

NOTE

FINDING FEDERALISM IN WAIVER OF PERSONAL JURISDICTION: FEDERALISM AND INDIVIDUAL RIGHTS IN THE SECOND CIRCUIT

Joshua M. Wesneski[†]

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INTRODUCTION

Waiver of personal jurisdiction is a long-standing tenet of federal and state civil procedure.¹ The scope of such waiver, particularly in-

[†] B.A., The University of Oklahoma, 2011; Candidate for J.D., Cornell Law School, 2014; Editor-in-Chief, *Cornell Law Review*, Volume 99. I would sincerely like to thank all members of the *Cornell Law Review* for their hard work and dedication, especially Steve Ma, Nate Taylor, Anthony “T.J.” Vita, Conor McCormick, Catherine Eisenhut, and Zachary Glantz.

¹ See *Petrowski v. Hawkeye-Security Ins. Co.*, 350 U.S. 495, 495–96 (1956) (finding that the court could exercise personal jurisdiction where the defendant had filed a stipulation voluntarily submitting itself to the jurisdiction of the court); *Chi. Life Ins. Co. v.*

voluntary waiver, has slowly expanded, culminating in the Supreme Court case of *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.² The Second Circuit's recent decision in *City of New York v. Mickalis Pawn Shop, LLC*, however, pushes the bounds of waiver beyond practicality and fairness, and redefines the theoretical principles of personal jurisdiction.³ While *Mickalis Pawn* represents a single circuit's interpretation of personal jurisdiction, describing waiver of personal jurisdiction strictly in terms of individual rights has implications for all personal-jurisdiction cases decided in the Second Circuit and brings into question the applicability of the Supreme Court's holding in *Burger King Corp. v. Rudzewicz*⁴ that federalism interests still lurk within personal jurisdiction.

In *Mickalis Pawn*, the Second Circuit determined that defendants who timely raised but unsuccessfully litigated the affirmative defense of personal jurisdiction and then defaulted on the judgment could not challenge personal jurisdiction either through collateral attack or direct appeal.⁵ The defendants, firearms dealers based outside the forum state of New York, had determined that failure at the trial on the merits was a "foregone conclusion" and that their best litigation strategy was to focus their defense on personal jurisdiction.⁶ The Second Circuit, however, found this strategy to be unacceptable. It determined that the defendants had forfeited their right of appeal or collateral attack by (1) appearing to defend the case and (2) defaulting on the judgment after two adverse rulings on personal jurisdiction.⁷

The holding in *Mickalis Pawn* opens up a critical discussion about the role of horizontal federalist interests in personal jurisdiction and specifically raises some questions about the consideration of federalist interests like judicial efficiency and fairness to the plaintiffs when examining waiver of personal jurisdiction. The omission of such interests in *Mickalis Pawn* is difficult to reconcile with *Burger King*, and the resulting tension may have a crucial impact on how district courts in the Second Circuit view and treat waiver of personal jurisdiction.

Cherry, 244 U.S. 25, 29–30 (1917) (recognizing the variation among states as to what constitutes a waiver of personal jurisdiction).

² *Insurance Corp. of Ireland* allowed courts to impose a presumption of fact regarding personal jurisdiction as a sanction for failing to comply with discovery procedures. See 456 U.S. 694, 706–07 (1982); *infra* Part I.B.

³ See 645 F.3d 114, 118–19 (2d Cir. 2011).

⁴ See 471 U.S. 462, 476–77 (1985) (noting the importance of the forum state's interest and the interstate judicial system's efficiency interest to the determination of personal jurisdiction).

⁵ 645 F.3d at 132–33.

⁶ *Id.* at 119, 124.

⁷ *Id.* at 139–40.

This Note argues that in the context of modern jurisprudence interpreting personal jurisdiction as an individual right construed within the framework of horizontal federalism, *Mickalis Pawn* creates an unnecessary tension between the individual rights and federalist interests that are at work in personal jurisdiction. This Note further argues that *Mickalis Pawn* is problematic in the theoretical framework it lays for district courts and in the practical difficulty of applying the rule announced by *Mickalis Pawn*.

Part I gives background on the state of personal jurisdiction and waiver of personal jurisdiction. It also gives the facts and holding from *Mickalis Pawn*. Part II discusses the holding in *Mickalis Pawn* and discusses the theoretical and factual analysis the Second Circuit applied that seems at odds with the Supreme Court's interpretation of personal jurisdiction. Part III discusses the theoretical and practical problems that may arise when district courts try to use *Mickalis Pawn* as precedent for the framework of personal jurisdiction. The final section is a conclusion.

I

BACKGROUND

A. The Theory of Personal Jurisdiction

The foundational principles of personal jurisdiction are most readily apparent in *Pennoyer v. Neff*, the landmark Supreme Court case determining that power over the defendant is a necessary prerequisite to a court's exercise of jurisdiction.⁸ *Pennoyer* arguably grounded this principle in the notion that states, as sovereign entities, are entitled to adjudicate disputes within their own borders and prevent other sovereign states from imposing foreign judgments on their citizens.⁹ Notwithstanding this framework, although *Pennoyer* focused its discussion on the power of the forum state over the defendant, the Court simultaneously described jurisdictional rules as necessary "for the protection and enforcement of private rights."¹⁰

⁸ 95 U.S. 714, 733 (1877) ("[T]he validity of . . . judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

⁹ See Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 702 (1983). But see James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 207 (2004) ("When the grand but irrelevant principles and extensive quotations are stripped away [from *Pennoyer*], what is left is a small emendation to the basic attachment rule—an exception calculated to vindicate *individual rights* by increasing the likelihood that the defendant will have actual notice of the proceeding." (emphasis added)).

¹⁰ 95 U.S. at 733.

Pennoyer's rigid test of strict territoriality soon gave way to other bases of power.¹¹ These expansions of power, though practically imperative, struggled to reconcile themselves with *Pennoyer's* statement of sovereign power as the source of jurisdiction.¹² Perhaps the most troubling and inconsistent of these expansions was consent: the idea that individual citizens could voluntarily forfeit their sovereign state's interest in adjudicating the claims of its own citizens.¹³ The best explanation the Court could come up with was that the forum state's interests somehow justified a deviation from the rigid *Pennoyer* standards of personal jurisdiction.¹⁴

The Supreme Court finally "rationalized these developments"¹⁵ in *International Shoe Co. v. Washington*.¹⁶ The Court recast personal jurisdiction in terms of "traditional notions of fair play and substantial justice"¹⁷ and the defendant's contacts with the forum state.¹⁸ Even as the landscape of personal jurisdiction has shifted, these two principles remain central to the Court's idea of personal jurisdiction.¹⁹ But it is unclear how the Court envisioned this test playing out in lower courts, as the relationship between the defendant's contacts and "fair play" was ambiguous.²⁰ Whatever the relationship, however, the decision subtly but unambiguously shifted the focus of personal jurisdiction from the power of the sovereign state to the individual rights of the defendant.²¹

¹¹ See Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 415 (1981) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940) (domicile); *Hess v. Pawloski*, 274 U.S. 352 (1927) (consent); *Fisher v. Fielding*, 34 A. 714 (Conn. 1895) (presence)).

¹² See Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 5-6 (1984).

¹³ See *id.* Lewis rightly points out that although the Supreme Court described consent to personal jurisdiction as a knowing forfeiture of sovereign power, most examples involved interstate motorists who likely were oblivious to the fact that they were "consenting" to the personal jurisdiction of the state they were in. *Id.* at 6 (citing *Hess*, 274 U.S. 352; *Kane v. New Jersey*, 242 U.S. 160 (1916)).

¹⁴ See Lewis, *supra* note 9, at 705.

¹⁵ Clermont, *supra* note 11, at 415.

¹⁶ 326 U.S. 310, 319 (1945).

¹⁷ *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

¹⁸ *Id.* at 319.

¹⁹ See Sarah R. Cebik, "A Riddle Wrapped in a Mystery Inside an Enigma": *General Personal Jurisdiction and Notions of Sovereignty*, 1998 ANN. SURV. AM. L. 1, 5.

²⁰ See Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 762-63 (2003) (arguing that the ambiguity of the language suggests that the Court intended lower courts to use a flexible reasonableness test in determining personal jurisdiction).

²¹ See Lewis, *supra* note 9, at 706 ("The Court's clear concern here is with 'fairplay and substantial justice' from the standpoint of the defendant, not the sovereign."). Lewis acknowledges that the Court later identified passages in *International Shoe* that suggested a lingering concern with state sovereignty, but Lewis contends that these statements are generalized recognitions that the interests of the defendant should be construed within the

Following *International Shoe*, courts struggled to implement the new reasonableness test, which grounded personal jurisdiction in the individual rights of the defendant.²² The Court began to integrate the plaintiff's and the forum state's interests into the analysis,²³ subtly challenging the notion that personal jurisdiction should be centered on the individual rights of the defendant.²⁴ The theory of state sovereignty as the underlying principle of personal jurisdiction made its most significant comebacks in *Hanson v. Denckla*²⁵ and again later in *World-Wide Volkswagen Corp. v. Woodson*.²⁶ These cases mark two short-lived pockets where state sovereignty and power returned as the dominating force of personal jurisdiction.²⁷

The Court in *Hanson* described restrictions on personal jurisdiction as a "consequence of territorial limitations on the power of the respective States."²⁸ While it is unclear how much this comment marked a commitment to federalism as a defining principle of personal jurisdiction, this invocation of states' power unequivocally reinserted federalism into the personal-jurisdiction dialogue.²⁹

The Court in *World-Wide* spoke more forcefully on the issue and announced that the "sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."³⁰ The Court went on to explicitly invoke federalism by adding that "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."³¹

framework of the federal system. *See id.* at 706–08 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293–94 (1980)).

²² *See* 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, 1747–48 (2000) (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

²³ *See, e.g., McGee*, 355 U.S. at 223 ("It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648 (1950) ("[T]he contacts and ties of appellants with Virginia residents, together with that state's interest in faithful observance of the certificate obligations, justify subjecting appellants to cease and desist proceedings under § 6.").

²⁴ *See* Lewis, *supra* note 9, at 709 n.55.

²⁵ 357 U.S. 235, 251 (1958).

²⁶ 444 U.S. 286, 291–92 (1980).

²⁷ *See* Lewis, *supra* note 9, at 709–18 (discussing the renewed consideration of state sovereignty in *Hanson* and its subsequent demise in later decisions).

²⁸ 357 U.S. at 251.

²⁹ *See* Lewis, *supra* note 9, at 710–11.

³⁰ 444 U.S. at 293.

³¹ *Id.* at 294 (citing *Hanson*, 357 U.S. at 251, 254).

This revival of state sovereignty in *Hanson* and *World-Wide*, however, was soon cut short by the Court's decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*.³²

B. *Insurance Corp. of Ireland* and Waiver of Personal Jurisdiction

The notion that defendants could waive their challenge to the court's jurisdiction over them extends as far back as 1809, when the Supreme Court in *Pollard v. Dwight* determined that the defendant, by appearing to defend in the action, waived his objection to the jurisdiction of the court.³³ Following *Pennoyer*, the Court soon reaffirmed the availability of waiver, notwithstanding *Pennoyer's* insistence on power over the defendant.³⁴ The Court in *Chicago Life Insurance Co. v. Cherry* expanded and elaborated upon this notion, clarifying that although "a court cannot conclude [that] all persons interested [are under its jurisdiction] by its mere assertion of its own power," "[i]f a statute should provide that filing a plea in abatement, or taking the question to a higher court should [submit the defendant to the court's jurisdiction], it could not be said to deny due process of law."³⁵ The Court in *Chicago Life Insurance* and other post-*Pennoyer* cases did its best to frame waiver of personal jurisdiction in terms consistent with the discussion of state sovereignty found in *Pennoyer*.³⁶

But as the Court's theory of personal jurisdiction evolved, so did its perception of waiver, and the Court's decision in *Insurance Corp. of Ireland* arguably marked the Court's contention that personal jurisdiction is fundamentally an individual right under the Due Process Clause.³⁷ The case is best known for allowing lower courts to presume

³² 456 U.S. 694 (1982); see Lewis, *supra* note 9, at 718.

³³ 8 U.S. 421, 428–29 (1808). At that time, the Court considered the issue of jurisdiction only generally, and an appearance by the defendant waived all rights to challenge the jurisdiction of the court on either the grounds of territoriality or improper service. *Id.*; see also Logan v. Patrick, 9 U.S. 288, 288 (1809) (holding that the court below was entitled to exercise jurisdiction over the defendant because the defendant, who had been served outside the court's district, appeared to answer the bill and did not initially object to the court's jurisdiction).

³⁴ See York v. Texas, 137 U.S. 15, 21 (1890) (holding that it was constitutional for a Texas statute to stipulate that defendants who appeared to argue any part of the suit submitted themselves to the jurisdiction of that court). The Court admitted that it would be more convenient to allow the defendant to appear in the Texas court solely to challenge personal jurisdiction, but stated that "mere convenience is not substance of right." *Id.*

³⁵ 244 U.S. 25, 29–30 (1917).

³⁶ See, e.g., Hess v. Pawloski, 274 U.S. 352, 356–57 (1927) (describing waiver of personal jurisdiction by the defendants as the sovereign power of the state to exclude interstate motorists unless they consent to the jurisdiction of the state courts).

³⁷ 456 U.S. at 704 ("In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual."); see also Lewis, *supra* note 9, at 723–24 (arguing that *Insurance Corp. of Ireland* firmly cast away the sovereignty concepts shortly revived by *World-Wide*). Weinstein argues that the Court's

jurisdictional facts against the defendant as a sanction for the defendant's failure to comply with discovery orders.³⁸ The Court began its analysis by recognizing the host of existing ways a defendant could waive the right to personal jurisdiction and concluded that the possibility of waiver necessarily defined personal jurisdiction as an individual right subject to defined procedural limitations and rules.³⁹ The defendants sought to distinguish personal jurisdiction from other instances of discovery sanctions, but the Court insisted that “[b]y submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court’s determination on the issue of jurisdiction: That decision will be res judicata on that issue in any further proceedings.”⁴⁰

In a critical footnote, Justice White repudiated the claim that identifying personal jurisdiction as an individual right would eliminate the “minimum contacts” test.⁴¹ White argued that the limitations on state sovereign power described in other cases are “ultimately a function of the individual liberty interest preserved by the Due Process Clause.”⁴²

Despite the Court’s insistence that personal jurisdiction exists solely as an individual right pursuant to the Due Process Clause, two subsequent cases cast considerable doubt on the Court’s belief in that theory. In *Burger King Corp. v. Rudzewicz*, the Court reaffirmed *World-Wide*’s holding that factors such as the burden on the defendant, the forum state’s interest in hearing the claim, the plaintiff’s interest in efficiency, the interstate judicial system’s interest in efficiency, and all states’ interests in “furthering fundamental substantive social policies” are relevant to the issue of personal jurisdiction.⁴³ The Court’s later decision in *Asahi Metal Industry Co. v. Superior Court* was a mess of concurring and dissenting opinions, but a majority of the Court agreed

analysis of waiver is flawed and that notions of federalism and state sovereignty still have a place in the theory of personal jurisdiction. See Weinstein, *supra* note 9, at 296–99. Despite these objections, however, Weinstein admits that the decision represents a clear move by the Court towards individual rights as the underlying theory of personal jurisdiction. See *id.* at 296.

³⁸ See Robert J. Faris, Note, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee: Justifying the Establishment of Jurisdiction as a Discovery Sanction*, 70 CALIF. L. REV. 1446, 1446–47, 1448–49 (1982).

³⁹ 456 U.S. at 703–05.

⁴⁰ *Id.* at 706.

⁴¹ *Id.* at 702–03 n.10.

⁴² *Id.* This seems to comport with the Court’s contention in *International Shoe* that “[personal jurisdiction] demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there.” 326 U.S. 310, 317 (1945).

⁴³ 471 U.S. 462, 476–77 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

that the interests of the forum state and the interests of other states in “furthering fundamental substantive social policies” were relevant considerations for personal jurisdiction.⁴⁴ Though somewhat ambiguous, these cases seem to hint at the lingering presence of state sovereignty in personal-jurisdiction jurisprudence.⁴⁵

C. The *Mickalis Pawn* Case

This unresolved tension between personal jurisdiction as purely an individual right versus the role of federalism as context for personal jurisdiction set the stage for a critical case of waiver in the Second Circuit. While the Second Circuit’s decision in *City of New York v. Mickalis Pawn Shop, LLC*, is problematic in more than one way, its crucial failure is its neglect of horizontal federalism as a foundational principle of personal jurisdiction.

1. *The Facts*

In 2006, the City of New York brought suit in the Eastern District of New York against fifteen out-of-state firearms dealers, alleging that the dealers had engaged in unlawful sales practices that amounted to a public nuisance in the City.⁴⁶ Notwithstanding this allegation, the defendant–appellant dealers had never done business in the state of New York, nor had they ever shipped guns out of their home states to New York or any other state.⁴⁷

Five defendants, including Mickalis Pawn Shop, timely filed a motion to dismiss for lack of personal jurisdiction.⁴⁸ The district court denied the motion after jurisdictional discovery, arguing that since the City only had to show a substantial likelihood of personal jurisdiction at the pleading stage, the evidence of firearms being “funnel[ed]” into the City was “sufficient to provide the minimum contacts necessary for an exercise of personal jurisdiction.”⁴⁹ The defendants attempted to obtain an interlocutory appeal on the issue of personal jurisdiction, but the court denied that request.⁵⁰ The City soon filed an amended complaint, and the defendants again moved to dismiss

⁴⁴ 480 U.S. 102, 113 (1987) (quoting *World-Wide*, 444 U.S. at 292).

⁴⁵ See Spampata, *supra* note 22, at 1751–52.

⁴⁶ *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 120 (2d Cir. 2011). The City specifically alleged that the dealers engaged in “strawman purchases” that allowed unlicensed individuals to bring guns into the City. *Id.*

⁴⁷ *Id.* at 120–21.

⁴⁸ *Id.* Mickalis Pawn operated a single retail store in South Carolina. *Id.* at 118.

⁴⁹ *Id.* at 121 (quoting *City of New York v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 374, 428 (E.D.N.Y. 2007)).

⁵⁰ *Id.*

for lack of personal jurisdiction, but the court again denied the motion on the same grounds.⁵¹

By March of 2008, Mr. Mickalis himself had been indicted on criminal charges.⁵² Mr. Mickalis opted to devote his limited financial resources to the criminal case against him, and the three law firms representing Mickalis Pawn moved to withdraw as counsel.⁵³ Counsel specifically stated that although the owner of Mickalis Pawn wanted to focus his attention on the criminal case being brought against him personally, Mickalis Pawn would continue to assert lack of personal jurisdiction as a defense and had no intention of waiving that defense.⁵⁴ Notwithstanding this assertion, counsel communicated that Mr. Mickalis was aware that the motion to withdraw could result in a default judgment against him and the granting of the injunctive relief that the City requested.⁵⁵ The City subsequently moved to enter default judgment against Mickalis Pawn over objections from Mickalis Pawn, now representing itself pro se,⁵⁶ and the district court granted the motion and entered default judgment against Mickalis Pawn in March of 2009.⁵⁷

Another defendant, Adventure Outdoors, continued with the litigation through discovery, even though all other defendants had either settled or defaulted.⁵⁸ While a third motion to dismiss for lack of personal jurisdiction was pending, the district court determined that the parties were not entitled to a jury and announced that it would sit as the trier of fact with an advisory jury.⁵⁹ The very next day, the district court denied Adventure Outdoors' motion for summary judgment.⁶⁰

Counsel for Adventure Outdoors, perceiving it to be a "foregone conclusion" that the trial would be unfair, moved to withdraw during the jury selection phase but added that Adventure Outdoors intended

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 122.

⁵⁴ *Id.* at 121–22. Mr. Mickalis had sought to stay the proceedings of the civil case until the resolution of his criminal case, but the district court denied the motion shortly before counsel for Mickalis Pawn moved to withdraw. *Id.* at 121–22.

⁵⁵ *Id.* at 122. The Judge told Mr. Mickalis, "[I]f you do not have an attorney to represent Mickalis Pawn, then the City is going to move for a default and because corporations cannot appear in court without counsel, a default will enter. . . . [T]hat means that the injunctive relief that the City has requested will in all likelihood be granted." *Id.* (alterations in original) (quoting Transcript of Civil Cause for Status Conference at 17, *City of New York v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369 (E.D.N.Y. 2007) (No. 06-CV-2233), 2008 WL 630483).

⁵⁶ *Id.* at 123.

⁵⁷ *Id.*

⁵⁸ *Id.* Adventure Outdoors operated a single retail store in Georgia. *Id.* at 119.

⁵⁹ *Id.* at 123.

⁶⁰ *Id.*

to appeal any default judgment against it.⁶¹ Counsel for Adventure Outdoors acknowledged that default was a possibility, and the district court entered default judgment against Adventure Outdoors in March of 2009.⁶² Both Mickalis Pawn and Adventure Outdoors appealed for lack of personal jurisdiction.⁶³

2. *The Opinion*

On appeal, the Second Circuit determined that both Mickalis Pawn and Adventure Outdoors had waived their objections to personal jurisdiction.⁶⁴ The court concluded that since the defendants had waived their jurisdictional objections, it was not the district court's burden to consider those defenses *sua sponte*.⁶⁵ The court then held that the district court did not have to consider whether personal jurisdiction had been established over the defendants before entering default judgment against them.⁶⁶

The court began by quoting *Insurance Corp. of Ireland* and identifying personal jurisdiction as an individual right that “can, like other such rights, be waived.”⁶⁷ The court then pointed out that waiving personal jurisdiction is possible by failing to raise the defense in the initial pleadings, failing to actively litigate the defense, or performing other actions that “amount to a legal submission to the jurisdiction of the court.”⁶⁸

⁶¹ *Id.* at 124.

⁶² *Id.*

⁶³ *Id.* at 119. The defendants also argued that their withdrawal from the litigation did not justify entering a default judgment against them and that the permanent injunctions the court imposed were unconstitutional. *Id.* This Note focuses solely on the appeal for lack of personal jurisdiction.

⁶⁴ *Id.*

⁶⁵ *Id.* at 135 (citing e360 Insight v. Spamhaus Project, 500 F.3d 594 (7th Cir. 2007)). Given the fact that the Supreme Court still seems to believe that federalism is at least a component of personal jurisdiction, it is not clear that the district court should not consider personal jurisdiction *sua sponte*. See *supra* Part I.B. The Second Circuit, in its discussion, identified four other circuit decisions holding that in a motion for default judgment, the district court must first consider whether it has personal jurisdiction over the defendant. *Mickalis Pawn*, 645 F.3d at 133 (citing *Mwani v. bin Laden*, 417 F.3d 1, 6–7 (D.C. Cir. 2005); *Sys. Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy*, 242 F.3d 322, 324 (5th Cir. 2001); *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999); *Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 772 (10th Cir. 1997)). This Note, however, focuses only on the issue of waiver.

⁶⁶ *Mickalis Pawn*, 645 F.3d at 135.

⁶⁷ *Id.* at 133 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

⁶⁸ *Id.* at 133–34 (quoting *Ins. Corp. of Ir.*, 456 U.S. at 704–05) (citing *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 60–62 (2d Cir. 1999); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998); *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir. 1993); *Yeldell v. Tutt*, 913 F.2d 533, 538–39 (8th Cir. 1990)). The defendant in *Hamilton*—the case that the Second Circuit cited as persuasive authority in *Mickalis Pawn*—had failed to actively litigate the personal-jurisdiction defense for four years before finally filing a motion to dismiss. 197 F.3d at 61.

The court relied heavily on *e360 Insight v. Spamhaus Project* in its analysis. That Seventh Circuit case held that when a defendant files an answer arguing lack of personal jurisdiction but then subsequently withdraws the answer and withdraws from litigation only a month later, the defendant cannot raise the defense of lack of personal jurisdiction on appeal.⁶⁹ The Second Circuit relied on this decision to establish waiver of personal jurisdiction in *Mickalis Pawn*, concluding that Adventure Outdoors and Mickalis Pawn had similarly abandoned their defenses and forfeited the jurisdictional defense.⁷⁰

In its analysis of waiver, the Second Circuit made no mention of Mickalis Pawn's expressed intention to continue to press the affirmative defense of lack of personal jurisdiction. The application of *e360* to the case before the court, in fact, was effectively reduced to a single sentence: "Similarly, in this case, Adventure Outdoors and Mickalis Pawn initially litigated their jurisdictional defense, but later changed course, announcing to the district court that they would cease defending even though a default would likely result."⁷¹ The remainder of the court's discussion on this issue focused on rejecting the applicability of the case law the defendants brought forward.⁷²

In the second part of its opinion, the Second Circuit held that because Mickalis Pawn and Adventure Outdoors had at least partially litigated before withdrawing, they could not collaterally attack the default judgment.⁷³ The court reasoned that by appearing in court, the defendants had submitted themselves to the district court's determination of jurisdiction.⁷⁴ The court consequently foreclosed the possibility of both collateral attack for lack of personal jurisdiction and direct appeal of the default judgment for lack of personal jurisdiction.⁷⁵ The court expressed concern that the defendants were trying to obtain a de facto interlocutory appeal on the issue of personal jurisdiction.⁷⁶

The court did briefly acknowledge that although the defendants had forfeited their personal-jurisdiction rights, the court has discretion to review even forfeited defenses on appeal if the issue is purely legal and consideration of the issue "is necessary to avoid manifest injustice."⁷⁷ But the court continued and held that it would not exer-

⁶⁹ See *e360*, 500 F.3d at 600.

⁷⁰ See *Mickalis Pawn*, 645 F.3d at 135.

⁷¹ See *id.* at 135.

⁷² See *id.* at 136.

⁷³ *Id.* at 139–40.

⁷⁴ *Id.* (citing *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998)).

⁷⁵ See *id.* at 139.

⁷⁶ See *id.* at 141.

⁷⁷ *Id.* at 140 (quoting *Patterson v. Balsamico*, 440 F.3d 104, 112 (2d Cir. 2006)).

cise that discretion where the defendants had strategically forfeited their defense in an effort to force the court to consider the issue of personal jurisdiction.⁷⁸

II

MICKALIS PAWN ANALYSIS

The decision in *Mickalis Pawn* suffers from both an incomplete theoretical framework and an unclear application of that framework to the relevant facts. The Second Circuit's reliance on *e360* is especially troublesome, as *e360*, in reality, works against the Second Circuit's explanation of personal jurisdiction and waiver.⁷⁹

A. Fundamental Misunderstandings

1. *Theoretical Foundation*

The problem with the Second Circuit's decision in *Mickalis Pawn* begins with its theory of personal jurisdiction. The theoretical background in *Mickalis Pawn* is summarized in a single sentence by the court: "Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."⁸⁰ While this initial statement of the law is true, the court does not go far enough in its explanation of personal jurisdiction. Even as *Insurance Corp. of Ireland* characterized personal jurisdiction as an individual right first, the court acknowledged the lingering presence of state sovereignty as a secondary function of personal jurisdiction.⁸¹ Thus, although federalism is not an independent restriction on personal jurisdiction, it persists as an underlying principle.⁸²

The Second Circuit seems to believe that because personal jurisdiction can be waived, it must be viewed exclusively as an individual right. John Drobak points out, however, that Fourth Amendment rights, which implicate concerns outside of the litigants, can still be waived.⁸³ Federalism, in fact, seems essential to personal jurisdiction, as the "minimum contacts" test still espoused by the Supreme Court hinges on the state's sovereign right to adjudicate the dispute.⁸⁴ The

⁷⁸ *Id.* at 140.

⁷⁹ *See infra* Part II.B.

⁸⁰ *See* 645 F.3d at 133 (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

⁸¹ *See Ins. Corp. of Ir.*, 456 U.S. at 702–03 & n.10.

⁸² *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1047–48 (1983).

⁸³ *See id.* at 1048 n.134 (comparing *Mapp v. Ohio*, 367 U.S. 643 (1961) with *Tollett v. Henderson*, 411 U.S. 258 (1973)).

⁸⁴ *See id.* at 1047–48.

Court in *International Shoe* similarly believed that state sovereignty was a necessary, albeit secondary, component of personal jurisdiction.⁸⁵

It is admittedly questionable whether federalism remains a practically operative concern when determining the jurisdiction of a court,⁸⁶ but the theoretical underpinnings of personal jurisdiction are important to the creation of practical rules.⁸⁷ Personal jurisdiction is, in many ways, an interaction between sovereign authorities.⁸⁸ With regard to waiver, a theoretical consideration of sovereign authority is necessary; finding waiver of personal jurisdiction without considering sovereign authority creates a circular mode of jurisdiction where the court relies on its own jurisdictional rules to assert substantive jurisdiction over a defendant.⁸⁹ The court must evaluate its sovereign authority before imposing rules of consent and waiver on the defendant.⁹⁰

So, the Second Circuit's theoretical foundation of personal jurisdiction is not incorrect—it is incomplete. Although personal jurisdiction exists first as an individual right, the analysis cannot end there. After all, the Supreme Court has continued to insist that factors such as the interests of the forum state, the plaintiff's interest in obtaining effective relief, the judicial system's interest in efficient resolution, and states' general interest in substantive social policies are all relevant in the context of personal jurisdiction.⁹¹ It would be incongruent for the Court to evaluate these factors while simultaneously employing an explanation of personal jurisdiction exclusively formulated around individual rights.⁹² The analysis should begin with personal jurisdiction as an individual right, but the Supreme Court's

⁸⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (“Those demands [of personal jurisdiction] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.”).

⁸⁶ *See Drobak, supra* note 82, at 1048 (questioning whether courts should consider federalism when determining the vitality of the minimum contacts test).

⁸⁷ *See Charles W. Rhodes, Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 907–08 (2004). Rhodes points out that personal jurisdiction is not the only scenario where the Court has considered federalism in the context of the Due Process Clause. The Court has acknowledged the importance of state sovereignty in the context of Due Process claims regarding punitive damages and choice-of-law determinations. *See id.* at 908–09 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)).

⁸⁸ *See, e.g., SHAUNNAGH DORSETT & SHAUN McVEIGH, JURISDICTION* 98 (2012) (asserting that jurisdictional laws create legal “places” that meet and interact through the laws).

⁸⁹ *See Lea Brilmayer, Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 9 (1989). Brilmayer describes this practice as “bootstrapping” but argues that such practice is acceptable so long as the applicable positive laws allow such inferences. *See id.* at 9, 27.

⁹⁰ *See id.* at 27.

⁹¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

⁹² The same can arguably be said about the Court's use of minimum contacts. *See supra* note 82 and accompanying text; *see also Rhodes, supra* note 87, at 909–10 (arguing that although convenience to state residents and efficiency of the judicial system could also

holdings make clear that courts should not abandon the federalist foundations of personal jurisdiction.

2. *Jurisdictional Waiver in Other Contexts*

This comprehensive formulation of personal jurisdiction is consistent with other instances of personal-jurisdiction waiver. Federal Rule of Civil Procedure 12(h)(1), for instance, imposes a waiver on defendants who fail to timely raise the defense of personal jurisdiction in their answer or first pre-answer motion.⁹³ The purpose of this rule, however, is not to penalize defendants arbitrarily for improper litigation practice but to protect plaintiffs and the judicial system from defendants who wish to “re-litigate” a case by waiting until the disposition of the case before appealing personal jurisdiction.⁹⁴ Protection of plaintiffs’ rights, especially foreign plaintiffs’ rights, is a core concern of federalism served by Rule 12(h)(1)’s waiver rule.⁹⁵ Additionally, this concern for judicial efficiency evinces a recognition of federalist principles at work other than the defendant’s individual due process.

The discovery sanctions imposed in *Insurance Corp. of Ireland* are also evidence of a theory of personal jurisdiction that encompasses more than just notions of individual due process. Justice White reaffirmed the role of federalism in personal jurisdiction by explaining that “[i]ndividual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.”⁹⁶ Similar to Rule 12(h)(1), the discovery sanctions levied in *Insurance Corp. of Ireland* under Rule 37(b)(2) are meant not as punishments for careless lawyers but as deterrents to other litigants who might be tempted to disobey discovery orders.⁹⁷

be justifications for retaining the minimum contacts test, state sovereignty provides the best rationale for why the Court has continued to employ the minimum contacts test).

⁹³ FED. R. CIV. P. 12(h)(1).

⁹⁴ See Henry Brownstein, Note, *Rule 60(B): A Rule Suitable for a Sua Sponte Motion*, 15 B.U. PUB. INT. L.J. 153, 164 (2005) (citing *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48–49 (1897)).

⁹⁵ Weinstein explains that the concern for plaintiffs’ interests is best explained by the concerns for interstate federalism. See Weinstein, *supra* note 9, at 228–29.

⁹⁶ *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 n.10 (1982).

⁹⁷ See *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (“[I]t might well be that these respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.” (emphasis omitted)). This position has not been without controversy. District courts still struggle to determine the appropriate magnitude of discovery sanctions under Rule 37(b). The Supreme Court, however, has largely remained silent on the issue. See Jodi Golinsky, Note, *The Second Circuit’s Imposition of Litigation-Ending Sanctions for Failures to Comply with Discovery Orders: Should Rule 37(b)(2) Defaults and Dismissals Be Determined by a Roll of the Dice?*, 62 BROOK. L. REV. 585, 594–96 (1996) (noting that

This concern for a competent and efficient judicial system echoes the Court's language in *Burger King* and squares the sanctions in *Insurance Corp. of Ireland* with the comprehensive personal jurisdiction theory suggested by Drobak and others.⁹⁸

3. Waiver of Individual Rights

The Second Circuit's theoretical analysis in *Mickalis Pawn* comes under more scrutiny when compared with waiver in other contexts. The exclusionary rule of the Fourth Amendment, for example, is an individual right designed to serve the public need of deterring police misconduct.⁹⁹ Still, a criminal defendant can inadvertently forfeit the right to challenge improper evidence by failing to object in a timely manner.¹⁰⁰ Similarly, the Sixth Amendment's Confrontation Clause is framed as a waivable individual right, but its original purpose was to give the jury an opportunity to evaluate a criminal witness' demeanor and trustworthiness.¹⁰¹ Both of these examples undermine the Second Circuit's conclusion that since personal jurisdiction is waivable, it should be framed exclusively as an individual right.

B. Application of Theory

The Second Circuit's shaky theoretical foundation might be harmless if not for its reliance on *e360* as the cornerstone for its analysis of waiver.¹⁰² The Second Circuit relied on *e360* to conclude that neither it nor the district court below was required to raise the jurisdictional defense on behalf of the defendants.¹⁰³ But the Second Circuit largely misinterpreted the reasoning behind *e360*.

the Court has not addressed Rule 37(b) since its 1976 *National Hockey* opinion). One author has suggested that the discovery sanctions in *Insurance Corp. of Ireland* might also be justified by viewing them as a presumption of fact; that is, failure to comply with jurisdictional discovery orders creates a presumption that the discovery would yield jurisdictional information unfavorable to the defendant. See Faris, *supra* note 38, at 1454–55. The author discounts this theory, however, because its use would discourage judges from using sanctions as a deterrent. *Id.*

⁹⁸ See *supra* notes 82, 91 and accompanying text.

⁹⁹ See *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

¹⁰⁰ See Weinstein, *supra* note 9, at 296–97 (citing *United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002); *People v. Middleton*, 429 N.E.2d 100, 103 (N.Y. 1981)).

¹⁰¹ See Adrienne Rose, Note, *Forfeiture of Confrontation Rights Post-Giles: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 286 (2011) (citing *Mattox v. United States*, 156 U.S. 237, 242 (1895)).

¹⁰² The court, in fact, relies almost exclusively on *e360* in its discussion of waiver as a result of default judgment. See *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 134–36 (2d Cir. 2011).

¹⁰³ *Id.* at 134–35 (citing *e360 Insight v. Spamhaus Project*, 500 F.3d 594 (7th Cir. 2007)).

Although the defendant in *e360* raised the affirmative defense of personal jurisdiction before defaulting on the judgment, it is significant that it neither filed a motion to dismiss nor engaged in jurisdictional discovery.¹⁰⁴ To determine personal jurisdiction in that case, the district court would have had to engage in its own jurisdictional discovery and formulate its own arguments for and against personal jurisdiction.¹⁰⁵ The court in *e360* expressed concern about requiring a district court to raise defenses that the defendant had elected not to pursue itself.¹⁰⁶ The court was especially uneasy in light of the fact that at the time the defendant's counsel withdrew from the proceedings, the defendant expressed its intention to "participate in the defense no further" and "do absolutely nothing."¹⁰⁷

At the heart of the *e360* decision is the judicial-efficiency concern noted by the Supreme Court in *Burger King*.¹⁰⁸ The court's analysis in *e360* echoes the jurisdictional determination process prescribed by the Supreme Court in *Burger King*: the court should begin with the purposeful actions of the defendant and then consider those actions in the context of other factors, including judicial efficiency and fairness to the plaintiff.¹⁰⁹ The court in *e360* appropriately started by considering the defendant's deliberate default, failure to make any attempt to pursue its affirmative defenses, and expressed intention to abandon the defense altogether.¹¹⁰ This consideration was then put in context of the burden that would befall the district court if it were effectively called upon to raise, research, and argue the issue of personal jurisdiction itself.¹¹¹

The Second Circuit in *Mickalis Pawn*, however, erred in its application of *e360* in the same way it erred in its theoretical explanation of personal jurisdiction. The Second Circuit identified that the defendants had abandoned their defense at the risk of default, but the Second Circuit went no further.¹¹² It stopped short of examining the burden on the district court and the resulting efficiency or ineffi-

¹⁰⁴ See *e360*, 500 F.3d at 596–97.

¹⁰⁵ One author explains that sua sponte motions by the court for personal jurisdiction are inappropriate because "[p]ersonal jurisdiction is not a right of the court. If personal jurisdiction were an issue of court power, the doctrine [of waiver] would make little sense." Brownstein, *supra* note 94, at 163.

¹⁰⁶ See *e360*, 500 F.3d at 599.

¹⁰⁷ *Id.* at 596, 600 (quoting Transcript of Record at 3, 5, *e360 Insight v. Spamhaus Project*, 500 F.3d 594 (7th Cir. 2007) (No. 06-4169)).

¹⁰⁸ See *supra* note 91 and accompanying text.

¹⁰⁹ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985).

¹¹⁰ *e360*, 500 F.3d at 599.

¹¹¹ *Id.* at 599 (denying any obligation of the district court to conduct an affirmative inquiry into personal jurisdiction or research the factual bases for jurisdiction prior to entering a default judgment).

¹¹² See *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 135 (2d Cir. 2011).

ciency.¹¹³ Unlike the defendant in *e360*, the defendants in *Mickalis Pawn* had, in fact, engaged in jurisdictional discovery, filed two motions to dismiss, and argued those motions before the court.¹¹⁴ Although the court had not yet rendered a definitive ruling on the issue of personal jurisdiction,¹¹⁵ the defendants had properly given the court the tools to do so. This fact, however, was overlooked by the Second Circuit. The Second Circuit effectively ignored the jurisdictional goal of efficiency inherent in the law of amenability¹¹⁶ and promoted in *Burger King*.¹¹⁷

The Second Circuit further overlooked the Seventh Circuit's emphasis on fairness to the litigants in its analysis. In an opinion preceding both *Mickalis Pawn* and *e360*, the Seventh Circuit expressed concern that in the absence of waiver rules, defendants could strategically wait to see how well or poorly the trial was going before pressing the personal-jurisdiction defense.¹¹⁸ Fairness to plaintiffs is primarily a federalist concern, as states have an interest in protecting the rights of its citizens who may be plaintiffs in other states' courts.¹¹⁹

The Second Circuit, however, made no mention of fairness. This omission is critical in light of the fact that *Mickalis Pawn* lacked the patent unfairness evident in *e360*. Unlike the defendant in *e360* who expressed its intention to "do absolutely nothing,"¹²⁰ *Mickalis Pawn* unambiguously stated its intention to continue to press the defense of lack of personal jurisdiction.¹²¹ The plaintiff in *Mickalis Pawn* was

¹¹³ See *id.* at 135–36.

¹¹⁴ *Id.* at 121.

¹¹⁵ See *City of New York v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 416 (E.D.N.Y. 2007) (establishing the plaintiff's burden of proof here as only to establish a substantial likelihood that all the elements of jurisdiction could be proven by a preponderance of the evidence at trial).

¹¹⁶ See Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 246–47; Spampata, *supra* note 22, at 1759–60 (citing Clermont, *supra* note 11, at 414 & n.9; Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 293–309 (1956)). One author questions whether the Supreme Court has been successful in instilling efficiency into the Court's theory of personal jurisdiction but maintains that efficiency remains important when the Court considers personal jurisdiction in relation to its other jurisdictional counterparts: subject-matter jurisdiction and venue. Spampata, *supra* note 22, at 1759–60.

¹¹⁷ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985).

¹¹⁸ *Rice v. Nova Biomed. Corp.*, 38 F.3d 909, 914 (7th Cir. 1994). The court in *Rice* explained that fairness would be disserved "if the defendant, having raised an objection to personal jurisdiction at the outset as required, could without any penalty fail or refuse to press it, creating the impression that he had abandoned it, and not seek to correct that impression until he appealed from an adverse final judgment on the merits." *Id.*

¹¹⁹ See Weinstein, *supra* note 9, at 228–29. Weinstein points out that the policy goal of fairness is inextricably related to the goal of efficiency, as fairness to plaintiffs "is part of a common law rule of interstate venue by which the Supreme Court has attempted to allocate judicial power among the states efficiently and fairly." *Id.*

¹²⁰ Transcript of Record, *supra* note 107, at 3, 5.

¹²¹ *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 122 (2d Cir. 2011).

acutely aware of Mickalis Pawn's intention to continue to press the defense of lack of personal jurisdiction and had every opportunity to prepare for it. Similarly, there was no threat of judicial abuse by Mickalis Pawn: unlike the situation alluded to by the Seventh Circuit in its waiver opinions, the defendants in *Mickalis Pawn* had not waited to evaluate their chances at trial before asserting their jurisdictional defense—they pressed it immediately.¹²²

The Second Circuit further complicated the issue by referring to the lack of “finality” in the personal jurisdiction decision below.¹²³ Although finality of judgment is a prerequisite to appellate review,¹²⁴ finality of judgment is wholly distinct from the issue of whether the question was preserved for appeal.¹²⁵ A rule that failing to wait for finality of judgment amounts to a waiver of personal jurisdiction is practically unworkable.¹²⁶ Finally, it is not clear that the district court did not make a final determination on the issue of personal jurisdiction: it did, after all, deny three separate motions to dismiss for lack of personal jurisdiction.¹²⁷

C. Consequences

1. *Efficiency and Fairness of the Ruling*

These errors result in an inefficient outcome. Defendants seeking to challenge personal jurisdiction can typically opt either to default entirely and collaterally attack the judgment or to appear and challenge the court's jurisdiction directly.¹²⁸ This second option expedites the process, but the defendant is bound by the jurisdictional decision rendered by the court, though the decision may still be chal-

¹²² *Id.* at 120. The suit was initiated on May 15, 2006, and both Mickalis Pawn and Adventure Outdoors moved to dismiss for lack of personal jurisdiction on August 8, 2006. *Id.*

¹²³ *Id.* at 140–41.

¹²⁴ See GARN H. WEBB & THOMAS C. BIANCO, FEDERAL JURISDICTION AND FEDERAL PROCEDURE 49 (1970).

¹²⁵ Indeed, the Second Circuit addressed it separately from the question of whether the personal-jurisdiction defense had been waived. See *Mickalis Pawn*, 645 F.3d at 140–41.

¹²⁶ If this were the rule, we would ask *when* the personal jurisdiction defense has been waived. The defense is not waived simply because the district court hedges in its language denying the motion to dismiss.

¹²⁷ See *Mickalis Pawn*, 645 F.3d at 121, 123. The finding of “substantial likelihood” here is even higher than the standard proposed by some scholars. See Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 992 (2006) (arguing that the standard should be “more likely than not” unless the jurisdictional facts overlap with the facts of the claim). The Second Circuit, however, was somewhat inconsistent in its characterization of the motions, noting in one place that the district court had determined that a “prima facie” case had been made, *Mickalis Pawn*, 645 F.3d at 118, and elsewhere using the language of “substantial likelihood” *id.* at 121.

¹²⁸ Peter A. Diana & J. Michael Register, Recent Developments, *Personal Jurisdiction in Flux: Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 69 CORNELL L. REV. 136, 143 n.33 (1983).

lenged on appeal.¹²⁹ In *Mickalis Pawn*, the defendants only intended to challenge the personal jurisdiction of the court.¹³⁰ The defendants still appeared in the action, however, if only to file a motion to dismiss.¹³¹ This choice proved to be fatal, despite the fact that it was actually the most efficient one. Rather than decline to appear in the action at all, wait for the district court to make a determination on the merits, wait until the plaintiffs tried to enforce the judgment in the defendants' home state, and then challenge the jurisdiction of the district court collaterally, the defendants in *Mickalis Pawn* opted to attack the jurisdiction directly and receive a more immediate disposition of the case. Not only did the defendants save themselves the uncertainty of waiting for a default judgment to be enforced against them at some undetermined time, they also saved (or attempted to save) the resources of all parties involved by focusing their efforts on the only issue in which they had confidence: personal jurisdiction.

The Second Circuit, however, made no mention of these considerations, despite *Burger King's* insistence that the judicial system's interest in efficient resolution is a relevant consideration for questions of personal jurisdiction.¹³² The omission is especially strange because New York courts have a distinct federalist interest in determining their own jurisdiction.¹³³ The decision in *Mickalis Pawn* encourages defendants like *Mickalis Pawn* and *Adventure Outdoors*, who only want to challenge personal jurisdiction in an action, to default on actions brought against them in a Second Circuit court, and then let their own state or federal court determine the jurisdictional reach of the Second Circuit court. This system works well as a check on interstate power, but it is in the interest of New York courts to determine their own jurisdictional reach instead of relying upon foreign courts to set the jurisdictional boundaries. While this federalist interest should be tempered by the efficiency and fairness concerns outlined above, it should at least be considered by the court because it might be the deciding factor in a close case like *Mickalis Pawn*.

¹²⁹ *Id.* (citing *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 531 (1931)).

¹³⁰ See 645 F.3d at 122.

¹³¹ See *id.*

¹³² *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

¹³³ See Cebik, *supra* note 19, at 15–16. Cebik notes that jurisdictional rules help a state frame its jurisdictional boundaries so that other states will not challenge its authority. Optimizing the balance of authority, according to Cebik, is a central goal of personal jurisdiction. *Id.* at 16 (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966)).

2. *Effect on the Underlying Goals of Waiver*

The Second Circuit's incomplete statement of the law ultimately led to a misunderstanding of the purpose of waiver. Punitive sanctions and waivers, like the one imposed in *Insurance Corp. of Ireland* and the one imposed in *Mickalis Pawn*, are only useful to the extent that they deter other litigants from engaging in similar behavior.¹³⁴ This justification only works, however, if the behavior itself is undesirable; in other words, punitive waiver should only be imposed to discourage behavior that is harmful to the judicial system or undesirable in terms of fairness. Here, it is unclear how the Second Circuit in *Mickalis Pawn* could have determined whether Mickalis Pawn's and Adventure Outdoors' behavior was undesirable without evaluating its effects on judicial efficiency and fairness to the litigants.

Instead, the Second Circuit employed a strictly individual-rights-based approach to personal jurisdiction that produced a rigid rule that failed to account for the additional factors mentioned in *Burger King*. Under such a rule, the court does not analyze the underlying goals of personal jurisdiction. Instead, the waiver is strictly punitive and may punish a defendant for taking action that is actually more efficient or fairer than the status quo.

III

THE FUTURE OF WAIVER IN THE SECOND CIRCUIT

Admittedly, it is not clear that the Second Circuit came to the wrong conclusion on the ultimate issue of waiver. From a judicial-efficiency standpoint, having two distinct and easily defined options for responding to a lawsuit might be more desirable than having a more flexible standard of waiver that requires a rigorous and in-depth analysis of the parties. Similarly, predictability is an element of fairness in that plaintiffs should be able to prepare their cases with some notion of the litigation strategies available to the defendants.¹³⁵

Additionally, although Adventure Outdoors expressed at default that it would appeal any default judgment against it, it is unclear whether Adventure Outdoors ever expressed its intention to continue to pursue the defense of lack of personal jurisdiction.¹³⁶ It may have been unfair, then, for Adventure Outdoors to continue to assert the

¹³⁴ See Faris, *supra* note 38, at 1455. One author argues that, especially in the context of discovery sanctions, every sanction seems to carry a punitive aspect. *Id.* at 1454–55. This is not always the case with waiver, however, because personal jurisdiction can be and is frequently waived voluntarily.

¹³⁵ Cf. Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 6 (1983) (explaining the undesirability of uncertainty in the law with regard to the ability of litigants and persons to plan their activities).

¹³⁶ See *Mickalis Pawn*, 645 F.3d at 124.

defense if it appeared to the plaintiff and to the court that the defendant had abandoned the defense.

Even with these possibilities in mind, though, *Mickalis Pawn* is problematic in that it does not lay a clear framework for district courts to follow.

A. Theoretical Framework

Mickalis Pawn's incomplete theoretical framework is likely to cause problems for district courts trying to adhere to the standards and theories laid out by the Second Circuit. First, because the Second Circuit's analysis is largely silent on the role federalist interests play in personal jurisdiction, district courts are unable to determine whether the Second Circuit has implicitly rejected a personal-jurisdiction framework that incorporates federalist interests or has merely failed to fully discuss the latent federalist framework that underlies *Burger King*. Although the Second Circuit's holding provides a case for direct factual comparison, the facts of *Mickalis Pawn* are unique enough to be of little help to district courts seeking a framework to decide cases arising under new sets of facts.¹³⁷ Without a firm grasp on the personal jurisdiction framework, this task will likely prove difficult.

A district court in the Second Circuit may, for example, encounter a case like *Philos Technologies, Inc. v. Philos & D, Inc.*¹³⁸ In this Seventh Circuit case, two of the defendants had responded to the plaintiff's complaint by sending a pro se "Response Letter" to the district court claiming that they had no business affiliation with the plaintiff and seeking a dismissal.¹³⁹ After default and entry of judgment, the defendants moved to void the judgment for lack of jurisdiction, but the district court refused to consider the issue of personal jurisdiction because it had been waived by the defendants' failure to press the issue when they had the chance.¹⁴⁰ The Seventh Circuit reversed, saying that because pro se letters are held to "less stringent standards than formal pleadings drafted by lawyers,"¹⁴¹ the court should give "heightened judicial solicitude" when "asked to construe a pro se litigant's filing in such a manner as to deny that litigant the opportunity to present a jurisdictional defense."¹⁴² The Seventh Circuit determined that the pro se letter did not constitute an appearance by the

¹³⁷ The Second Circuit, after all, described this case as one of "first impression." *Id.* at 118.

¹³⁸ 645 F.3d 851 (7th Cir. 2011).

¹³⁹ *Id.* at 853.

¹⁴⁰ *Id.* at 854.

¹⁴¹ *Id.* at 858 (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

¹⁴² *Id.* at 858.

defendant so there could not have been a waiver of personal jurisdiction.¹⁴³

If such a case came to a Second Circuit district court, it would be difficult to resolve using the holding of *Mickalis Pawn*. For example, the Seventh Circuit considered fairness to the pro se defendant in its analysis of waiver, but a Second Circuit district court would be unsure whether such a consideration was proper because *Mickalis Pawn* is silent on the issue of fairness to either the plaintiff or the defendant. The Seventh Circuit also considered the evinced intent of the defendants in their pro se filings—a consideration that likely demonstrates the court’s concern for fairness to the plaintiffs.¹⁴⁴ Though both defendants expressed their intent to pursue the jurisdictional defense in *Mickalis Pawn*, the court did not incorporate this fact into its discussion of waiver. How, then, should the district court incorporate intent into its analysis? *Mickalis Pawn* does not say one way or the other. This omission is striking in light of the fact that *Mickalis Pawn* relies heavily on Seventh Circuit precedent, especially *e360*, to come to its conclusion about waiver.¹⁴⁵

Second, if the omission of federalist interests represents a rejection of their importance, then *Mickalis Pawn* is at least partially at odds with *Burger King*. This tension is problematic even in cases of personal jurisdiction that do not involve waiver. Waiver is, after all, an aspect of personal jurisdiction, and its theoretical foundation is inextricably tied to that of personal jurisdiction.¹⁴⁶ The Second Circuit, then, cannot discount efficiency and fairness factors when discussing waiver of personal jurisdiction but still consider those factors when examining personal jurisdiction in general. This is especially troubling because the Second Circuit has explicitly adopted the reasonableness test and factors described in *Asahi* and *Burger King*.¹⁴⁷

Thus, a district court might read *Mickalis Pawn* as a rejection of judicial efficiency and fairness to plaintiffs when considering personal jurisdiction in any context. This seems largely at odds with the Supreme Court’s holding in *Burger King*. It should be noted, however, that *Burger King* described factors like judicial efficiency and plaintiffs’ interests as factors that courts “may” consider in “appropriate

¹⁴³ *Id.* at 859.

¹⁴⁴ See *id.* at 858–59. The intent of the defendants, in fact, seemed to be the most crucial part of the case for the Seventh Circuit. See *id.*

¹⁴⁵ See *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 134 (2d Cir. 2011) (citing *e360 Insight v. Spamhaus Project*, 500 F.3d 594 (7th Cir. 2007); *Rice v. Nova Biomed. Corp.*, 38 F.3d 909 (7th Cir. 1994); *Cont’l Bank, N.A. v. Meyer*, 10 F.3d 1293 (7th Cir. 1993)).

¹⁴⁶ See Weinstein, *supra* note 9, at 296.

¹⁴⁷ *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 573 (2d Cir. 1996).

case[s].”¹⁴⁸ While it is unclear what kind of “appropriate cases” the Court is referring to, surely it did not mean to foreclose the consideration of these factors in all personal jurisdiction cases, which may be the practical effect of *Mickalis Pawn* in lower courts.¹⁴⁹

The district courts, then, are left with a conundrum. They can (1) adopt a broad interpretation of *Mickalis Pawn* by discounting federalist interests in all personal jurisdiction cases while effectively undermining the Supreme Court’s ruling in *Burger King*, (2) incorporate federalist interests into waiver of personal jurisdiction in accordance with *Burger King* while effectively undermining the Second Circuit’s ruling in *Mickalis Pawn*, or (3) narrowly follow *Mickalis Pawn* by ignoring federalist interests in the context of waiver of personal jurisdiction but incorporate such considerations when establishing personal jurisdiction in other contexts. This third outcome is the most likely, as it runs the lowest risk of being overturned on appeal,¹⁵⁰ but it creates an internal inconsistency within the Second Circuit’s theory of personal jurisdiction.¹⁵¹ This tension can manifest itself through unpredictability, unfairness, and inefficiency. Furthermore, cases that blur the line between waiver of personal jurisdiction and the broader issue of personal jurisdiction will be especially problematic for district court judges who may be confused as to which theoretical framework to apply. This distinction is critical, as the choice of theoretical framework may be dispositive on the outcome of the case.

B. Practical Application

Even after dismissing the theoretical tension arising from the Second Circuit’s ruling in *Mickalis Pawn*, practical application of the rule in *Mickalis Pawn* is also challenging. The first question that courts under *Mickalis Pawn* must decide is: What amounts to an abandonment of the jurisdictional defense? *Mickalis Pawn* relies on the Seventh Circuit to answer that question, but since the Seventh Circuit

¹⁴⁸ 471 U.S. 462, 477 (1985) (alterations in original) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

¹⁴⁹ *Burger King* notes that these considerations are useful either to establish jurisdiction when there is a “lesser showing of minimum contacts than would otherwise be required” or to defeat jurisdiction when a defendant has clear minimal contacts with the forum. But these considerations establish that jurisdiction would be unreasonable. *Id.* at 477. This list seems to include virtually every personal-jurisdiction case.

¹⁵⁰ Empirical data suggests that judges are sensitive to the threat of being overruled and will adjust their rulings accordingly if overruled consistently on the same issues. See Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 *JUST. SYS. J.* 28, 29–30 (2006).

¹⁵¹ It is too soon to determine how lower courts will interpret *Mickalis Pawn*. Thus far, Second Circuit district courts have cited *Mickalis Pawn*’s waiver discussion primarily for the proposition that personal jurisdiction can be waived. See, e.g., *China Nat’l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F. Supp. 2d 579 (S.D.N.Y. 2012); *Digital Sin, Inc. v. Does 1–27, No. 12 Civ. 3873(JMF)*, 2012 WL 2036035, at *3 (S.D.N.Y. June 6, 2012).

uses the expressed intent of the defendant and fairness to the litigants as crucial parts of its test,¹⁵² *Mickalis Pawn*, by disposing of those considerations, gives district courts little to rely on. Without the principles of efficiency and fairness to consider, district courts must simply evaluate whether the case before it is factually similar enough to *Mickalis Pawn* to warrant a waiver of personal jurisdiction.

Similarly, there is no weighing mechanism for district courts to evaluate defendants' behavior. Even if the Second Circuit meant that efficiency and fairness are not appropriate considerations and that the actions of the defendant should be the sole focus of the analysis, the Second Circuit did not provide an evaluative method for measuring defendants' conduct. Again, factual similarity is the only tool that district courts are equipped with to determine future cases.

Factual comparisons, admittedly, are part of what district courts must do, but such comparisons should be made in the context of workable principles of law.¹⁵³ In the absence of principles giving relative weight to determinative facts, district courts may be indirectly called upon to "fill the theoretical void" through "casuistical judgments at the point of application."¹⁵⁴ Such a setup has its own problems with efficiency and fairness.¹⁵⁵

District courts must also consider how the ruling of *Mickalis Pawn* affects other constitutionally protected individual rights. The Supreme Court has announced that fundamental constitutional rights are entitled to "every reasonable presumption against waiver."¹⁵⁶ If the Second Circuit describes personal jurisdiction as exclusively an individual right under the Due Process Clause, then isn't personal jurisdiction entitled to the same presumption? And if this exercise of waiver is appropriate, then should other constitutional rights be analyzed under the same liberal standards of waiver? Excluding any consideration of federalist interests from personal jurisdiction seems to create some dissonance among constitutional rights that cannot be readily resolved. District courts will either have to accept the dissonance and structure their opinions around purely factual comparisons

¹⁵² See *supra* notes 110, 119 and accompanying text.

¹⁵³ See Yavar Bathaee, Comment, *Incompletely Theorized Agreements: An Unworkable Theory of Judicial Modesty*, 34 *FORDHAM URB. L.J.* 1457, 1470 (2007) ("Predefined principles determine which facts are relevant and should be used for comparison. Principles also determine whether the ultimate outcome of the analogy is sound. Therefore, principles must be defined a priori, because they do not emerge simply through the analogical process.").

¹⁵⁴ *Id.* at 1460, 1462 (second quotation quoting CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35 (1998)).

¹⁵⁵ See *id.* at 1480–81 (arguing that incomplete theorization in precedent invites lower courts to engage in their own theorization to enable analogical reasoning and, possibly, overstep their bounds in doing so).

¹⁵⁶ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

or import the reasoning from *Mickalis Pawn* into other constitutional rights. Neither of these outcomes is desirable or efficient.

C. Waiver of Personal Jurisdiction Going Forward

It is admittedly too soon to determine the ultimate impact of *Mickalis Pawn* in the Second Circuit. Its problematic framework may be ignored by courts altogether as its incomplete description of waiver provides little framework on which district courts can rely.

One possibility is that the holding of *Mickalis Pawn* should and will be cabined to its individual facts. This might have been the case if not for the notable absence of factual discussion in *Mickalis Pawn*. After a lengthy discussion about waiver's status as an individual right, the Second Circuit reduces the application of that legal discussion to a single sentence.¹⁵⁷ Although the Second Circuit incompletely describes waiver as purely an individual right, it nevertheless devotes a good portion of this section to a discussion of the existing state of the law.¹⁵⁸ To a district court, *Mickalis Pawn* looks like a complete framework for waiver of personal jurisdiction—one that can be applied in factually dissimilar cases.

Thus far, at least one court has cited *Mickalis Pawn* in its analysis of waiver. In *China National Chartering Corp. v. Pactrans Air & Sea, Inc.*, the district court found no waiver of personal jurisdiction despite the plaintiff's myriad of arguments to the contrary.¹⁵⁹ Most notably, however, the district court analyzed two key issues, the filing of a third-party complaint and the "substantial delay" in filing a motion to dismiss, using a framework strikingly similar to that in *Mickalis Pawn*.¹⁶⁰ On both of these issues, the court focused exclusively on the defendant's actions in the case without any discussion of fairness or judicial efficiency.¹⁶¹ This omission is notable because both of these questions seem to implicate questions about judicial efficiency and fairness to the plaintiff.¹⁶²

The court ultimately concluded that there had been no waiver of personal jurisdiction, but its application of *Mickalis-Pawn*-like considerations may suggest that district courts will begin to collapse their analysis of waiver into a purely individual-rights-based consideration.

¹⁵⁷ See *supra* note 71 and accompanying text.

¹⁵⁸ *Id.*

¹⁵⁹ See 882 F. Supp. 2d 579, 588–96 (S.D.N.Y. 2012).

¹⁶⁰ See *id.* at 588–91, 593.

¹⁶¹ See *id.*

¹⁶² For example, in its discussion of substantial delay, the court noted that the jurisdictional defense was not practically available to the defendant before the motion to dismiss was filed because of changing case law. See *id.* at 593. The court made no mention, however, of the judicial inefficiency that may emerge if changes in case law do not toll the time defendants are typically allotted to file a motion to dismiss. See *id.*

On the other hand, the district court's ultimate findings in *China National* may suggest that the district court felt no need to "pile on" reasons for finding no waiver of personal jurisdiction. Like the opinion in *Mickalis Pawn*, however, there is little discussion about the theoretical framework underlying waiver of personal jurisdiction and even less about the relevant factors that inform the discussion.

CONCLUSION

The landscape of personal jurisdiction still remains largely unclear. The Supreme Court has expressed, however, a lingering concern for the federalist interests that once exclusively provided the bedrock foundation for personal jurisdiction. Until the Supreme Court clarifies its position on the theoretical groundwork for personal jurisdiction (which may, admittedly, never come), district and circuit courts must be sensitive to the complexity and depth of the law.

Mickalis Pawn does not represent a failure by the Second Circuit to understand the law, but rather it marks a failure to fully incorporate and discuss the competing ideas that make up the law of personal jurisdiction. Complete explanation of the law of personal jurisdiction is no less important when the court is dealing with questions of waiver: key to the future success of personal jurisdiction is a comprehensive theory that accounts for each subtle detail and decision that defines personal jurisdiction.

Such a comprehensive theory must strive to account for the federalist interests revived by the Supreme Court in *Burger King*. Even as courts recognize that personal jurisdiction exists primarily as an individual right, the Supreme Court has not yet abandoned the fundamentally federalist interests of judicial efficiency, fairness to the litigants, and the interests of the forum state. While the Court has not yet fully defined the role of these interests, it is clear that they must continue to play some part in the theory of personal jurisdiction and, consequently, in the theory of waiver as well.

Going forward, the Second Circuit and other circuits must be aware of the impact that their theory of personal jurisdiction will have on their own rulings and the rulings of district courts in their circuits. As the issue of waiver becomes more complicated, district courts require fuller and more complete explanations of the theory of personal jurisdiction that can also be practically applied to novel fact patterns.

Mickalis Pawn represents the danger of incomplete statements of law and theory. In order to unify personal jurisdiction with the application of waiver, courts must be willing to discuss and develop the theory in full. If the federalist goals of personal jurisdiction are to remain relevant, they must be recognized and detailed in all contexts.