Court's federalism decisions generally and concludes that the rigid formalism of Justice Kennedy's plurality opinion and the modified formalism of Justice Breyer's concurrence produced a dysfunctional consequence that ignores the reality of contemporary international commerce. I propose that the Court adopt a different modified formalist model that preserves the significance of territorial sovereignty, like Justice Breyer's concurrence, but that adapts the sovereignty concept to the reality of global commerce to achieve a functionally fair result.

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I. INTRODUCTION

In 2010 and 2011, a fractured Supreme Court handed down two consecutive decisions which, yet again, addressed, but did not resolve, perennially vexing questions about where to strike the balance in judicial federalism in both the *intra*-state *Erie* context—in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*¹ (2010)—and the *inter*-state and international context of personal jurisdiction—in *J. McIntyre Machinery, Ltd. v. Nicastro*² (2011). In each case, a plurality opinion pursued a rigidly formalist approach, a dissenting opinion adopted a functional approach, and a concurring opinion limited the precedential reach of the plurality’s strictly formalist approach. These decisions are the latest in the Court’s ongoing struggle to develop an approach to *Erie* and personal jurisdiction doctrine that is principled enough to provide guidance to practitioners and lower courts, yet flexible enough to adapt to changing social, political, and economic realities.

Part II of this Article establishes the parallel formalist–functionalist split in these two decisions that offers a unique opportunity to contrast the functional and dysfunctional roles of formalism in calibrating the appropriate judicial balance of power in vertical and horizontal federalism and, most pertinent to this Symposium, to evaluate the *Nicastro* opinions through the formalist–functionalist prism. Professor Chemerinsky has argued that “a formalistic approach to federalism is misguided”³ and that “[t]he [federalism] analysis, now and always, must be functional.”⁴ This absolute condemnation of formalism is unwarranted, as exemplified by the plurality and concurring opinions in *Shady Grove* which, as demonstrated in Part II.B, provide examples of the functional uses of formalism. By contrast, the plurality opinion in *Nicastro*, described in Part II.A, illustrates the dysfunctional application of rigid formalism.

This Article’s thesis is that formalism can be justified, depending on the doctrinal context, in functional terms such as enhancing predictability and reducing resource-consuming litigation on preliminary procedural issues. I propose that formalist and functionalist approaches to federalism are not mutually exclusive, irreconcilable concepts. Rather, they can be located on a continuum that includes an eclectic⁵ blend of

¹ 130 S. Ct. 1431 (2010).

² 131 S. Ct. 2780 (2011).

³ Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959, 960 (1997).

⁴ *Id.* at 984.

⁵ One writer observes that the Supreme Court’s “eclectic center” has adopted this approach in separation of powers cases: “Formalism and functionalism are more than mere decisionmaking styles. Rather, they incorporate distinct reasoning methodologies and doctrinal supports in larger theories of the separation of powers. Both methodologies and doctrinal supports are evident in the Court’s key separation of powers opinions since *Buckley v. Valeo*, 424 U.S. 1 (1976)]. More importantly, the

formalism and functionalism that I refer to as Modified Formalism (and others have denominated New Formalism, Balanced Formalism, or Presumptive Formalism) located at the continuum's center. A pragmatic employment of these formalist approaches in the appropriate doctrinal context can have beneficial real-world consequences. Part III lays the groundwork for a formalist–functionalist comparison of *Shady Grove* and *Nicastro* by fleshing out these three jurisprudential perspectives.

The unresolved tension between functionalism and formalism reflected in the *Nicastro* opinions is inherent in federal-to-state and state-to-state judicial federalism. As demonstrated in Part IV, this tension has surfaced in the choice of law context, both *intra*-state, in *Erie*,⁶ and *inter*-state, in conflicts law⁷ and, as recounted in Part V.B, in the personal jurisdiction context as well. In the field of *intra*-state judicial federalism, no fixed geographical “lines” demarcate the boundaries between federal and state judicial authority,⁸ as there are no fixed lines between substance and procedure in the so-called *Erie–Hanna* sense. The line between federal and state judicial authority to supply the appropriate law applicable in federal diversity suits—the ephemeral line between “substance” and “procedure”—has oscillated in Supreme Court jurisprudence between formalist tests of *Sibbach v. Wilson & Co.*⁹ and *Hanna v. Plumer*,¹⁰ and functionalist approaches of *Guaranty Trust Co. v. York*¹¹ and *Gasperini v. Center for Humanities, Inc.*¹²

This formalist–functionalist tension also continues to play out in the *inter*-state context of determining the appropriate relationship among state sovereignties in the fields of conflicts law and state-court jurisdiction. But here, unlike intrastate federalism, state lines mark the territorial limits of the sovereignty of individual states, both in terms of the extraterritorial reach of state law, in conflicts, and of adjudicatory power over nonresidents, in state-court jurisdiction. As elaborated in Part IV.B, Joseph Henry Beale's vested-rights theory, adopted by the First

Court's decision whether to base its analysis on formalism or functionalism has rested upon an eclectic approach, considering whether formalism or functionalism's underlying basis seemed best suited to, and paramount in, the decision at hand. Using an eclectic approach, the members of the Court who have been unwilling to accept strict formalism or strict functionalism have blended the two concepts.” Matthew James Tanielian, Comment, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 997 (1994).

⁶ Part IV.A *infra*.

⁷ Part IV.B *infra*.

⁸ Chemerinsky, *supra* note 3, at 983 (“Line-drawing, of course, is inevitable in all of constitutional law. My objection, though, is not to the need to draw lines, but to whether meaningful lines can be drawn at all.”).

⁹ 312 U.S. 1 (1941).

¹⁰ 380 U.S. 460 (1965).

¹¹ 326 U.S. 99 (1945).

¹² 518 U.S. 415 (1996).

Restatement of Conflicts,¹³ like the minimum contacts rule in personal jurisdiction, was a “territorial rule . . . that selects a state’s law without regard to the law’s content but based on some contact that state has with the parties or the transaction.”¹⁴ The Second Restatement of Conflicts, under the influence of legal realists like Brainerd Currie, replaced the vested-rights principle with a flexible, state-interest-balancing approach that, in functionalist fashion, assesses the practical consequences of applying one state’s law over another and seeks to advance the policies underlying conflicting state laws.¹⁵

Similarly, state territorial borders were employed in *Pennoyer v. Neff*¹⁶ to define the limits beyond which a state court cannot constitutionally extend its adjudicatory authority. In *Pennoyer*, the Court applied the formalist concept of state territorial sovereignty to deduce, from the premise that a sovereign state has the exclusive *de facto* power to seize persons and property located within that state’s territory, that state lines set the limits of the legitimate jurisdictional reach of state courts over defendants, in personam, and over property, in rem.¹⁷ In the words of one commentator, “[t]he principal function of the due process clause in the jurisdictional context, according to *Pennoyer*, was to preserve the territorial sovereignty of the several states.”¹⁸

With the exponential increase in the mobility of persons and goods across state lines since *Pennoyer*, the relevance of state borders in marking the due process limits of personal jurisdiction has diminished—but not entirely—as the Supreme Court in *International Shoe* reconceived the reach of state-court jurisdiction in terms of “fair play and substantial justice.”¹⁹ *International Shoe*’s two-part minimum contacts test married the formalist minimum contacts test of “purposeful availment,” which requires the non-resident defendant to target his claim-related activities at the forum state, with the functionalist “fairness” assessment, which

¹³ See LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 220 (1986) (“The *Restatement* aimed to set out a body of rules simple in form and capable of easy administration that would promote uniformity of results, enhance predictability, and discourage forum-shopping in multistate cases.”).

¹⁴ RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.2 (6th ed. 2010).

¹⁵ *Id.* §§ 6.2–6.6.

¹⁶ 95 U.S. 714 (1878).

¹⁷ *Id.* at 723–24, 733–34.

¹⁸ David E. Seidelson, *A Supreme Court Conclusion and Two Rationales That Defy Comprehension: Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 53 BROOK. L. REV. 563, 568 (1987).

¹⁹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The concept of “purposeful availment,” as a refinement of *International Shoe*’s focus on defendant’s contacts with the forum, was first articulated by the Court 13 years later in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (“[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” (citing *Int’l Shoe Co.*, 326 U.S. at 319 (1945))).

entails balancing a variety of factors, including forum interest and party convenience.²⁰ As in the context of vertical federalism, the pendulum, since *International Shoe*, has oscillated between these two approaches, manifested in a series of dueling Court opinions that debate the relevance of sovereignty versus fairness in “minimum contacts” analysis.²¹ As noted in Part V.A, long-running academic discourse about the virtues and vices of these shifting formalist and functionalist approaches has become a cottage industry.

In *Nicastro*, this “duel”²² was waged once again between the plurality’s formalist approach, which resurrected the doctrinal significance of state sovereignty, and the dissent’s functionalist approach, this time in the international context of a machine manufactured in the U.K., directly marketed in the U.S., and purchased by a New Jersey scrap-metal company where it severely injured an employee.²³ The *Nicastro* opinions, in the supreme courts of New Jersey and the United States, clash over the following question: Given the irrelevance of international borders in international trade and the Internet since *International Shoe*, what is their legal relevance in defining the limits of state court adjudicatory power over alien defendants? On the practical significance of state borders, Professor Resnik writes: “Global trading, national and transnational companies, national law firms, the Internet, a population of which 17 percent move annually and of which some 40 percent do not live in the state of their birth—none of these are easily categorized as belonging either singularly to one state or exclusively to the national government.”²⁴ More generally, the debate continues over the relevance of state lines—

²⁰ *Id.* at 316–17.

²¹ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“The Due Process Clause, by ensuring the ‘orderly administration of the laws,’ gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” (quoting *Int’l Shoe Co.*, 326 U.S. at 319)); *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).

²² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J., dissenting) (referring to “the dueling opinions of Justice Brennan and Justice O’Connor” in *Asahi*).

²³ *Id.* at 2786 (plurality opinion).

²⁴ Judith Resnik, Afterword, *Federalism’s Options*, 14 YALE L. & POL’Y REV. 465, 482 (1996) (footnotes omitted); see also *id.* at 492–93 & n.141 (“Given cyberspace and globalization, the coherence of physicality as the basis of jurisdiction diminishes, with variation depending on the context.”) (footnotes omitted) (citing Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65, 90 (1996) (“Borders are no longer as significant as they once were. From the economic standpoint at least, they are hardly impenetrable frontiers, but rather flimsy and insubstantial curtains of gauze, through which goods, ideas, and people flow rather easily.”)).

the concrete manifestation of interstate federalism—in state-court jurisprudence.²⁵

This Article evaluates *Nicastro*'s opinions through the larger formalist–functionalist perspective that informs the Court's federalism decisions generally and, in Part V.C, concludes that the rigid formalism of the plurality opinion and the modified formalism of Justice Breyer's concurrence produced a dysfunctional consequence that ignores the reality of contemporary international commerce. I propose that the Court adopt a different modified formalist model that preserves the significance of sovereignty, like Justice Breyer's concurrence, but that adapts the sovereignty concept to the reality of global commerce to achieve a functionally fair result. Steering a middle course between a formalism that focuses narrowly on state territorial boundaries and a functionalism that would remove territorial sovereignty and the Due Process Clause entirely from the personal jurisdiction equation, I suggest that the minimum contacts doctrine should be reformulated to expand the concept of sovereignty, in the context of international commerce, from state to nation, permitting a court to aggregate an alien defendant's contacts with the national territory. A formalist presumption of legitimacy based on the alien defendant's aggregate national contacts could then be rebutted by a compelling showing of unfairness that takes account of defendants such as the small Egyptian shirt-maker, referred to

²⁵ See, e.g., *id.* at 476; *id.* at 487 n.110 (“I question not the longevity of state boundaries but their normative implications.”); *id.* at 489 (“In short, territoriality and physicality—material connections in water, air, and land—are centerpieces of jurisdictional authority, theory, and practice. . . . But we who think about courts will need to reassess assumptions—both of structure and of process—heretofore deeply rooted in the physical relationship of human beings on a specific piece of soil and a particular courthouse.”); Lea Brilmayer, *Introduction: Three Perennial Themes in the Law of Personal Jurisdiction*, 22 RUTGERS L.J. 561, 562 (1991) (“Unless the defendant's contacts with ‘the state’ are to be ruled out completely, then, state borders will continue to matter in the jurisdictional calculus.”); Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L.J. 627, 638 (1991) (“In a society in which individuals view other states as inherently territorial in nature, a due process theory that speaks in terms of territory will be more meaningful. In contrast, in a society in which boundaries are of less significance, a due process standard structured in territorial terms will prove less satisfactory in meeting one of the major goals of the due process clause, to provide a psychological sense that the legal system is fundamentally fair.”); Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 262–63 (1990) [hereinafter Kogan, *A Neo-Federalist Tale*] (“The existence of boundary lines between states is a fact of our constitutional life. A central issue of federalism is the significance of these boundaries. Personal jurisdiction doctrine addresses this issue with respect to one feature of our federalist nation, the existence of separate court systems in each of the fifty bounded areas. It attempts to justify the constitutional limits placed on the adjudicatory authority of each of these court systems over nonresidents. In performing this seemingly narrow task, however, the doctrine necessarily implicates a vision of the nature of American federalism.” (footnote omitted)).

in Justice Breyer's concurrence,²⁶ who sells his wares to an international distributor.

II. *SHADY GROVE* AND *NICASTRO*—A TALE OF TWO CASES: THE FAULT LINE BETWEEN FORMALISM AND FUNCTIONALISM IN *INTER-STATE* AND *INTRA-STATE* JUDICIAL FEDERALISM

The Court's opinions in *Nicastro* and *Shady Grove* splintered along formalist–functionalist fault lines with a concurring opinion in each case that adopted a more moderate, modified version of formalism. This Part highlights the parallel nature of the two decisions, which reflects an historic split in approach to federalism issues, not only in the personal jurisdiction context,²⁷ dating from *International Shoe*, but also in choice of law doctrine, in both the *Erie* (intrastate)²⁸ and “conflicts” (interstate)²⁹ contexts. These opinions are particularly striking in their use of formalist and functionalist rhetoric and reasoning that serves to vividly contrast these divergent approaches to federalism.

A. *Nicastro*

In 2001, Robert Nicastro, an employee of Curcio Scrap Metal located in New Jersey,

was operating the McIntyre Model 640 Shear, a recycling machine used to cut metal. Nicastro's right hand accidentally got caught in the machine's blades, severing four of his fingers. The Model 640 Shear was manufactured by J. McIntyre Machinery, Ltd., ([McIntyre UK]) a company incorporated in the United Kingdom, and then sold, through its exclusive [but independent] United States distributor, McIntyre Machinery America, Ltd. (McIntyre America) to Curcio Scrap Metal.³⁰

In the mid-1990s, Frank Curcio attended a trade convention in Las Vegas, Nevada, sponsored by the Institute of Scrap Recycling Industries, and attended by McIntyre UK's president. At the convention, Curcio visited McIntyre America's booth and was introduced to the McIntyre Model 640 Shear. In 1995, Curcio Scrap Metal purchased the machine from McIntyre America which the latter shipped from McIntyre America's headquarters in Ohio to New Jersey. In 2003, Nicastro named McIntyre UK and McIntyre America as defendants in a product-liability action in the New Jersey Superior Court.³¹

²⁶ *Nicastro*, 131 S. Ct. at 2794 (Breyer, J., concurring).

²⁷ Parts V.A and B *infra*.

²⁸ Part IV.A *infra*.

²⁹ Part IV.B *infra*.

³⁰ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 577 (*Nicastro I*) (N.J. 2010).

³¹ *Id.* at 577–78.

The New Jersey Supreme Court held “that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action.”³² The Court viewed the “increasingly fast-paced globalization of the world economy [that] removed national borders as barriers to trade” as the latest phase in the transformation of the U.S. economy that began with the country’s growth “from an agrarian/manufacture-based economy dominated by local markets to a national economy fueled by the forces of industrialization.”³³ The Court observed that this changing economic reality expanded the reach of state courts under the Due Process Clause “from the rigid rule of *Pennoyer v. Neff*³⁴ to *International Shoe*’s “more flexible standard.”³⁵ According to this functional view, in which doctrine adapts to real-world developments, the continued progress “in the transportation of products and people and instantaneous dissemination of information” that has created a “global economy” should continue to drive the evolution of this flexible standard to expand the reach of state judicial power over foreign corporations who target their products at the U.S. market using “the complex international marketing schemes that bring products into our State.”³⁶ The New Jersey Court’s holding was the next logical step in the evolution of the personal jurisdiction doctrine, applying *International Shoe* in a twenty-first century globalized world that it termed a “new reality.”³⁷

This flexible application of the minimum contacts standard, echoed in Justice Ginsburg’s *Nicastro* dissent, derived doctrinally from Justice Brennan’s version of *World-Wide Volkswagen*’s stream-of-commerce test,³⁸ articulated in his *Asahi* concurrence.³⁹ The New Jersey Supreme Court

³² *Id.* at 589.

³³ *Id.* at 577, 582.

³⁴ *Id.* at 583 (internal quotation marks omitted) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

³⁵ *Id.* at 582–83 (“The power of a state to subject a person or business to the jurisdiction of its courts has evolved with the changing nature of the American economy.”).

³⁶ *Id.* at 582, 585.

³⁷ *Id.* at 577 (“Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation’s shores and into our State. The question before us is whether the jurisdictional law of this State will reflect this *new reality*.” (emphasis added)); *id.* at 594 (“Within the confines of due process, *jurisdictional doctrines must reflect the economic and social realities of the day*.” (emphasis added)).

³⁸ *World-Wide Volkswagen*’s majority opinion reaffirmed *Hanson v. Denckla*’s resurrection of the sovereignty basis of the minimum contacts standard. See Part V.B *infra*.

³⁹ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116–17 (1987) (Brennan, J., concurring) (“[Justice O’Connor’s plurality opinion] states that ‘a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the

viewed this test as “a *new theory* of state-court jurisdiction—the stream of commerce—to respond to the contemporary realities of modern commerce.”⁴⁰ In *Asahi*, Justice Brennan rejected Justice O’Connor’s formalist “stream of commerce plus” test that requires the defendant to purposefully target its products at the forum state’s territory through “[a]dditional conduct . . . indicat[ing] an intent or purpose to serve the market in the forum State.”⁴¹ Justice Brennan deemphasized the sovereignty principle by interpreting stream of commerce as “refer[ring] . . . to the regular and anticipated flow of products from manufacture to distribution to retail sale.”⁴² In his view, the defendant’s awareness that a substantial volume of its products were being marketed in the forum state satisfied due process.⁴³ This expansive interpretation of “stream of commerce” is consistent with Brennan’s dissent in *World-Wide Volkswagen*, where he chastised the Court’s excessive focus on the defendant’s purposeful contacts targeting the forum state.⁴⁴ In writing the Court’s Opinion in *Burger King Corp. v. Rudzewicz*, Brennan again emphasized the significance of the functional “fairness” inquiry.⁴⁵

stream into an act purposefully directed toward the forum State. Under this view, a plaintiff would be required to show ‘[a]dditional conduct’ directed toward the forum before finding the exercise of jurisdiction over the defendant to be consistent with the Due Process Clause. I see no need for such a showing, however. The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. *As 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.* Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State’s laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.” (alteration in original) (emphasis added) (citations omitted) (quoting *id.* at 112 (plurality opinion)).

⁴⁰ *Nicastro I*, 987 A.2d at 584 (emphasis added).

⁴¹ *Asahi*, 480 U.S. at 112 (plurality opinion).

⁴² *Id.* at 117 (Brennan, J., concurring).

⁴³ *Id.*

⁴⁴ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299–300 (1980) (Brennan, J., dissenting) (“The Court’s opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State’s interest in the case and fail to explore whether there would be any actual inconvenience to the defendant. The essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends ‘traditional notions of fair play and substantial justice.’” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))).

⁴⁵ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (“Thus courts in ‘appropriate case[s]’ may evaluate ‘the burden on the defendant,’ ‘the forum State’s interest in adjudicating the dispute,’ ‘the plaintiff’s interest in obtaining convenient

Applying Justice Brennan's flexible version of the "stream of commerce" test, the New Jersey Supreme Court ruled that "J. McIntyre knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers" and, therefore, "it now must present a compelling case that defending a product-liability action in New Jersey would offend 'traditional notions of fair play and substantial justice.'"⁴⁶ In placing the focus "not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold,"⁴⁷ the New Jersey Court rejected the notion that foreign manufacturers should "be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products."⁴⁸

The New Jersey Supreme Court's opinion also reflects Justice Brennan's shift of emphasis, expressed in his *World-Wide Volkswagen* dissent, from the majority's threshold purposeful availment requirement, which, in Brennan's view, "focus[es] tightly on the existence of contacts between the forum and the defendant,"⁴⁹ to the fairness prong of the minimum contacts doctrine, which focuses on the forum state's interest in providing a convenient forum for local residents:

A state has a strong interest in protecting its citizens from defective products, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or workplace machinery that causes disabling injuries to employees. A state also has a paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace.⁵⁰

and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (alteration in original) (citations omitted) (quoting *World-Wide Volkswagen*, 444 U.S. at 292 (1980)).

⁴⁶ *Nicastro I*, 987 A.2d at 593 (quoting *Lebel v. Everglades Marina, Inc.*, 558 A.2d 1252, 1257 (N.J. 1989)).

⁴⁷ *Id.* at 592.

⁴⁸ *Id.* at 585 (internal quotation marks omitted) (quoting *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1137 (N.J. 1986)).

⁴⁹ *World-Wide Volkswagen*, 444 U.S. at 299 (Brennan, J., dissenting).

⁵⁰ *Nicastro I*, 987 A.2d at 590; *id.* at 577 ("Due process permits this State to provide a judicial forum for its citizens who are injured by dangerous and defective products placed in the stream of commerce by a foreign manufacturer that has targeted a geographical market that includes New Jersey. The exercise of jurisdiction in this case comports with traditional notions of fair play and substantial justice." (citation omitted)).

By a six to three majority, the U.S. Supreme Court reversed. Two-thirds of this six-justice majority was comprised of a plurality opinion that is solidly grounded in the concept of state sovereignty, the formalist pedigree of which dates back to *Pennoyer* and the agrarian economy of the mid-nineteenth century.⁵¹ The dissenting justices countered with a functionalist approach that gave “prime place to reason and fairness,” rather than state sovereignty.⁵²

The Supreme Court’s grant of certiorari in *Nicastro* gave it the opportunity finally to resolve the confusion over the *Asahi* Court’s “four to four division on the proper scope of the stream of commerce principle [that] has left matters in somewhat of a muddle.”⁵³ Missing this opportunity, the Court splintered along formalist–functionalist lines, as it did in *Asahi*, into a plurality opinion by Justice Kennedy, joined by Chief Justice Roberts, and Justices Scalia and Thomas, a dissenting opinion by Justice Ginsburg, joined by Justices Sotomayor and Kagan, and an opinion concurring in the judgment by Justice Breyer, joined by Justice Alito.

The plurality opted for a strictly⁵⁴ formalist application of the “territorial sovereignty” thread of the minimum contacts doctrine, the pedigree of which extends back to *Pennoyer v. Neff*’s territorial sovereignty premise for defining the limits of state-court jurisdiction.⁵⁵ It rejected Justice Brennan’s interpretation of “stream of commerce” which incorrectly, in its view, “discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability.”⁵⁶ Consistent with its emphasis on state sovereignty, the plurality interpreted the purposeful availment prong of the minimum contacts standard as just another way a defendant may “submit to a State’s authority,”⁵⁷ along with the traditional jurisdictional bases of presence, consent, and citizenship or domicile, each of which, in the plurality’s view, “reveals circumstances, or a course of conduct, from which it is

⁵¹ See *J. McIntyre Mach., Ltd. v. Nicastro* (*Nicastro*), 131 S. Ct. 2780, 2786–87 (2011).

⁵² *Id.* at 2800 (Ginsburg, J., dissenting) (commenting that “[t]he modern approach to jurisdiction over corporations and other legal entities, ushered in by *International Shoe*, gave prime place to reason and fairness”).

⁵³ 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1067.4, at 497 (3d ed. 2002).

⁵⁴ *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring) (“The plurality seems to state strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum.’” (alteration in original) (quoting *id.* at 2788 (plurality opinion))).

⁵⁵ John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1039 (1983) (“The opinion’s requirement [in *International Shoe*] of contacts with the forum state . . . does conform with *Pennoyer*’s emphasis on territorial sovereignty.”).

⁵⁶ *Nicastro*, 131 S. Ct. at 2788 (plurality opinion); see also *id.* at 2787 (“Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.”); *id.* at 2789 (concluding “that jurisdiction is in the first instance a question of authority rather than fairness”).

⁵⁷ *Id.* at 2787.

proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State.”⁵⁸ The plurality’s strict formalist approach, focusing narrowly on state sovereignty, interpreted purposeful availment as a “more limited form of submission to a State’s authority for disputes that ‘arise out of or are connected with the activities within the state.’”⁵⁹

Although *World-Wide Volkswagen*’s articulation of the stream of commerce test referred to a “corporation that delivers its products into the stream of commerce *with the expectation* that they will be purchased by consumers in the forum State,”⁶⁰ the plurality embraced Justice O’Connor’s “plus” requirement in noting that “[t]his 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.”⁶¹ To make the primary role of sovereignty in limiting state-court jurisdiction unmistakably clear, the plurality opinion mentioned the word “sovereign” or “sovereignty” seventeen times, and referred eight times to the requirement that the defendant submit to the power of a sovereign.⁶² The plurality also stressed the relevance of interstate federalism in defining due process limits on state-court jurisdiction, commenting that, “if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”⁶³ Since McIntyre UK did not *target* the New Jersey market specifically, but only the U.S. market nationwide, the plurality opined that it is not subject to personal jurisdiction in the New Jersey state court.⁶⁴

Justice Ginsburg’s dissent, joined by Justices Sotomayor and Kagan, struck a distinctly functional note that echoed Justice Brennan’s emphasis on second-prong “fairness” and “reasonableness” factors by observing that the “modern approach to jurisdiction over corporations and other legal entitles, ushered in by *International Shoe*, gave prime place to reason and fairness.”⁶⁵ Reminiscent of Justice Brennan’s focus, in his *World-Wide Volkswagen* dissent, on the strong “interest of the forum State and its connection to the litigation,”⁶⁶ Justice Ginsburg focused on the

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

⁶⁰ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (emphasis added).

⁶¹ *Nicastro*, 131 S. Ct. at 2789 (emphasis added).

⁶² *Id.* at 2787–90.

⁶³ *Id.* at 2789.

⁶⁴ *Id.* at 2790–91.

⁶⁵ *Id.* at 2800 (Ginsburg, J., dissenting).

⁶⁶ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 305 (1980) (Brennan, J., dissenting) (noting that the “automobile accident underlying the litigation occurred in Oklahoma,” “[t]he plaintiffs were hospitalized in Oklahoma when they brought suit,” and “[e]ssential witnesses and evidence were in Oklahoma”).

same second-prong fairness inquiry by posing the rhetorical questions: “Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury? Do not litigational convenience and choice-of-law considerations point in that direction?”⁶⁷ Her dissenting opinion’s emphasis on second-prong fairness also evokes Justice Brennan’s functionalist observation that *International Shoe’s* “almost exclusive focus on the rights of defendants, may be outdated” and that “[t]he model of society on which the *International Shoe* Court based its opinion is no longer accurate” in light of the “nationalization of commerce.”⁶⁸

The dissent also applied a more functional concept of sovereignty by expanding its focus in the international arena to include an alien defendant’s national contacts by minimizing, like Justice Brennan, the functional significance of state boundaries in limiting jurisdiction over a foreign corporation that targets the U.S. market.⁶⁹ I will conclude, in Part V.C., that the dissenting and concurring Justices missed the opportunity to cobble together a majority on the common ground of territorial sovereignty, but a sovereignty expanded to include an alien defendant’s aggregate *national* contacts.

Justice Breyer’s concurring opinion, joined by Justice Alito, confined itself narrowly to the facts of the case, thereby minimizing the precedential weight of the plurality’s broad pronouncements on state sovereignty and federalism.⁷⁰ He steered a middle course between the plurality’s “strict rules that limit jurisdiction where a defendant does not ‘intend to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum,’”⁷¹ and the New Jersey Court’s “absolute approach,” which would subject “a producer . . . to jurisdiction for a

⁶⁷ *Nicastro*, 131 S. Ct. at 2800 (footnotes omitted).

⁶⁸ *World-Wide Volkswagen*, 444 U.S. at 307–09 (“Business people, no matter how local their businesses, cannot assume that goods remain in the business’ locality. Customers and goods can be anywhere else in the country usually in a matter of hours and always in a matter of a very few days.”).

⁶⁹ *Nicastro*, 131 S. Ct. at 2801 (“McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, ‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States. . . . How could McIntyre UK not have intended, by its actions targeting a national market, to sell products in the fourth largest destination for imports among all States of the United States and the largest scrap metal market?”); *id.* at 2801 n.13 (“For purposes of international law and foreign relations, the separate identities of individual states of the Union are generally irrelevant.” (internal quotation marks omitted) (quoting Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 36 (1987))).

⁷⁰ *Id.* at 2791 (Breyer, J. concurring) (“I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.”).

⁷¹ *Id.* at 2793 (quoting *id.* at 2788 (plurality opinion)).

products-liability action so long as it ‘knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.’”⁷² Accordingly, his concurrence avoided choosing between the two *Asahi* interpretations of *World-Wide Volkswagen’s* “stream of commerce” theory. In Justice Breyer’s view, neither interpretation supported the New Jersey Court’s exercise of personal jurisdiction over McIntyre UK because, applying O’Connor’s “stream of commerce plus” approach, McIntyre U.K. did not do “something more” to direct its machine to New Jersey—mere awareness that the stream will carry the Model 640 Shear to that state is insufficient—and, under Brennan’s “stream of commerce” approach, the isolated occurrence of a single sale in New Jersey fell far short of a “‘regular and anticipated flow’ of commerce into the [forum] State.”⁷³

Justice Breyer’s respect for precedent—including “the constitutional demand for ‘minimum contacts’ and ‘purposefu[l] avail[ment]’” by the defendant *with the forum*, which rests upon “*defendant-focused* fairness”⁷⁴—shares aspects of the plurality’s formalist focus on state—rather than national—sovereignty,⁷⁵ but eschews the plurality’s rigid formalism based on the defendant’s intent to “submit to the sovereign”⁷⁶ and is also flexible enough to leave the door open to adapting precedent to new commercial realities. This flexible use of formalism, which I have called modified formalism,⁷⁷ allows for the evolution of precedent in light of changing reality, but only by proceeding cautiously,⁷⁸ declining to “work

⁷² *Id.* (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 592 (N.J. 2010)).

⁷³ *Id.* at 2792 (quoting *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring in part and concurring in the judgment) (“Here, the relevant facts found by the New Jersey Supreme Court show no ‘regular [] flow’ or ‘regular course’ of sales in New Jersey; and there is no ‘something more,’ such as special state-related design, advertising, advice, marketing, or anything else.”).

⁷⁴ *Id.* at 2793 (alterations in original) (emphasis added) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 297 (1980)).

⁷⁵ *Id.* (“For one thing, to adopt this view would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between ‘the defendant, the *forum*, and the litigation,’ it is fair, in light of the defendant’s contacts *with that forum*, to subject the defendant to suit there.” (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

⁷⁶ *Id.* (referring to the plurality’s “strict rules that limit jurisdiction where a defendant does not ‘inten[d] to submit to the power of a sovereign’ and cannot ‘be said to have targeted the forum’”).

⁷⁷ See *infra* Part III.B.

⁷⁸ See, e.g., John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591, 751 (1995) (“My concern is for how change occurs, and within the particular arena of constitutional law, *I want change to be undertaken responsibly, not recklessly*. Our Constitution is a constitution of diffused power, . . . checked at every level by entrenched respect for individual rights. Rights are both precious and costly. . . . Rights are also vulnerable. They are constructs founded in history and tradition as well as current consensus, and they are disserved by the pragmatist’s recurrent clamor that the past ought to guide progress, but not unduly restrain it.” (emphasis added));

such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests *without a better understanding of the relevant contemporary commercial circumstances.*"⁷⁹

This balanced approach also steers a middle course that accommodates both prongs of *International Shoe's* minimum contacts analysis. It is formalist in that it emphasizes *World-Wide Volkswagen's* first-stage purposeful availment focus on defendant's *forum-based* contacts as a threshold requirement, as opposed to the dissent's broader approach that gives "prime place to reason and fairness" focusing on the place of injury.⁸⁰ But Justice Breyer would temper the harsh effects of rigid formalism by taking into account the second-stage "fairness" concern that the New Jersey Supreme Court's absolute approach could be "fundamentally unfair" to a "small Egyptian shirt maker"⁸¹ who sells his wares through an international distributor. I will conclude in Part V.C that the concurrence's modified formalist approach was dysfunctional in focusing exclusively on state sovereignty. Justices Breyer and Alito could have taken a different modified formalist path that would have been functionally "fair" by staking common ground with the dissenting Justices to affirm the New Jersey Supreme Court's holding, but on the narrow, first-prong ground of sovereignty, adapted to reflect global commercial reality by focusing on *national* sovereignty and subject to a second-prong "fairness" inquiry, which would accommodate Justice Breyer's concern about the New Jersey Supreme Court's "absolute approach" that would ensnare "the Egyptian shirtmaker" in U.S. lawsuits.

B. Shady Grove

Like the three Supreme Court opinions in *Nicastro*, the *Shady Grove* Court also fractured in formalist–functionalist terms, this time over *Erie's* distinction between "substance" and "procedure" in choice of law. At issue was whether federal class action Rule 23 conflicted with, and

id. at 752–53 ("It may well be . . . that the current constitutional law of state-court personal jurisdiction is a poor elaboration of individual rights against state power within a federal structure. . . . How far these rights should be conceived as derivative from territorial limits of state sovereignty rather than normative limits of fairness remains a lively question for a body of law that is not yet dead. . . . This model argues for a reformulation of 'minimum contacts' theory in which the concept of purposefulness is more carefully defined as the criterion for what 'contacts' count, and in which the intertwined concepts of the magnitude of the contacts and their relationship to the claim in issue are more carefully defined as criteria for whether the cognizable contacts meet the required 'minimum.' And it argues as well for a *parallel reformulation of the concepts of sovereignty and subject* within a federal union in which economic integration and the transformation of property into information have profoundly altered the traditional relationships of territoriality, power, and politics." (emphasis added)).

⁷⁹ *Nicastro*, 131 S. Ct. at 2794 (emphasis added).

⁸⁰ *Id.* at 2800 (Ginsburg, J., dissenting).

⁸¹ *Id.* at 2794 (Breyer, J., concurring).

therefore preempted, Civil Practice Law and Rules (CPLR) section 901(b), a subsection of New York's class action rule, which barred actions to recover statutory penalties from being maintained as a class action in state court.⁸² In *Shady Grove*, "the straight-ahead formalism"⁸³ of Justice Scalia's plurality opinion, the balance of formalism and functionalism of Justice Stevens' concurrence, and the functionalist realism⁸⁴ of Justice Ginsburg's dissent align respectively, in *Nicaastro*, with Justice Kennedy's plurality opinion, Justice Breyer's concurrence, and Justice Ginsburg's dissent. As I have commented elsewhere,⁸⁵

the opinions in *Shady Grove* reflect the spectrum of formalist–realist perspectives in characterizing a rule as "procedural" or "substantive," from the formalism of Justice Scalia, who essentially ignores the practical impact of procedural differences on substantive rights and litigation outcomes and applies "the [state] statute's clear text,"⁸⁶ to the mix of formalism and realism of Justice Stevens, who would "allow[] for the [rare]"⁸⁷ possibility that a state rule that regulates something traditionally considered to be procedural might actually define a substantive right,⁸⁸ but who "respect[s] the *plain textual reading*" of a rule located in the state's procedural code when "there are two plausible competing narratives" about the rule's purpose,⁸⁹

⁸² *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1436 (2010).

⁸³ Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907, 912 (2011).

⁸⁴ Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 468 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960* (1986)) (noting one aspect of Professor Kalman's description of Legal Realism: "First, it is a form of functionalism or instrumentalism."); LAURA KALMAN, *LEGAL REALISM AT YALE: 1927–1960*, at 30 (1986) ("[Functionalism] also promised to give the realists a more accurate picture of the way the judicial process functioned.")

⁸⁵ Glenn S. Koppel, *The Fruits of Shady Grove: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999, 1045 (2011) (alteration in original) (emphasis added) (footnote omitted); see also Stempel, *supra* note 83, at 909 n.7 ("Applied to *Shady Grove* and the *Erie* doctrine, Justice Scalia is a formalist in that he embraces a rule or set of rules (e.g., apply federal procedural rules in federal court diversity cases if there is an applicable federal rule) while Justice Ginsburg is a functionalist in that she devotes greater attention to furthering the public policy goals underlying a doctrine (e.g., avoid differing outcomes in state and federal court and discourage federal–state forum shopping) even if at first glance a broad application of the general rule (apply federal procedure in federal court) would appear to end the inquiry. . . . [B]road application of the rule does not end the inquiry for Justice Ginsburg because she is concerned that a state procedural rule conflicting with the federal rule may in fact embody a state public policy and that failure to apply the state rule will lead to disparate results and increased forum shopping.").

⁸⁶ *Shady Grove*, 130 S. Ct. at 1440.

⁸⁷ *Id.* at 1455 n.13 (Stevens, J., concurring) (noting that it will be the "rare state rule[] that, although 'procedural' in the ordinary sense of the term, operate[s] to define the rights and remedies available in a case") (emphasis added).

⁸⁸ *Id.* at 1453 n.8.

⁸⁹ *Id.* at 1459–60 (emphasis added).

to the full-blown realism⁹⁰ of Justice Ginsburg, who characterizes a state procedural rule as “substantive” if it is “outcome affective in the sense our cases on *Erie* (pre- and post-*Hanna*) develop.”⁹¹

Justice Scalia’s plurality opinion resurrected *Sibbach v. Wilson & Co.*’s⁹² bright-line test of Federal Rule validity under § 2072(b) of the Rules Enabling Act (REA)—the so-called “substantive rights proviso”—which focused solely on whether the Federal Rule in question “really regulates procedure” and ignored the outcome-determinative consequences that application of that Rule might have over the competing state rule.⁹³ Justice Scalia—true to his plain text approach to statutory interpretation⁹⁴—avoided delving into New York’s legislative intent and policy underlying CPLR section 901(b) to determine whether it conflicted with Rule 23 and whether the federal class action rule was “valid” under the substantive rights proviso as applied to preempt the New York statute. Consistent with a formalist approach to federalism, the plurality refused to engage in the exercise of balancing federal and state interests that characterized Justice Ginsburg’s opinion in *Gasperini* and her dissent in *Shady Grove*.

Justice Ginsburg’s dissent, like her dissent in *Nicastro*, focused functionally on the real-world consequences of interpreting Rule 23 broadly to conflict with New York’s class action statute. Her *Shady Grove* dissent,⁹⁵ as well as the Court’s Opinion in *Gasperini*, which she

⁹⁰ *Id.* at 1463 n.2 (Ginsburg, J., dissenting) (noting that Justice Stevens’ characterization of § 901(b) as a procedural rule that is not part of New York’s substantive law “does not mirror reality” (emphasis added)).

⁹¹ *Id.* at 1471.

⁹² 312 U.S. 1, 14 (1941) (establishing a single test of Federal Rule validity: “whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them”); 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4508, at 223 (2d ed. 1996) (“Implicit in the Court’s opinion in *Sibbach* is the assumption that matters of procedure and matters of substance are, in the words of [Justice Frankfurter’s] dissent, ‘mutually exclusive categories with easily ascertainable contents.’” (quoting *Sibbach*, 312 U.S. at 17 (Frankfurter, J., dissenting))); Stempel, *supra* note 83, at 912 (referring to the “revival-cum-enshrinement of *Sibbach v. Wilson & Co., Inc.*”).

⁹³ *Shady Grove* 130 S. Ct. at 1443 (plurality opinion) (“The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of ‘incidental effec[t]’ we have long held does not violate [the substantive rights proviso].” (emphasis added)).

⁹⁴ Stempel, *supra* note 83, at 915 (“Justice Scalia, a textual absolutist who seems to just ‘know’ when there are no other reasonable constructions of a word or phrase, again gets more than his share of academic criticism, perhaps deservedly.” (footnote omitted)).

⁹⁵ *Shady Grove* 130 S. Ct. at 1463 (Ginsburg, J., dissenting) (“[B]oth before and after *Hanna*, the above-described decisions show, federal courts have been cautioned by this Court to ‘interpre[t] the Federal Rules . . . with sensitivity to important state interests,’ and a will ‘to avoid conflict with important state regulatory policies.’” (alterations and omission in original) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7, 438 n.22 (1996))).

authored,⁹⁶ advocated a flexible approach⁹⁷ to interpreting the Federal Rules with sensitivity to important state interests and regulatory policies and, toward that end, advocated that federal courts should narrowly construe Federal Rules where necessary to avoid differences in litigation outcomes. In her view, the *Shady Grove* majority's holding that Rule 23 preempted New York's more restrictive class action rule had the practical consequence of converting "a \$500 case into a \$5,000,000 award" thereby undermining the social policy of the New York legislature that statutory penalties not be used to bludgeon defendants.⁹⁸ Fourteen years earlier, she applied this functionalist, outcome determination approach in *Gasperini v. Center For Humanities, Inc.* where the Court, in resolving what it viewed as an *Erie* issue—whether Federal Rule 59, or a New York statute allowing greater appellate scrutiny over damage awards, supplied the applicable standard for granting a new trial on grounds of excessive damages—balanced state and federal interests by narrowly interpreting Federal Rule 59 to, in her words, "give effect to the substantive thrust of [the competing New York statute] without untoward alteration of the federal scheme for the trial and decision of civil cases."⁹⁹ Justice Scalia, true to his formalist perspective, and consistent with his plain-text interpretation of Rule 23 in *Shady Grove*, argued in dissent "that the Federal Rule is 'sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that law,'"¹⁰⁰ and therefore, *Erie* doctrine, including *York*'s outcome determination test, was inapplicable.

⁹⁶ *Gasperini*, 518 U.S. at 418.

⁹⁷ On the negative consequences of this functionalist approach to rules interpretation on procedural uniformity, see Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 815 (2010) ("A functional approach purported to offer sufficient flexibility to consider all of the variables implicated in any particular application of the substance–procedure distinction. But, of course, flexibility cannot be achieved without severely compromising the values of predictability and uniformity.").

⁹⁸ *Shady Grove*, 130 S. Ct. at 1460 ("The Court today approves *Shady Grove*'s attempt to transform a \$500 case into a \$5,000,000 award, although the State creating the right to recover has proscribed this alchemy.").

⁹⁹ *Gasperini*, 518 U.S. at 415, 420, 426.

¹⁰⁰ *Id.* at 467–68 (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987)) (internal quotation marks omitted) ("[I]n my view, one does not even reach the *Erie* question in this case. The standard to be applied by a district court in ruling on a motion for a new trial is set forth in Rule 59 of the Federal Rules of Civil Procedure, which provides that [a] new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. That is undeniably a federal standard. Federal District Courts in the Second Circuit have interpreted that standard to permit the granting of new trials where it is quite clear that the jury has reached a seriously erroneous result and letting the verdict stand would result in a miscarriage of justice. Assuming (as we have no reason to question) that this is a correct interpretation of what Rule 59 requires, it is undeniable that the Federal Rule is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving

Justice Ginsburg's focus on litigation outcomes harks back to the extreme legal realism of *Guaranty Trust v. York*'s outcome determinative test.¹⁰¹ *York* replaced the rigid, bright-line, a priori distinction between substance and procedure that courts had applied during the first seven years after *Erie* with a functional approach that required a case-by-case assessment of the policies underlying the state rule at issue.¹⁰² In reaction to the "extreme interpretations of the *York* case that seemed to require federal courts in the exercise of their diversity jurisdiction to transform themselves into state courts,"¹⁰³ the Court restored some equilibrium to the federal-state judicial balance of power in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* by adding the federal interests or policies behind the candidate Federal Rule to the *Erie* calculation as a counterweight to outcome difference.¹⁰⁴ *Byrd* thereby moderated the impact of outcome determination that, seven years later, *Hanna v. Plumer* would delete entirely from the *Erie* calculus, as applied to the Federal Rules, by resurrecting the formalist, bright-line, substance-procedure test of *Sibbach*.¹⁰⁵ In *Hanna*, the Court adopted a formalist approach to the federal rules, protecting the REA's goal of Federal Rules uniformity from being undermined by case-by-case *York* analysis. However, Justice

no room for the operation of that law. It is simply not possible to give controlling effect both to the federal standard and the state standard in reviewing the jury's award. That being so, the court has no choice but to apply the Federal Rule, which is an exercise of what we have called Congress's power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." (second alteration and omission in original) (footnote and citations omitted) (internal quotation marks omitted)).

¹⁰¹ *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945); Robert J. Condlin, "A Formstone of Our Federalism": *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 496 n.89 (2005) ("*York*, like *Erie* itself, is another offspring of legal realism and as such, part of the general movement away from the formalism that represented American jurisprudence in the first part of the twentieth century.").

¹⁰² Condlin, *supra* note 101, at 496.

¹⁰³ 19 WRIGHT ET AL., *supra* note 92, § 4504, at 36; Charles E. Clark, chief drafter of the Federal Rules, presaged the threat to Federal Rules uniformity when he warned, four years before *York*, "that the federal rules may be decidedly endangered if certain views of the wide scope of substance and the narrow extent of procedure which have been expressed should prevail." Charles E. Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417, 418 (1940).

¹⁰⁴ *Byrd v. Blue Ridge Coop., Inc.*, 356 U.S. 525, 536-37 (1958) ("But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction.").

¹⁰⁵ *Hanna v. Plumer*, 380 U.S. 460, 470-71 (1965) ("[I]n cases adjudicating the validity of Federal Rules, we have not applied the *York* rule or other refinements of *Erie*, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in *Sibbach*."); *id.* at 472 ("Neither *York* nor the cases following it ever suggested that the rule there laid down for coping with situations where no Federal Rule applies is coextensive with the limitation on Congress to which *Erie* had adverted.").

Ginsburg's Opinion in *Gasperini* threatened to jeopardize *Hanna*'s "plain meaning" approach to interpreting the Federal Rules.¹⁰⁶ Justice Scalia's plurality opinion 14 years later in *Shady Grove* reinforced the precedential weight of *Hanna*,¹⁰⁷ moderated, however, by Justice Stevens' concurrence that would allow a degree of interest-balancing between federal rules uniformity versus "quasi-substantive state policy."¹⁰⁸

Like Justice Breyer's concurrence in *Nicastro*, Justice Stevens' concurrence in *Shady Grove* embraced a centrist position on the formalist–functionalist continuum. Although he disagreed with the plurality's rigid, inflexible *Sibbach* test, his concurrence tilted toward the formalist end of the spectrum, as did Justice Breyer's in *Nicastro*. While the plurality's rigid adherence to *Sibbach* essentially discounted the substantive rights proviso's concern with substantive state policies, Justice Stevens breathed life into the proviso by delving into the legislative history behind New York's class action rule to determine whether that rule was sufficiently intertwined with the definition of state substantive rights and remedies to invalidate, as applied, the Federal Rule.¹⁰⁹ His modified formalist position reflected, to a limited extent, the functionalist concern with sensitivity to state interests and policies, thereby restoring independent significance to the substantive-rights proviso. But, in evaluating the state rule, he applied the plurality's plain-text approach as a default position when the purpose behind the competing state rule is unclear.¹¹⁰ His concurrence stopped short of the dissent's more extreme sensitivity to state policies that counseled

¹⁰⁶ Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1642–43 (1998). See also Stempel, *supra* note 83, at 976 (“*Gasperini*, like the *Shady Grove* dissent, arguably reflects excessive concern with attempting to achieve maximum congruence in federal and state trial outcomes. The concern is misplaced for two reasons. First, modest differences between federal and state courts are a necessary cost of federalism. *Erie* ‘hawks’—those who give the most limited reach to federal procedural rules—wrongly see federalism in this context as unvarying equivalence. But federalism also entails accepting some degree of difference between the two systems, just as state-to-state differences are accepted as a cost of doing business in American government and law. Second, and perhaps more important and certainly more inarguable, a quest for intra-court symmetry is doomed to failure and inconsistent with the inevitable differences in case outcomes that the legal system is forced to embrace as a concession to reality.”).

¹⁰⁷ See John B. Oakley, *Illuminating Shady Grove: A General Approach to Resolving Erie Problems*, 44 CREIGHTON L. REV. 79, 87 (2010) (“*Hanna* affirmed ‘the goal of uniformity of federal procedure’ as a desideratum to be guarded when *Erie* problems arise. As I read *Hanna*, this goal . . . supports *Hanna*’s accord of preemptive effect to an arguably procedural, formal Federal Rule . . .” (quoting *Hanna*, 380 U.S. at 463)).

¹⁰⁸ *Id.* at 87–88 (“Justice Stevens would . . . condition[] the preemptive effect of a formal Federal Rule on a balancing of the interest in federal procedural uniformity against its impact on quasi-substantive state policy, such as the limitation of the aggregate liability threatened by a state statutory penalty of the sort at issue in [*Shady Grove*].”).

¹⁰⁹ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1457–59 (2010) (Stevens, J., concurring in part and concurring in the judgment).

¹¹⁰ *Id.* at 1451 n.5.

narrowly interpreting federal rules to avoid differences in litigation outcome. To do otherwise would work an end run around congressional policy of rules uniformity.¹¹¹ His modified formalist approach adopted a flexible version of formalism that struck a balance between the plurality's excessive rigidity and the dissent's excessive flexibility. Although he eschewed the plurality's *strict* plain text approach that ignored the New York rule's policy goals as reflected in legislative history, his concurrence in the judgment tipped the balance of judicial federalism in favor of the formalist concern with predictability and rule-uniformity.¹¹²

Similarly, Justice Breyer's concurrence in *Nicastro* rejected the plurality's rigid state sovereignty principle, but followed Court precedent that places primary focus on a defendant's purposeful contacts with the forum "which rest[s] upon a particular notion of defendant-focused fairness."¹¹³ This balanced approach to interstate federalism acknowledges the functional need to adapt precedent to fundamental changes in commerce, but does not shift the thrust of minimum contacts doctrine from "sovereignty" to "fairness."

Neither Justice Scalia's strict formalism nor Justice Stevens' modified formalism in *Shady Grove* suffers from the "brooding omnipresence" and *abstraction* of nineteenth century formalism lampooned by legal realists. Rather, they both *function* to achieve real-world, beneficial consequences in the administration of justice that accrue from the relatively predictable application of a uniform set of federal rules and from a recognition of the uniquely procedural norms behind those rules¹¹⁴ as set forth in Federal Rule 1: "to secure the just, speedy, and inexpensive determination of every action and proceeding."¹¹⁵ Professor Stempel, an

¹¹¹ *Id.* at 1451 n.5, 1459–60, (differing with Justice Ginsburg "about the degree to which the meaning of federal rules may be contorted, absent congressional authorization to do so, to accommodate state policy goals").

¹¹² *Id.* at 1457, 1459–60 ("In my view, however, the bar for finding an Enabling Act problem is a high one. The mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies. And for the purposes of operating a federal court system, there are costs involved in attempting to discover the true nature of a state procedural rule and allowing such a rule to operate alongside a federal rule that appears to govern the same question. The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt.").

¹¹³ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring in the judgment).

¹¹⁴ See Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to The Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 270–71 (2008) ("[L]et's not be too hasty to toss aside the traditional procedural values. Rulemaking that flows from our Rule 1 ideals—the just, speedy, and inexpensive administration of the law—is not without its benefits.").

¹¹⁵ Fed. R. Civ. P. 1. Charles Clark, one of the drafters of the Federal Rules, identified as a legal realist, struck a balance between formalism and functionalism. See Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 88 (1989) ("Clark

avowed functionalist, nevertheless found functional value in the plurality's strict formalist approach. His exhaustive research of the legislative history behind the New York statute at issue in *Shady Grove* revealed that the law was enacted "with almost no serious reflection,"¹¹⁶ slipping under the public's radar under the guise of procedure. He concludes:

[F]ormalism has its place in the law's analytic arsenal. If not excessively narrow and fundamentalist, adherence to a formalist approach, like Ulysses['] now famous decision to have himself lashed to the mast to avoid responding to the Sirens' Song, may save the courts not only from greater investment of adjudication resources but also may act as a modest impetus for government "in the sunshine" by forcing more public and separate consideration of serious policy issues that might otherwise get short shrift when appended to, or interwoven with, procedural legislation. To the extent that a state proceeds to cloth[e] substantive legal entitlements or immunities in procedural garb, it is far less likely to avoid federal procedural pre-emption in federal court litigation if the *Shady Grove* plurality approach holds in future cases. Notwithstanding the academy's general preference for functionalism and the jurisprudence of Justices Ginsburg, Stevens, and Harlan over formalism and the jurisprudence of Justice Scalia, *Shady Grove* shows the occasional virtues of formalism properly applied.¹¹⁷

believed that judicial decision ought to strike a balance between the social interest in predictability and certainty, on the one hand, and the social interests served by a dynamic legal system and an individualized approach to justice, on the other. Reliance on rule and precedent helped to promote predictability and certainty, but the importance of individualized justice meant that use of rule and adherence to precedent ought not be slavish. In short, while judicial decision for Clark was not determinate in the way late nineteenth century conceptualism supposed it to be, it was also neither an exercise in completely unguided discretion nor a strictly intuitive reaction to a particular fact situation." (footnote omitted).

¹¹⁶ Stempel, *supra* note 83, at 965 ("[T]he inarguable point is that § 901(b) arrived on the scene and became part of state law with almost no serious reflection. It was added, however, to thoughtful class action law years in the making that was modeled on a successful and tested federal procedural rule. Neither the legislature nor the executive appears to have seriously examined or debated the arguments in favor of the penalty limitation. The general public was never even informed of the matter or given a chance to assess the arguments for, or against, a penalty limitation. This aspect of the legislation appears to have been solely the province of political insiders engaged in some last-minute tinkering designed to secure smooth enactment.").

¹¹⁷ *Id.* at 978.

III. THE FORMALIST–FUNCTIONALIST DIVIDE . . . OR CONTINUUM

A. *The Dichotomy*

Formalism and Functionalism have traditionally been viewed by legal realists as mutually exclusive, dichotomous jurisprudential outlooks, separated by a Grand Canyon-like divide.¹¹⁸ Legal Realism, like formalism, is not a “school”¹¹⁹ of legal thought, nor is it a group or movement. It is, rather, “a form of functionalism.”¹²⁰ Legal realists employed functionalism “to better their understanding of how law functions in the real world.”¹²¹ Realists shared the functionalist’s rule-skepticism,¹²² pragmatism,¹²³ and consequentialism,¹²⁴ preferring to do justice in the

¹¹⁸ See generally BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).

¹¹⁹ ROY L. BROOKS, *STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY* 90 (2d ed. 2005) (“For all of its influence, legal realism is something of a mystery. Karl Llewellyn, one of legal realism’s central figures, insisted in 1931 that there is no realist ‘school,’ only a congeries of perspectives that have left and right wings.” (citing Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1254 (1931))); TAMANAHA, *supra* note 118, at 68 (“Another fundamental misapprehension is that the legal realists formed a group or movement. They did not.”).

¹²⁰ Singer, *supra* note 84, at 468; see also KALMAN, *supra* note 84, at 3, 17 (noting that the original realists sought to understand legal rules in terms of their social consequences in that “[m]ost realists believed that the key lay in the social sciences. Their functionalism preached that law was one of the social sciences and that the social sciences should be examined to illuminate social policy.”); Martin P. Golding, *Realism and Functionalism in the Legal Thought of Felix S. Cohen*, 66 CORNELL L. REV. 1032, 1055 (1981) (“Cohen saw realism as just one consequence of the functional approach.”).

¹²¹ Singer, *supra* note 84, at 468.

¹²² Cf. BROOKS, *supra* note 119, at 90–91 (“All legal realists are rule-skeptic and fact-skeptic. . . . [R]ule-skepticism is the belief that law is not a body of rules but a set of facts that give rise to competing policy choices.”).

¹²³ Singer, *supra* note 84, at 499–501 (1988) (noting that “the legal realists sought to base legal reasoning on pragmatism. Pragmatic legal reasoning—what Llewellyn called ‘Grand Style judging’—encompassed four broad propositions. First, the realists argued that it is impossible to induce a unique set of legal rules from existing precedents. . . . Second, the realists argued against conceptualism. As Holmes noted in his dissent in *Lochner v. New York*: ‘General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.’ . . . Concepts can only be given meaning by reference to considerations of policy and morality. . . . Third, the realists argued that judges should make law based on a thorough understanding of contemporary social reality. . . . [Judges] should closely examine the social context in which those affected by legal rules operate. Understanding this social context would enable judges to adjudicate disputes through ‘situation-sense,’ meaning the ability to fit the law to social practice and to satisfy the felt needs of society to achieve a ‘satisfying working result.’ [*Lochner v. New York*, 198 U.S. 45, 76 (1905).] . . . Finally, the realists argued against formalistic, mechanical application of rigid rules regardless of their social consequences. Judges should apply rules in light of

individual case by applying flexible standards that require balancing a variety of factors and interests,¹²⁵ but often at the expense of predictability and uniformity.¹²⁶

The following is one commentator's effort to capture the core distinction between functionalism and formalism:

Formalism is distinct from instrumentalism, which is sometimes called functionalism. Formalism attempts to apply rules through classification of the instant case under a general rule or principle and rigorous, deductive application of the selected rule for decision. Instrumentalist adjudication does not disregard the governing rule but application of the rule may be modified if strict application would undermine or fail to further the function intended to be achieved by the rule or the legal system of which it is a part.¹²⁷

Another writer casts the distinction in a somewhat different light:

Understanding the way in which rules truncate the range of reasons available to a decisionmaker helps us to appreciate the distinction between formalism and functionalism, or instrumentalism. Functionalism focuses on outcomes and particularly on the outcome the decisionmaker deems optimal. Rules get in the way of this process, and thus functionalism can be perceived as a view of decisionmaking that seeks to minimize the space between what a particular decisionmaker concludes, all things considered, should be done and what some rule says should be done.¹²⁸

their purposes, looking to the goals of the rules and their social effects." (footnotes omitted) (quoting *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting)).

¹²⁴ Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1334 (1947) ("The scientific spirit among lawyers will foster the notion that existing or proposed legal rules should be evaluated respectively in terms of their actual or potential social consequences."); Singer, *supra* note 84, at 471 (observing that realists served two competing goals of "choos[ing] legal rules that have desirable social consequences" and "enabling persons in planning in planning their conduct to foresee the legal import of their acts"); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 532 (1988) ("Llewellyn distinguished the Grand Style from the Formal Style because he believed that formalism, as the obeisance to the literal language of a rule, could frustrate the rule's purpose and lead to difficulties where the practical consequences of the decision would indicate a different result.").

¹²⁵ Singer, *supra* note 84, at 504 ("The realists were extremely successful at introducing interest balancing, line-drawing, policy analysis, purposive reasoning, and process concerns into legal thought. But they were far less successful in translating these vague ideas into a workable vocabulary and stance toward normative legal argument. . . . Legal theorists have attempted to formulate normative legal argument without abandoning the realists' insights.").

¹²⁶ See, e.g., Main, *supra* note 97, at 815 ("[F]lexibility cannot be achieved without severely compromising the values of predictability and uniformity.").

¹²⁷ BAILEY KULKIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 145 (1994).

¹²⁸ Schauer, *supra* note 124, at 537 (footnote omitted).

The functionalist's concern with policy, interest-balancing, and litigation outcomes was apparent in Justice Ginsburg's focus in her *Shady Grove* dissent on *Erie*'s policy that federal courts sitting in diversity must respect substantive state policies and avoid variations in litigation outcomes by failing to respect those policies.¹²⁹ Similarly, her *Nicastro* dissent stressed the functionalist standard of "reasonableness,"¹³⁰ rather than forum-targeted contacts by defendants, and emphasized the real-world consequences of global commerce in the twenty-first century on the legal significance of state boundaries and sovereignty.¹³¹ As discussed in Part V.B, academics who take a functionalist approach to state-court personal jurisdiction jurisprudence criticize what they perceive as the formalist's focus on abstract notions of state sovereignty, rather than the pragmatic goal of locating, on a case-by-case basis, the most rational forum in which to litigate, essentially a venue concern with the rational allocation of interstate judicial resources.¹³²

B. Formalism: A Functionalist Perspective

Formalism is a jurisprudential stepchild of the legal academy, and the term is frequently used as a pejorative.¹³³ As Professor Stempel notes: "In the academy, formalism generally enjoys lower status than functionalism (often also labeled pragmatism or instrumentalism), even though law at its most basic remains a formalist enterprise, with functional application of judgment coming into play for more complex or nuanced cases."¹³⁴ Professor Chemerinsky, critical of the Court's shift toward formalism in federalism in the 1990s,¹³⁵ argued that formalism has no place in federalism.¹³⁶ Others, like Professor Caminker, "think that

¹²⁹ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1471 (2010) (Ginsburg, J., dissenting) ("In short, Shady Grove's effort to characterize § 901(b) as simply 'procedural' cannot successfully elide this fundamental norm: When no federal law or rule is dispositive of an issue, and a state statute is outcome affective in the sense our cases on *Erie* (pre and post-*Hanna*) develop, the Rules of Decision Act commands application of the State's law in diversity suits.").

¹³⁰ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2800 (2011) (Ginsburg, J., dissenting).

¹³¹ *Id.* at 2800–01.

¹³² Daniel J. Capra, Book Review, *Conceptual Limitations on Long-Arm Jurisdiction*, 52 *FORDHAM L. REV.* 1034, 1034 (1984) (commenting that "conceptual concerns with sovereignty limitations or with physical presence serve no useful purpose in a modern, efficient system of forum allocation").

¹³³ Schauer, *supra* note 124, at 510.

¹³⁴ Stempel, *supra* note 83, at 913–14 (footnote omitted).

¹³⁵ Chemerinsky, *supra* note 3, at 960 (critiquing the "Supreme Court's approach to federalism in the 1990s [as] formalistic, not functional. . . . [T]he [Court's] federalism decisions have reasoned deductively from assumed major premises and have largely ignored functional considerations in allocating power between federal and state governments.").

¹³⁶ *Id.* at 969–70 ("Much earlier in this century, the legal realists exposed the fatal flaws in formalistic analysis. Their criticisms of formalism are just as cogent today and

both interpretative approaches have an important role to play.¹³⁷ This Article's theme is that formalism—including a version that I have called modified formalism—can function, in appropriate circumstances, to achieve real-world benefits in the field of federalism.

Formalism is an elusive term. As one writer observed, “[n]ot only is there no single agreed-upon conceptualization of formalism, but the several existing conceptualizations are themselves not fully specified.”¹³⁸ At the heart of formalism, according to Professor Schauer, “lies the concept of decisionmaking according to *rule*.”¹³⁹ Shifting focus from the pejorative to the functional meaning of formalism, he notes:

[R]ecognizing the way in which formalism is merely a way of describing *the process of taking rules seriously* allows us to escape the epithetical mode and to confront the critical question of formalism: What, if anything, is good about the unwillingness to go beneath the rule and apply its purpose . . . directly to the case before the decisionmaker?¹⁴⁰

Professor Tamanaha refers to the contemporary brand of formalism, represented by Justice Scalia, Judge Easterbrook and Professor Lawrence Solum, as “The Realism of the ‘New Formalists’”¹⁴¹ that “accept[s] the core positions realists espouse about the openness of law and the limitations of human judges.”¹⁴² Tamanaha identifies the following “loose cluster of positions” that “make[] contemporary formalists distinctively ‘formalistic’”:

[Formalists] want clear contractual terms to be enforced as written rather than be modified by courts; they prefer the constraint and predictability of legal rules over the openness of standards; they

applicable to the Supreme Court's modern use of formalism in the area of federalism. Benjamin Cardozo said that ‘the demon of formalism tempts the intellect with the lure of scientific order’ and said that when judges ‘are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.’ The formalism of the 1990s likewise appears to offer ‘scientific order’ in the form of the certainty of deductive reasoning and ignores considerations of the ‘welfare of society.’” (footnotes omitted) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66–67 (1921)).

¹³⁷ Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 201 (“My concern is . . . with maintaining the integrity of each approach, which requires that each is both skillfully applied and invoked only when appropriate. Where foundational sources of text, structure, and history provide scant guidance, interpretive formalism can easily become an exercise in undirected choice from among competing conceptions and formulations—choice that seems arbitrary because it appears neither dictated by the underlying sources, nor counseled by articulated purposes, values, or consequences.”).

¹³⁸ Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 201 (2009).

¹³⁹ Schauer, *supra* note 124, at 510.

¹⁴⁰ *Id.* at 537–38 (emphasis added).

¹⁴¹ TAMANAHA, *supra* note 118, at 177.

¹⁴² *Id.* at 179.

emphasize the text of legislation; they object to giving weight to legislative history in the interpretation of statutes; they would not permit purpose to trump the plain meaning of statutory terms; they advocate adherence to precedent; they argue that courts ought to defer to other institutional bodies (legislatures, administrative agencies, etc.) when the applicable legal provisions are vague or uncertain, or not rule-like; most argue that courts should decide in accordance with clear rules even if the legally indicated outcome in a particular case would be unjust.¹⁴³

Tamanaha maintains that “formalism” is not a theory of law but merely a term that “drew its pejorative connotations from unforgiving forms of action that visited absurd or unjust consequences.”¹⁴⁴ Formalism, he argues, is a myth created by Legal Realists like Roscoe Pound, Jerome Frank, and Grant Gilmore, and is devoid of theoretical content.¹⁴⁵ According to this realist critique, between the Civil War and the early 1930s judges conceived of law as a “science” in which judging was “an exercise in mechanical deduction”¹⁴⁶ from unquestioned premises.

Duncan Kennedy’s critique of nineteenth century Classical Individualism in the private law arena notes that “rules represented a fully principled and consistent solution *both* to the ethical and to the practical dilemmas of legal order.”¹⁴⁷ The process of deduction from abstract premises was thought by nineteenth century formalists to yield “determinate legal rules defining the boundaries and content of tort and contract duties.”¹⁴⁸ Legal realists condemned this process of decision-making as “mechanical jurisprudence.”¹⁴⁹ Justice Field’s reliance in

¹⁴³ *Id.* (footnote omitted).

¹⁴⁴ *Id.* at 46; *see also id.* at 161 (“Formalism has always served as a term of abuse with no real theoretical content.”).

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.* at 28; Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, LEGAL WORKSHOP (Jan. 15, 2010), <http://legalworkshop.org/2010/01/15/varieties-of-new-legal-realism-can-a-new-world-order-prompt-a-new-legal-theory> (“[B]y formalism we mean a theory of law based on rationally organized first principles deductively applied.”).

¹⁴⁷ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1728 (1976).

¹⁴⁸ *Id.* at 1729.

¹⁴⁹ TAMANAHA, *supra* note 118, at 4 (“Every account of the legal formalists and the widespread belief in ‘mechanical jurisprudence’ has been written by *critics* like Roscoe Pound and Jerome Frank, and by modern historians and theorists relying upon the accounts of critics.”); Schauer, *supra* note 124, at 522 (noting the criticism of the “formalistic . . . perception of law as a closed system, within which judgments are mechanically deducible from the language of legal rules”); Singer, *supra* note 84, at 496–97 (focusing on formalism as a type of legal reasoning sometimes called “mechanical jurisprudence,” noting “different aspects of legal reasoning generally associated with formalism. First, the classical legal thinkers like Langdell, Williston, and Beale believed that the entire legal system could be reduced to a very small number of general principles. . . . Second, the classical theorists believed that these general principles contained legal concepts that could be rigidly separated. . . . Third,

Pennoyer on the territoriality principle of public international law—that states have exclusive *de facto* power over persons and property located within its territory—as the premise from which he deduced the permissible bases for the exercise of personal jurisdiction by state courts, is illustrative of this perception of the formalist approach to law in the context of personal jurisdiction.¹⁵⁰ Rather than the metaphorical “lines” drawn by nineteenth century classicists to draw “well-defined boundaries”¹⁵¹ to determine the limits of liability, Justice Field utilized the concrete geographical lines that define the limits of territorial sovereignty among the states to define the limits of the reach of personal jurisdiction by one state’s court over citizens located in a sister state.¹⁵² The relevance of state lines in demarcating the limits of personal jurisdiction persists in the *Nicastro* plurality’s emphasis on state sovereignty.

Another critique of rigid, rule-bound formalism is that “it is inherently conservative, in the nonpolitical sense of the word.”¹⁵³ In Professor Schauer’s words, “[b]y limiting the ability of decisionmakers to consider every factor relevant to an event, rules make it more difficult to adapt to a changing future. Rules force the future into the categories of the past.”¹⁵⁴ As demonstrated in Part V.C., the *Nicastro* plurality’s rigid application of the notion of sovereignty and state boundaries in the era of global commerce, unknown and unknowable at the time of *International Shoe*, is an example of this dysfunctional use of formalism.

This realist critique also takes aim at formalism’s perceived concern with legal uncertainty.¹⁵⁵ According to Kennedy’s account of “the liberal theory of justice,” the advantages of formalism are that “*it is inherently certain and predictable.*”¹⁵⁶ “[T]he elimination of uncertainty about what

lawyers used these general principles composed of rigidly defined concepts to generate specific legal conclusions by a logical, objective, and scientific process of deduction. Highly abstract concepts were thought to be operative, or capable of generating specific consequences by their very nature.”)

¹⁵⁰ *Pennoyer v. Neff*, 95 U.S. 714, 719, 721–23 (1878).

¹⁵¹ Kennedy, *supra* note 147, at 1729.

¹⁵² Singer, *supra* note 84, at 496–97 (“[T]he classical theorists believed that these general principles contained legal concepts that could be rigidly separated. Distinctions between concepts were analogized to boundary lines between two pieces of property; either you are on my property or you are on your property—there is no gray area. Either there is a contract with all its attendant legal obligations or there is no contract and there are no affirmative obligations; *either a state has personal jurisdiction or it does not*; either you have acted unreasonably or you have acted reasonably. Our current view of concepts as shading into each other was almost completely absent in this period.” (emphasis added)).

¹⁵³ Schauer, *supra* note 124, at 542.

¹⁵⁴ *Id.*

¹⁵⁵ TAMANAHA, *supra* note 118, at 33 (“An urgent theme within legal circles in this period . . . was legal uncertainty.”); Schauer, *supra* note 124, at 539 (“One of the things that can be said for rules is the value variously expressed as predictability or certainty.”).

¹⁵⁶ Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351, 364 (1973).

the state will do means that by advance planning private parties can adjust their conduct so as to turn favorable intervention to maximum favorable effect, while minimizing the occasions of adverse intervention.”¹⁵⁷ Giving formalism the functional benefit of the doubt, Schauer posits that there are cases “in which a particular application [of a rule] would not serve the reasons behind the rule, [but] the rule nevertheless provides its own reason for deciding the case according to the rule; [then] *the rule itself has a normative force that provides a reason for action or decision.*”¹⁵⁸ For instance, formalism promotes stability and predictability as “value[s] in [their] own right.”¹⁵⁹

In *Shady Grove*, the federal class action rule’s preemption of New York’s rule prohibiting class actions in the state’s courts to enforce statutory penalties, while outcome determinative, functionally benefited the administration of justice in federal court by promoting predictability in the uniform application of Federal Rule 23, by saving adjudication resources, and, in Professor Stempel’s words, by “act[ing] as a modest impetus for government ‘in the sunshine’ by forcing more public and separate consideration of serious policy issues that might otherwise get short shrift when appended to, or interwoven with, procedural legislation.”¹⁶⁰

The Court relied on the formalist values of certainty and predictability in the personal jurisdiction context in *World-Wide Volkswagen v. Woodson* to justify the threshold requirement of a purposeful connection between a non-resident defendant and the forum state’s territory:

The Due Process Clause, by ensuring the “orderly administration of the laws,” gives a degree of *predictability* to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation “purposefully avails itself of the privilege of conducting activities within the forum State,” it has clear notice that

¹⁵⁷ *Id.* at 374.

¹⁵⁸ Schauer, *supra* note 124, at 535 (emphasis added); *id.* at 537 (“What makes formalism formal is this very feature: the fact that taking rules seriously involves taking their mandates as reasons for decision independent of the reasons for decision lying *behind* the rule. . . . Rules therefore supply reasons for action *qua* rules.”).

¹⁵⁹ *Id.* at 542 (“Thus, stability, not as a necessary condition for predictability but as a value in its own right, is fostered by truncating the decisionmaking authority. . . . Rules stabilize by inflating the importance of the classifications of yesterday. We achieve stability, valuable in its place, by relinquishing some part of our ability to improve on yesterday.”); *id.* at 539 (“One of the things that can be said for rules is the value variously expressed as predictability or certainty.”); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989), (referring to “another obvious advantage of establishing as soon as possible a clear, general principle of decision: predictability. Even in simpler times, uncertainty as been regarded as incompatible with the Rule of Law.”).

¹⁶⁰ Stempel, *supra* note 83, at 978.

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.¹⁶¹

Formalism can also function to restrain the arbitrary exercise of state power. In this connection, Duncan Kennedy observed “that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty.”¹⁶² Justice Scalia, one of the Court’s more outspoken formalists, notes that rule-based decisionmaking that cabins judicial discretion commits the judge to the “governing principle.”¹⁶³ He writes: “Only by announcing rules do we hedge ourselves in.”¹⁶⁴ Along the same lines, Schauer comments that, while rules “get in the way of wise decisionmakers who sensitively consider all of the relevant factors as they accurately pursue the good,” the countervailing beneficial function of formalism may be “to restrict misguided, incompetent, wicked, power-hungry, or simply mistaken decisionmakers whose own sense of the good might diverge from that of the system they serve.”¹⁶⁵ The problem, he adds, is the difficulty in “decid[ing] the extent to which we are willing to disable good decisionmakers in order simultaneously to disable bad ones.”¹⁶⁶ Contemporary commentators cite this aspect of formalism to justify preserving the role of the Due Process Clause in protecting out-of-state defendants from overreaching by state courts.¹⁶⁷

¹⁶¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (emphasis added) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

¹⁶² Kennedy, *supra* note 147, at 1688.

¹⁶³ Scalia, *supra* note 159, at 1179; *id.* at 1178 (“And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so.*”).

¹⁶⁴ *Id.* at 1180.

¹⁶⁵ Schauer, *supra* note 124, at 543.

¹⁶⁶ *Id.*

¹⁶⁷ *See, e.g., Oakley, supra* note 78, at 752 (“[T]he current constitutional law of state-court personal jurisdiction . . . was founded, however imperfectly, in respect for the rights of parties such as Franklina Gray and Marcus Neff, divested of property by overreaching use of the judicial process aided and comforted by state legislation responsive to local political concerns and indifferent to the rights of citizens of other states.”); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 89 (“By prohibiting unreasonable deprivations [of an individual’s property] and requiring a justification for state imposition of legal burdens, the Due Process Clause seems to require that the person who would suffer the deprivation have some contact with the State by which he has subjected himself to its power.”).

C. *A Continuum: The “Yin and Yang”¹⁶⁸ of Formalism and Functionalism*

This Article’s thesis is that a formalist approach to decision-making can be functional¹⁶⁹ or dysfunctional depending on the legal and historical context.¹⁷⁰ Formalism and functionalism are not mutually exclusive theologies, but rather reflect different functional emphases in resolving difficult legal issues.¹⁷¹ I propose that Formalism and Functionalism, applied to judicial lawmaking, can more productively be perceived, not as a dichotomy, but as a continuum on which a spectrum of judicial opinions on federalism issues may be located, often in the same Supreme Court case. As noted earlier, *Nicastro* and *Shady Grove* each include formalist plurality opinions, functionalist dissenting opinions and, in the center of the continuum, concurring opinions that blend features of each approach. This pragmatic, eclectic view recognizes that each approach can offer something of value to the decision-making process depending the doctrinal context.¹⁷²

I draw inspiration for this perspective from Professor Tamanaha’s thoughtful work, *Beyond the Formalist–Realist Divide*, in which he debunks the traditional formalist–realist narrative that frames debates about

¹⁶⁸ “The ancient Chinese subscribe to a concept called Yin Yang which is a belief that there exist two complementary forces in the universe. One is Yang which represents everything positive or masculine and the other is Yin which is characterized as negative or feminine. One is not better than the other. Instead they are both necessary and a balance of both is highly desirable.” *Yin and Yang Meaning*, ABSOLUTELY FENG SHUI, <http://www.absolutelyfengshui.com/fengshui/feng-shui-yin-yang.php>.

¹⁶⁹ Duncan Kennedy explored the instrumental value of form. See Kennedy, *supra* note 147, at 1746 (“We can ignore the existence of these divergent historical paths so long as we ourselves are interested in a purely instrumental understanding of the issue of form.”).

¹⁷⁰ See, e.g., James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 199 (2004) (observing that the formalist requirement of in-state service of process embraced by *Pennoyer* served an historically functional goal of “respon[ding] to the tensions inherent in the federal system”: “Viewed in isolation, and from our vantage point nearly two centuries later, the service of process requirement may seem highly formalistic, overly restrictive, and unduly solicitous of the sovereignty of individual states at the expense of optimal allocation of judicial power among them. But, when judged in light of the time in which it was conceived, and when viewed as an integral component of a larger scheme to enforce sister-state judgments, the service of process requirement was an effective response to the tensions inherent in the federal system.”).

¹⁷¹ TAMANAHA, *supra* note 118, at 179.

¹⁷² See, e.g., Tanielian, *supra* note 5, at 997 (“Formalism and functionalism are more than mere decisionmaking styles. Rather, they incorporate distinct reasoning methodologies and doctrinal supports in larger theories of the separation of powers. Both methodologies and doctrinal supports are evident in the Court’s key separation of powers opinions since *Buckley*. More importantly, the Court’s decision whether to base its analysis on formalism or functionalism has rested upon an eclectic approach, considering whether formalism or functionalism’s underlying basis seemed best suited to, and paramount in, the decision at hand. Using an eclectic approach, the members of the Court who have been unwilling to accept strict formalism or strict functionalism have blended the two concepts.”).

judging “in terms of antithetical formalist–realist poles that jurists do not actually hold.”¹⁷³ He contends that “the now-dominant formalist–realist divide . . . was a politically inspired story repeated innumerable times, given credibility by a string of citations to authoritative figures, resting on a wobbly, unsupported set of thin legs.”¹⁷⁴ He posits that most judges adopt a more centrist approach that he alternately denominates “Balanced Formalism,” “New Formal[ism],”¹⁷⁵ or “Balanced Realism.”¹⁷⁶ These approaches represent “differences of attitude and emphasis.”¹⁷⁷ Tamanaha acknowledges, however, that these differences are more pronounced in the Supreme Court, which accepts a small number of “legally uncertain cases or cases that involve bad rules or bad results.”¹⁷⁸

Professor Schauer proposes another version of balanced formalism that he calls “presumptive formalism”:

Under such a theory . . . there would be a presumption in favor of the result generated by the literal and largely acontextual interpretation of the most locally applicable rule. Yet that result would be presumptive only, subject to defeasibility when less locally applicable norms, including the purpose behind the particular norm . . . offered *especially exigent reasons* for avoiding the result generated by the presumptively applicable norm.

Such a system would bring the advantages of predictability, stability and constraint of decisionmakers commonly associated with decision according to rule, but would temper the *occasional unpleasant consequences* of such a system with an escape route that allowed some results to be *avoided* when their *consequences* would be *especially outrageous*.¹⁷⁹

¹⁷³ TAMANAHA, *supra* note 118, at 3.

¹⁷⁴ *Id.* at 202.

¹⁷⁵ *Id.* at 177, 180 (“The Realism of the ‘New Formalists’”).

¹⁷⁶ *Id.* at 180 (arguing that disagreement between Balanced Realists and Balanced Formalists “breaks out over second-level issues that typically arise on the margins: what to do when the legal rules are vague or uncertain; whether rules or standards are preferable; whether certainty and predictability matter more than justice or equity;[] what should be done when statutory terms lead to an absurd or undesirable result; and so forth”); *see also* Singer, *supra* note 84, at 504, 516–32 (“Despite the significant realist influence on contemporary legal theory, many current scholars [whom Singer labels “liberal theorists” as opposed to “critical theorists”] reintroduce formalist elements into their normative theories. While theorists associated with legal process, rights theory, and law and economics all attempt to absorb the insights of legal realism, they also attempt to create a new foundation for legal principles and decisions to replace the discredited foundations of formalism. They each attempt to recreate, to some extent, the idea of an objective standpoint that judges can use to adjudicate complex legal issues without taking sides in desperate social struggles.”).

¹⁷⁷ TAMANAHA, *supra* note 118, at 179.

¹⁷⁸ *Id.* at 197–98.

¹⁷⁹ Schauer, *supra* note 124, at 547 (emphasis added).

As noted previously,¹⁸⁰ Justice Stevens' concurrence in *Shady Grove* and Justice Breyer's concurrence in *Nicastro* are examples of a modified or balanced formalist approach that positions each opinion at the center of the formalist–functionalist continuum. In defining the boundaries between federal rulemaking and state substantive law in the *Erie–Hanna* context, Justice Stevens utilized a modified formalist approach that enforces the norm of federal rules uniformity yet, to a very limited degree, also accommodates state substantive policy so long as that policy is an integral part of a state's procedural rule. Expressed in terms of Schauer's presumptive formalism, Justice Stevens implicitly employed a presumption, in favor of the "plain textual reading" of statutory text where legislative history is ambiguous, that can be rebutted in the rare case where it can be demonstrated that "the state rule is different than it appears."¹⁸¹

As I will conclude in Part V.C, the *Nicastro* plurality's rigidly formalist focus on state sovereignty is a *dysfunctional* approach to defining the limits of state-court jurisdiction in an era of global trade across national boundaries. The consequence of that extreme formalist position is, to use Schauer's term, "especially outrageous."¹⁸² In *Nicastro*, a more functional, balanced formalist position—one that adapts the sovereignty principle to the reality of global commerce—would have been to broaden the scope of the sovereignty principle to encompass national territorial sovereignty. Justice Breyer's concern that this approach could unfairly be applied to the metaphorical "Egyptian shirt-maker" who sells to an international distributor could be addressed by applying the second-prong "fairness factors" to rebut the formalist presumption.¹⁸³

As discussed in Parts IV and V, the complementary nature of formalism and functionalism—its intrinsically yin and yang aspect—is apparent in the back-and-forth swing in emphasis between these approaches in the Court's *Erie* and personal jurisdiction jurisprudence. It is also reflected in the winding path taken by evolving conflicts-of-laws doctrine that meanders between, on the one hand, satisfying the need for predictability and judicial efficiency offered by rules, and on the other, the need to achieve a more finely calibrated balance of policy goals and to arrive at a just result through flexible standards. As noted by Professor Symeonides, "[t]he tension between the need for legal certainty, predictability, and uniformity on the one hand and the desire for flexible, equitable, individualized solutions on the other is as old as law itself."¹⁸⁴ Similarly, in *International Shoe*, the Court sowed the seeds of

¹⁸⁰ See *supra* Part II.

¹⁸¹ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1460 (2010) (Stevens, J., concurring).

¹⁸² Schauer, *supra* note 124, at 547.

¹⁸³ See *infra* notes 323–26 and accompanying text.

¹⁸⁴ Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 69 (2001).

this innate tension in personal jurisdiction jurisprudence by preserving *Pennoyer's* sovereignty principle to protect defendants from the illegitimate exercise of a state's adjudicatory power while tempering this formalist approach with pragmatic considerations—such as plaintiff convenience and forum state interest—that bear upon “fairness and reasonableness.” Since *International Shoe*, the Court has struggled to articulate a balanced approach that accommodates both of these formalist and functionalist goals.¹⁸⁵

IV. THE UNRESOLVED TENSION BETWEEN FORMALISM AND FUNCTIONALISM IN CHOICE OF LAW: *INTRA-* AND *INTER-*STATE

A. *Intra-State: Erie, the REA, and Shady Grove*

The Court's approach to *Erie* since 1938 has alternated between the formalist penchant for predictability and judicial efficiency and the functionalist concern with enforcing *Erie's* underlying policies¹⁸⁶—the so-called “twin aims” of “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”¹⁸⁷ The *Erie* decision itself was a legal realist reaction to *Swift v. Tyson's* formalist concept of a “transcendental body of law”¹⁸⁸ that permitted courts for nearly a century to dismiss state substantive common law as merely evidence of the law¹⁸⁹ and, therefore, non-binding authority in federal court.¹⁹⁰ Justice Holmes' famous realist critique of this concept of law—that “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign . . . that can be identified”¹⁹¹—laid the groundwork for the realist view—manifested in *Erie*—that law is not discovered, but made by judges.¹⁹²

¹⁸⁵ See *infra* Part V.B.

¹⁸⁶ *Hanna v. Plumer*, 380 U.S. 460, 467 (1965) (“[T]he message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, ‘litmus paper’ criterion, but rather by reference to the policies underlying the *Erie* rule.”).

¹⁸⁷ *Id.* at 468.

¹⁸⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

¹⁸⁹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

¹⁹⁰ See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1475 n.84 (1997) (“This conception of general common law drew heavily upon Blackstone's *Commentaries*, which maintained that common law existed independent of judicial decisions and was based on ‘natural justice’ and ‘the established custom of the realm.’”). But see Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 682 (1998) (“It is doubtful that *Swift* represented a commitment to or belief in the ‘brooding omnipresence’ theory later attributed to it by Holmes and *Erie*.”).

¹⁹¹ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917).

¹⁹² *Erie*, 304 U.S. at 79–80.

For seven years after *Erie*, courts applied a formalist dichotomy between “substantive” state law—applicable in federal court unless preempted by a controlling federal statute—and federal “procedural” law, which *Erie* did not purport to address. The formalist–functionalist pendulum¹⁹³ swung toward a functional approach to *Erie*’s “substance–procedure” dichotomy in *Guaranty Trust Co. v. York*.¹⁹⁴ *York*’s flexible standard focused, in each individual case, on the litigation’s outcome to more accurately enforce one of *Erie*’s core policies: the avoidance of forum shopping in federal court.

After *York*, courts tended toward a formalist, bright-line application of the outcome determination test to the point where *any* outcome difference between federal and state procedure could require application of state over federal law.¹⁹⁵ Responding to the threat this trend posed to federal rules uniformity, the Court, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,¹⁹⁶ “restored some equilibrium to the federal–state judicial balance of power by counterbalancing ‘outcome determination’ with the interests of the federal courts as an independent judicial system” in following their own procedural rules.¹⁹⁷

The formalist momentum in the direction of protecting federal rules uniformity continued in *Hanna v. Plumer*, which insulated the Federal Rules from *York*’s outcome determinative analysis.¹⁹⁸ The *Hanna* Court

¹⁹³ For an example of the swinging pendulum metaphor to describe the Supreme Court’s oscillation between sensitivity to state substantive interests and the federal interest in procedural uniformity, see 19 WRIGHT ET AL., *supra* note 92, § 4504, at 46–47 (referring to Justice Harlan’s concern in his concurring opinion in *Hanna v. Plumer* that the majority went too far “by sanctifying unduly and rendering inviolate the federal rules,” and asking, “But has the pendulum [in *Hanna*] swung too far? In a separate concurring opinion, Justice Harlan suggested that it has.” (footnote omitted)); see also John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 696 (1974) (“[T]he pendulum that had begun in *Byrd* to swing back toward the teaching of *Erie* swung too far . . . in Chief Justice Warren’s opinion for the Court in *Hanna v. Plumer*.”).

¹⁹⁴ See *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

¹⁹⁵ See 19 WRIGHT ET AL., *supra* note 92, § 4504, at 30; ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 334 (5th ed. 2007) (referring to *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949): “After these decisions, there was great concern that the outcome determinative test articulated in *Guaranty Trust* and applied in *Cohen*, *Ragan*, and *Woods* ultimately would preclude the use of the Federal Rules of Civil Procedure in diversity cases because the Rules certainly can determine the outcome of litigation.”); Ely, *supra* note 193, at 724 n.170 (“[I]t would seem that any rule can be said to have both ‘procedural effects,’ affecting the way in which litigation is conducted, and ‘substantive effects,’ affecting society’s distribution of risks and rewards. Thus, an ‘effects test’ [to determine whether a Federal Rule abridges a state substantive right] would seem destined either to unintelligibility or to the invalidation of every Federal Rule, thereby rendering the Enabling Act entirely self-defeating.”).

¹⁹⁶ 356 U.S. 525, 535–37 (1958).

¹⁹⁷ Koppel, *supra* note 85, at 1023.

¹⁹⁸ *Hanna v. Plumer*, 380 U.S. 460, 470–72 (1965).

ruled that the applicability of a Federal Rule over conflicting state procedure should be determined solely under the Rules Enabling Act, not the Rules of Decision Act which only governs “the relatively unguided *Erie* choice.”¹⁹⁹ *Hanna* applied *Sibbach*’s formalist test of rule validity under the Rules Enabling Act (REA), which turned solely on “whether a rule really regulates procedure.”²⁰⁰ If so, the federal rule should be applied regardless of its substantive impact on a competing state law. *Sibbach*, as affirmed in *Hanna*, effectively rendered a nullity the REA’s substantive-rights proviso that federal rules may not “abridge, enlarge or modify any substantive right.”²⁰¹

Three decades later, in *Gasperini*, the Court again shifted back toward a policy-sensitive, interest-balancing *Erie* approach that narrowly construes the Federal Rules to avoid a conflict with, and thus to accommodate “the substantive thrust” of, state law, even state procedural rules.²⁰² *Gasperini*’s return to a functional approach to *Erie* caused commentators to speculate whether Justice Ginsburg’s opinion augured a reversal of the Court’s formalist “plain meaning” approach to interpreting Federal Rules.²⁰³

The Court’s answer came fourteen years later when, in *Shady Grove*, the pendulum reversed direction toward a formalist, plain-meaning application of the REA over Justice Ginsburg’s dissent.²⁰⁴

B. Inter-State: Conflicts of Laws and the Tension Between Predictability and Flexibility

The yin and yang tension between formalism and functionalism, so apparent in the Court’s *Erie* and state-court jurisdiction jurisprudence, has bedeviled the field of conflicts law²⁰⁵ among both academics and

¹⁹⁹ *Id.* at 471.

²⁰⁰ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

²⁰¹ 28 U.S.C. § 2072(b) (2006).

²⁰² *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996).

²⁰³ See, e.g., Freer, *supra* note 106, at 1642; J. Benjamin King, Note, *Clarification and Disruption: The Effect of Gasperini v. Center for Humanities, Inc. on the Erie Doctrine*, 83 CORNELL L. REV. 161, 189–90 (1997).

²⁰⁴ *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting).

²⁰⁵ This Part’s discussion of conflicts law does not focus on the Supreme Court’s stance on the constitutional limits on a forum state’s application of its own law rather than the law of another state. Professors Brilmayer and Lee have noted that the Burger Court’s deference to state sovereignty in the state-to-state conflicts context is less than it is in the federal–state context: “In the federal/state arena, forum shopping is treated as a serious threat to relations between the superior sovereign and inferior ones. In the Burger Court’s view, deference to state interests requires strict limits on such activities. . . . In conflict of laws a more freewheeling attitude prevails. Although the Court speaks the language of state sovereignty, its decisions permit virtually complete disregard of the interests of the other states.” Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833, 834

jurists.²⁰⁶ Divergent approaches to conflicts law—between “conflicts justice”²⁰⁷ and “material justice”²⁰⁸—reflect the functionalist–formalist tension between certainty and predictability versus doing justice in each case.²⁰⁹ These themes parallel the tension in the Court’s personal jurisdiction jurisprudence between the formalist emphasis on sovereignty and predictability and the functionalist concern with fairness in the individual case and the rational allocation of litigation among state courts.

The formalism of Joseph Beale’s vested rights doctrine of conflicts law,²¹⁰ “etched in stone in the (First) Restatement,”²¹¹ was based, like

(1985) (footnote omitted). Brilmayer and Lee note “the tightfistedness with which the [substance/procedure] distinction is applied in the federal/state [*Erie*] arena, and the leniency in the state/state context. . . . The Court has recently reaffirmed [in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985)] *Allstate*’s holding that the due process clause and the full faith and credit clause of the Constitution provide only modest restrictions on the forum’s application of its own law.” *Id.* at 848–49 (discussing *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).

²⁰⁶ See generally PETER HAY ET AL., CONFLICT OF LAWS §§ 2.9–2.25 (5th ed. 2010).

²⁰⁷ See *id.* § 2.12, at 52 (“[C]onflicts justice’ . . . proceeds from the basic premise that the function of conflicts law is simply to refer each multistate case to the *state* that has the ‘most appropriate’ relationship for supplying the applicable law, rather than to directly search for the proper *law* or, much less, the proper *result*.”).

²⁰⁸ See *id.* § 2.12, at 53 (“Directly opposed to the ‘conflicts-justice’ view is the ‘material-justice’ view. It begins with the premise that multistate cases are not qualitatively different from fully domestic cases and that a judge’s duty to resolve disputes *justly and fairly* does not disappear the moment the judge encounters a case with foreign elements. Resolving such disputes in a manner that is substantively fair and equitable to the litigants should be an objective of conflicts law as much as it is of internal law.”).

²⁰⁹ See Symeonides, *supra* note 184, at 7–8 (illustrating the contrasting functionalist–formalist approaches to answering “basic and direct questions about the fundamental goals, objectives, and aspirations of conflicts law, and the means that can best advance those goals,” including the contrasting values of “Certainty” vs. “Flexibility” and “Conflicts Justice” vs. “Material Justice”); see also HAY ET AL., *supra* note 206, § 2.26, at 126 (referring to the need to “restore [in choice of law] a proper equilibrium between the perpetually competing values of certainty and flexibility”); James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2137 (1991) (“This dispute [between advocates of choice of law rules and proponents of case-by-case analysis of the policies at issue] . . . is merely a particularized example of a larger legal debate about rules versus discretion. It is a debate that cannot be resolved in general terms or on the basis of deductive logic. Rather, the choice between rules and case-specific analysis (or an appropriate mix of the two) turns in any particular context on certain empirical and value judgments: How important is predictability in this area? Does case-by-case analysis identify substantively correct answers better than rules we can realistically formulate? How much better? Can we devise rules that are sufficiently clear and workable to provide real guidance?”).

²¹⁰ Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 36 (2010) (“In Beale’s view, the forum court should give effect to any right that had ‘vested’ within the territory of a foreign sovereign. ‘[T]he chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created [the creation of a right].’” (alterations in original) (quoting I JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 8A.8 (1935))).

Pennoyer's power theory of personal jurisdiction, on the principle of state territorial sovereignty. The power theory was deduced from the premise that a sovereign has exclusive power over persons and property located within its territory.²¹² Beale's vested-rights theory, like *International Shoe's* minimum contacts doctrine, was a "territorial rule . . . that selects a state's law without regard to the law's content but based on some contact that state has with the parties or the transaction."²¹³ The functional advantage of Beale's formalist approach to conflicts doctrine was its "certainty and ease of application."²¹⁴

The revolutionary impact of legal realism's functional approach on intrastate choice of law in *Erie* and state-court jurisdiction in *International Shoe*²¹⁵ also radically transformed conflicts law.²¹⁶ Walter Wheeler Cook, "one of the first second-generation realists,"²¹⁷ led the charge against Beale.²¹⁸ According to Cook's "local law theory," "the forum court did not recognize a foreign right created in another jurisdiction, as the vested rights theory taught, but enforced a right created by its own law, the *lex loci*."²¹⁹ As Professor Childress explains: "Beale's vested rights approach was undermined in the United States by the legal realists. The legal realists argued that Beale's approach substituted an artificial, metaphysical theory of vested rights as a cover for what the courts actually did in cases."²²⁰ The Second Restatement of Conflicts rejected Beale's

²¹¹ HAY ET AL., *supra* note 206, § 2.7, at 21.

²¹² See BRILMAYER, *supra* note 13, at 219 ("When applied to conflicts law, the vested rights doctrine has historically been linked with a territorial theory of jurisdiction. The territorial theory holds that every sovereign has an exclusive right to regulate persons and things within its territory according to its sovereign will. In other words, all events happening, or having effects, within a sovereign's territory are subject to that sovereign's laws. In a conflicts case a forum applies its own choice of law rules to any case involving other states, because the case itself is an 'event' happening within the sovereign's territory. However, at the same time it asserts exclusive jurisdiction within its territory, the forum state recognizes rights created under foreign law.").

²¹³ WEINTRAUB, *supra* note 14, at 348 (noting that "[a]n example [of a territorial rule] is the rule of the first Restatement of Conflicts that selected the law of the place of injury for torts").

²¹⁴ *Id.*; BRILMAYER, *supra* note 13, at 220 ("The *Restatement* aimed to set out a body of rules simple in form and capable of easy administration that would promote uniformity of results, enhance predictability, and discourage forum-shopping in multistate cases.").

²¹⁵ George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 349 (2002) ("The opinion in *International Shoe* is one of the enduring monuments of Legal Realism . . .").

²¹⁶ Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1197 (1987) ("Cook's critique of the conceptualist pretenses of traditional choice of law was of a piece with functionalist 'realist' analyses of other fields of law.").

²¹⁷ KALMAN, *supra* note 84, at 25.

²¹⁸ HAY ET AL., *supra* note 206, § 2.8, at 24–25.

²¹⁹ KALMAN, *supra* note 84, at 25.

²²⁰ Childress, *supra* note 210, at 39; HAY ET AL., *supra* note 206, § 2.9, at 26–27 ("Cook's attack on the traditional theory was continued by Professor David F. Cavers,

vested rights theory²²¹ in favor of a “consequence-based rule . . . that chooses the law of a state with knowledge of the content of that law and to advance the policies underlying that law.”²²² This functional approach, which considers “the social consequences that are likely to follow” from the determination of a choice of law issue,²²³ parallels Justice Ginsburg’s rejection of formalism in the *Erie* context—in *Gasperini* and *Shady Grove* where she argued that Federal Rules should be interpreted with sensitivity to substantive state policies—and in the state-court jurisdiction context—in *Nicastro* where her dissent focused on the realities of international commerce that diminish the legal relevance of state boundaries in determining due process limits on state-court jurisdiction over alien defendants serving the U.S. market.²²⁴

Commentators have criticized the realist critique of formalism as “an overreaction against *any* rules”²²⁵ and for “purchas[ing] certainty at the

who at the time shared many of Cook’s legal-realist convictions and the same skepticism towards generalizations. . . . Cavers further exposed the mechanical nature of the traditional methodology . . . based solely on territorial contacts and without regard to the content of the implicated laws.”).

²²¹ HAY ET AL., *supra* note 206, § 2.14, at 77 (“[T]he Second Restatement was drafted during a period of transition from an inflexible territorialist approach to flexible policy-based approaches.”).

²²² WEINTRAUB, *supra* note 14, § 6.1, at 348.

²²³ *Id.*; HAY ET AL., *supra* note 206, § 2.9, at 29–30 (“[Brainerd] Currie’s legal-realist, or perhaps legal-positivist, conception of law as ‘an instrument of social control’ is projected at the interstate level: states do have an interest in the outcome of litigation between private persons, in domestic as well as in conflicts cases. However, in articulating those interests, Currie almost invariably assumed that a state is interested in protecting its domiciliaries only, but no out-of-staters similarly situated.”).

²²⁴ *See supra* Part II.

²²⁵ *See, e.g.*, Symeon C. Symeonides, *The ALI’s Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 856–57 (1994) (“For too long, American conflicts thinking has been mesmerized by the teachings of Brainerd Currie who proclaimed that all rules are necessarily evil. . . . This agnosticism was a natural but naive overreaction to the theology of Joseph Beale and the theocracy of his first Restatement of Conflicts. It has been the great misfortune of American conflicts that the only rule system it ever had was a spectacularly bad one. The rules of the first Restatement were too rigid and mechanical, leaving no room for evolution. This rigidity led to the overuse of the few available escape devices Because of the wide and frequent utilization of these escape devices, the Restatement was perceived as incapable of producing the legal certainty and predictability that its drafters had promised. In turn, this failure encouraged and nourished an open revolution in the early 1960’s, at least in the area of tort and contract conflicts. As with many revolutions, the established system was demolished rather than repaired. The obvious deficiencies of the Restatement’s rules, coupled with the influence of American Legal Realism, the philosophical school of choice of most conflicts revolutionaries, provoked an overreaction against *any* rules. This prejudice against *a priori* rules continues to dominate the conflicts literature. After thirty years of revolution and a few years of counter-revolution, after so many years of *impressionism juridique* and experimentation with various ad hoc approaches, including the one advanced by Currie, American conflicts law looks like ‘a tale of a thousand-and-one-cases’ in which ‘each case is

expense of justice . . . in the [conflicts] field . . . [where] some degree of certainty is not incompatible with justice and is, in truth, a condition of justice.”²²⁶ In the 1960s, at the height of the conflicts “revolution,” Professor Ehrenzweig asked: “Has the pendulum swung too far? Is revolution being met by counter-revolution?”²²⁷ The incoherence of conflicts law—a product of the tug between formalist and functionalist approaches—prompted some commentators to suggest moving the pendulum back in the formalist direction to reach “a proper equilibrium” that serves the functional goals of each approach,²²⁸ a balanced approach evocative of Schauer’s presumptive formalism or Tamanaha’s New Formalism. The Second Restatement of Conflicts’ attempt at balancing the formalist goal of uniformity and predictability with the functionalist feature of interest-balancing flexibility²²⁹ parallels *International Shoe*’s effort to counterbalance the formalism of minimum contacts with the functionalism of reasonableness and the just result. Professor Symeonides has called for a Third Restatement to pursue further this balanced approach.²³⁰

The decline of Beale’s territorially-based, vested-rights approach to conflicts law mirrored the decline, in *International Shoe*, of *Pennoyer*’s narrow focus on state territorial sovereignty; both phenomena were a

decided as if it were unique and of first impression.” (footnotes omitted) (quoting P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 578, 580 (1985)).

²²⁶ Edgar H. Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 415 (1941); see also Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2137 (1991) (“The easy answer is that uniform treatment of choice of law helps the parties by assuring predictable outcomes. People seldom plan to end up in court, and usually do not know where they will litigate until hostilities commence. Consequently, if states employ different approaches to choice of law, the parties cannot know what law governs their conduct until after they have acted. The resulting uncertainty is unfair, and it discourages desirable interstate activity. Because this is bad for all states, all states should have an interest in devising a choice of law system that provides predictable, uniform treatment of multistate cases.” (footnote omitted)).

²²⁷ Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 377 (1966).

²²⁸ See, e.g., HAY ET AL., *supra* note 206, § 2.26, at 126 (referring to the need to “restore [in choice-of-law] a proper equilibrium between the perpetually competing values of certainty and flexibility”); Symeonides, *supra* note 225, at 857.

²²⁹ See, e.g., BRILMAYER, *supra* note 13, at 243–44 (discussing the Second Restatement’s Section 6 policy factors: “(a) The needs of interstate and international systems (b) The relevant policies of the forum (c) The relevant policies of other interested states and the relative interests of those states in the determination of a particular issue (d) The protection of justified expectations (e) The basic policies underlying the particular field of law (f) Certainty, predictability, and uniformity of result (g) Ease in the determination and application of the law to be applied. Note that factors a, d, f, and g retain the basic criteria of the *First Restatement*, whereas factors b, c, and e reflect the values of interest analysis.”).

²³⁰ Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1280–81 (1997).

consequence of the decreasing practical importance of state borders brought about by increased mobility of people and commerce.²³¹ Nevertheless, as considered in Parts V.A and B, state sovereignty has not disappeared from the due process radar, and the relevance of state borders in defining the limits imposed by the Due Process Clause on state-court jurisdiction has surfaced once again in *Nicastro*, this time in the international context of foreign corporations serving the U.S. market.

V. *NICASTRO* AND THE RELEVANCE OF STATE LINES²³² IN
DEFINING THE LIMITS OF PERSONAL JURISDICTION IN A GLOBAL
ECONOMY: THE DYSFUNCTIONAL ROLE OF FORMALISM IN
FEDERALISM

The tension between formalism and functionalism has bedeviled the Court's state-court jurisdiction jurisprudence since Justice Field's opinion in *Pennoyer*, in Professor Juenger's words, "lump[ed] together the two disparate ideas of sovereignty and fairness, but ever since the two have coexisted uneasily in the realm of jurisdiction."²³³ Fifteen years later, this appraisal accurately characterizes the fractured Court's opinions in *Nicastro*.

A. *The Legacy of International Shoe: The Marriage of Formalism and Functionalism—Irreconcilable Differences or Complementary Partners?*

Pennoyer's power theory of personal jurisdiction,²³⁴ premised on the de facto power of a "sovereign" state over persons and property located within that state's territory, was "an example *par excellence* of what Karl

²³¹ HAY ET AL., *supra* note 206, § 2.7, at 24 ("Even in the 1930s, Beale's position was odd for a country like the United States, which purported to be 'one nation, indivisible,' notwithstanding its internal boundaries. With the subsequent advent of new means of transportation and communication, and the increased mobility of people, state boundaries became even less important, and Beale's insistence on territoriality as the dominant principle made even less sense than before.").

²³² See Brilmayer & Lee, *supra* note 205, at 833 (1985) ("[T]he increased mobility of citizens and capital renders state lines less important as a practical matter. Still, we are told, these trends do not spell the demise of state sovereignty or the complete centralization of legal institutions and power.").

²³³ Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1029 (1995).

²³⁴ Drobak, *supra* note 55, at 1019 ("As Justice Holmes said, '[t]he foundation of jurisdiction is physical power'" (alteration in original) (quoting *McDonald v. Mabee*, 243 U.S. 90, 91 (1917))); Seidelson, *supra* note 18, at 568 ("The principal function of the due process clause in the jurisdictional context, according to *Pennoyer*, was to preserve the territorial sovereignty of the several states. . . . 'The other principle of public law . . . follows from the one just mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.'" (second omission in original) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878))).

Llewellyn called the Formal Style in juristic reasoning.²³⁵ The Court in *Pennoyer* held that the Due Process Clause limits the reach of state-court jurisdiction to protect the “sovereign interests of other states . . . from the forum state’s assertion of jurisdiction over a non-resident.”²³⁶ This formalist application of state boundaries to demarcate the limits of state-court jurisdiction appealed to the classical theorists’ belief that:

[T]hese general principles contained legal concepts that could be rigidly separated. Distinctions between concepts were *analogized to boundary lines between two pieces of property*; either you are on my property or you are on your property—there is no gray area. Either there is a contract with all its attendant legal obligations or there is no contract and there are no affirmative obligations; *either a state has personal jurisdiction or it does not.*²³⁷

Commentators dispute the legacy of the Court’s landmark decision in *International Shoe*²³⁸ and, particularly, the extent to which that decision erased or preserved the relevance of state sovereignty in due process analysis of state-court jurisdiction. *International Shoe* has been called “one of the enduring monuments of Legal Realism.”²³⁹ One writer contends that *International Shoe*’s essentially functionalist core—“the broader principle of fair play and substantial justice”—has been concealed by the focus on minimum contacts in the Court’s subsequent decisions.²⁴⁰ In a similar vein, Justice Brennan, in his *World-Wide Volkswagen* dissent, opined that “[t]he clear focus in *International Shoe* was on fairness and reasonableness,”²⁴¹ not on the non-resident defendant’s contacts with the forum. But just as academics have criticized the realist critique of the First Restatement of Conflicts’ formalism as “an overreaction against *any* rules,”²⁴² making “American conflicts law look[] like ‘a tale of a thousand-

²³⁵ Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 271 (citing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 38–39 (1960)).

²³⁶ Capra, *supra* note 132, at 1038.

²³⁷ Singer, *supra* note 84, at 496–97 (emphasis added).

²³⁸ On the different interpretations of *International Shoe*, see generally Rutherglen, *supra* note 215.

²³⁹ *Id.* at 349.

²⁴⁰ Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe’s Half-Buried Legacy*, 28 U.C. DAVIS L. REV. 561, 580 (1995) (internal quotation marks omitted) (“What was news in *International Shoe* was that the Court appeared to make some progress towards shaking off the ancient formalisms that had come to haunt it. So much attention has been devoted to the ‘minimum contacts’ language in *International Shoe* that it is easy to forget the other things the court said. First, the Court dispensed with, in part, the ritualist reliance upon sovereignty that had come to dominate jurisdictional analysis. . . . Second, the Court’s ultimate test for jurisdiction was not so much the ‘minimum contacts’ concept that has dominated our analysis since, but, rather, the broader principle of ‘fair play and substantial justice.’”).

²⁴¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300 (1980) (Brennan, J. dissenting).

²⁴² Symeonides, *supra* note 184, at 70.

and-one-cases,”²⁴³ Professor Rutherglen commented that “it is difficult, in all the controversy that Legal Realism generated when it came on the scene, to find a more effective and more thorough job of ‘trashing’ legal rules than has been accomplished by *International Shoe*.”²⁴⁴

International Shoe’s minimum contacts standard²⁴⁵ combines features of both formalism and functionalism, preserving an uneasy co-existence between sovereignty and fairness which, as summarized in Part V.B, is reflected in the alternating shifts in emphasis between these “[t]wo divergent strands” in the Court’s subsequent personal jurisdiction jurisprudence.²⁴⁶ Professor Kogan characterizes *International Shoe* as “Janus-faced,”²⁴⁷ looking backward to *Pennoyer*’s “focus on interstate sovereignty as the major consideration governing personal jurisdiction”²⁴⁸ and forward to the principle of fairness, in which “the goal of personal jurisdiction principles is to assist in the complex administrative task shared by all courts in the country to achieve the fair administration of justice in a federal society.”²⁴⁹ He suggests that *International Shoe* contained within itself two “forward-looking paradigms,” laying out two different paths for the Court to travel.²⁵⁰ His Reciprocity Paradigm, rooted in the first-prong “purposeful availment” requirement, “while clearly focusing on fairness concerns, recognizes a role for state sovereignty”²⁵¹ in the sense that “[a] defendant can be forced to litigate a dispute in a forum that empowered the parties to engage in the transaction underlying the dispute.”²⁵² His Mutual Inconvenience Paradigm eliminates state sovereignty from the equation altogether, “view[ing] the personal jurisdiction question as involving solely an issue

²⁴³ Symeonides, *supra* note 225, at 857 (quoting Kozyris, *supra* note 225, at 578).

²⁴⁴ Rutherglen, *supra* note 215, at 349.

²⁴⁵ Despite its provenance in *Pennoyer*’s principle of territorial sovereignty, the minimum contacts test is a standard, not a rule. As noted by Justice Stevens: “Like any standard that requires a determination of ‘reasonableness,’ the ‘minimum contacts’ test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite ‘affiliating circumstances’ are present. We recognize that this determination is one in which few answers will be written ‘in black and white. The greys are dominant and even among them the shades are innumerable.’” *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978) (citation omitted) (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

²⁴⁶ Rutherglen, *supra* note 215, at 360–61 (“Two divergent strands in the opinion, in particular, have come to dominate academic analysis of its consequences. The first is the invocation of ‘traditional notions of fair play and substantial justice’ as the test for jurisdiction under the Due Process Clause. . . . The second strand of interpretation, unlike the first, takes the standard of ‘minimum contacts’ at face value, emphasizing territorial limitations on state power.”).

²⁴⁷ Kogan, *A Neo-Federalist Tale*, *supra* note 25, at 358.

²⁴⁸ *Id.* at 360.

²⁴⁹ *Id.* at 363.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 363, 367.

²⁵² *Id.* at 366.

of the administration of justice, . . . seek[ing] out a cost-efficient, national solution to the administrative problem.”²⁵³

It is an understatement that “[t]he appropriate role of federalism as part of the personal jurisdiction analysis has spawned much academic discussion.”²⁵⁴ Across the formalist–functionalist spectrum of proposed solutions, there appears to be a consensus that the Court’s personal jurisdiction doctrine is “a mess.”²⁵⁵ Professor Juenger called *International Shoe’s* “marriage” of sovereignty and fairness a mismatch²⁵⁶ yielding incoherent case law. Several writers have counseled a divorce, advocating, on the formalist end of the spectrum, the elimination of the reasonableness inquiry²⁵⁷ and, on the functionalist end, the elimination of sovereignty and state lines from the due process analysis²⁵⁸ or the removal of due process from “the equation” altogether.²⁵⁹

²⁵³ *Id.* at 368; *id.* at 370 (“The Mutual Inconvenience Paradigm is a radical departure from current doctrine. Most significantly, it appears to dismiss completely any limitation on personal jurisdiction arising by reason of interstate sovereignty and territorial boundaries. It does this by allowing litigation to be brought in any forum that is ‘mutually inconvenient’ for both parties at the time the litigation is commenced, irrespective of whether that forum had any prior relationship with the underlying controversy or any residence-like relationship with the defendant.”)

²⁵⁴ Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1, 62 n.280 (2004).

²⁵⁵ Borchers, *supra* note 240, at 564 (“The only fair conclusion is that jurisdiction in the United States is a mess.”); Juenger, *supra* note 233, at 1027 (“There is no longer any doubt: American jurisdictional law is a mess.”); Weinstein, *supra* note 170, at 299 (“Although commentators on the subject agree on very little else, there is a consensus that the state of personal jurisdiction doctrine is unsatisfactory.”).

²⁵⁶ Juenger, *supra* note 233, at 1029 (noting that “sovereignty and due process have entirely different thrusts: whereas the former sanctions the prerogatives of states, the latter protects the rights of individuals”).

²⁵⁷ See, e.g., Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 576 (1991).

²⁵⁸ WEINTRAUB, *supra* note 14, § 4.8A(1)(D), at 191; *id.* § 4.8A(1)(E), at 195 (“It is a disgrace that we have made what should be a matter of interstate venue a constitutional issue and then have micromanaged state-court jurisdiction to adjudicate so that this threshold issue is one of the most litigated.” Weintraub likens the situation to a “labyrinth in which we are trapped like the Minotaur” and “[t]he preferable way [out of the labyrinth] is to permit a plaintiff to bring suit against a United States defendant in any forum that has a reasonable interest in adjudicating the case: the plaintiff’s residence, the place of injury, defendant’s residence or principal place of business.”); Nicholas R. Spampata, Note, *King Pennoyer Dethroned: A Policy-Analysis-Influenced Study of the Limits of Pennoyer v. Neff in the Jurisdictional Environment of the Internet*, 85 CORNELL L. REV. 1742, 1743–44 (2000) (“[I]n spite of the criticisms leveled against it, *Pennoyer* has had a stranglehold on our courts, if not our minds, and its vestiges remain today.”); see also Stephen E. Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 WASH. U. L.Q. 1291, 1334–38 (1983); Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2183–84 (1997) (“[T]he Supreme Court must with all deliberate speed disavow the doctrine that the Due Process Clause of the Fourteenth Amendment, or anything else in the United States Constitution, requires a territorial

Among the formalist perspectives, Professor Oakley “celebrate[s]” *International Shoe* for preserving the role of due process in protecting the individual rights of defendants against overreaching state courts,²⁶⁰ while Professor McFarland criticizes the decision as too functional: “The irony is that the Court sacrificed predictability for fairness and now the result is only what one judge . . . concludes is fair in an individual case.”²⁶¹ Professor Brilmayer contends that state sovereignty, “grounded in the structure of a federal union,” should play a critical role in personal jurisdiction jurisprudence: “Imposition of burdens on outsiders . . . must be justified. The most convincing justification is the State’s right to regulate activities occurring within the State.”²⁶² Accordingly, she comments that the exercise of sovereign power over a defendant should be justified by either the defendant’s status as an “insider”—as a domiciliary or virtual domiciliary by virtue of systematic and continuous contacts with the forum as a basis for general jurisdiction—or “if the defendant was somehow responsible” for “substantive occurrences” within the forum state that the state has the right to regulate.²⁶³ Brilmayer defends *World-Wide Volkswagen’s* purposeful availment requirement as rooted in the structure of federalism:

The reason for limiting jurisdiction to cases where the defendant had some control over the eventual location of the product is to prevent the forum from always shifting the costs to persons to whom its sovereignty does not extend, namely, the out-of-state

nexus between forum and defendant as a sine qua non for the exercise of in personam jurisdiction.”); Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 522–28 (1984); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 846–52 (1981).

²⁵⁹ Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 89 (1990).

²⁶⁰ Oakley, *supra* note 78, at 752 (“In reviving the constitutional law of state-court personal jurisdiction, I would seek to celebrate rather than to denigrate *International Shoe* as a model of law reform. Justice Stone’s opinion in *International Shoe* did not condemn the past, but sought to reinterpret it. No case was overruled, no precedent was disavowed, but the teachings of those cases were harmonized with the changing realities of modern interstate litigation.”).

²⁶¹ Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 767 (2003).

²⁶² Brilmayer, *supra* note 167, at 85–86 (“It is natural . . . to give these structural arguments [in favor of sovereignty limitations] due process foundations because they constitute one requirement for a State to render a binding judgment. So understood, the sovereignty concept inherent in the Due Process Clause is not the reasonableness of the burden but the reasonableness of the particular State’s imposing it.” (footnote omitted)).

²⁶³ *Id.* at 87, 89 (“By prohibiting unreasonable deprivations [of an individual’s property] and requiring a justification for state imposition of legal burdens, the Due Process Clause seems to require that the person who would suffer the deprivation have some contact with the State by which he has subjected himself to its power.”).

consumers who have no contact with the forum.²⁶⁴

Professor Silberman advocates eliminating the second-prong “reasonableness” standard to promote clarity and predictability and also to restrain plaintiffs from forum shopping for the most favorable choice of law rules.²⁶⁵

Professor Stein proposes another formalist defense of sovereignty through his “sovereign allocation model” in which “[p]ersonal jurisdiction . . . takes on *the function* of allocating sovereign authority, because a court’s power depends on the state’s legitimate reg[ul]atory stake in the litigation.”²⁶⁶ Stein seeks to reconcile the Due Process Clause’s focus on individual rights with the protection of sovereign interests of other states: “The federalism–individual rights debate thus poses a false dichotomy. Due process protects the sovereign interests of other states, but only incidentally, through its protection of the individual from illegitimate assertions of state authority. Legitimacy, though, is defined by reference to the state’s allocated authority within the federal system.”²⁶⁷

The prevailing sentiment within the academy, however, tends toward functionalist solutions to the incoherence of personal jurisdiction doctrine. In 1987 Professor Stein observed that “[t]he emerging

²⁶⁴ *Id.* at 95; *id.* at 95–96 (“If the defendant deliberately sent a product into the State, he has a choice to stop marketing there if the costs of doing business exceed the value to him of that market. And the State is unlikely to impose upon him jurisdictional burdens exceeding the actual cost of his activities there, because the State does not want to discourage his activities in the State unless the benefits of the activities are less than the burdens. But if jurisdiction can be asserted even where the defendant had no control, these checks cannot be assumed to be adequate. Since the defendant cannot structure his conduct in a way that makes him immune to suit there, the State is not adequately restrained by the possibility that the defendant will withdraw from its markets. . . . And requiring the defendant to litigate in the forum is an impermissible means of regulating substantively relevant impact there where the defendant had no control over the location of the impact, because the result is that the plaintiff’s option to litigate in a convenient place is paid by out-of-state consumers.” (footnote omitted)).

²⁶⁵ Silberman, *supra* note 257, at 576 (“The need for a clear rule is critical for preliminary questions such as jurisdiction, and avoiding a ‘reasonableness’ inquiry in every situation is desirable.”); see also Martin B. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. Rev. 407, 407 (1980) (defending “the bright-line approach taken by the Court in these cases as one necessary to end the inexorable growth of state long arm jurisdiction inherent in a balancing test that would allow a state court to weigh local interests in asserting jurisdiction”).

²⁶⁶ Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 698, 725 (1987) (emphasis added); *id.* at 739 n.220 (“Limits on state court jurisdiction must be derived from a unique relationship between the states, the federal government, and the parties. That relationship renders the doctrine’s application to alien defendants problematical.”).

²⁶⁷ *Id.* at 711 (footnote omitted) (“Considered in this light, *International Shoe’s* command that jurisdiction be ‘reasonable, in the context of our federal system of government,’ makes eminent sense.” (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945))).

consensus [among academics] largely would efface the significance of state lines.”²⁶⁸ Functionalists like Professor Juenger condemn *International Shoe*’s vestiges of state sovereignty²⁶⁹ or, like Professor Weintraub, would eliminate sovereignty and state lines from the due process analysis.²⁷⁰ Professor Borchers would “take the Constitution out of the equation” entirely,²⁷¹ noting that “[g]etting the Court out of the business of regulating personal jurisdiction would be a giant step in the right direction. The most immediate consequence would be to throw the matter back to the states.”²⁷² At a minimum, Borchers would drastically reduce the role of due process by applying a *procedural* due process—“rationality-plus-fair-hearing”—standard that assesses fairness to both plaintiff and defendant.²⁷³

Between the two poles of the formalist–functionalist continuum lies a flexible, modified formalist model that reconciles, and benefits from, the complementary goals of these two approaches to judicial decision-making. *International Shoe* embraced this “model of law reform” by adapting *Pennoyer*’s sovereignty principle to changing economic and social reality.²⁷⁴ Similar to the American Law Institute’s eclectic approach to the Second Restatement of Conflicts, the Court in *International Shoe* fashioned an eclectic approach to personal jurisdiction that “preserved

²⁶⁸ *Id.* at 690.

²⁶⁹ Juenger, *supra* note 233, at 1030–31 (criticizing *International Shoe*’s “continuing interrelationship between the divergent notions of sovereignty and fairness” rather than “linking jurisdictional precepts with the Full Faith and Credit Clause [which] would have emphasized that domestic and international jurisdiction are not necessarily identical Regrettably, the Chief Justice not only failed to explain what, if anything, state lines and territorial contacts have to do with due process, but also left in doubt what kinds of contacts must exist before a court can proceed against a nonresident.”); Spampata, *supra* note 258, at 1743–44 (“[I]n spite of the criticisms leveled against it, *Pennoyer* has had a stranglehold on our courts, if not our minds, and its vestiges remain today.”).

²⁷⁰ WEINTRAUB, *supra* note 14, § 4.8A(1)(E), at 195; *see also* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The “Power” Myth and Forum Conveniens*, 65 *YALE L.J.* 289, 314 (1956) (“And pseudo-medieval formulas established and perpetuated by nineteenth century conceptualism, which for decades have obstructed the free flow of legal progress, will have been replaced by what may become known as the new and old American common law of interstate venue in the forum conveniens.”); Weinstein, *supra* note 170, at 188 (“Generations of commentators have criticized the doctrine’s strong territorial element and many have advocated that the jurisdictional rules should instead focus on the convenience of the parties.”); Whitten, *supra* note 258, at 846 (“The primary ‘territorial’ rule that the Court should follow . . . is that a court has jurisdiction to adjudicate an action against any defendant, unless the defendant demonstrates that the relative burdens imposed by suit in the particular court are so great that the defendant is, as a practical matter, unable to defend there adequately.”).

²⁷¹ Borchers, *supra* note 259, at 89.

²⁷² *Id.* at 103–04 (“An even better alternative, particularly for those who fear parochial state legislatures, is congressional action to create uniform national standards.”).

²⁷³ Borchers, *supra* note 240, at 579.

²⁷⁴ Oakley, *supra* note 78, at 752.

most of the decisions under the formal territorial theory, but added the flexibility of an open-ended standard of reasonableness.”²⁷⁵ *International Shoe’s* threshold requirement of contacts directed by the defendant at the forum state²⁷⁶ that can be tempered by a compelling showing of unfairness²⁷⁷ exemplifies Schauer’s presumptive formalism²⁷⁸ and Rutherglen’s “presumptive rules.”²⁷⁹

Professor Oakley proposes a balanced formalist model of personal jurisdiction doctrine that “seek[s] constructive growth of the law” by avoiding the extremes of rigid formalism that resists adaptation to changing reality, on the one hand, and “pragmatic instrumentalism” that “produces conflict and even chaos” by producing too much change,²⁸⁰ on the other. In his words:

This model argues for a reformulation of “minimum contacts” theory in which the concept of purposefulness is more carefully defined as the criterion for what “contacts” count, and in which the intertwined concepts of the magnitude of the contacts and their relationship to the claim in issue are more carefully defined as criteria for whether the cognizable contacts meet the required “minimum.” And it argues as well for a parallel reformulation of the concepts of sovereignty and subject within a federal union in which economic integration and the transformation of property into

²⁷⁵ Rutherglen, *supra* note 215, at 363 (“The Restatement (Second) of Conflict of Laws took this eclectic approach one step further. In an obvious compromise, the Second Restatement accepted the grounds of jurisdiction already recognized in the First Restatement and added ‘relationships to the state which make the exercise of judicial jurisdiction reasonable’ as a further ground of jurisdiction. This compromise, like the opinion in *International Shoe* itself, preserved most of the decisions under the formal territorial theory, but added the flexibility of an open-ended standard of reasonableness.” (quoting RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 27(k) (1971))).

²⁷⁶ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (“That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.”).

²⁷⁷ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987) (“Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.”).

²⁷⁸ Schauer, *supra* note 124, at 547.

²⁷⁹ Rutherglen, *supra* note 215, at 370–71 (“The most promising candidates are rules of intermediate generality: not as rigid as those of the First Restatement and not as open-ended as the abstract standards of *International Shoe*. Such rules, moreover, would correspond to the widespread sense that the decisions applying the test of minimum contacts are all broadly consistent with another. If so, it should be possible to state more specifically the form that such consistency takes. Few authors have tried to do so. This effort, it should be emphasized, would be entirely consistent with the structure and ambitions of *International Shoe* itself.”); *id.* at 371 (“[P]resumptive rules can be devised to allocate cases in a way that fosters interjurisdictional cooperation.”).

²⁸⁰ Oakley, *supra* note 78, at 750–51 & n.518, 754 (noting that “the improvement of the future that pragmatism seeks must be attained incrementally, one step at a time”).

information have profoundly altered the traditional relationships of territoriality, power, and politics.²⁸¹

This incremental, rather than instrumental, approach to the evolution of personal jurisdiction doctrine “keep[s] faith with history by seeking constructive growth of the law, asking courts to prune its branches, but not to uproot its trunk.”²⁸² This brand of balanced, flexible formalism values the Constitution’s “entrenched respect for individual rights” which “are constructs founded in history and tradition as well as current consensus, and . . . are disserved by the pragmatist’s recurrent clamor that the past ought to guide progress, but not unduly restrain it.”²⁸³ Although Oakley urges that *Pennoyer* not be “buri[ed]” but “exhume[d]”—since it was “founded, however imperfectly, in respect for the rights of parties such as . . . Marcus Neff”—he also rejects a narrow focus on the “territorial limits of state sovereignty” that ignores the “normative limits of fairness.”²⁸⁴

Applying this modified formalist model to my critique of *Nicastro*, I will conclude in Part V.C that the Court could have preserved the concept of sovereignty, but adapted it to the reality of global commerce by expanding its scope to encompass national, rather than state, territorial borders in determining the due process limits of state-court personal jurisdiction over foreign manufacturers that target the U.S. market.

B. The Pendulum Swings, Since International Shoe, Between Formalism and Functionalism: An Incoherent Doctrine

Since *International Shoe*, the Court’s state-court personal jurisdiction jurisprudence has alternately shifted its emphasis between the two strands of the minimum contacts doctrine in an ongoing attempt to accommodate the norms of both formalism and functionalism.²⁸⁵ This

²⁸¹ *Id.* at 752–53.

²⁸² *Id.* at 754. Oakley rejects what he calls Borchers’s “pragmatic instrumentalism,” borrowed from Samuel Summers: “This theory is . . . pragmatic in its general view that physical and social reality can be marshaled and deployed for human use. . . . [M]any instrumentalists assume that we can readily alter reality to serve practical ends. In the hands of legal personnel, reality—including especially the law’s own machinery—is significantly malleable. Furthermore, instrumentalism is pragmatic in that, rather than concentrating on rules and other legal forms, it addresses the roles played by official personnel—especially judges. Viewing legal personnel as ‘social engineers,’ it treats their roles, the skills they must deploy, and the effects of their behavior.” *Id.* at 750 n.518 (quoting ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20–22 (1982)).

²⁸³ *Id.* at 751.

²⁸⁴ *Id.* at 752.

²⁸⁵ Borchers, *supra* note 259, at 92; *see also* Rex R. Perschbacher, *Foreword*, 28 U.C. DAVIS L. REV. 513, 529 (1995) (“Unless we can adopt the radical reverse law reform to reunderstand *Pennoyer* and *International Shoe* as advocated by Borchers and others, it looks as though we will have to make due with the arbitrary particularization

pattern, consistent with the Court's *Erie* jurisprudence and the development of conflicts law, appears to be intrinsic to balancing the federalism equation. Professor Borchers' observation of this formalist-functional tension in state-court jurisdiction over two decades ago is as fresh today—in *Nicastro*—as it was when written:

In the space of twenty-nine years the Court has accepted, then rejected, then accepted, then rejected, and then accepted the “federalism” or “sovereignty” factor in the jurisdictional calculus. Like a tumbleweed, the constitutional law of personal jurisdiction has been blown from place to place with the winds of whatever verbal formulation strikes the Court's fancy. . . .

. . . .

The most on-again, off-again theme in personal jurisdiction is the notion that constitutional intervention in personal jurisdiction is necessary to preserve interests of “federalism” or “sovereignty.”²⁸⁶

Twelve years after *International Shoe*, the Court handed down a pair of decisions that sent conflicting signals about the primacy of territorial sovereignty versus fairness in the jurisdictional equation. In *McGee v. International Life Insurance Co.*, the Court stressed the “fairness” factors of forum state interest, party convenience, and location of witnesses²⁸⁷ while, that same Term, in *Hanson v. Denckla*, it held that purposeful availment's focus on defendant's forum contacts is a threshold requirement for personal jurisdiction. Further affirming the role of sovereignty, *Hanson* proclaimed that restrictions on the exercise of personal jurisdiction by state courts

and ad hoc decision-making that characterize the past fifty years of *International Shoe*. There are virtues in vagueness and uncertainty—they do allow courts to make individual judgments of what is fair and just and reasonable in ways that bright lines do not. But is the cost of constant litigation and seemingly endless reformulations of the minimum contacts test worth the price? The Symposium's collective judgment is ‘no.’”).

²⁸⁶ Borchers, *supra* note 259, at 78, 92 (footnotes omitted); *see also* Perschbacher, *supra* note 285, at 526 (“Professor Goldstein begins his comparative analysis with his own critique. He believes the problems with United States personal jurisdiction doctrine stem from the Court's attempt to perform two quite different tasks in its due process jurisdiction jurisprudence. The Court has tried both to allocate personal jurisdiction among the several states and to limit excessive assertions of jurisdiction by the states. While this second aim is amenable to judicial control, the first is principally a legislative, not a judicial, function. With *Pennoyer* as the allocational fountainhead and *International Shoe* as the true forbearer of due process limitations on jurisdiction, the Court has wandered from one thread to the other over the years since *International Shoe*. *Hanson v. Denckla* and *World-Wide Volkswagen* belong in the *Pennoyer* camp, while *Shaffer v. Heitner*, *Kulko v. Superior Court*, and *Rush v. Savchuk* all are substantive due process progeny of *International Shoe*. The two threads continue to weave their way in and out of cases and individual Justices' opinions to this very day.” (footnotes omitted)); *id.* at 529.

²⁸⁷ *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957).

are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the “minimal contacts” with that State that are a prerequisite to its exercise of power over him.²⁸⁸

Twenty years later, the Court appeared to retreat from territorial sovereignty in *Shaffer v. Heitner* by holding that the due process assessment of *quasi-in-rem* jurisdiction, that had been based on *Pennoyer*'s power theory,²⁸⁹ was now to be measured solely by *International Shoe*'s minimum contacts yardstick.²⁹⁰ The Court's broad language—“all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny”²⁹¹—appeared completely to overrule *Pennoyer* and raised the question, addressed thirteen years later in dueling opinions by Justices Scalia and Brennan,²⁹² whether the in personam wing of *Pennoyer*'s territoriality principle was the other shoe to fall. One year following *Shaffer*, the Court reversed course again toward territorial sovereignty when, in *Kulko v. Superior Court*, it reversed the California Court's exercise of personal jurisdiction, in a child-support-and-custody action, over a divorced New York defendant who bought his daughter a one-way ticket to California to live with her mother, ruling that “[a] father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement *can hardly be said to have 'purposefully availed himself' of the 'benefits and protections' of California's laws.*”²⁹³ Two years later, the Court's personal jurisdiction jurisprudence moved further toward the formalist end of the continuum in *World-Wide Volkswagen v. Woodson*,²⁹⁴ in which “Justice White specifically addressed the role of sovereignty and federalism concerns in a controversial passage in which he noted that the minimum contacts

²⁸⁸ *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

²⁸⁹ *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977); *id.* at 212 n.38 (The *Shaffer* Court acknowledged that, as late as *Hanson v. Denckla*, “we noted that a state court's *in rem* jurisdiction is ‘[f]ounded on physical power’ and that ‘[t]he basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.’” (alterations in original) (quoting *Hanson*, 357 U.S. at 246)).

²⁹⁰ *Id.* at 206 (“It is clear, therefore, that the law of state-court jurisdiction no longer stands securely on the foundation established in *Pennoyer*. We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*.”).

²⁹¹ *Id.* at 212.

²⁹² *Burnham v. Superior Court*, 495 U.S. 604 (1990).

²⁹³ *Kulko v. Superior Court*, 436 U.S. 84, 94 (1978) (emphasis added).

²⁹⁴ 444 U.S. 286 (1980); see Capra, *supra* note 132, at 1038 (“As Professor Casad stresses, the talismanic result in *World-Wide* is symptomatic of the formalistic legal reasoning, particularly the reliance on fictional sovereignty interests, employed by the Supreme Court in its 100-year bout with principles of personal jurisdiction.” (footnote omitted)).

standard acts to protect the defendant from burdensome or inconvenient litigation *and also acts to preserve some notions of state sovereignty.*²⁹⁵

Two years after *World-Wide Volkswagen*, the Court, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,²⁹⁶ moderated its explicit endorsement of the role of federalism and state sovereignty in minimum contacts analysis. In a “Delphic footnote,”²⁹⁷ Professors Wright and Miller note:

Justice White explained that federalism concerns are not separate from traditional due process notions. Rather, jurisdictional restrictions based on state sovereign power “must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns.”²⁹⁸

²⁹⁵ 4 WRIGHT & MILLER, *supra* note 53, § 1067.1, at 441 (emphasis added) (noting “the continuing role played by the historic notions of state sovereignty and interstate federalism in personal jurisdiction jurisprudence”); *id.* at 442 (“This invocation of state sovereignty limitations as a basis of the minimum contacts test is of particular interest, since most prior case law—most notably the majority opinion in *Hanson v. Denckla*—had focused on the rights of the defendant as the determinative factor for deciding jurisdictional questions.”); *see also* Capra, *supra* note 132, at 1037 (“Under *World-Wide*, if minimum contacts are not established, the forum state, in effect, is violating the ‘due process rights’ of the defendant’s state when it hears the plaintiff’s case—even if the defendant himself suffers no burden in defending in the forum state. In the absence of minimum contacts, the forum state is acting beyond its sovereign power and encroaching on the sovereign powers of a sister state.”); Drobak, *supra* note 55, at 1043 (“The answer supplied by *World-Wide Volkswagen* is that minimum contacts are needed to protect federalism.”).

²⁹⁶ 456 U.S. 694 (1982).

²⁹⁷ 4 WRIGHT & MILLER, *supra* note 53, § 1067.1, at 442 (referring to *Ins. Corp. of Ir.*, 456 U.S. at 702 n.10).

²⁹⁸ *Id.* § 1067.1, at 442–43 (quoting *Ins. Corp. of Ir.*, 456 U.S. at 703 n.10) (“Notwithstanding the Insurance Corporation of Ireland footnote, it does not seem plausible to read territoriality and sovereignty concerns entirely out of the minimum contacts analysis. Although it is true that the Due Process Clause of the Fourteenth Amendment ‘makes no mention of federalism concerns,’ it nonetheless also is true that the states to which that Amendment applies are coequal sovereigns within a federalist system, and the Amendment must be read with this in mind. Moreover, state courts always have had the power to assert personal jurisdiction over any defendant found within the territory of the state.” (quoting *Ins. Corp. of Ir.*, 456 U.S. at 703 n.10)); Drobak, *supra* note 55, at 1047 (“*Ireland* demonstrates that minimum contacts with the forum are necessary to protect the defendant’s own interest in freedom from an unrelated sovereign. On the other hand, *World-Wide Volkswagen* asserts that minimum contacts are necessary to preserve federalism. . . . As the Court said in *Ireland*, the federalism theme in personal jurisdiction cannot be an independent restriction on the sovereign power of a court; otherwise, waiver would not be possible. That does not mean, however, that the federalism theme is dead. Federalism is preserved by personal jurisdiction as a by-product of the application of the doctrine to protect the defendant.” (footnote omitted)).

In *Asahi Metal Industry Co. v. Superior Court*²⁹⁹ and *Burnham v. Superior Court*,³⁰⁰ the Court handed down a pair of consecutive decisions, in 1987 and 1990—each containing a set of “dueling opinions,” as Justice Ginsburg’s *Nicastro* dissent would later characterize them³⁰¹—that highlighted the formalist–functionalist fault line that still runs through the Court in *Nicastro* between sovereignty and fairness. In *Burnham*, Justices Scalia and Brennan debated whether *Pennoyer*’s power theory of personal jurisdiction survived *International Shoe*.³⁰² Justice Scalia’s plurality opinion—joined by Justice Kennedy, who authored the plurality opinion in *Nicastro* that Justice Scalia joined—breathed life into *Pennoyer* by affirming the continued viability of *Pennoyer*’s “presence” principle.³⁰³ A similar formalist–functionalist split appeared in *Asahi*, which failed to resolve the division among the circuits over the proper interpretation of *World-Wide Volkswagen*’s stream of commerce test and which, in Borchers’s words, “demonstrated the incredible durability of the notion that ‘federalism’ plays a role in evaluating the constitutionality of state court assertions of jurisdiction.”³⁰⁴ This doctrinal split would appear once again in *Nicastro*, which would fail to resolve the question whether the

²⁹⁹ 480 U.S. 102 (1987).

³⁰⁰ 495 U.S. 604 (1990); see Borchers, *supra* note 259, at 76–77 (“*Asahi*, if nothing else, demonstrated the incredible durability of the notion that ‘federalism’ plays a role in evaluating the constitutionality of state court assertions of jurisdiction.”); *id.* at 78–79 (“As it turned out, the reports [after *Shaffer*] of *Pennoyer*’s death were greatly exaggerated. In *Burnham* the Court upheld the constitutionality of tag jurisdiction.” (footnote omitted)); Juenger, *supra* note 233, at 1034 (“Perhaps the most glaring example of [the Court’s incoherent case law] is *Pennoyer*’s resurrection in *Burnham v. Superior Court*.”); *id.* at 1035 (“[N]ot only do the two plurality opinions in *Burnham* contradict each other—which leaves *Pennoyer*’s continued authority in limbo—but each of them is as implausible as the other.”); McFarland, *supra* note 261, at 781 (articulating a formalist defense of *Burnham*: “One small victory for certainty, predictability, and ease of application was the Court’s refusal to abandon service within the boundaries of a state as a sure jurisdictional hold. Beyond that one island of certainty, all else seems to be at sea in the Court’s stream of personal jurisdiction cases.”); Resnik, *supra* note 24, at 488 (“But despite [the] move in the 1950s away from physicality to a ‘relational’ theory of jurisdictional power over people in civil litigation, territoriality remains a vital part of contemporary jurisdictional law.”).

³⁰¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 (2011) (Ginsburg, J. dissenting) (referring to “the dueling opinions of Justice Brennan and Justice O’Connor”).

³⁰² *Burnham*, 495 U.S. at 622–28 (1990) (Scalia, J., plurality opinion); *id.* at 628–30 (Brennan, J., concurring in part and concurring in the judgment).

³⁰³ *Id.* at 619 (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’ That standard was developed by *analogy* to ‘physical presence,’ and it would be perverse to say it could now be turned against that touchstone of jurisdiction.”).

³⁰⁴ Borchers, *supra* note 259, at 77.

minimum contacts principle is primarily a “‘sovereign’ limitation on the power of States”³⁰⁵ or a standard of “reason and fairness.”³⁰⁶

As noted earlier, many commentators have recommended a divorce between these two seemingly irreconcilable approaches to personal jurisdiction. In Part V.C, I propose that these two strands of *International Shoe*’s minimum contacts doctrine can be reconciled in a modified or balanced formalist model, along the lines of Schauer’s presumptive formalism, that would have produced a more functional result in *Nicastro*.

C. *Nicastro*’s Dysfunctional Use of Formalism: Projecting the Concept of Interstate Federalism into the International Arena of Global Trade

The way the world transacts business has been radically transformed in the 67 years since *International Shoe* stretched *Pennoyer*’s sovereignty principle to include defendant’s contacts with the forum state as a proxy for defendant’s presence *in* that state.³⁰⁷ The key issue confronting the Court in *Nicastro*—and unresolved since *Asahi*—is whether state sovereignty within the federal system makes sense in the international context.³⁰⁸

Since Justice Brennan commented 30 years ago, in his *World-Wide Volkswagen* dissent, that “[t]he model of society on which the *International Shoe* Court based its opinion is no longer accurate”³⁰⁹ in view of the rapid *nationalization* of commerce in the U.S., the rapid *globalization* of commerce and information continues to challenge the Court to adjust its personal jurisdiction jurisprudence to catch up with these realities, as it did 65 years ago in *International Shoe*. This challenge confronted the Court in *Asahi* where the Justices divided between O’Connor’s formalist and Brennan’s functionalist interpretations of *World-Wide Volkswagen*’s

³⁰⁵ *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 714 (1982) (Powell, J., concurring); *Nicastro*, 131 S. Ct. at 2789 (“And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”).

³⁰⁶ *Nicastro*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

³⁰⁷ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (emphasis added) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

³⁰⁸ See, e.g., Juenger, *supra* note 233, at 1030–31 (criticizing *International Shoe*’s “continuing interrelationship between the divergent notions of sovereignty and fairness” rather than “linking jurisdictional precepts with the Full Faith and Credit Clause [which] would have emphasized that domestic and international jurisdiction are not necessarily identical: if the Constitution does indeed serve to allocate jurisdiction within the United States, treaties and conventions are the appropriate vehicles for worldwide cooperation.”).

³⁰⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 309 (1980) (Brennan, J., dissenting).

“stream of commerce” metaphor as applied, in the international context, to a foreign manufacturer of a component sold to another foreign manufacturer and incorporated into a product deliberately marketed to California.³¹⁰ As noted by Professors Wright and Miller: “Given the increasingly interstate and international character of today’s economy and the relatively free movement of goods and services without regard to state and national boundaries, few issues of personal jurisdiction are more important than the status of this stream of commerce theory.”³¹¹ The California trial court, in ruling that the stream of commerce theory allowed it to exercise personal jurisdiction over Asahi, expressed itself in terms similar to those of the New Jersey Supreme Court, 27 years later, in *Nicastro*: “Asahi obviously does business on an international scale. It is not unreasonable that [it] defend claims of defect in [its] product on an international scale.”³¹² Both rulings would be reversed by the U.S. Supreme Court.³¹³

The plurality and dissenting opinions in *Asahi* parallel the plurality and dissenting opinions in *Nicastro*, which failed once again to resolve this critical issue. The *Nicastro* plurality aligned with Justice O’Connor’s formalist “stream of commerce *plus*” interpretation, requiring the defendant to deliberately target the forum state’s market,³¹⁴ while Justice Ginsburg’s dissent—though it declined to take a position on the “stream of commerce” question³¹⁵—echoed Justice Brennan’s functionalist perspective that minimized the practical significance of state boundaries as limitations on state-court jurisdiction, emphasizing fairness and reasonableness over state sovereignty.³¹⁶ The dissent came down heavily in favor of this second prong of the minimum contacts standard, noting that “*International Shoe* gave prime place to reason and fairness.”³¹⁷ By contrast, it is noteworthy that Justice Scalia, who joined the *Nicastro* plurality opinion, did not join with the other eight justices in *Asahi*, who agreed that, regardless of the appropriate interpretation of “stream of commerce” to satisfy “purposeful availment,” “the exercise of personal jurisdiction by a California court over Asahi in this instance would be *unreasonable and unfair*.”³¹⁸

³¹⁰ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

³¹¹ 4 WRIGHT & MILLER, *supra* note 53, § 1067.4, at 476, 480–81.

³¹² *Asahi*, 480 U.S. at 107.

³¹³ *See id.* at 108; *see also* J. McIntyre Mach., Ltd. v. *Nicastro*, 131 S. Ct. 2780, 2785 (2011).

³¹⁴ *Nicastro*, 131 S. Ct. at 2788–89.

³¹⁵ *Id.* at 2803 (Ginsburg, J., dissenting) (“Given the confines of the controversy, the dueling opinions of Justice Brennan and Justice O’Connor were hardly necessary.”).

³¹⁶ *Id.* at 2798 (“[T]he constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty.”).

³¹⁷ *Id.* at 2800.

³¹⁸ *Asahi*, 480 U.S. at 116 (emphasis added).

Justice Breyer's concurrence in the judgment, joined by Justice Alito, rejected the dissent's "absolute approach,"³¹⁹ based on his concern that it would force an "Egyptian shirt maker" who sells his wares through an international distributor to "respond to products-liability tort suits in virtually every State in the United States."³²⁰ Adopting a balanced formalist perspective,³²¹ Justice Breyer's concurrence aligned with the plurality's focus on state, rather than national, sovereignty, but left the door open to future reconsideration of sovereignty when applied to a company that "targets the world"³²² *through the Internet*. However, Justice Breyer refused to agree with the New Jersey Supreme Court's observation that the advent of a *global economy*, in which foreign corporations target their products at the U.S. market using "the complex international marketing schemes that bring products into our State,"³²³ qualifies as such a change in "the nature of international commerce . . . as to require a new approach to personal jurisdiction."³²⁴

The *Nicastro* majority's strict adherence to state forum-focused sovereignty in the international context of global trade is a dysfunctional use of formalism. Professor Seidelson's critique of the *Asahi*-plurality's more demanding "stream of commerce plus" test applies at least equally to the *Nicastro* plurality's affirmance of that test: "Under the plurality opinion in *Asahi*, counsel for a parts manufacturer, desirous of having his client enjoy the economic benefits of a nationwide market while still enjoying immunity from jurisdiction in any state other than the client's home state simply has to [avoid engaging in conduct specifically directed toward the forum state]."³²⁵ Seidelson concludes: "[T]he Court, by

³¹⁹ *Nicastro*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) ("Under that view, a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'" (quoting *Nicastro v. McIntyre Mach. Am., Ltd. (Nicastro I)*, 987 A.3d 575, 592 (N.J. 2010))).

³²⁰ *Id.* at 2794.

³²¹ TAMANAHA, *supra* note 118, at 177, 180 (referring to New Formalists and Balanced Formalism).

³²² *Nicastro*, 131 S. Ct. at 2793.

³²³ *Nicastro I*, 987 A.2d 575, 585.

³²⁴ *Nicastro*, 131 S. Ct. at 2794; *id.* at 2792–93 ("Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.").

³²⁵ Seidelson, *supra* note 18, at 579; *see also* WEINTRAUB, *supra* note 14, § 4.8, at 176 ("The most ominous aspect of the *Asahi* opinion is that four Justices joined in the finding that *Asahi* did not have 'minimum contacts' with California. Although none of the opinions says so in plain English, this means that jurisdiction over *Asahi* was not available in the California courts *even on behalf of the slain and mangled California residents*. The reasoning of this portion of the opinion was that minimum contacts did not exist because *Asahi* did not 'purposefully avail itself of the California market.'") (emphasis added) (footnotes omitted); Juenger, *supra* note 233, at 1044 ("However

plurality and by majority, respectively, may have overlooked the basic function of the due process clause in the jurisdictional context and the significant need for jurisdiction over foreign defendants in today's society."³²⁶

Nicastro's facts presented an easier case than *Asahi* for exercising state-court jurisdiction over the alien manufacturer. Unlike *Asahi*, whose component parts *found their way* into California as part of a larger product marketed by the manufacturer in the forum state, McIntyre *itself* engaged the services of a U.S. distributor to market its finished product directly to U.S. consumers, though admittedly not specifically to any particular state.³²⁷ *Nicastro's* plurality takes the immunity from state-court jurisdiction over foreign manufacturers afforded, in effect, by the *Asahi* plurality's formalism a step further by applying Justice O'Connor's "stream of commerce plus" test to the foreign manufacturer of the *finished product*.³²⁸ Professor Weintraub predicted this extended application of the *Asahi* plurality's formalist version of "stream of commerce":

The finding of no minimum contacts may have implications for defendants *other than component part manufacturers*. The manufacturer of the finished product may utilize a tactic that predated modern long-arm statutes; sell the product at the place of manufacture to an 'independent' distributor and claim that the resulting layers in the marketing process insulate the maker from suit in a forum where the product is finally sold to a user and causes injury.³²⁹

He prophetically warned: "The no 'minimum contacts' portion of the [plurality] opinion threatens a return to the days when injured users of defective products had to hunt afar for a forum in which they could sue the manufacturers."³³⁰

As a result of the majority's ruling that due process requires an alien manufacturer's contacts to target specifically the forum state's market to justify subjecting the manufacturer to the jurisdiction of that state's courts, *Nicastro*, injured in his home state of New Jersey by a machine

misguided the Supreme Court's *Asahi* decision may have been otherwise, it at least did not discriminate against outsiders.").

³²⁶ Seidelson, *supra* note 18, at 587.

³²⁷ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 106–07 (1987); see also *Nicastro*, 131 S. Ct. at 2786.

³²⁸ See WEINTRAUB, *supra* note 14, § 4.8, at 177 (noting that, at least, the plurality opinion's "stream of commerce plus" approach would not be applied to the foreign manufacturer of the finished product: "If an injured user is not able to obtain jurisdiction over a component part manufacturer, is this of any real consequence? In many cases, perhaps in most cases, as in *Asahi*, the seller of the finished product and the local retailer will be amenable to jurisdiction, responsible under doctrines such as strict liability in tort for the injury caused by the defective component, and have assets sufficient to pay the judgment." (footnote omitted)).

³²⁹ *Id.* at 179 (emphasis added).

³³⁰ *Id.*

targeted by the British manufacturer at the U.S. market, may have to seek redress in Ohio, where the McIntyre UK's American distributor did business, or in Nevada, the site of the trade convention attended by the manufacturer. And, as noted by the New Jersey Supreme Court, "defending the product-liability action in Ohio . . . or in Nevada . . . would be no more convenient [to McIntyre UK] than in New Jersey"³³¹ which, of course, is closer to Britain. Furthermore, had McIntyre UK *not* shipped its machines directly to a distributor inside the U.S. and had it *not* attended a trade convention in the U.S., the *only* forum available to Nicastro might have been Britain. If, however, the defendant had been a U.S. manufacturer who, like McIntyre UK, served the U.S. market but targeted no particular state, Nicastro would at least have been able to bring suit in the domestic manufacturer's home state.³³²

However plausible the formalist justification of state territorial sovereignty's role in personal jurisdiction doctrine domestically,³³³ the plurality's concern with upsetting the federal balance of sovereign power among the states is misplaced in the international context of national sovereignties.³³⁴ Even Professor Stein acknowledges that his formalist "sovereign allocation model" of jurisdiction "might have different implications for international jurisdictional disputes."³³⁵ More particularly, Stein comments: "The sovereign allocation model of jurisdiction might also support consideration of national rather than state-specific contacts. A foreign defendant's complaint is that it is subjected to illegitimate United States judicial authority, not illegitimate

³³¹ *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 593 (N.J. 2010). But see BRILMAYER, *supra* note 13, at 294 for Professor Brilmayer's critique of a variation on this convenience argument: "The second justification for aggregation of an alien defendant's contacts relates to the inconveniences of the defendant. Some courts argue that the convenience of the forum is more significant to American defendants than it is to alien defendants, for whom all American jurisdictions are, in a sense, equally distant and inconvenient. Courts that advance this convenience rationale are, in effect, arguing that since it is already burdensome for alien defendants to come to the United States, the incremental burden of litigating in a particularly remote state should not matter. This rationale is questionable, however. First, it depends on litigation in American courts being more inconvenient for alien defendants than it is for American defendants. This is often not the case. Moreover, it is not clear that an initial disadvantage should justify a further disadvantage."

³³² See *Nicastro*, 131 S. Ct. at 2789 ("If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction.").

³³³ See, e.g., Brilmayer, *supra* note 167, at 85; Stein, *supra* note 266, at 698.

³³⁴ See *Nicastro*, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[N]o issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State.").

³³⁵ Stein, *supra* note 266, at 739 n.220 ("Limits on state court jurisdiction must be derived from a unique relationship between the states, the federal government, and the parties. That relationship renders the doctrine's application to alien defendants problematical.").

forum state authority; from this perspective, the states are mere administrative divisions.”³³⁶ Commentators have noted the diminished relevance of state sovereignty in the international context in other contexts as well.³³⁷

Nicastro's facts provided Justices Breyer and Alito with a missed opportunity to avoid the dysfunctional result of the plurality's rigid formalism without abandoning the threshold requirement of purposeful availment. As noted earlier, the Court's inability to resolve the tension inherent in *International Shoe*'s “marriage of sovereignty and fairness” has produced incoherent case law. I propose that a way forward to resolve this tension—one that avoids either extreme of the formalist–functionalist continuum—lies in pursuing, rather than abandoning, *International Shoe*'s sovereignty-tempered-by-fairness legacy through a presumptive formalism³³⁸ approach that preserves purposeful availment's *sine qua non* focus on sovereignty expanded, in the international context, to encompass national, rather than state, sovereignty, and also permits the presumption of jurisdiction to be rebutted by a compelling showing of unfairness. Both Professors Oakley and Rutherglen have suggested similar modified formalist approaches that remain true to the structure of *International Shoe* but, in Rutherglen's words, reformulate minimum contacts doctrine to develop more specific presumptive rules “of intermediate generality: not as rigid as those of the First Restatement and not as open-ended as the abstract standards of *International Shoe*.”³³⁹

Both the two concurring Justices and the three dissenting Justices could have found common ground in a pragmatically flexible application of the territorial sovereignty principle that would have permitted the Court to aggregate the alien defendant's contacts with U.S. territory to satisfy purposeful availment. In other words, personal jurisdiction over McIntyre UK in a New Jersey court could have been upheld, even under Justice O'Connor's “stream of commerce plus” test, by finding that, in Justice Ginsburg's words, “McIntyre UK, by engaging McIntyre America

³³⁶ *Id.*

³³⁷ See, e.g., Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1447 (1994) (“[W]e are on the front end of a new wave of nationalizing, this one brought about through international pressures. And with this latest wave will come even more pressure to ‘harmonize,’ and a concomitant pressure to reduce state autonomy.”); *id.* at 1472 (“[I]nternationalization only continues what nationalization began: a diminution in the separate sovereignty and independence of state government.”); Juenger, *supra* note 233, at 1037.

³³⁸ See Schauer, *supra* note 124, at 547 (describing “presumptive formalism”).

³³⁹ Rutherglen, *supra* note 215, at 370–71 (“Such rules, moreover, would correspond to the widespread sense that the decisions applying the test of minimum contacts are all broadly consistent with another. If so, it should be possible to state more specifically the form that such consistency takes. Few authors have tried to do so. This effort, it should be emphasized, would be entirely consistent with the structure and ambitions of *International Shoe* itself. . . . [P]resumptive rules can be devised to allocate cases in a way that fosters interjurisdictional cooperation.”); Oakley, *supra* note 78, at 752–53; see also Silberman, *supra* note 257, at 576.

to promote and sell its machines in the United States, ‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States” and that McIntyre UK, by “targeting a national market,” also targeted New Jersey’s market.³⁴⁰ The plurality’s concern³⁴¹ about exposing the metaphorical “Egyptian shirt-maker,” who sells his wares through an international distributor, to jurisdiction in a U.S. court could have been addressed by invoking second-prong “fairness” considerations where a compelling case can be made to rebut the formalist presumption based on sovereignty. Through this modified formalist approach, the dissenting Justices, by not pressing their functionalist position on the *primacy* of “fairness,” could have made incremental progress toward a more realistic approach to personal jurisdiction by adjusting the Court’s jurisprudence to global commercial realities. This balanced formalist approach would, in Oakley’s words, “reformulat[e] . . . the concepts of sovereignty and subject within a federal union in which economic integration and the transformation of property into information have profoundly altered the traditional relationships of territoriality, power, and politics.”³⁴²

Instead of removing territorial sovereignty from the personal jurisdiction equation and severing its link to the Due Process Clause, the minimum contacts doctrine should be reformulated to expand the concept of sovereignty, in the context of international commerce, from state to national territory, permitting a court to aggregate an alien defendant’s contacts with the national territory. Professor Weintraub has suggested a similar approach:

For defendants residing or headquartered abroad, a decent respect for foreign countries requires that the defendant have some contact with the United States, not with any individual state, that makes it reasonable under the circumstances to order the foreigner to appear and defend here. The idea of focusing on nation-wide contacts has received limited and halting recognition in Federal Rule of Civil Procedure 4(k)(2), which took effect on December 1, 1993.³⁴³

³⁴⁰ J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2801 (2011) (Ginsburg, J. dissenting).

³⁴¹ *Id.* at 2790 (plurality opinion) (extending Justice Breyer’s concern to small domestic producers: “It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan’s approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States’ courts without ever leaving town.”).

³⁴² Oakley, *supra* note 78, at 752–53.

³⁴³ WEINTRAUB, *supra* note 14, § 4.8A(1)(D), at 191 (footnote omitted); Russell J. Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 620 (1991) (“If the defendant is foreign, reasonable affiliating contacts with the

In states where long-arm statutes authorize personal jurisdiction to the full extent of the Fourteenth Amendment's Due Process Clause, or where defendant's activities cause injury in the forum,³⁴⁴ no additional statutory authorization for state-court jurisdiction over alien defendants would be required. The Court would only need to expand the scope of the Fourteenth Amendment Due Process Clause's purposeful availment requirement, applied to an alien defendant under existing state long-arm statutes, to include that defendant's aggregate national contacts. An alternative approach to working within existing state statutes, mentioned in Justice Kennedy's plurality opinion in *Nicastro*, would require congressional enactment of a nationwide service of process statute applicable "in appropriate courts" which could include state courts.³⁴⁵ While Justice Kennedy declined to speculate on "any constitutional concerns that might be attendant to that exercise of power,"³⁴⁶ the source of constitutional justification for this type of statute would likely be the Fifth Amendment rather than the Fourteenth.³⁴⁷ Some commentators

United States would be required. For this purpose, the defendant's contacts with the United States would be cumulated.").

³⁴⁴ *Nicastro*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting) ("When industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer. For example, the State's statute might provide, as does New York's long-arm statute, for the 'exercise [of] personal jurisdiction over any non-domiciliary . . . who . . . commits a tortious act without the state causing injury to person or property within the state, . . . if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.' Or, the State might simply provide, as New Jersey does, for the exercise of jurisdiction 'consistent with due process of law.'" (alterations and omissions in original) (quoting N.Y. C.P.L.R. § 302(a)(3)(ii) (McKinney 2008); N.J. Ct. R. 4:4-4(b)(1) (West 2010)).

³⁴⁵ *Nicastro*, 131 S. Ct. at 2790 (plurality opinion); Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731, 764 (noting that Congress has conferred "worldwide service of process" on both state and federal courts: "Thus, whether the claim be a federal or nonfederal one, if Congress has authorized nationwide service of process over that claim, the state court has the power of nationwide service of process."); see also BRILMAYER, *supra* note 13, at 294 (noting that "[m]ost courts . . . have refused to aggregate an alien defendant's contacts unless Congress has provided for nationwide service of process for domestic defendants. . . . [S]ince states applying their long-arm statutes cannot aggregate a defendant's national contacts neither can federal courts using those statutes."). Justice O'Connor's plurality opinion in *Asahi* also made passing reference to the prospect of congressional authorization of personal jurisdiction over alien defendants, not in state courts, but in federal court diversity suits based on aggregate national contacts under the Fifth Amendment. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987).

³⁴⁶ *Nicastro*, 131 S. Ct. at 2790.

³⁴⁷ Weinberg, *supra* note 345, at 763-64 (positing that such jurisdiction-conferring statutes must vindicate the national interest which, in the case of nationwide service of process on alien defendants, would relate to the foreign relations power); Deborah Dunn, Comment, *The ALI's Complex Litigation Project and Federal-to-State Consolidation: A Due Process Analysis of Granting to State Courts Nationwide*

have argued that personal jurisdiction over alien defendants is not the domain of domestic law at all, but should be governed by treaty, such as the Hague Convention.³⁴⁸

VI. CONCLUSION

Formalism and functionalism are not mutually exclusive dogmas but represent complementary aspects of decision-making. Each approach, as well as a balanced blend of each, can offer something of value to the decision-making process in the appropriate doctrinal context. *Shady Grove's* formalist defense of rules uniformity offers an example of the functional use of formalism in federalism. *Nicastro*, by contrast, illustrates its dysfunctional use.

The modified formalist approach I have proposed stakes a pragmatic middle position on the formalist–functionalist continuum between the rigid sovereignty principle of *Nicastro's* plurality and the free-form fairness inquiry espoused by the dissent. This proposal avoids the negative aspects, but retains the functional benefits, of formalism and functionalism consistent with *International Shoe's* reformist model of

Personal Jurisdiction, 1995 BYU L. REV. 1019, 1024–25 (“[T]he [American Law Institute’s] Proposal [providing for nationwide service of process in state courts] asserts that because the source of legislation is federal, the Fifth Amendment due process analysis is more appropriately applied to a state transferee court’s exercise of nationwide personal jurisdiction.”); *id.* at 1027 (“In short, based on analogies to *International Shoe's* Fourteenth Amendment analysis, decisions of the lower federal courts, and dicta from two retired Supreme Court Justices, the Proposal asserts that national contacts is the proper basis for asserting personal jurisdiction under the Fifth Amendment.”). *But see* Joan Steinman, *Reverse Removal*, 78 IOWA L. REV. 1029, 1119 (1993) (“[I]t is the state that must possess a legitimate basis for exercising personal jurisdiction. The power of the United States to subject those within its borders or those who have minimum contacts with the nation to jurisdiction in any of its courts is irrelevant. While, ‘[a]s far as exercise of the *federal judicial* power is concerned, state boundaries are given no significance by the Constitution,’ when it comes to *federal legislative* power concerning *state judicial* power, state boundaries have constitutional significance. Regardless of who is doing the legislating, the relevant boundaries are those of the sovereign that has created the court.” (alterations in original) (footnote omitted) (quoting Howard M. Erichson, Note, *Nationwide Personal Jurisdiction in All Federal Question Cases: A New Rule 4*, 64 N.Y.U. L. REV. 1117, 1141–42 (1989))).

³⁴⁸ See, e.g., Patrick J. Borchers, *Judgments Conventions and Minimum Contacts*, 61 ALB. L. REV. 1161, 1161–63 (1998); Juenger, *supra* note 233, at 1030–31 (criticizing *International Shoe's* “continuing interrelationship between the divergent notions of sovereignty and fairness” rather than “linking jurisdictional precepts with the Full Faith and Credit Clause [which] would have emphasized that domestic and international jurisdiction are not necessarily identical: *if the Constitution does indeed serve to allocate jurisdiction within the United States, treaties and conventions are the appropriate vehicles for worldwide cooperation*” (emphasis added)); 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, 1237–42 (1998).

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adapting personal jurisdiction precedent incrementally to ever-changing commercial and technological realities.