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Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident, Alien Defendants

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SOVEREIGNTY, NOT DUE PROCESS: PERSONAL JURISDICTION OVER NONRESIDENT ALIEN DEFENDANTS

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The Due Process Clause, with its focus on a defendant's liberty interest, has become the key, if not only, limitation on a court's exercise of personal jurisdiction. This due process jurisdictional limitation is universally assumed to apply with equal force to alien defendants as to domestic defendants. With few exceptions, scholars do not distinguish between the two. Neither do the courts. "Countless cases assume that [foreigners] have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction."[1]

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1. Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1362 (7th Cir. 1985), *abrogated on other grounds by* Salve Regina Coll. v. Russell, 499

But is this assumption sound? This Article explores the uncritical assumption that the same due process considerations apply to alien defendants as to domestic defendants in the personal jurisdiction context. It concludes that the current approach to personal jurisdiction over foreign defendants is doctrinally inconsistent with broader notions of American constitutionalism. The inconsistency is particularly stark given recent Fifth Amendment jurisprudence, including those cases involving Guantánamo Bay detainees. The limits on a court's power to assert extraterritorial personal jurisdiction over alien defendants derive not from the Due Process Clause, as commonly assumed, but from the inherent attributes of sovereignty under international law. The Article concludes by suggesting two frameworks for determining when a court may exercise personal jurisdiction over a nonresident, alien defendant. For theoretical coherence and pragmatic reasons, the Court should untether the personal jurisdiction analysis from the Constitution in international cases. Sovereignty, not due process, limits a U.S. court's extraterritorial assertion of personal jurisdiction.

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U.S. 225 (1991).

"[H]ow long soever it hath continued, if it be against reason, it is of no force in law."
– Sir Edward Coke[2]

I. INTRODUCTION

Academics often lament the current law of personal jurisdiction as incoherent and convoluted.[3] But in some ways, the law limiting a court's extraterritorial assertion of personal jurisdiction is settled. The U.S. Supreme Court has not taken a personal jurisdiction case for over fifteen years.[4] And despite any shortcomings, the law is "sufficiently clear to permit expeditious resolution of jurisdictional issues in most cases."[5] Due process requires that a defendant "not present within the territory of the forum, . . . have certain minimum contacts with [the forum state] such that the maintenance of the

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2. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND § 80 (Garland Publishing 1979) (1628).

3. For some recent examples, see Robert J. Condlin, *"Defendant Veto" or "Totality of the Circumstances"? It's Time for the Supreme Court to Straighten out the Personal Jurisdiction Standard Once Again*, 54 CATH. U. L. REV. 53, 53 (2004) ("Commentators frequently claim that there is no single, coherent doctrine of extra-territorial personal jurisdiction, and unfortunately, they are correct." (footnote omitted)); Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189, 189 (1998) (noting that "[a]mbiguity and incoherence have plagued the minimum contacts test"); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 171 (2004) (explaining that "[a]lthough the extensive body of commentary on federally imposed limitations of state court jurisdiction agrees on very little, the one point of consensus is that Supreme Court personal jurisdiction doctrine is deeply confused"). *But see* Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855, 856 (1987) (arguing that "[t]he doctrine of personal jurisdiction is . . . consistent and coherent"); Earl M. Maltz, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on* Asahi Metal Industry Co. v. Superior Court of California, 1987 DUKE L.J. 669, 670 ("Rejecting the claim that the Supreme Court's approach to personal jurisdiction is incoherent, . . . [and] argu[ing] that the decisional pattern of personal jurisdiction cases is the product of the interaction of a number of perfectly understandable conceptions of fairness held by individual Justices.").

4. The last significant Supreme Court case addressing personal jurisdiction was *Burnham v. Superior Court*, 495 U.S. 604 (1990).

5. Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 108 (1983); *see also* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 4 (1987) ("Despite these criticisms, *International Shoe*'s minimum contacts test generally appears to function adequately in interstate cases."); Lilly, *supra*, at 107 (noting that despite uncertainties in personal jurisdiction law, those "uncertainties are not of great practical significance").

suit does not offend 'traditional notions of fair play and substantial justice.'"[6] In at least one respect, the doctrinal formulation is thus unmistakable: due process is the starting and ending point to any personal jurisdiction analysis.[7] As the U.S. Supreme Court has expressly said, the Due Process Clause[8] is the sole limitation on a state's power to subject an out-of-state defendant to the personal jurisdiction of its courts.[9]

This focus on the Due Process Clause, and the jurisdictional principles derived from it, is universally assumed appropriate whether the case involves a domestic or a foreign defendant.[10] With few exceptions, scholars do not distinguish between the two.[11] Neither do the courts.[12] "Countless cases assume that foreign

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6. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

7. *See* Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 887 (1995) ("[P]ersonal jurisdiction jurisprudence has, for fifty years, . . . exclusively focused on defendants' due process concerns."); *see also infra* notes 66-70 and accompanying text.

8. When a court's jurisdiction is based on a state statute or common law, the Due Process Clause of the Fourteenth Amendment is implicated. U.S. CONST. amend. XIV, § 1. If a federal jurisdictional statute is involved, the Fifth Amendment provides the Due Process limitation. *Id.* at amend. V.

9. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982); *see also* KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 21-23 (1999) (reviewing sources of personal jurisdiction law and concluding that "the only significant external restriction on states' territorial authority to adjudicate lies in the Fourteenth Amendment's Due Process Clause").

10. The term "alien" is used to refer to either: (1) a person who is not a U.S. resident or (2) a corporation incorporated in a foreign country.

11. *See, e.g.*, Edward B. Adams, Jr., *Personal Jurisdiction Over Foreign Parties, in* INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 113, 114 (David J. Levy ed., 2003) (noting that the same standards apply for "personal jurisdiction over a non-resident or foreign defendant"); *cf.* FED. R. CIV. P. 4, 1993 advisory committee's note (explaining that "[t]here remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421, reporter's notes 2, 7 (1987) (excepting availability of nationwide jurisdiction and not distinguishing between foreign and domestic defendants).

12. *See* Karen Halverson, *Is a Foreign State a "Person"? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 135-36 (2001) (stating that under "the 'minimum contacts' test . . . it is well settled that foreign corporations are entitled to due process" but noting that the Supreme Court has not "explicitly address[ed] the threshold question of whether a foreign corporation is entitled to due process"); Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 110 (1993) (describing how the

companies have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction."[13] The assumption—now firmly entrenched—is that the personal jurisdiction standards for domestic defendants and nonresident, alien defendants are the same. But is this assumption sound?

This question—whether the jurisdictional standard developed for domestic defendants from "foreign states" appropriately applies to alien defendants from "foreign nations"—is not academic; jurisdictional rules can have profound implications. First, litigation in the United States routinely features foreign defendants. The number of suits against nonresident alien defendants over recent years has steadily increased, and international class actions have become a common phenomenon.[14] The proliferation of transnational activity and globalization means that this increasing trend will doubtlessly continue.[15] The Internet's tremendous growth also contributes to transnational litigation, as U.S. citizens and aliens increasingly interact even when the alien has no physical contact with the United States.[16] Second, the impact of U.S. courts accepting jurisdiction can be acutely felt in the foreign affairs arena. U.S. courts broadly asserting jurisdiction can negatively impact foreign, diplomatic, and trade relations.[17] The jurisdictional inquiry also impacts judgment enforcement. While some countries have recently shown a greater willingness to recognize U.S. judgments

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courts treat the Due Process Clause's jurisdictional protections as "apply[ing] to alien defendants in the same way they apply to domestic defendants").

13. Afram Export Corp. v. Metallurgiki Halyps, S.A. 772 F.2d 1358, 1362 (7th Cir. 1985), *abrogated on other grounds by* Salve Regina Coll. v. Russell, 499 U.S. 225 (1991).

14. *See infra* notes 211-12 and Part IV.A.1.

15. *See* Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 799-800 (1988) (describing the increase in transnational litigation); Haugen, *supra* note 12, at 110 (discussing global integration and the "rapidly expanding system of transnational activity"). Even in the early 1980s, commentators noted that "[t]he flourishing activity of international commerce has resulted in increased numbers of claims against alien defendants brought in American courts." Lilly, *supra* note 5, at 116. *See generally infra* Part IV.A.I.

16. For an extensive discussion of the Internet and globalization, see Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002). For discussions of the personal jurisdiction analysis in domestic Internet cases, see Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction for the Twenty-First Century*, 66 U. CIN. L. REV. 385 (1998) and Dennis T. Yokoyama, *You Can't Always Use the* Zippo *Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147 (2005).

17. Born, *supra* note 5, at 28-29 (describing the ways that "assertions of jurisdiction over foreigners can affect United States foreign relations in ways that domestic claims of jurisdiction cannot").

abroad, most countries refuse to recognize U.S. judgments based on what they perceive to be exorbitant jurisdictional assertions.[18] *Third*, the current jurisdictional jurisprudence constrains the United States when attempting to reach agreement on international jurisdictional and judgment treaties. The failure of the now defunct Hague Convention on Jurisdiction and Satisfaction of Judgments has been ascribed to the breadth of U.S. jurisdictional rules as applied to foreigners.[19]

These implications alone justify reexamining the doctrinal bases underlying the limits of a court's exercise of personal jurisdiction over alien defendants. An examination is particularly timely, however, for another reason. Given the Supreme Court's fifteen-year hiatus from granting certiorari on a personal jurisdiction case,[20] scholars predict that "the Supreme Court is about to get back into the personal jurisdiction business."[21] When the Supreme Court does address the issue again, its decision will hopefully clarify and lend coherence to personal jurisdiction law rather than ignore, or even worse contribute to, the disarray. And even if the Supreme Court does not decide a case soon, jurisdictional limits over nonresident aliens will be reexamined in light of the American Law Institute's soon-to-be proposed federal statute on the recognition and enforcement of foreign judgments.[22] Surprisingly given the relevance and importance of the issue and despite the overwhelming

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18. *See infra* Part IV.A.2 (describing foreign nations' willingness to recognize U.S. judgments). *See generally* Comm. on Foreign & Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 378 (2001) (surveying foreign approaches to U.S. judgment recognition and enforcement).

19. *See infra* Part IV.A.2.

20. Burnham v. Superior Court, 495 U.S. 604 (1990). Although *Burnham* was decided most recently, it has been over twenty years since the Court's last major discussion of the "minimum contacts" standard. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-78 (1985); Condlin, *supra* note 3, at 100. Coincidentally, approximately twenty years had passed since the Court's last hiatus from addressing the law of personal jurisdiction. When the Supreme Court decided *Shaffer v. Heitner*, 433 U.S. 186 (1977), and the series of cases that followed, it was reentering an area it had not trodden since 1958 with *Hanson v. Denckla*, 357 U.S. 235 (1958). *See generally* Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1112 (1981) (noting the "flurry of activity" after a twenty-year hiatus from giving "extensive consideration to the theoretical and practical problems that arise in the law of personal jurisdiction").

21. Condlin, *supra* note 3, at 56.

22. *See* AMERICAN LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (Proposed Final Draft 2005).

amount of commentary on personal jurisdiction in general,[23] a dearth of scholarship exists addressing personal jurisdiction over alien defendants.[24] This Article attempts to fill this scholarship gap.

This Article argues that the assumption that the same due process considerations apply equally to nonresident, alien defendants as to domestic defendants in the personal jurisdiction context is doctrinally inconsistent with broader notions of American constitutionalism. This Article does three things. Part II traces the history of personal jurisdiction law. Without retelling for "the thousandth time the history of in personam jurisdiction,"[25] it explains a conceptual evolution: the demise of territorial sovereignty and the rise of due process as the only meaningful limitation on the extraterritorial assertion of personal jurisdiction. Part II ends by explaining how courts have contributed to this evolution by focusing on the defendant's individual liberty interests even when the case involves nonresident, alien defendants. Part III explores the relationship between due process and personal jurisdiction in cases involving foreign defendants. It concludes that nonresident, alien defendants do not have due process rights under the Fourteenth and Fifth Amendments and that, contrary to conventional wisdom, sovereignty principles are what limit a court's jurisdiction. Part IV suggests two possible frameworks for determining whether a court should exercise extraterritorial jurisdiction over aliens. The Article does not call for radical revision of the minimum contacts doctrine; modest changes would suffice to address the current doctrinal incoherence existing in the personal jurisdiction jurisprudence of

23. 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, 57 & nn. 226-27 (1990) (noting that "[a] tremendous amount of scholarship has been devoted to attempting to untangle [personal jurisdiction] case law, and each new case brings a flood of commentary" and collecting law review citations).

24. For the little scholarship that exists, see Haugen, *supra* note 12, at 109; Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501 (1993); 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 (1998). Of the scholarship that does exist, much of it is outdated because it was written before or shortly after the Supreme Court's landmark decision in *Asahi Metal Industries Co. v. Superior Court*, 480 U.S. 102, 113 (1987). *See, e.g.*, Born, *supra* note 5, at 1; Degnan & Kane, *supra* note 15, at 799; Lilly, *supra* note 5, at 85; Janice Toran, *Federalism, Personal Jurisdiction, and Aliens*, 58 TUL. L. REV. 758, 758 (1984).

25. Russell J. Weintraub, *Due Process Limitations on the Personal Jurisdiction of State Courts: Time for Change*, 63 OR. L. REV. 485, 487 (1984).

international cases and remedy its negative effects. The better and doctrinally sound approach, however, would be to untether once and for all the personal jurisdiction analysis from due process when the defendant is foreign.

II. A SHORT HISTORY OF PERSONAL JURISDICTION

The history of personal jurisdiction has been told often, from various perspectives. Common in the history's assessment, however, is that the Due Process Clause,[26] with its focus on a defendant's liberty interests, has become the key, if not only, limitation on a court's exercise of jurisdiction. But it was not always this way.

A. *The Demise of Territorial Sovereignty*

Before the Fourteenth Amendment's ratification, jurisdictional limits were a matter of common law, derived from international legal principles.[27] Under international law, territorial jurisdiction "arose among a band of independent sovereigns, limited in what they *could* do, but more importantly limiting themselves in what they *would* do in order to avoid stepping on the others' toes."[28] In the United States, jurisdiction was based on territoriality: a theory derived from Dutch scholars[29] holding that "each sovereign had

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26. Generally, with some limited exceptions, the application of the Fifth and Fourteenth Amendments has been treated the same in the personal jurisdiction analysis. Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456, 460-61 (2004) (critically noting that most commentators and courts assume that the jurisdictional "limits imposed by the Fifth Amendment are comparable to those imposed on the states by the Fourteenth Amendment").

27. *See, e.g.*, D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 123 (1992) (explaining that "[e]arly on, the Supreme Court considered jurisdictional precepts to be a matter of common law, deduced from international law"); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871-76 (1989) (discussing how the original federal common law rules of jurisdiction were based on territorial rules derived from international law).

28. CLERMONT, *supra* note 9, at 5; *see also id.* at 5-7 (arguing that the original thrust behind jurisdictional rules was grounded not in concepts of power, but the "desirable allocation of jurisdictional authority among competing sovereigns").

29. James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73, 74-85 (1990) (discussing how early American jurisdictional theories developed from Dutch theorists, such as Ulrich Huber).

jurisdiction, exclusive of all other sovereigns, to bind persons and things present within its territorial boundaries."[30] Jurisdiction was not a matter of constitutional law.[31] To the extent the Constitution was relevant to jurisdictional precepts, only the Full Faith and Credit Clause[32] was important, and the Supreme Court drew on international law to interpret it.[33] The Full Faith and Credit Clause required states to recognize, without reexamination, sister-state judgments so long as the judgment remained faithful to international jurisdictional rules.[34] These jurisdictional principles of international law were adopted in numerous early cases.[35]

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30. CLERMONT, *supra* note 9, at 6.

31. Jay Conison, *What Does Due Process Have to Do With Jurisdiction?*, 46 RUTGERS L. REV. 1071, 1104 (1994) (noting that at the time, since it "seemed obvious to treat the United States as a collection of interrelated but sovereign states," courts routinely turned to "the law of nations for appropriate [jurisdictional] principles and rules"); *see also* Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 796-808 (1955) (explaining that the American colonies inherited a long-standing tradition from international law that recognized territorial borders as the key limitation on a sovereign's authority and jurisdiction).

32. U.S. CONST., art. IV, § 1.

33. *Id.*; *see* Borchers, *supra* note 23, at 29-32 (arguing that in personam jurisdiction historically was a matter of common law and a concern over whether the Full Faith and Credit Clause effected that common law); Conison, *supra* note 31, at 1104 (arguing that initially "[t]he Full Faith and Credit Clause and its implementing act, as well as the Privileges and Immunities Clause, were virtually the only federal constraints on interstate legal relations" (footnotes omitted)); Halverson, *supra* note 12, at 146 ("In resolving [the interpretation of the Full Faith and Credit Clause], the Supreme Court consistently relied on international law. . . ."). *See generally* 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 (1981) (reviewing historical materials related to the Full Faith and Credit Clause and questioning whether the Fourteenth Amendment's Due Process Clause was originally intended to limit a court's jurisdictional authority).

34. D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1850); *see also* Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485-86 (1813) (Johnson, J., dissenting) (explaining that a collateral attack on a sister state judgment for lack of personal jurisdiction does not offend the Full Faith and Credit Clause).

35. Galpin v. Page, 85 U.S. (18 Wall.) 350, 367 (1873) (discussing territorial limits of jurisdiction); *D'Arcy*, 52 U.S. (11 How.) at 174 (finding a New York judgment invalid because it was rendered against a noncitizen who had not been served in New York and owned no property there); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 255 (1827) (holding that state insolvency proceedings could not discharge claims of noncitizen creditors). *See generally* Borchers, *supra* note 23, at 25 n.21 (listing the large number of cases on jurisdictional topics decided prior to *Pennoyer*); Trangsrud, *supra* note 27, at 872 & nn.116-20 (listing early cases that approached personal jurisdiction using principles from

The U.S. Supreme Court continued to embrace sovereignty-based jurisdictional principles after the Fourteenth Amendment's ratification; yet, the source of those principles changed. In 1877, the Court handed down the landmark decision *Pennoyer v. Neff*.[36] That case asked whether the federal courts should recognize as valid a default judgment that an Oregon state court had entered against nonresident defendant Neff in a prior lawsuit. In the original lawsuit, the Oregon court asserted jurisdiction over Neff "even though he was neither domiciled nor present in the state."[37] The Court held that the Oregon court lacked the power to assume jurisdiction, and the judgment was accordingly void.[38] A plaintiff, the Court concluded, must serve an unwilling, nonresident defendant within the state's boundaries for the state court to have jurisdiction.[39]

In reaching this conclusion, the *Pennoyer* Court relied on the Fourteenth Amendment's Due Process Clause; by doing so it exalted the "theory of territorial sovereignty" to the status of constitutional doctrine.[40] The case succinctly stated its jurisdictional principles in terms of territorial integrity: "every State possesses exclusive jurisdiction and sovereignty over persons and property within [a state's] territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory."[41] Sovereignty thus necessarily restricted a state court's authority; "[a]ny attempt to exercise authority beyond [its territorial] limits

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the Law of Nations).

36. 95 U.S. 714 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977). Although *Pennoyer* is "widely read and cited as the source of the Court's theories of territorial jurisdiction," the "Court had articulated these rules many times prior to 1877 and continued to do so afterwards." Trangsrud, *supra* note 27, at 874 (footnotes omitted). For a general discussion of the early cases leading to *Pennoyer*, see Borchers, *supra* note 23, at 25-32; Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 277-98 (1990).

37. Greenstein, *supra* note 3, at 862.

38. *Pennoyer*, 95 U.S. at 734.

39. *Id.*; *see also* Douglas D. McFarland, *Drop the* Shoe*: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 753 (2003).

40. George Rutherglen, International Shoe *and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 348; *see also* Kogan, *supra* note 36, at 298 (noting that a "common theme unites much of modern thinking in personal jurisdiction"—that *Pennoyer* caused doctrinal confusion by "engrafting, without justification, the sovereignty-based international law approach to territorial jurisdiction into the due process clause of the fourteenth amendment"). The seminal article criticizing Justice Story's territorial theory of jurisdiction and Justice Field's adoption of that approach in *Pennoyer* is Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252-62.

41. *Pennoyer*, 95 U.S. at 722.

would be deemed in every other forum . . . an illegitimate assumption of power."[42] As a result, presence within a forum state's territorial borders became the "*sine qua non* standard for personal jurisdiction."[43]

The *Pennoyer* holding—and its reliance on territorial sovereignty and physical presence—was still faithful to the then existing international law.[44] *Pennoyer*'s analysis relied on both Story's treatise on conflict of laws and Wheaton's treatise on international law.[45] Even though due process was referenced in dicta,[46] the *Pennoyer* decision embraced the established sovereignty-

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42. *Id.* at 720; *cf.* Mills v. Duryee, 11 U.S. (7 Cranch) 481, 486 (1813) (Johnson, J., dissenting) ("[J]urisdiction cannot be justly exercised by a state over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction.");

> The courts of a state, however general may be their jurisdiction, are necessarily confided to the territorial limits of the state. Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them, would be deemed an usurpation of foreign sovereignty, not justified or acknowledged by the law of nations.

Picquet v. Swan, 19 F. Cas. 609, 611 (D. Mass. 1828) (No. 11,134).; *see also* Dearing v. Bank of Charleston, 5 Ga. 497, 515 (1848) (explaining that "no sovereign can extend its process beyond its territorial limits, to subject either persons or property to its judicial decisions"). *See generally* Strauss, *supra* note 24, at 1250-54 (describing early cases and the "era of territorial jurisdiction").

43. Yokoyama, *supra* note 16, at 1151 (citing *Pennoyer*, 95 U.S. at 722).

44. *Pennoyer*, 95 U.S. at 722. Commentators on *Pennoyer* have often made this observation. Degnan & Kane, *supra* note 15, at 814-15; Halverson, *supra* note 12, at 144; Hazard, *supra* note 40, at 262-65. *But cf.* Weinstein, *supra* note 3, at 173-74 (arguing that "home grown common law rule[s]" rather than international law was the source of the jurisdictional rules found in *D'Arcy v. Ketchum*, a key case proceeding *Pennoyer*). This territorial or sovereignty-based approach was followed in other areas of the law, such as the presumption against extraterritorial application of law and in the enforcement of judgments law. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 12-18 (2002).

45. *Pennoyer*, 95 U.S. at 722.

46. Philip B. Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 572 (1958) (describing how *Pennoyer*'s discussion of due process was dictum); Trangsrud, *supra* note 27, at 876-80 (arguing that Justice Field's reliance on the Due Process Clause as the basis for federal rules limiting State judicial power was unprecedented, unexplained, and unnecessary); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 174 (2004) (describing how *Pennoyer* interpreted the newly adopted Fourteenth Amendment in dictum). For a discussion of *Pennoyer*'s questionable reliance on the Due Process Clause given the timing of the case in relation to the ratification of the Fourteenth Amendment, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and* Pennoyer *Reconsidered*, 62 WASH. L. REV. 479, 502-03 (1987) (noting that Justice Field's discussion of Due Process was largely dictum) and

based international law approach to international jurisdiction.[47] This was nothing new: at the time when the Constitution was under debate[48] and for a hundred years thereafter, "[t]he restriction on jurisdiction over persons beyond the territorial power continued as a feature of the state court system and the states continued to operate, with respect to each other, as states of the world rather than as states linked together in a union."[49]

In 1945, however, the Supreme Court abandoned the strict territoriality-based approach to jurisdiction *Pennoyer* embraced.[50] Regarded as the fountainhead of modern personal jurisdiction doctrine, *International Shoe Co. v. Washington*[51] suggested that the "Due Process Clause of the Fourteenth Amendment to the Constitution is the sole limitation on a state's power to subject an out-of-state defendant to the personal jurisdiction of its courts."[52] In its now famous articulation of the "minimum contacts" test, the Court explained that due process requires that a defendant "not present within the territory of the forum . . . have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[53] The Court further indicated that "[a]n 'estimate of the inconveniences'" to the defendant was relevant to the analysis.[54] In

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Whitten, *supra* note 33, at 821 (explaining how *Pennoyer*'s discussion of Due Process is dictum because of the timing of the case and the Fourteenth Amendment).

47. Redish, *supra* note 20, at 1116; *see also* Kogan, *supra* note 36, at 270 (noting that the personal jurisdiction doctrine in the United States was "clearly an outgrowth of common law principles of international sovereignty").

48. Personal jurisdiction at the time of the Fourteenth Amendment's ratification and *Pennoyer* was a compromise between two constitutional views, rooted in how nation-states interact with one another: "[o]ne vision viewed the states as cooperative units in a national sovereign union; the other viewed the states as competing sovereigns loosely knit together." Kogan, *supra* note 36, at 270-71.

49. Simon E. Sobeloff, *Jurisdiction of State Courts Over Non-Residents in our Federal System*, 43 CORNELL L.Q. 196, 199 (1957-1958) (relying on and citing to Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839)).

50. For discussions of how *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), dramatically broke from the jurisdictional theories established in *Pennoyer*, see Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 692 & n.17 (1987) (describing *International Shoe* as a break with, not a refinement of, *Pennoyer* and listing commentators discussing the history of personal jurisdiction).

51. 326 U.S. 310 (1945).

52. Condlin, *supra* note 3, at 57.

53. *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

54. *Id.* at 317 (citing Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141

so ruling, the Court found jurisdiction may be appropriately exercised regardless of a defendant's physical presence within the forum state's territorial boundaries.[55] The strict territorial model of jurisdiction—and its reliance on international sovereignty principles—had been replaced.

B. The Rise of Due Process

If territorial sovereignty was the governing paradigm for cases before *International Shoe,* due process and its focus on the individual litigant was the one for the cases that followed. After *International Shoe*, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest[ed], became the central concern of the inquiry into personal jurisdiction."[56] This is not to say that territoriality and allocation of sovereign authority were no longer part of the equation, but they were relegated to a secondary role.

International Shoe signaled a radical change and a new theory of jurisdiction; nevertheless, the full impact of that change was not felt for several decades.[57] In 1977, the Court purported to overturn *Pennoyer*'s reliance on territoriality once and for all by holding that the presence of property within jurisdictional boundaries did not guarantee a court the power to exercise jurisdiction.[58] In *Shaffer v. Heitner*,[59] the Court disclaimed the *Pennoyer* notion that "territorial power is both essential to and sufficient for jurisdiction."[60] "[A]ll assertions of state-court jurisdiction," the Court explained, "must be evaluated according to the standards [of fair play and substantial justice] set forth in *International Shoe* and its progeny."[61] The case

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(2d Cir. 1930); *see also* Redish, *supra* note 20, at 1117.

55. *Int'l Shoe*, 326 U.S. at 316-17.

56. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

57. Rutherglen, *supra* note 40, at 358-59 ("[The] immediate reaction to *International Shoe* was surprisingly subdued.").

58. Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 305 (1983) (explaining how any "theoretical ambivalence" that remained after *International Shoe* "came to an end" with *Shaffer*).

59. 433 U.S. 186 (1977).

60. *Id.* at 211.

61. *Id.* at 212. With *Shaffer,* the Court shifted the focus onto the "individual's liberty interest in not being subject to the illegitimate power of a foreign sovereign." Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 100 (1999). Before *International Shoe*, jurisdictional limits advanced the idea of "reciprocal sovereignty"; that is, "State 1 would not reach far into State 2's domain in exchange for State 2's restraint in analogous cases." *Id.* When property was present in a jurisdiction, this concern

found the practice of attaching property as a means of securing jurisdiction did not comport with modern fair play standards.[62]

Any doubt that the limits of personal jurisdiction reflect an understanding of an individual's due process liberty interest rather than the limits of sovereign authority was eradicated in 1982. In *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,[63] the Supreme Court clarified that "[t]he 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."[64] The Due Process Clause, the Court explained, is "the only source of the personal jurisdiction requirement."[65] Any restrictions imposed by individual state sovereignty, the Court went on to explain, "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause," because "the Clause itself makes no mention of federalism concerns."[66] Lower courts naturally paralleled the rejection of sovereignty concerns as part of the jurisdictional analysis.[67]

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of reciprocal sovereignty was nonexistent, and, therefore, jurisdiction would be proper.

62. *Shaffer*, 433 U.S. at 212.

63. 456 U.S. 694 (1982).

64. *Id.* at 702; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.13 (1985) (citing to *Insurance Corp. of Ireland* and reaffirming that liberty interests constrain a court's exercise of jurisdiction).

65. *Ins. Corp. of Ir.*, 456 U.S. at 703 n.10.

66. *Id.*; *see also Burger King*, 471 U.S. at 471-72 & n.13 (noting that jurisdictional due process protections serve to safeguard the liberty interests of the individual, rather than those of federalism). *See generally* 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, 699 (1983) (arguing that "the resilience of state sovereignty in the personal jurisdiction jurisprudence" died after the *Insurance Corp. of Ireland* case).

67. *See, e.g.*, Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1210 (10th Cir. 2000) (noting that the limits of personal jurisdiction flow from individual liberty interests and not sovereignty); Busch v. Buchman, Buchman & O'Brien, Law Firm, 11 F.3d 1255, 1257 (5th Cir. 1994) (observing that personal jurisdiction limitations do not arise from the limitations inherent in sovereignty); Pardazi v. Cullman Med. Ctr., 896 F.2d 1313, 1317 (11th Cir. 1990) ("Unlike the rules of subject matter jurisdiction, the rules of personal jurisdiction protect an individual's rights, not a sovereign's rights."); Simon v. Philip Morris, Inc., 86 F. Supp. 2d 95, 130 (E.D.N.Y. 2000) ("More recent Supreme Court cases appear to reject sovereignty concerns as a justification for due process limits on personal jurisdiction, positing the protection of individual liberty interests as their primary rationale."); Cannon v. Gardner-Martin Asphalt Corp. Ret. Trust Profit Sharing Plan, 699 F. Supp. 265, 267-68 (M.D. Fla. 1988) (employing nonsovereignty factors in deciding personal jurisdiction based on *Insurance Corp. of Ireland*).

This evolution toward a due process focus is also evident in the development and creation of "traditional notions of fair play and substantial justice" as an independent prong of the jurisdiction test. Generally, the judicial approach to personal jurisdiction analysis has been to determine first whether a defendant has the necessary minimum contacts with the forum state to satisfy due process.[68] If the defendant has minimum contacts, the defendant must present a compelling case that the presence of some of the fair play and substantial justice factors would render jurisdiction unreasonable to defeat jurisdiction.[69] The determination of reasonableness involves a balancing of interests.[70] Among the factors considered, the "burden on the defendant" is seen as a "primary concern" in assessing the reasonableness of asserting personal jurisdiction.[71] This inquiry

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68. Linda J. Silberman, *"Two Cheers" for* International Shoe *(and None for* Asahi*): An Essay on the Fiftieth Anniversary of* International Shoe, 28 U.C. DAVIS L. REV. 755, 760 (1995).

69. Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 446 (1991); *see also* Silberman, *supra* note 68, at 760-61 (describing the two-step level of analysis in the personal jurisdiction inquiry and the relatively new focus on fairness).

70. In its most recent cases, the Supreme Court has referred to five factors that must be weighed and balanced:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "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."

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980)).

71. *World-Wide Volkswagen*, 444 U.S. at 292; *see also* Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128 (9th Cir. 1995) (analyzing seven factors but finding that the defendant's burden is the most important in the reasonableness assessment); Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 212 (1st Cir. 1994) (explaining that determining the defendant's burden and inconvenience is the most important inquiry); Ins. Co. of North America v. Marina Salina Cruz, 649 F.2d 1266, 1272 (9th Cir. 1981) ("The law of personal jurisdiction, . . . is asymmetrical. The primary concern is for the burden on a defendant."); GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 94 (3d ed. 1996) (recognizing the "[p]rimary importance of defendant's contacts and inconvenience"); Abramson, *supra* note 69, at 447 ("The Supreme Court has clearly indicated that the burden on the defendant is always a primary concern in assessing the reasonableness of jurisdiction."); Peter Hay, *Judicial Jurisdiction Over Foreign-Country Corporate Defendants—Comments on Recent Case Law*, 63 OR. L. REV. 431, 431-33, 451 (1984) (suggesting that the Supreme Court has become more defendant-orientated, with personal jurisdiction focusing on the inconvenience to the foreign defendant); von Mehren, *supra* note 58, at 321-22 (explaining the

assesses the inconvenience and expense to the defendant of appearing in the forum including: "the location of potential witnesses, documents and records; whether the defendant has a subsidiary or agent [that] maintains an office or other physical presence in the forum; [and] the distance between the defendant's residence and the forum."[72]

Despite the due process focus, the U.S. Supreme Court has never wholly discarded taking sovereignty concerns into account in its personal jurisdiction analysis.[73] The Court has often referred back to sovereignty principles.[74] In *Hanson v. Denckla*,[75] the Court noted that the restrictions on personal jurisdiction are "more than a guaranty of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."[76] Two decades later, in *World-Wide Volkswagen*,[77] the Court again emphasized that it has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could [the Court], and remain faithful to the principles of interstate federalism embodied in the Constitution."[78] And, of course, the "minimum contacts" standard at

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reasons behind the focus on the defendant and not the plaintiff in the jurisdictional analysis).

72. Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1043 (2004).

73. Many academics have indicated that the constitutional limitation on state court jurisdiction can not just be the Due Process Clause. *See, e.g.*, Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1591 & n.8 (1992) (listing scholars supporting the argument that "[i]t is now reasonably clear that the source [of constitutional limitations on state court jurisdiction] is not just the Due Process Clause . . . [and that] [o]ther constitutional provisions may be more important"); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 18-19 (1989) (arguing that state sovereignty considerations as part of the personal jurisdiction calculus is "mandated by history"); James Weinstein, *The Early American Origins of Territoriality in Judicial Jurisdiction*, 37 ST. LOUIS U. L.J. 1, 60 (1992) ("[T]he measure of the legitimacy of a state's assertion of authority over an individual should reflect [a state's] territoriality.").

74. Borchers, *supra* note 27, at 126 (describing how after *International Shoe* and "[o]ver the course of the next forty-six years . . . the Court revived, then dismissed, then revived, then dismissed, then revived, a 'sovereignty' factor in the jurisdictional calculus" (footnotes omitted)).

75. 357 U.S. 235 (1958).

76. *Id.* at 251.

77. 444 U.S. 286 (1980).

78. *Id.* at 293. In *World-Wide Volkswagen*, the Court explained that "the reasonableness of asserting jurisdiction over the defendant must be assessed 'in the context of our federal system of government.'" *Id.* at 293-94 (quoting *Int'l Shoe*, 326 U.S. at 317). The Court went on to note that "the Framers . . . intended that the States retain many essential attributes of sovereignty . . .

face value implies some sort of territorial limitation on state power.[79]

But even cases that paid lip-service to sovereignty concepts—such as *Hanson* or *World-Wide Volkswagen*—couched them in terms of due process.[80] And soon after making statements that appeared to endorse sovereignty considerations in the personal jurisdiction analysis, the Court was quick to denigrate them and limit their effect.[81] Scholarly conclusions were even less generous:

> Put bluntly, the neo-sovereign utterances of the Court since *International Shoe* enjoy scant standing in precedent, amount to little more than fanciful obiter dicta on facts that fell short of satisfying party-fairness standards, and make no discernible decisional difference. . . .
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> . . .
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> By resisting the temptation to succumb to sovereignty, the Court has freed itself from a formalistic ghost of *Pennoyer*. Unencumbered by governmental interest baggage, it may continue to chart a course consistent with the individual rights focus of *International Shoe*.[82]

[and] [t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 293.

79. *Id.* at 291-92; *see also* Stein, *supra* note 50, at 689 (arguing that "assertions of jurisdiction, as exercises of power, ought to reflect the general limits on state sovereignty inherent in a federal system").

80. *World-Wide Volkswagen*, 444 U.S. at 293-94.

81. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 204 & n.20 (1977) (explaining that *Hanson* simply "makes the point that the States are defined by their geographical territory" and *Hanson*'s invocation of sovereignty was not to suggest sovereignty is of central concern to the personal jurisdiction analysis); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 & n.10 (1982) (noting that nothing in *World-Wide Volkswagen* should be interpreted to change the focus of analysis away from a defendant's liberty interests); *cf.* Kulko v. Superior Court, 436 U.S. 84, 92 (1978) ("While the interests of the forum State . . . are, of course, to be considered, an essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State." (citations omitted)).

82. Lewis, *supra*, note 66, at 716, 724, 742 (arguing that in *Insurance Corp. of Ireland.* the court "scotched sovereignty altogether"); Louise Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. CAL. L. REV. 913, 923 (1985) (explaining that the Supreme Court has "quietly but summarily banished concerns of federalism or comity from the due process inquiry" and "disembarrassed itself" of its "brief flirtation" with sovereignty concerns in the *Ins. Corp. of Ir.* case); *cf.* Rutherglen, *supra* note 40, at 348-49 ("The only dispute, as a descriptive matter, is over how many remnants are left of the old

In any case, sovereignty remains (at most) a secondary consideration of the personal jurisdiction analysis. The Court has plainly said that even strong state interests cannot justify jurisdiction unless the forum would be "fair" to the defendant.[83]

C. *Modern Law and Nonresident Aliens*

Although significant debate in the scholarly literature has raged over the proper role of individual liberty interests and sovereignty concerns, no similar debate exists when the defendant is foreign. The Supreme Court cases involving nonresident alien defendants are built on two commonalities. First, "the Court has approached international jurisdiction as an ad hoc appendage" to its domestic jurisdiction cases.[84] Second, as discussed below, the Court has

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formal territorial theory . . . [the] exceptions stand like isolated ruins, revealing how completely the old rules have been devastated and how little reconstruction has occurred.").

83. *Shaffer*, 433 U.S. at 215; *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477-78 (1985) (explaining that courts must decline to exercise jurisdiction if prosecution of the action in the forum state would be unreasonable and unfair); Rush v. Savchuk, 444 U.S. 320, 332 (1980) (noting that shifting the focus from the defendant's due process rights to the plaintiff's interests in a convenient forum is "forbidden by *International Shoe* and its progeny"); *Kulko*, 436 U.S. at 92, 98 (characterizing the interests of the forum as "important," yet considering fairness to the defendant the "essential criterion in all cases").

84. Strauss, *supra* note 24, at 1237; *see also* 1 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS 3-52 (2003) (describing domestic jurisdictional principles as applicable to foreign defendants); Adams, *supra* note 11, at 113-31 (describing domestic jurisdictional principles as applicable to foreign defendants); Degnan & Kane, *supra* note 15, at 804 (noting that in international cases, "the courts and the parties seem not even to have recognized that the nonresident defendant's status as an alien might suggest that a different [personal jurisdiction] inquiry would be appropriate"); Friedrich K. Juenger, *A* Shoe *Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1037-38 (1995) (noting that the Court now "tends to treat transnational cases as if they were interstate in nature"); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373, 387 & n.51 (1995) [hereinafter Strauss, *Beyond National Law*] (explaining that "courts assume that the domestic doctrines related to jurisdiction that allow forums to decline to exercise their constitutional grant of jurisdiction are applicable to all cases regardless of the nationality of the litigants" and citing cases in support of this assessment); Toran, *supra* note 24, at 770-71 ("[C]ourts have assumed that identical due process concerns exist in cases involving domestic and alien defendants."). Every Supreme Court decision involving challenges to a state court's jurisdiction over a foreigner have assumed the minimum contacts test as developed in domestic cases applies equally to foreigners. *See, e.g.*, Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984); Ins. Corp. of Ir.

embraced the notion that due process and individual liberty is the key constraint on a court's jurisdiction.[85] Both commonalities, however, appear to have been the result of happenstance, not deliberate choice.

1. The Due Process Assumption

Current law involving alien defendants, like with domestic defendants, is primarily focused on individual due process rights. The Supreme Court's declaration that the limits of personal jurisdiction are only a function of a defendant's individual liberty interests was made in *Insurance Corp. of Ireland*—a transnational litigation.[86] *Asahi Metal Industries Co. v. Superior Court*,[87] the Court's most recent case involving foreign defendants, also embodied an individual liberty approach to personal jurisdiction.[88] That case arose in California when a motorcycle's rear tire exploded, causing the motorcycle to collide with a tractor.[89] The California motorcyclist sued several defendants, including Cheng Shin, the Taiwanese manufacturer of the tire tube.[90] The plaintiff alleged that the motorcycle's tire and parts were defective. Cheng Shin, in turn, filed an indemnity cross-claim against several defendants and joined Asahi, the Japanese manufacturer of the tire's stem valve assembly. The plaintiff then settled with the defendants, leaving unresolved only Cheng Shin's indemnity claim against Asahi.[91] The issue before the Court was whether Asahi, a foreign corporation that had "place[d] goods into interstate or international commerce ultimately causing injury in the forum state[, was] amenable to jurisdiction."[92]

The only portion of the opinion that commanded a majority was on the fairness issue; eight of the nine Justices found it unreasonable for a Japanese corporation to be required to defend an indemnity claim brought by a Taiwanese corporation in a California court.[93] In reaching this conclusion, the Court largely "focused on the distance that the [foreign] defendant would be forced to travel to

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v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 n.10 (1982); Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 444 (1952). Only *Asahi*, while applying the same standard, noted that foreign cases raise unique concerns. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1987).

85. *See infra* notes 86-130 and accompanying text.
86. *Ins. Co. of Ir.*, 456 U.S. at 703 n.10.
87. 480 U.S. 102 (1987).
88. Rutherglen, *supra* note 40, at 361.
89. *Asahi*, 480 U.S. at 105-06.
90. *Id.* at 106.
91. *Id.*
92. Silberman, *supra* note 24, at 508.
93. *Asahi*, 480 U.S. at 116.

defend itself," and the other burdens the defendant would face.[94] Although a majority agreed that the assertion of jurisdiction would be unfair, the Court could not agree as to what degree of contact with a forum state was sufficient to establish jurisdiction.[95] On the minimum contacts question—whether Asahi had contacts with California sufficient to justify jurisdiction—the Court split four-four.[96] Because of cases like *Asahi* and *Insurance Corp. of Ireland*, many believe that "[t]he 'burden on the defendant' may be the most influential of the reasonableness factors in international litigation."[97]

Courts, of course, recognize that international cases raise special considerations. The Supreme Court has warned that the burden of mounting a defense in a foreign legal system is "unique" and should be afforded "significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[98] As the Court cautioned in *Asahi*: "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[99] But despite the recognition that alien defendants may have special burdens, the Court has failed to articulate what specific concerns are involved or what weight to accord foreign interests.[100]

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94. Maltz, *supra* note 3, at 679. In *Asahi*, the Court ruled that due to the international context: 1) the forum state, California, had a "small interest in deciding a dispute between two foreign firms" disputing contribution rights; 2) the defendant's burden in litigating was unacceptably high; and 3) "the plaintiff's interest in litigating in California was slight." Abramson, *supra* note 69, at 444 (citing *Asahi*, 480 U.S. at 112-16).

95. The case introduced a two-tiered analysis: "The test required determining, first, whether contacts sufficient for an exercise of jurisdiction exist, and second, whether exercise of that jurisdiction under all of the circumstances [was] reasonable." Silberman, *supra* note 24, at 509. The *Asahi* decision and its two-tiered approach have been widely criticized. *See, e.g.*, Silberman, *supra* note 68, at 760; Russell J. Weintraub, Asahi *Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L.J. 55, 62-63 (1988).

96. *Asahi*, 480 U.S. at 103-04, 112; Silberman, *supra* note 24, at 508 & n.27.

97. Heiser, *supra* note 72, at 1043.

98. *Asahi*, 480 U.S. at 114; *accord* Ellicott Mach. Corp. v. John Holland Party Ltd., 995 F.2d 474, 478-79 (4th Cir. 1993) (affirming dismissal because litigating in a Maryland court would "unquestionably impose a heavy burden" on an Australian defendant); Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 376 (8th Cir. 1990) (noting that *Asahi* "counsel[s] caution in the exercise of personal jurisdiction over alien defendants").

99. *Asahi*, 480 U.S. at 115 (quoting United States v. First Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

100. Degnan & Kane, *supra* note 15, at 800 ("Unfortunately, the [*Asahi*] Court failed adequately to come to grips with what special consideration ought

Without any guidance, lower courts have been ill-equipped to decide whether jurisdiction exists over foreigners; lower courts reveal deep confusion over what exact standard to apply. On the first inquiry, whether the defendant has minimum contacts, obtaining jurisdiction over an alien abroad—despite *Asahi*'s warnings—is often easier than obtaining jurisdiction over a domestic defendant.[101] Unlike with domestic defendants, a federal court may exercise personal jurisdiction over a foreign defendant based on an aggregation of contacts with the United States as a whole, rather than based on the defendant's contacts with the state in which the court sits.[102] Although the Supreme Court has never directly addressed its constitutionality,[103] courts will often permit a "national contacts" approach when dealing with foreign defendants.[104] Commentators have noted other differences that relax the standard for asserting jurisdiction over foreigners.[105]

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to be given, and instead limited itself to the mere recognition that courts should be aware of the special burdens imposed on aliens defending here when assessing the fairness of asserting jurisdiction over them.").

101. Born, *supra* note 5, at 6-10 (listing cases and demonstrating a three-way split pre-*Asahi* as to what jurisdictional standard to apply).

102. *See* FED. R. CIV. P. 4(k)(2) (authorizing national contacts approach when no State exists with jurisdiction over defendant). *See generally* Degnan & Kane, *supra* note 15, at 813-24 (explaining why the national contacts approach should determine personal jurisdiction over foreign defendants); Lilly, *supra* note 5, at 127-45 (discussing "aggregation of contacts" by federal courts); Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 139-40 (1997) (arguing for the national contact approach).

103. *Asahi*, 480 U.S. at 113 n.* (expressly declining to consider "whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts").

104. *See, e.g.*, Warfield v. KR Entm't, Inc. (*In re* Fed. Fountain, Inc.), 165 F.3d 600, 601 (8th Cir. 1999) (adopting the national contacts approach and "align[ing] [itself] with virtually every other court that has ruled on the issue"); SEC v. Carrillo, 115 F.3d 1540, 1543-44 (11th Cir. 1997) (adopting the national contacts approach); Go-Video, Inc. v. Akai-Elec. Co., 885 F.2d 1406, 1415-17 (9th Cir. 1989) (applying the national contacts approach).

105. As one commentator noted:

> Contrary perhaps to the teaching in *Asahi* . . . lower courts have held that the standards for piercing the corporate veil under U.S. law, already low by international standards, should be relaxed further in the international context to permit the exercise of judicial jurisdiction over foreign parents of U.S. subsidiaries. Running afoul of international and national legal standards which traditionally required some indicia of abuse of the corporate form, these courts have disregarded, if not inverted, comity by requiring a showing of little more than joint ownership and some degree of day-to-day control by

Under general jurisdiction principles, for instance, foreign companies that conduct business in many parts of the world can be sued in the United States over wrongful acts and injuries occurring solely abroad.[106]

As to whether the exercise of jurisdiction is reasonable, the analysis is considerably more muddled. The factors to consider "are amorphous and courts seem to use them to rationalize whatever decision they have already made."[107] Cases reach contrary results on nearly identical facts.[108] Predicting how a court will apply the fairness factors, therefore, is difficult.[109]

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the parent in order to spare U.S. plaintiffs the inconvenience of litigating their claims abroad.

Brian Pearce, Note, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 532 (1994).

106. Heiser, *supra* note 72, at 1039.

107. Adams, *supra* note 11, at 123; *see also* Condlin, *supra* note 3, at 121 (explaining that confusion in the minimum contacts standard has licensed "result-oriented lower court judges to take a Robin-Hood perspective on jurisdictional questions and to 'do the right thing' no matter the cost in doctrinal clarity or predictability, though so far, few lower courts seem to have exercised this option"); Conison, *supra* note 31, at 1201 (arguing that the reasonableness inquiry permits a court to "rationalize a decision based on instinct"); Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 925-27 (2000) (concluding that an absence of meaningful standards permit a court to justify any "reasonableness" conclusion it desires); McFarland, *supra* note 39, at 777-78 (noting that decisions have little precedential value and that courts are required to "engage in a pointillist process with little guidance," which renders the minimum contacts test a "conclusion rather than a reason"); Howard B. Stravitz, *Sayonara to Minimum Contacts:* Asahi Metal Industry Co. v. Superior Court, 39 S.C. L. REV. 729, 805 (1988) ("[T]he current test is difficult to apply, and it is unlikely to promote consistent and predictable results.").

108. *Compare* Deprenyl Animal Health Inc. v. Univ. of Toronto Innovations Found., 297 F.3d 1343, 1356 (Fed. Cir. 2002) (finding minimal burden on Canadian corporation to defend in Kansas) *and* Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 629 (6th Cir. 1998) (finding minimal burden on Canadian defendant to defend in Kentucky) *with* OMI Holdings, Inc. v. Royal Ins. Co. of Can., 149 F.3d 1086, 1096 (10th Cir. 1998) (finding it unreasonable to exercise personal jurisdiction over a Canadian company in Kansas because "[d]efendants will not only have to travel outside their home country, they will also be forced to litigate the dispute in a foreign forum").

109. Adams, *supra* note 11, at 123; *see, e.g.*, Roth v. Garcia Marquez, 942 F.2d 617, 625 (9th Cir. 1991) (finding jurisdiction in California over two foreign defendants from Mexico and Spain, even though only two of the reasonableness factors favored plaintiff while three factors favored defendants, and defendants had "ma[d]e a strong argument . . . that the exercise of jurisdiction may be unreasonable"); *see also* Bruce Posnak, *The Court Doesn't Know Its* Asahi *From Its* Wortman: *A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875, 887-96 (1990) (criticizing the

For foreign defendants who have some contact to the United States, jurisdiction is almost never denied on fairness grounds.[110] Although cases will purport to consider all the fairness factors, the lower court decisions often turn on the defendant's burden of litigating in the United States.[111] Courts are likely to find the exercise of jurisdiction reasonable, unless the defendant and its witnesses have to travel extremely long distances.[112] This has provided increasingly less protection from jurisdictional assertions, as courts believe that "modern advances in communications and transportation have significantly reduced the burden of litigating in

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uncertainty and ad hoc balancing the reasonableness test requires); Rutherglen, *supra* note 40, at 368 (describing limitations of the "rule skepticism" that legal realists cultivated in the fairness inquiry).

110. BORN, *supra* note 71, at 142 ("In general, lower courts have been reluctant to decline jurisdiction over foreign defendants that have minimum contacts with the forum because of reasonableness concerns.").

111. Abramson, *supra* note 69, at 449-50 (citing cases); *see also* Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994) (citing cases and explaining that "most of the cases that have been dismissed on grounds of unreasonableness are cases in which the defendant's center of gravity, be it place of residence or place of business, was located at an appreciable distance from the forum").

112. *See, e.g.*, *Deprenyl*, 297 F.3d at 1356 (finding the burden on Canadian corporation to defend in Kansas court minimal "in light of modern transportation and communication methods," and the similarity between the U.S. and Canadian legal systems); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 99 (2d Cir. 2000) (concluding that the burden imposed on European parent companies to litigate in New York not sufficient to preclude jurisdiction); *Aristech Chem.*, 138 F.3d at 628 (finding that jurisdiction over a Canadian corporation was reasonable when distance between Ontario, Canada and Kentucky was not overly burdensome when a "short plane flight separates Ontario from Kentucky"); Sculptchair, Inc. v. Century Arts Ltd., 94 F.3d 623, 631-32 (11th Cir. 1996) (holding that the burden of forcing a Canadian defendant to litigate in Florida was "uncompelling"); Pritzker v. Yari, 42 F.3d 53, 64 (1st Cir. 1994) (finding that the burden on a New York defendant to defend in Puerto Rico was not unacceptable or unreasonable); Theunissen v. Matthews, 935 F.2d 1454, 1462 (6th Cir. 1991) (finding only a slight burden on the defendant when Detroit was only approximately ten miles from Windsor, Ontario, Canada, the defendant's residence); S. Sys., Inc. v. Torrid Oven Ltd., 58 F. Supp. 2d 843, 852 (W.D. Tenn. 1999) (finding a minimal burden on a Canadian defendant given the similarities in legal systems and the short flight from Canada to Tennessee); Ensign-Bickford Co. v. ICI Explosives USA Inc., 817 F. Supp. 1018, 1031 (D. Conn. 1993) (emphasizing the "relatively short distance from defendant's principal place of business in Ontario, Canada[,] to the site of this litigation in Connecticut"); Glinka v. Abraham & Rose Co., 199 B.R. 484, 497 (Bankr. D. Vt. 1996) (observing that the "slight" burden of traveling from Montreal, Canada to Vermont justified the exercise of jurisdiction).

another country."[113] Rare are the cases that find the exercise of jurisdiction over foreign companies unreasonable,[114] and this normally occurs only when both the plaintiff and the defendant are foreign.[115] Accordingly, although the Supreme Court was adamant

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113. Heiser, *supra* note 72, at 1043 n.32; *see, e.g.*, Anderson v. Dassault Aviation, 361 F.3d 449, 455 (8th Cir. 2004) (finding the exercise of jurisdiction over a French jet manufacturer reasonable when an Arkansas forum would not be especially inconvenient and the French company had "ready access to air transportation for conveniently making the trip"); Mutual Serv. Ins. Co. v. Frit Indus., Inc., 358 F.3d 1312, 1320 (11th Cir. 2004) (finding the exercise of jurisdiction over a foreign insurer reasonable because, among other things, "'modern methods of transportation and communication' have lessened the burden of defending a suit in a foreign jurisdiction" (internal citation omitted)); Harris Rutsky & Co. Ins. Serv. v. Bell & Clements Ltd., 328 F.3d 1122, 1132-33 (9th Cir. 2003) (finding personal jurisdiction over an U.K. insurance broker, noting that modern advances in transportation and communication have reduced the burden of foreign litigation, and observing that the defendant did not face the burden of a language barrier); Panavision Int'l v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998) (stating that the location of witnesses and documents is "no longer weighed heavily given the modern advances in communication and transportation"); Sher v. Johnson, 911 F.2d 1357, 1365 (9th Cir. 1990) (noting that as a rule, requiring a nonresident to defend locally is not constitutionally unreasonable "[i]n this era of fax machines and discount air travel"); *see also* Metro Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 575 (2d Cir. 1996); Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1199 (9th Cir. 1988) (observing that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country"). *See generally* CLERMONT, *supra* note 9, at 12 ("Of course, the revolution in transportation and communication has increased the occurrence of long-distance disputes, but it has also decreased the burden of long-distance litigating.").

114. Only if the perceived burden is great do courts reject the exercise of jurisdiction. *See, e.g.*, Benton v. Cameco Corp., 375 F.3d 1070, 1079-80 (10th Cir. 2004) (rejecting the exercise of jurisdiction as unreasonable, despite a Canadian defendant's minimum contacts with the forum, because of the burden of litigating far from home and in a foreign system); Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1488-90 (9th Cir. 1993) (holding that jurisdiction over a Swedish defendant sued in California was unreasonable); Amoco Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 852 (9th Cir. 1993) (holding that jurisdiction was unreasonable over a Filipino defendant sued in Washington); Cas. Assurance Risk Ins. Brokerage Co. v. Dillon, 976 F.2d 596, 600 (9th Cir. 1992) (finding no personal jurisdiction over a District of Columbia defendant sued in Guam); Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299, 302-03 (9th Cir. 1986) (ruling that specific jurisdiction was unreasonable for a British defendant sued in California); Pac. Atl. Trading Co. v. M/V Main Express, 758 F.2d 1325, 1330 (9th Cir. 1985) (finding that jurisdiction was unreasonable in light of the heavy burden on a Malaysian defendant to procure Malaysian witnesses in the California forum).

115. *See, e.g.*, Glencore Grain Rotterdam v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1125-26 (9th Cir. 2002) (holding that the exercise of general

in *Asahi* that international cases raise unique considerations, those considerations almost never change the outcome.

Peculiarly absent from serious consideration in international cases are comity concerns, or whether the exercise of jurisdiction would offend another nation's sovereignty. The cases do not reveal "what respect for another nation's sovereignty entails."[116] To the extent that a court recognizes that a foreign state's sovereignty is relevant at all, sovereignty concerns usually receive only a passing mention without analysis.[117] And by default, many courts will find the exercise of jurisdiction proper simply "when the foreign nation expresses no sovereign interest in the case and the defendant cites no foreign policy or political consideration to prevent the United States court from exercising jurisdiction."[118] Even if the parties identify a foreign sovereignty interest, courts will commonly find that U.S. interests override the foreign interests when the "claim is based on questions of American federal law."[119] Paradoxically, some academics believe that considerations of foreign interests—in the guise of considering the "shared interest" of the several states in furthering fundamental substantive social policies—will often "support rather than undermine the reasonableness of jurisdiction."[120]

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jurisdiction was unreasonable in a California action brought by a Dutch plaintiff against an Indian defendant); *Amoco*, 1 F.3d at 851-53 (finding a Washington federal district court's exercise of general jurisdiction to be unreasonable in a lawsuit that an Egyptian plaintiffs brought against a Philippine defendant arising out of an accident in Egyptian waters).

116. Bradley W. Paulson, Comment, *Personal Jurisdiction Over Aliens: Unraveling* [sic] *Entangled Case Law*, 13 HOUS. J. INT'L L. 117, 123-24 (1990) (listing cases and noting that the cases are "not helpful in eliciting a clear understanding of what respect for another nation's sovereignty entails—other than simply the nation's stake in the controversy").

117. *Harris Rutsky*, 328 F.3d at 1133 (noting sovereign interests but finding that factor not controlling); Jet Wine & Spirits, Inc. v. Bacardi & Co., 298 F.3d 1, 12 (1st Cir. 2002) (mentioning, but not considering, foreign sovereign interests when analyzing jurisdiction over a company from Lichtenstein and the Bahamas); Ballard v. Savage, 65 F.3d 1495, 1501 (9th Cir. 1995) (finding jurisdiction over an Austrian bank and rejecting an "international comity" argument); *Sinatra*, 854 F.2d at 1199 (explaining that foreign state interests do not control); Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1333 (9th Cir. 1984) (finding the sovereignty interests of a foreign state not controlling because "if [this factor were] given controlling weight, it would always prevent suit against a foreign national in a United States court").

118. Abramson, *supra* note 69, at 466 (footnote omitted).

119. *Id.* (footnote omitted).

120. *Id.*

2. Reasons for the Assumption: Chance Not Choice

The reason why nonresident, alien defendants have been treated essentially the same as domestic defendants is murky at best. The Court's application of domestic jurisdictional standards to alien defendants, however, appears not to have been the result of considered reflection. The Court did not raise the issue of the Due Process Clause's applicability in any of the four international cases involving personal jurisdiction questions.[121] The parties themselves seemed content to assume that the Due Process Clause applied.[122] Similarly, the academic community at the time of *Asahi* universally assumed the Due Process Clause protected foreign defendants from jurisdictional assertions.[123]

The Court's assumption that due process considerations apply to alien defendants may have been the result of scholarship, which appears to have driven changes in how the Court analyzed jurisdictional issues. In 1981, in his seminal article, Martin Redish criticized the consideration of sovereignty concerns in any jurisdictional analysis.[124] Other academics agreed, arguing that the personal jurisdiction analysis must be based solely on an overall inquiry into the fairness to the defendant of conducting the litigation in a particular forum.[125] Russell J. Weintraub—a long-

121. *See* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

122. *See, e.g.*, Brief of Respondent at 7-27, *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102 (1987) (No. 85-693) (arguing that the requirements of the Due Process Clause were met); Brief of Petitioner at 13-15, *Asahi,* 480 U.S. 102 (1987) (No. 85-693) (arguing that although international standards impose a further restraint on a state's power, the Due Process Clause requirements were not met); *see also* Reply Brief of Cross-Respondent at 3-8, *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (No. 81-440); Brief of Cross-Petitioner at 8, *Ins. Corp. of Ir.*, 456 U.S. 694 (1982) (No. 81-440); Reply Brief of Cross-Petitioner at 16, *Ins. Corp. of Ir.*, 456 U.S. 694 (1982) (No. 81-440).

123. *See, e.g.*, Born, *supra* note 5, at 4; Degnan & Kane, *supra* note 15, at 799-800; Lilly, *supra* note 5, at 107; Toran, *supra* note 24, at 758.

124. Redish, *supra* note 20, at 1112.

125. *See, e.g.*, Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 83-89 (1984) (arguing that the Court should take due process seriously as the sole source of authority for jurisdictional rules); Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533, 534 (1982) ("[T]he proper constitutional limitations on state judicial authority should be derived from considerations of fairness and not from imaginary concerns about interstate harmony."); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1065-66 (1983) (explaining that while "[t]he

standing advocate to the fairness approach to jurisdiction—more recently urged the Court to "reject once and for all the notion that state sovereignty and state lines are important constants in the due process calculus."[126] Scholars like Redish and Weintraub themselves stand on the shoulders of legal realists, like Philip Kurland, Geoffrey Hazard, Arthur T. von Mehren, and Donald T. Trautman, who deconstructed the law of personal jurisdiction and pushed the doctrine and academic analysis towards fairness as the touchstone for personal jurisdiction analysis.[127]

Good reasons exist to believe the barrage of literature criticizing the Court for not focusing solely on due process and fairness considerations influenced the Court. Scholars suggest that the Court's decision in *Insurance Corp. of Ireland* and its reemphasis on due process was a direct response to Martin Redish's 1981 article, which objected to the use of sovereignty factors in the personal jurisdiction analysis.[128] That article and others like it, however, did not consider whether foreign defendants should be treated differently.[129] Likewise in *Asahi*, the decision appeared to embrace recently published scholarship that for pragmatic reasons argued for

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federalism theme is still part of personal jurisdiction," it is only a byproduct and that the modern emphasis is correctly placed on personal due process rights); Hazard, *supra* note 40, at 281-88 (arguing that state court jurisdiction should not be a problem of state sovereignty); Lewis, *supra* note 66, at 724 (criticizing reliance on state sovereignty in jurisdictional analysis); Weintraub, *supra* note 25, at 486 & n.14 (listing numerous scholars arguing that fairness and not "invisible state lines" should limit a court's exercise of jurisdiction).

126. Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 548-49 (1995); *cf.* Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377, 379 (1985) (arguing that state-borderline-based territoriality should remain relevant).

127. Rutherglen, *supra* note 40, at 350, 360-61. *See generally* Hazard, *supra* note 40; Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts: From* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569 (1958); Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

128. Condlin, *supra* note 3, at 79 n.163 & 88 n.229 (arguing that "[t]he difficulty of justifying the use of sovereignty factors has been recognized for a long time, but the Redish article made the objection too powerful to be ignored any longer," and that in *Insurance Corp. of Ireland* the Court "would . . . agree with Redish's argument, but without mentioning his article"); *see also* Winton D. Woods, Burnham v. Superior Court*: New Wine, Old Bottles*, 13 GEO. MASON U. L. REV. 199, 214 n.50 (1990) ("One of the classic examples of the interplay between enigmatic Supreme Court doctrine and academic concern with constitutional propriety is Professor Martin Redish's attack on Justice White's doctrine of interstate federalism. In a famous article, Professor Redish forced a hasty retreat.").

129. *See supra* note 125.

heightened constitutional scrutiny in international cases.[130]

III. A LONG-OVERDUE EXAMINATION

Why courts and academics alike assume that nonresident aliens have due process rights in the context of the personal jurisdiction analysis is puzzling. Equally puzzling are assertions that sovereignty concerns—at least those untethered to the Due Process Clause—are less relevant, if not irrelevant, to international cases. Current constitutional doctrine and history supports neither assumption.

A. The Due Process Clause's Inapplicability

Nonresident foreign defendants generally do not enjoy due process protections under the Constitution. Putting aside the uncritical assumption that plaintiffs may only haul nonresident foreign corporations or individuals into American courts consistent with due process, the Supreme Court has consistently refused to provide foreign defendants located abroad, or not under U.S. control, constitutional rights.[131]

1. Current Constitutional Doctrine

The case law is unambiguous and uniform. Although aliens are "persons" for Constitutional purposes,[132] nonresident aliens obtain constitutional protections only when they have some substantial connection to the United States[133] or are physically present here.[134]

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130. *See, e.g.*, Born, *supra* note 5; Lilly, *supra* note 5; *see also* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113, n.* (1987) (citing to Professors Born's and Lilly's articles).

131. Even foreign criminal defendants who are forcibly abducted abroad are not guaranteed due process rights. *See* Roberto Iraola, *A Primer on Legal Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 AM. J. CRIM L. 1, 3-7 (2001).

132. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that the Due Process Clause and Equal Protection Clause are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of . . . nationality"); *see also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (finding that aliens are persons under the Fourteenth Amendment).

133. Guessefeldt v. McGrath, 342 U.S. 308, 317-319 (1952) (holding that "friendly aliens" with property in the United States have rights to "just compensation" for takings); United States v. Pink, 315 U.S. 203, 228 (1942) (holding that nonresident aliens owning property within the United States are entitled to the protection of the Fifth Amendment).

134. Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); United States v. Verdugo-Urquidez, 494 U.S. 259, 273-75 (1990) (noting that illegal aliens in the

Nonresident aliens seeking admittance to the United States may not invoke the Due Process Clause's procedural protections.[135] And the Constitution generally has no extraterritorial effect.[136] In fact, in almost every context aliens—even resident aliens—have less due process rights than citizens.[137]

United States have Fourth Amendment rights but that aliens outside the U.S. borders do not enjoy constitutional protections); *Plyler*, 457 U.S. at 210-12 (finding that illegal aliens, present in the United States, are entitled to protection under the Equal Protection Clause and that the provisions of the Fourteenth Amendment "*are universal in their application, to all persons within the territorial jurisdiction*" (quoting *Yick Wo*, 118 U.S. at 369)); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring))); *Yick Wo*, 118 U.S. at 369 (holding that aliens in the United States enjoy the same rights as citizens). For a seminal discussion of the federal power over immigration and alienage rights, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987).

135. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) (internal citations omitted); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)

136. *Fong Yue Ting*, 149 U.S. at 738; *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."). The Supreme Court has resisted applying the Constitution globally. *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) (finding that the Sixth Amendment right to jury trial did not apply in Puerto Rico); Ocampo v. United States, 234 U.S. 91, 98 (1914) (finding that the Fifth Amendment grand jury provisions were inapplicable in the Philippines); Dorr v. United States, 195 U.S. 138, 149 (1904) (holding jury trial provisions inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197, 215-16 (1903) (finding grand jury and jury trial provisions inapplicable in Hawaii). Notions of territorial sovereignty have traditionally restrained U.S. courts from applying constitutional principles abroad. Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, *in* TERRITORIALITY AND CONFLICT IN AN AGE OF GLOBALIZATION (Miles Kahler & Barbara Walter eds., forthcoming 2006) [hereinafter Raustiala, *Evolution of Territoriality*], *available at* http://ssrn.com/abstract=700244; *see also* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2506 (2005) ("[T]he protections of the Bill of Rights are not untethered from the territory of the United States. Rather, they are spatially bound: operative only within the fifty states and other territories unequivocally possessed by the United States.") [hereinafter Raustialia, *Geography of Justice*].

137. *See* Demore v. Kim, 538 U.S. 510, 521 (2003) (stating that Congress often makes rules in naturalization and immigration that would not be accepted if applied to citizens); *Verdugo-Urquidez*, 494 U.S. at 273 (noting that prior decisions held certain constitutional provisions were not intended to apply to

The Supreme Court's analysis in *United States v. Verdugo-Urquidez*[138] is instructive. That case involved a Mexican resident and citizen, whom U.S. drug enforcement authorities arrested in Mexico.[139] Following the arrest, the drug enforcement officers searched the defendant's Mexican residence without a warrant.[140] The defendant moved in federal court to suppress the evidence, claiming that the search violated the Fourth Amendment's protection against unreasonable searches and seizures.[141] The Supreme Court disagreed, holding that the Fourth Amendment does not protect noncitizens living abroad.[142] Noting that its "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic" the Court explained that "aliens receive constitutional protections [only] when they have come within the territory of the United States and [have] developed substantial connections with this country."[143]

The court's earlier declaration in *Johnson v. Eisentrager*[144] was essentially the same: it rejected the claim that aliens are entitled to Fifth Amendment protections outside U.S. sovereign territory.[145] The Court explained that the constitutional text does not support applying the Fifth Amendment extraterritorially to aliens and that doing so would produce undesirable consequences, and would be

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aliens in the same way as applied to citizens); Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). *See generally* DAVID COLE, ENEMY ALIENS 85-179 (2003) (describing how, in the name of national security, the government has taken extreme measures against noncitizens, defending those measures on the ground that noncitizens deserve only diminished constitutional protections).

138. 494 U.S. 259 (1990).

139. *Id.* at 262.

140. *Id.*

141. *Id.* at 263.

142. *Id.* at 265-71. The concurring opinions also make very clear that aliens outside U.S. jurisdiction and control are not entitled to constitutional protections. *Id.* at 275 (Kennedy, J., concurring) ("[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."); *id.* at 279 (Stevens, J., concurring) ("[A]liens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights.").

143. *Id.* at 269-71; *see also* United States v. Davis, 905 F.2d 245, 251 (9th Cir. 1990) (holding that nonresident aliens on ships in international waters have no Fourth Amendment protections).

144. 339 U.S. 763 (1950).

145. *Id.* at 771; *see also* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903) (describing plenary power of Congress to exclude nonresident aliens without judicial review).

unprecedented.[146] In short, "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise."[147] Only "as ties to the United States deepen, [do] constitutional protections deepen as well."[148]

Recent cases similarly underscore why foreign defendants, not present in the United States, do not enjoy due process rights. In 2003, the Supreme Court reaffirmed that only aliens within the U.S. territory are "persons" entitled to Due Process Clause protections.[149] Two years earlier, in 2001, the Court was equally clear that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders."[150]

The lower courts are similarly consistent. In recent cases alleging torture and illegal detention at Guantánamo Bay, courts that have found detainees entitled to fundamental constitutional rights have done so because "Guantánamo Bay must be considered the equivalent of a U.S. territory."[151] Courts that have reached the

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146. *Eisentrager*, 339 U.S. at 782-84.

147. People's Mojahedin Org. of Iran v. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also* Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections."); 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (finding that Irish political organizations were not entitled to due process before being designated as terrorist organizations because the organizations did not have "substantial connections" to the United States.); United States v. Husband R. (Roach), 453 F.2d 1054, 1058 (5th Cir. 1971) ("In areas under the jurisdiction of the United States to which the Fifth Amendment is applicable, an alien is entitled to its protection to the same extent as a citizen."); Pauling v. McElroy, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) ("The non-resident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States." (citing *Eisentrager*, 339 U.S. at 763)).

148. Raustiala, *Geography of Justice, supra* note 136, at 2553; *see also Eisentrager*, 339 U.S. at 770 ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); Raustiala, *Geography of Justice*, *supra* note 136, at 2550-53 (criticizing, but acknowledging the current approach tied to geography, and arguing for a "Global Constitution").

149. Demore v. Kim, 538 U.S. 510, 543 (2003).

150. Zadvydas v. Davis, 533 U.S. 678, 693 (2001). In a parenthetical citing *United States v. Verdugo-Urquidez*, 494 U.S. 256, 269 (1990), the Court noted, "[the] Fifth Amendment's protections do not extend to aliens outside the [U.S.] territorial boundaries." *Zadvydas*, 533 U.S. at 693.

151. *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005); *see also* Almurbati v. Bush, 366 F. Supp. 2d 72, 80 n.6 (D.D.C. 2005) (citing *In re* Guantánamo Detainee Cases, 355 F. Supp. 2d at 464). *See generally* Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073, 2073 (2005) (noting that the U.S. Supreme Court's *Rasul* opinion "strongly suggests in a footnote

opposite conclusion do so because they find the detainees to be outside sovereign U.S. territory.[152] No court has found nonresident aliens entitled to constitutional protections when not in U.S. sovereign territory or under U.S. governing authority.[153]

Scholars, while perhaps rightfully criticizing the lack of constitutional protections provided aliens, concede that current law does not accord aliens abroad due process rights.[154] Theoretically, this approach has appeal: "[t]o the extent that the Constitution is a social contract establishing a system of self-government, permanent outsiders . . . seem to have little claim to invoke 'constitutional rights.'"[155]

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that foreign nationals in U.S. custody at Guantánamo Bay Naval Base . . . possess constitutional rights" but explaining that the decision is unclear whether this is because the detainees "are human beings in long-term U.S. custody or because of the special character of U.S. authority at Guantánamo").

152. *See, e.g.*, Khalid v. Bush, 355 F. Supp. 2d 311, 321-23 (D.D.C. 2005). Prior to the Supreme Court's decision last June in *Rasul v. Bush*, lower courts denied Guantánamo Bay detainees the right to file habeas petitions because they were "detained *outside* the geographic boundaries of the United States" and therefore lacked legal protection. Raustiala, *Geography of Justice*, *supra* note 136, at 2502 (citing Al Odah v. United States, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003); *Khalid*, 355 F. Supp. 2d at 320-23); Coal. of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002); Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law: Ability of Detainees in Cuba to Obtain Habeas Corpus Review*, 96 AM. J. INT'L L. 481 (2002); *see also* Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1417, 1428-29 (11th Cir. 1995) (finding that Haitian and Cuban aliens outside U.S. territory could not assert various statutory and constitutional rights).

153. *See* Rasul v. Bush, 542 U.S. 466, 484-85 (2004) (discussing *Al Odah* and *Eisentrager* and whether aliens have Constitutional rights when the United States exercises sufficient governing authority). Not only does the Constitution not guarantee aliens due process, but Congress has chosen also to deny due process rights to aliens who are charged with illegally entering the United States. *See generally* Larry Kupers, *Aliens Charged with Illegal Re-Entry are Denied Due Process and, Thereby, Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861, 862-63 (2005).

154. *See, e.g.*, Henkin, *supra* note 134, at 858-63 (describing—with distaste—that it is possible to read controlling precedent as providing for no constitutional scrutiny of Congressionally imposed restrictions on alien entry); *see also* ALEINIKOFF, *supra* note 44, at 66-73 (describing how the Rehnquist Court focused on citizenship and individual, personal rights rather than on group-based rights and as a result not recognized rights for nonresident aliens); ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 53 (1985) ("Once aliens are within the territorial jurisdiction of the United States, however, the situation changes dramatically: They are then entitled to most of the rights guaranteed in the Constitution. The importance of 'territorial presence' is thus overriding . . . ."); Neuman, *supra* note 151, at 2077 (explaining that aliens abroad are not accorded constitutional protections).

155. Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L.

Given the Supreme Court's pronouncements, the notion that nonresident alien defendants can assert due process protections within the context of personal jurisdiction leads to an inexplicable result. Aliens abroad with no connection to the United States have no constitutional rights but, under current personal jurisdictional law, paradoxically have the strongest claim that the Due Process Clause prohibits a U.S. court from asserting jurisdiction over them. Conversely, aliens with substantial U.S. connections are entitled to constitutional protections but cannot resist jurisdictional assertions because, if they have substantial connections, they certainly must meet the minimum contacts test. Gary Haugen has aptly summed up the "Court's 'Catch-22'":[156]

> The result is the legal equivalent of the "Gift of the Magi"—what the Due Process Clause gives away, it destroys in the giving. . . . [A]lien defendants who need the "minimum contacts" test the most—those with no substantial connections to the United States—are the ones who, under *Verdugo-Urquidez*, cannot claim this constitutional protection.[157]

The suggestion—that aliens abroad may claim due process protections only in those circumstances when the protections are of no use, i.e., when the alien defendant has sufficient contacts to justify assertion of jurisdiction—seems illogical, if not absurd. The more palatable conclusion, to avoid this doctrinal incoherence, is that under current constitutional doctrine nonresident aliens do not have due process rights.

The conclusion advanced here, that the Fourteenth and Fifth Amendments do not protect foreign defendants from jurisdictional assertions, is consistent with history. Several academics have convincingly argued that the Framers never intended the Fifth or Fourteenth Amendment's Due Process Clause to limit territorial assertions of power even in the domestic context.[158] "[T]he phrases

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REV. 483, 487 (1987).

156. Haugen, *supra* note 12, at 117.

157. *Id.* at 115-16.

158. *See* Borchers, *supra* note 23, at 20 (arguing that the Court should "abandon the notion that state court personal jurisdiction is a matter of constitutional law, and relinquish its role as the final authority on the general ability of state courts to reach beyond their borders"); Conison, *supra* note 31, at 1073-76 (describing in detail the constitutionalizing of personal jurisdiction law and stating that the constitutional law of personal jurisdiction is "spurious"); Linda Silberman, *Reflections on* Burnham v. Superior Court: *Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 RUTGERS L.J. 569, 582 n.68 (1991) (decrying the constitutional character of the personal jurisdiction analysis); *see also* Trangsrud, *supra* note 27, at 876-80;

'due process of law,' and its Magna Carta equivalent 'law of the land,' did *not* connote any limitation on personal jurisdiction.... [N]othing in the history of the adoption of the [F]ourteenth [A]mendment suggests a departure from the preratification understanding of the term 'due process.'"[159] To the extent that this academic scholarship is compelling, its logic applies with greater force when the case involves a foreign defendant. One professor, Andrew Strauss, has even argued that international law is the only limit on a court's jurisdiction.[160] The Constitution, in the context of foreign defendants, specifically "defers to international law to prescribe jurisdiction among the nation-states of the world."[161]

2. Responding to Counterarguments

No scholarship directly explains why aliens are currently entitled to due process protection from extraterritorial jurisdictional assertions. Gary Born, in the late 1980s, argued that heightened constitutional scrutiny is required in alien jurisdiction cases, for a host of policy reasons.[162] Similarly, Arthur von Mehren and Donald Trautman have argued that because of the difficulties in enforcing judgments abroad, jurisdiction over aliens should face more stringent judicial scrutiny.[163] But these scholars do not explain why constitutional protections apply. Instead, they identify several pragmatic reasons why courts should be careful not to interpret their jurisdictional reaches broadly.[164] These scholars are certainly

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Whitten, *supra* note 33, at 799-804; *cf.* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368-70 (1910-1911) (describing the history of due process); Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583 (1930) (describing the history and meaning of Due Process).

159. Borchers, *supra* note 23, at 88.

160. Strauss, *supra* note 24, at 1239.

161. *Id.* at 1242; *see also id.* at 1263 ("[U]nder the Constitution, the international order governs relations between nation-states, and that international jurisdiction, including contacts jurisdiction, is about allocating authority between nation-states.").

162. Born, *supra* note 5, at 21-44; *see also* Holly A. Ellencrig, Comment, *Expanding Personal Jurisdiction Over Foreign Defendants: A Response to* Omni Capital International v. Rudolf Wolff & Co., 24 CAL. W. INT'L L.J. 363, 374 (1994) (arguing for "heightened constitutional scrutiny of [a] defendant's contacts and the standard of fair play and substantial justice because of the 'greater litigation burdens' that a foreign defendant must bear" (footnotes omitted)).

163. von Mehren & Trautman, *supra* note 127, at 1127-28. Some commentators have reached the opposite conclusion. Weinberg, *supra* note 82, at 931-34, 945-46 (arguing for more expansive jurisdiction over alien defendants as compared to domestic defendants).

164. *See, e.g.*, Born, *supra* note 5, at 21-43.

correct in their conclusion that asserting jurisdiction over foreigners raises unique problems that call for judicial restraint—a conclusion the U.S. Supreme Court endorses.[165] Yet, no matter how many sensible reasons exist to constrain jurisdiction, no doctrinally coherent reason appears to elevate the analysis to one of constitutional concern.

Two explanations for why personal jurisdiction cases are distinguishable from other alien cases have been suggested, but neither explanation is satisfactory. The first argues that jurisdictional issues are different because the Due Process Clause acts as a restraint on a U.S. court exercising power *in the United States*, and, therefore, no extraterritorial application of the Constitution exists.[166] But current law and constitutional theory does not support this distinction. In *Verdugo-Urquidez*, for example, the issue was whether to suppress, in a U.S. trial, evidence obtained in violation of the Fourth Amendment.[167] The Court focused not on whether the Fourth Amendment restricted the U.S. court from admitting evidence unconstitutionally seized, but on individual rights.[168] The Court avoided finding any constitutional violation by holding that aliens abroad do not have constitutional rights.[169] In fact, Justice Brennan's dissent specifically argued that "[t]he focus of the Fourth Amendment [should be] on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these actions may be taken."[170] The majority, however, declined to adopt this approach.[171]

Moreover, it would be particularly peculiar to find that due process protections inure to aliens because the Due Process Clause limits a court's power to hear cases. That suggestion has been widely rejected in the domestic context. Historically, the restrictions on personal jurisdiction have, as described above,[172] focused on the individual. "That is, such rights exist to shield individuals from government actions; they do not divest the government of

165. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990).

166. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1235 (1992).

167. *Verdugo-Urquidez*, 494 U.S. at 263.

168. *Id.* at 288 (Brennan, J., dissenting) (describing the majority opinion's focus on individual rights).

169. *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 105-06 (1996) (describing the *Verdugo-Urquidez* case).

170. *Verdugo-Urquidez*, 494 U.S. at 288 (Brennan, J., dissenting).

171. *Id.* (contrasting the focus on *what* and *how* with the *against whom* approach adopted by the majority).

172. *See infra* Parts II.B, II.C.1.

competence to act." [173] If due process operated as an independent restriction on the court's sovereign power to act, rather than as an individual right, "it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty."[174] As many have observed, while "private defendants should be in a position to waive their own rights, they should hardly be given the power to forfeit the sovereign prerogatives of state governments."[175] A court, however, can accept jurisdiction based entirely on a defendant's consent.[176]

A second explanation for the different treatment is that civil defendants are passive participants: they seek "neither entrance into the United States nor any benefit under our laws."[177] But why an active/passive distinction is relevant for constitutional purposes is unclear. Nothing in the Constitution's language suggests this distinction.[178] Also obscure is why a defendant in a civil case would be considered more passive than an enemy alien or an alien undergoing deportation proceedings. A foreign civil defendant has almost always done something to initiate the litigation in the United States—e.g., sold a product into the United States. Or put differently, how "active" are the Guantánamo Bay detainees, who seek neither entrance to the United States nor the benefits of our laws but who are being held involuntarily? Perhaps more fatal is that the passive/active distinction mirrors what has been referred to as the "mutuality of obligation" approach to constitutionalism, most commonly associated with Gerald Neuman's writings.[179] In that approach, foreign nationals obtain constitutional rights when "the United States seeks to impose and enforce its own law."[180] But that

173. A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 385 (1997).

174. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).

175. Maltz, *supra* note 3, at 688.

176. *Ins. Corp. of Ir.*, 456 U.S. at 703; *see also* Lewis, *supra* note 66, at 727 (arguing that "the sole proper concern of the due process clause in the personal jurisdiction setting is with the interests of the individual litigants," and not with state government interests); Redish, *supra* note 20, at 1143 (observing that the "sole concern" of due process should be the "prevention of injustice to the individual").

177. Brilmayer & Norchi, *supra* note 166, at 1238-39 (1992); *see also* Weisburd, *supra* note 173, at 404 (distinguishing cases where alien litigants are passive actors "rather than seeking something affirmative from their opponents").

178. U.S. CONST. amends. V, § 1 & XIV, § 1.

179. NEUMAN, *supra* note 169, at 108; Neuman, *supra* note 151, at 2076-77; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 981-90 (1991).

180. Neuman, *supra* note 151, at 2077; *see also* NEUMAN, *supra* note 169, at

approach—although perhaps desirable—is decidedly not the law.[181] Even advocates of that approach acknowledge this.[182]

This is not to approve of the current constitutional doctrine, which denies nonresident aliens constitutional rights.[183] Instead, the point is that the Court's current due process formulations in the jurisdictional context are incoherent with its approach to U.S. constitutionalism in other contexts. Another approach might well be a welcome development. Gerald Neuman's "mutuality of obligation" approach may be preferable over the current territorially-connected constitutional analysis.[184] Or alternatively, Kal Raustiala has argued for a "global constitution," urging the Court to stop "cling[ing] to the notion that American law is tethered to territory—that individual rights ebb and flow based on where the individual is physically located."[185] Under Raustiala's global constitution, geography would be decoupled from justice: "that where the government exercises power, that exercise is presumed to operate without regard to territorial location and is always subject to

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108 ("[T]he mutuality of obligation approach affords the express protections of fundamental law, to the extent that their terms permit, as a condition for subjecting a person to the nation's law.").

181. United States v. Verdugo-Urquidez, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting) (urging Court to use a mutuality principle).

182. Neuman, *supra* note 151, at 2077; *cf.* Raustiala, *Evolution of Territoriality*, *supra* note 136.

183. Even putting aside constitutional considerations, good reasons exist to criticize the Bush Administration's handling of Guantánamo Bay detainees, which appears to deny those detainees basic fundamental rights under U.S. and international law. *See generally* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004) (exploring whether detention, interrogation, and treatment of detainees violates human and constitutional rights); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1412-32 (2002) (describing objections to detentions based on international law and the U.S. Constitution); Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 303 (2002) (criticizing the Bush Administration's policy on human rights and other grounds); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005) (discussing the presidential power to designate and detain enemy combatants, and try them by special military tribunal); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) (evaluating the Bush Administration's claim that it is not bound by the Geneva Conventions in regard to detainees held at Guantánamo Bay, and finding the President's position spurious). This Article should not be read as either indirectly or implicitly endorsing the Bush Administration's approach to enemy aliens.

184. *See supra* note 179 and accompanying text.

185. Raustiala, *Evolution of Territoriality*, *supra* note 136.

Constitutional restrictions."[186] Raustiala proposes that "courts ought to treat any person that comes within the power of the United States as at least presumptively in possession of the full gamut of [constitutional] protections reasonably applicable under the circumstances."[187] But as Neuman, Raustiala, and others are quick to concede: these alternatives are "not currently the law for foreign nationals."[188] And the Court has shown no inclination to change its longstanding jurisprudence.

B. Sovereignty's Continuing Relevance

Not only do nonresident, foreign aliens not have due process rights, the other assumption that underlies conventional personal jurisdiction analysis in the domestic context—that sovereignty plays little or no role—is a flawed assumption when the case involves foreign defendants. This is not to engage in the debate whether sovereignty (often referred to as federalism) should play a greater role in domestic personal jurisdiction cases.[189] "There is no reason to assume that the scope of legitimate judicial authority of the United States as it operates in the international community is essentially parallel to the scope of the authority of each of our individual states."[190] Nor is it an attempt to contribute to the burgeoning literature debating sovereignty's continuing importance, given the rise of international institutions and interdependence.[191] Instead, it is to state a truism: sovereignty remains the governing principle under international law limiting jurisdictional assertions.[192]

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186. *Id.*

187. *Id.*

188. Neuman, *supra* note 151, at 2077; *see also* Raustiala, *Evolution of Territoriality*, *supra* note 136 (arguing the claim that the "Constitution is not presumptively spatially-delimited may seem radical but is not fanciful").

189. For a new article arguing that state interests and sovereignty should play a prominent role in domestic personal jurisdiction analysis, see A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. (forthcoming Spring 2006).

190. Perdue, *supra* note 26, at 461.

191. *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999). *See generally* Louis Henkin, Lecture, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999); Jenik Radon, *Sovereignty: A Political Emotion, not a Concept*, 40 STAN. J. INT'L L. 195 (2004) (exploring the conflicting notion of sovereignty); Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 841-42 & n.1 (2003) (listing examples of the "voluminous" literature analyzing sovereignty and "its relationship to international economic institutions").

192. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287-88 (6th ed. 2003).

The sovereign state remains "the basic unit of political separation into which the global community divides itself."[193] "The international regime of nation states is not about to collapse[,]" and "[n]ational sovereignty may be somewhat less secure these days, but it is still the strongest game in town."[194] Alexander Aleinikoff has described sovereignty's continuing importance this way:

> It is important that [national sovereignty remain secure] . . . . [T]he state remains "the main mechanism for social transfers, that is to say for collecting an appropriate fraction of the economy's total income . . . and redistributing it among the population according to some criterion of public interest, common welfare and social needs." It is also "the best unit we have . . . from the point of view of democratic politics, for which supranational, transnational and global authorities provide little or no real space."[195]

Accordingly, "[a]lthough much criticized, the concept of 'sovereignty' is still central to most thinking about international relations and particularly international law."[196]

The theory of nation-state sovereignty, at least its basic contours, is well understood. Sovereignty implies independence, "that is the right to exercise, within a portion of the globe and to the exclusion of other States, the functions of a State such as the exercise of jurisdiction and enforcement of laws over persons therein."[197] Because each nation possesses exclusive jurisdiction within its territory, in theory, each nation shares an equality with other nations,[198] despite economic or military distinctions.[199] In other words, sovereignty—at least that version known as Westphalian sovereignty[200]—"is the right to be left alone, to exclude, to be free

193. Strauss, *supra* note 84, at 406.

194. ALEINIKOFF, *supra* note 44, at 194.

195. *Id.* (quoting E.J. Hobsbawm, *The Future of the State*, 27 DEV. & CHANGE 267, 276-77 (1996)).

196. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 782 (2003).

197. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 379 (2d ed. 2002); *see also* Fitzpatrick, *supra* note 183, at 308-09.

198. The doctrine of state equality can be traced back to theorists such as Hobbes and Bodin. *See* THOMAS HOBBES, LEVIATHAN 9-10 (Richard Tuck ed., Cambridge University Press 1991) (1651); JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 7-8 (M.J. Tooley trans., 1955) (1576).

199. BROWNLIE, *supra* note 192, at 287; *see also* The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule upon another.").

200. For discussions of Westphalian sovereignty, see Raustiala, *supra* note

from any external meddling or interference. . . . [I]t is also the right to be recognized as an autonomous agent in the international system, capable of interacting with other states and entering into international agreements."[201] "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations;" there exists a "duty of non-intervention in the area of exclusive jurisdiction of other states."[202] Personal jurisdiction in international law—as opposed to U.S. law—thus unsurprisingly is a doctrine concerned with this allocation of sovereign authority.[203]

Under domestic law, it may well be appropriate to find that sovereignty plays little or no role in the personal jurisdiction analysis.[204] States within the United States no longer retain the sovereign independence they once did:

> The United States today is very different from the way it was at the time of the Constitution's framing. The jealousies among states are not nearly as great as they once were, and it no longer seems appropriate—if it ever was—to view the relations among the states as analogous to the relations among foreign nations.[205]

191, at 874-78; *see also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 153-62 (2d ed. 1993) (describing Thomas Hobbes' conception of sovereignty and the Peace of Westphalia).

201. Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 284 (2004).

202. BROWNLIE, *supra* note 192, at 287; *see also* JANIS, *supra* note 200, at 330-50. The classic statement of comity can be found in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895):

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

203. Perdue, *supra* note 26, at 457-63 (arguing that personal jurisdiction is a doctrine that allocates sovereign authority and reviewing laws in the European Union to support argument).

204. McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957) (noting the "fundamental transformation of our national economy"); *see also* CLERMONT, *supra* note 9, at 11-12 ("The common law of territorial jurisdiction has evolved largely in response to socio-economic-political pressures, as well as changes in technology and even philosophy."). *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 325 (1816) (noting that "the sovereign powers vested in state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States").

205. Redish, *supra* note 20, at 1136. Admittedly, even academics like Redish

"Indeed, one of the very purposes of the Constitution was to alter the relations of the states so that they would no longer interact as the equivalent of separation [sic] nations."[206]

In the international context, however, "any extraterritorial exercise of jurisdiction potentially infringes on the sovereignty of another state."[207] Accordingly, extraterritorial conduct is subject to a state's jurisdiction under international law only when:

- A "substantial and bona fide connection" between the subject-matter and the jurisdiction's source exists;
- The "principle of non-intervention in the domestic or territorial jurisdiction of other states" is observed; and
- The principles of accommodation, mutuality, and proportionality are applied.[208]

Several scholars have explained well why jurisdictional limits are inherently a product of international law.[209] Interestingly, unlike U.S. law, which focuses extensively on the "reasonableness" of asserting jurisdiction, international law's "reasonableness" requirement is quite different.[210]

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would concede that the Constitution intended to preserve some measure of sovereign independence for the States. *See* Alden v. Maine, 527 U.S. 706, 713-15 (1999) (describing the retained sovereignty of the states within the federal system); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 907 (3d ed. 2000) (noting how the Constitution presupposes the existence of states as independent sovereign entities). As James Madison explained, states retain "a residuary and inviolable sovereignty." THE FEDERALIST, NO. 39, at 198 (James Madison) (George W. Carey & James McClellan eds., 2001) (applying international law principles to the sovereignty of the several states of the Union).

206. Redish, *supra* note 20, at 1136 n.156 (citing THE FEDERALIST NOS. 6-8, at 27-47 (Alexander Hamilton) (Bicentennial ed. 1976)); *see also* Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1601-02 (2002) (exploring the extent that states retain sovereignty in the federal system).

207. Halverson, *supra* note 12, at 149.

208. BROWNLIE, *supra* note 192, at 309; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 421 (1986). For a detailed discussion of jurisdictional principles under international law, see JANIS, *supra* note 200, at 330-50.

209. Halverson, *supra* note 12, at 148-52; Strauss, *Beyond National Law*, *supra* note 84, at 408.

210. Perdue, *supra* note 26, at 469 ("As the earlier discussion indicates, other countries do not appear to engage in an open-ended "reasonableness" inquiry . . . ."); Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 396 (1995) ("I do not think that any fair reading of jurisdictional law in the member

IV. RETHINKING PERSONAL JURISDICTION OVER NONRESIDENT ALIEN DEFENDANTS

The foregoing discussion has attempted to show that the two assumptions girding the current approach to jurisdictional questions (i.e., the dominance of due process and the rejection of state sovereignty) are unsupported when the case involves a nonresident, alien defendant. The minimum contacts test, however, has been with us for over a half century, and the Court has never evinced an interest in reexamining its fundamental tenets. Given that reality, what should be done?

A. *The Stakes*

Before describing a proposal for change, what is at stake is important to understand. Articulating a personal jurisdiction doctrine for nonresident, alien defendants that is doctrinally sound is not a purely academic exercise; the impact is significant.

1. Unique Burdens, Foreign Relations, and International Trade

Whether a U.S. court should exercise personal jurisdiction over an alien defendant raises a host of collateral issues, unique to international litigation. As a preliminary matter, the number of international cases continues to grow, which makes the jurisdiction question an important one.[211] This increase is an inevitable "feature of the modern global economy."[212] The tremendous expansion of the

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states of the European Union or of the Brussels Convention establishes anything like the amorphous reasonableness standard that has been elevated to constitutional principle by the United States Supreme Court.").

211. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1456 (1991) (noting that international litigation is of "increasing practical importance and substantial theoretical interest"); Degnan & Kane, *supra* note 15, at 799 ("It is trite but true to observe that disputes between United States nationals and people from other lands have been increasing steadily and doubtless will continue to do so."); Trek C. Doyle & Roberto Calvo Ponton, *The Renaissance of the Foreign Action and a Practical Response*, 33 TEX. TECH L. REV. 293, 294 (2002) (observing that "[f]actually, there has been a dramatic increase in the number of foreign actions being brought in Texas and elsewhere"); Lilly, *supra* note 5, at 116 ("The flourishing activity of international commerce has resulted in increased numbers of claims against alien defendants brought in American courts."); Eugene J. Silva, *Practical Views on Stemming the Tide of Foreign Plaintiffs and Concluding Mid-Atlantic Settlements*, 28 TEX. INT'L L.J. 479, 480 (1993) ("Over the last fifteen years, however, multinational litigation has demonstrated particularly sustained growth.").

212. Raymond Paretzky, *A New Approach to Jurisdictional Questions in Transnational Litigation in U.S. Courts*, 10 U. PA. J. INT'L. BUS. L. 663, 663

Internet has also contributed to the proliferation of transnational litigation, as U.S. citizens and aliens are able to easily interact even when the alien has no physical connection to the United States.[213] In 2003, an Austrian professor summed up the issue nicely:

> Because of the globalization process in trade and commerce, the global liberalization of cross-border sales of goods and supply of services under GATT and GATS, and the increasing use of electronic means of communication in international transactions, a just and predictable solution of the various problems emerging from transatlantic litigation has become even more urgent.[214]

Concomitant with this growth of international cases has been the recent prevalence of parallel proceedings abroad[215] and international class actions,[216] which raise their own set of unique problems.

(1988); *see also* Born, *supra* note 5, at 5 ("The post-War era's expansion of international trade fueled a dramatic increase in legal disputes between United States citizens and foreign persons.").

213. Berman, *supra* note 16, at 330-33 (exploring the impact of globalization and the Internet and its implications for jurisdiction); Moritz Keller, *Lessons for The Hague: Internet Jurisdiction in Contract and Tort Cases in the European Community and the United States*, 23 J. MARSHALL J. COMPUTER & INFO. L. 1, 15 (2004) ("With the increasing popularity of the Internet, multinational litigation, involving the Internet, has dramatically increased.").

214. Willibald Posch, *Resolving Business Disputes Through Litigation or Other Alternatives: The Effects of Jurisdictional Rules and Recognition Practice*, 26 HOUS. J. INT'L L. 363, 367 (2004).

215. Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 3-15 (2004) (describing the increase of parallel proceedings, the race to file, and the problems with concurrent jurisdiction in international cases); *see also* Daniel G. Murphy et al., *Parallel Proceedings: Moving into Cyberspace*, 35 INT'L LAW. 491, 493-95 (2001) (noting the increasingly transnational character of daily transactions and the likelihood of litigants becoming embroiled in parallel litigation as a result of the Internet's growth); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 339-46 (2004) (exploring the means to address and deal with parallel international litigation).

216. For scholarship discussing the phenomenon, see generally Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619 (discussing the need for additional measures to protect due process in the transnational context, concluding that the traditional concept of personal jurisdiction does not apply, and advocating for an procedure whereby non-U.S. litigants could opt-in to binding U.S. class litigation as a solution) [hereinafter Bassett, *Implied "Consent"*]; Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41 (2003) (exploring the impact of

The growth in international litigation is in part attributable to plaintiffs preferring to choose U.S. courts rather than foreign courts to resolve their disputes. The nature of the American judicial system makes it so:

> Courts in the United States attract plaintiffs, both foreign and resident, because they offer procedural advantages beyond those of foreign forums: the existence of civil juries, the availability of broad discovery, easier access to courts and lawyers, contingent fee arrangements, and the absence of "loser-pay-all" cost-shifting rules.[217]

Other reasons exist for this plaintiff preference for U.S. litigation. In some areas, such as products liability, U.S. law appears to favor plaintiffs more than other foreign regimes.[218] Getting a case into a

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non-U.S. citizens' participation in U.S. class actions); Janet Walker, *Crossborder Class Actions: A View From Across the Border*, 2004 MICH. ST. L. REV. 755 (studying the international approaches to transnational class action litigation and the vagrancies of such litigation); Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 WILLAMETTE L. REV. 145 (2001) (offering fair venue as the controlling principle to decide jurisdictional and choice of law issues in mass tort transnational litigation).

217. Silberman, *supra* note 24, at 502 (footnotes omitted); *see also* Silva, *supra* note 211, at 481 ("[L]iberal United States discovery rules, choice of law analyses, and pro-plaintiff tort laws [among other reasons] attract foreign litigants." (footnotes omitted)); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323 (1994) (noting that U.S. forums "offer a plaintiff both lower costs and higher recovery" because of extensive pretrial discovery, plaintiff-friendly liability laws, plaintiff favorable choice of law rules, and trial by jury); David Boyce, Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 TEX. L. REV. 193, 196-204 (1985) (explaining in depth the advantages to plaintiffs of suing in the United States). *See generally* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 560-64 (1989) (discussing perceived advantages for plaintiffs in U.S. litigation).

218. Silberman, *supra* note 26, at 502. *See generally* Michael N. Meller, *Costs are Killing Patent Harmonization*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 211 (1997) (describing how U.S. patent litigation offers injunctive relief and damage awards significantly greater than those available in Japan and Europe); Glenn R. Sarno, *Haling Foreign Subsidiary Corporations into Court Under the 1934 Act: Jurisdictional Bases and Forum Non Conveniens*, LAW & CONTEMP. PROBS., Autumn 1992, at 379 (discussing the increase of suits against foreign nonresident defendants for securities law violations); Phil Rothenberg, Note, *Japan's New Product Liability Law: Achieving Modest Success*, 31 LAW & POL'Y INT'L BUS. 453 (2000) (describing the differences between U.S. and Japanese law and the failure of Japanese law to provide punitive damages); Marcy Sheinwold, Comment, *International Products Liability Law*, 1 TOURO. J. TRASNAT'L L. 257 (1988) (comparing U.S., European, and Japanese products liability law and

U.S. court can be outcome determinative.[219] Consistent with the old cliché, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."[220]

Conversely, as much as plaintiffs often prefer U.S.-styled litigation, foreigners do not take kindly to being hauled into U.S. courts, particularly when the plaintiff is a U.S. citizen. Foreign defendants believe that U.S. courts favor U.S. litigants.[221] American courts apply U.S. choice of law rules and decide cases with U.S. judges, in a manner that has the appearance, if not the reality, of promoting U.S. interests.[222] Similarly, as much as plaintiffs may

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finding that the U.S. law offers plaintiffs the greatest advantages).

219. David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW. Q. REV. 398, 418-20 (1987) (discussing survey suggesting that plaintiffs ousted from U.S. courts do not regularly pursue remedies elsewhere); *see also* Weintraub, *supra* note 217, at 322 (arguing that with "few exceptions, a lawyer anywhere in the world representing a client with a claim for a serious injury or death, who does not explore the feasibility of bringing suit in the United States, is guilty of malpractice" (footnote omitted)).

220. Smith, Kline & French Labs. Ltd. v. Bloch, (1983) 2 All E.R. 72, 74 (C.A. Civ. Div. 1982) (Denning, J.); *see also* Castanho v. Brown & Root (U.K.) Ltd., (1980) 1 W.L.R. 833, 849 (C.A. Civ. Div. 1980), *aff'd,* (1981) A.C. 557 (H.L. 1980) (Denning, J.) ("A Texas-style claim is big business."); *cf.* John S. Willems, *Shutting the U.S. Courthouse Door?: Forum Non Conveniens in International Arbitration,* DISP. RESOL. J., Aug./Oct. 2003, at 54, 56 ("Litigants are attracted to the high quality of U.S. courts, the willingness of U.S. courts to exercise jurisdiction over international disputes, and, rightly or wrongly, the belief that U.S. courts are ready to award large sums of damages.").

221. *See* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121-22, 1143 (1996) (exploring reasons why foreigners fear U.S. courts but concluding, based on empirical data, that foreign litigants do not fare badly in U.S. litigation); *see also* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 35 (1996) (discussing current bias against foreign citizens); Elmer J. Stone & Kenneth H. Slade, *Special Considerations in International Licensing Agreements*, 1 TRANSNAT'L LAW. 161, 169 (1988) (explaining that U.S. and foreign parties both fear discrimination in each other's respective court systems and prefer arbitration as a "more impartial and neutral way to resolve disputes"). *See generally* Hartwin Bungert, *Equal Protection for Foreign and Alien Corporations: Towards Intermediate Scrutiny for a Quasi-Suspect Classification*, 59 MO. L. REV. 569 (1994) (arguing that a history of discrimination against foreign corporations in the U.S. justifies heightened scrutiny of regulation of foreign corporations).

222. Christopher L. Doerksen, *The Restatement of Canada's Cuban (American) Problem*, 61 SASKATCHEWAN L. REV. 127, 134-35 (1998) ("Canada believes that a judge raised within the cultural construct of the United States will necessarily tend to favor U.S. interests . . . ."); Posch, *supra* note 214, at 374

often prefer U.S. discovery rules, alien defendants perceive those unfamiliar rules as free-wheeling, unsupervised "fishing expeditions."[223] For alien defendants, international lawsuits brought in the U.S. "are expensive, difficult to investigate and defend, and legally complex."[224] The host of complaints foreigners make as to U.S. civil litigation include complaints about: "juries, discovery, class actions, contingent fees, and often substantive American law, which is perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules."[225] In short, foreign defendants are rightfully concerned that plaintiffs may forum shop for favorable

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(explaining that "U.S. lay judges may not always be impartial if they have to deliver a verdict in a case where the interests of a U.S. party and a European party are in conflict" and that "[f]or Europeans, it is common belief that a member of a U.S. jury, even if carefully selected, will usually be inclined to sympathize with the U.S. plaintiffs rather than with the foreign defendants"). This concern of bias existed between state citizens in the early formation of the United States. *See* Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (emphasizing the need for federal diversity jurisdiction to avoid actual prejudice to out-of-state litigants, and to eliminate fear of prejudice, whether justified or not); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475-76 (1793) (stating that disputes between citizens of different states should be resolved in federal court because of "the danger of irritation and criminations arising from apprehensions and suspicions of partiality"). "As James Madison said of the state courts: 'We well know, sir, that foreigners cannot get justice done them in these courts . . . .'" Clermont & Eisenberg, *supra* note 221, at 1121 (citing 3 JONATHAN ELLIOT, THE DEBATE IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Philadelphia, Lippincott 2d ed. 1876)).

223. BORN, *supra* note 71, at 848 (internal citation omitted); *see also* Richard M. Dunn & Raquel M. Gonzalez, *The Thing About Non-U.S. Discovery for U.S. Litigation: It's Expensive and Complex*, 67 DEF. COUNS. J. 342, 342, 346-47 (2000) (noting that "[a]s evidenced by some of the discovery blocking statutes in [civil law] nations, there is widespread distaste for American-style pretrial discovery" and discussing blocking statutes).

224. Doyle & Ponton, *supra* note 211, at 295; *see also id.* at 294 (noting the attraction of plaintiffs to litigating "the very worst foreign accidents" in U.S. court venues).

225. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 320 (2002); *see also* Posch, *supra* note 214, at 372-74 (discussing European dislike of American legal fee structure and right to jury trial); Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons, in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 267 (John J. Barcelo & Kevin M. Clermont eds., 2002) (noting that "United States judgments are feared in the rest of the world" and that there exists "genuine concern over the assertion of jurisdiction by United States courts because of the size of the awards that juries in the United States are believed to grant in civil litigation").

law in the United States,[226] or otherwise impose greater costs upon them.[227]

U.S. jurisdictional rules, however, impact more than just individual defendants. Extraterritorial jurisdictional assertions "can affect United States foreign relations in ways that domestic claims of jurisdiction cannot."[228] An exorbitant jurisdictional assertion, or at least the appearance of it, "can readily arouse foreign resentment," "provoke diplomatic protests," "trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields."[229] The impact can be profound: "[E]xhorbitant jurisdictional claims can frustrate diplomatic initiatives by the United States, particularly in the private international law field. Most significantly, these claims can interfere with U.S. efforts to conclude international agreements providing for mutual recognition and enforcement of judgments or restricting exorbitant jurisdictional claims by foreign states."[230] In many ways, broad

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226. Juenger, *supra* note 217, at 554-56 (explaining how exorbitant jurisdictional practices in the United States provide an incentive to forum shop).

227. Rutherglen, *supra* note 40, at 372 ("Choosing between national legal systems creates greater risks . . . to impose costs upon the defendant.").

228. Born, *supra* note 5, at 28; *see also* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 115-16 (1987) (noting that the assertion of personal jurisdiction in California over a Japanese corporation might cause a strain in foreign relations); George Monro, Ltd. v. Am. Cynamid & Chem. Corp., K.B. 432, 437 (1944) ("Service out of the jurisdiction at the instance of our courts is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected.").

229. Born, *supra* note 5, at 28-29; *see* Bassett, *Implied "Consent"*, *supra* note 216 at 634 ("[A]mong the practical reasons commanding a closer evaluation of the assertion of personal jurisdiction over foreign claimants is the potential impact on foreign relations. Carelessness and overreaching in asserting jurisdiction over foreign citizens may cause offense or resentment in foreign countries." (footnote omitted)); *cf.* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 472 (2001) (describing how human rights litigation in the U.S. under the Alien Tort Statute can often cause "foreign relations damage"); David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 98 (1998) ("[T]he Internet is international in scope and questions of personal jurisdiction are likely to be even more problematic when countries with heterogeneous legal systems and jurisdictional approaches are thrown into the mix. Jurisdiction in that context also raises problems in foreign relations."); Ellencrig, *supra* note 162, at 368-69 (noting the need for uniformity in personal jurisdiction law "because of the implications of foreign relations").

230. Born, *supra* note 5, at 29; *see also* LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 289 (1986). Brilmayer states:

The resolution of [conflicts with an international component] is a

assertions of jurisdiction raise the same concerns for international relations that the extraterritorial application of law does.[231]

Not only can foreign relations be impacted when a U.S. court entertains claims against a foreigner, but U.S. trade relations can be particularly harmed as well.[232] The U.S. Solicitor General has argued that broad jurisdictional assertions would have "a 'significant potential for discouraging foreign forums from purchasing American products' and 'would thwart positive efforts of Congress and the Executive Branch to make American firms and products more competitive internationally.'"[233] Little doubt exists that "in a globalized economy[,] differences between domestic rules governing jurisdictional issues and the recognition of foreign judgments may hamper the functioning of international trade and commerce."[234] The refusal of foreign courts to recognize judgments because of U.S. jurisdictional rules, also "seriously damages the competitiveness of U.S. manufacturers" as "foreign manufacturers can discount the collectibility" of U.S. judgments.[235]

> particularly delicate matter because the confrontation between laws and policies of the United States and foreign states are often sharper and more complex than any analogous showdown between two states. Simply put, overly aggressive adjudication can disrupt commerce and peace between nations much more than it can between States.

Id.

231. *See generally* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 312-13 (1996) (discussing negative impacts extraterritorial application of law may have).

232. Born, *supra* note 5, at 30-31; Paretzky, *supra* note 212, at 677; *see also* Diana K. Tani, Note, *Specific Personal Jurisdiction Over Foreign Corporate Defendants*, 10 LOY. L.A. INT'L & COMP. L.J. 361, 386-89 (1988) (explaining how jurisdictional rules impact foreign trade).

233. Silberman, *supra* note 24, at 507 (quoting ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 175-76 (1993) (citing Brief for the United States as Amicus Curiae, at 9-12, *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408 (1984) (No. 82-1127))); *cf.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972), *superseded by federal statute* (recognizing in a related context that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts").

234. Posch, *supra* note 214, at 363-64.

235. George L. Priest, *Lawyers, Liability, and Law Reform: Effects on American Economic Growth and Trade Competitiveness*, 71 DENV. U. L. REV. 115, 147-49 (1993) (explaining how a German's court's refusal to enforce an American punitive damages judgment "implicat[es] . . . U.S. trade competitiveness and national wealth"); *see also* J. Noelle Hicks, *Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT'L L. 155, 178 (2002)

Related to the concern that jurisdictional rules impact foreign relations and trade is the concern over retaliatory practices. Some nations have enacted statutes that authorize their courts to exercise jurisdiction over a foreign defendant whenever the defendant's nation would do the same in analogous situations.[236] Retaliation is particularly likely when a U.S. court provides a forum for a foreign plaintiff injured in his or her home nation. Permitting courts to exercise jurisdiction in these circumstances undercuts foreign nations' policies. "This is so because nations balance many factors in deciding on a trade policy, and the results of this balancing are reflected in the rules of decision that they adopt to govern tort recoveries in their courts."[237]

A good example of how jurisdictional assertions can impact foreign and diplomatic relations is the contentious *Trail Smelter* case, currently pending before the Ninth Circuit.[238] In that case, a federal court in Washington State exercised jurisdiction over a Canadian smelting company operating solely in Canada for alleged environmental damage occurring in the United States.[239] Although the district court's decision to assert personal jurisdiction under the effects test is faithful to current personal jurisdiction law,[240] Canada believes that, by permitting the case to go forward, the U.S. court is undermining Canadian environmental policies and infringing on Canadian sovereignty.[241] The defendant has summed up the Canadian reaction to the U.S. court accepting jurisdiction well: "Canada sets its own environmental agenda, sets its own environmental standards, has its own body of laws that applies to both the regulation of operators like Trail and any remedial obligations associated with those operations, and it doesn't need any

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(arguing that valid U.S. judgments need to be enforced in foreign courts to "facilitate the expansion of foreign trade").

236. Born, *supra* note 5, at 15, 22, 33 n.139; *see also* BORN, *supra* note 71, at 93 ("[A] state court's assertion of judicial jurisdiction over residents of another U.S. state virtually never provokes retaliatory measures; in contrast, assertions over *foreign* defendants can result in retaliation from foreign nations."); Perdue, *supra* note 26, at 464-65 (describing French, Belgian, and European Union retaliatory practices).

237. Paretzky, *supra* note 212, at 680.

238. Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-AAM, 2004 WL 2578982, 35 Envtl. L. Rep. 20,083 (E.D. Wash. Nov 8, 2004). *See generally* Austen L. Parrish, *Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363 (2005) (describing pending litigation in detail).

239. Parrish, *supra* note 238, at 376-80.

240. *Id.* at 387-92.

241. *Id.* at 402-06.

help from the United States."[242] The case has received significant attention and has become a crisis in U.S.-Canadian diplomatic relations.[243]

2. *Judgment Enforcement: Jurisdiction's Collateral Effects*

Jurisdictional issues are also important because of the status of judgment recognition in other countries. For some, like Canada and the United Kingdom, courts increasingly recognize and enforce U.S. judgments without reexamining the case's merits.[244] But most countries resist enforcing U.S. judgments.[245] The United States is currently not a party to any bilateral judgments convention.[246] And

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242. *Id.* at 407 (footnote omitted). *See generally* Arthur T. Downey, *Extraterritorial Sanctions in the Canada/U.S. Context—A U.S. Perspective,* 24 CAN.-U.S. L.J. 215, 215 (1998) (explaining how "Canada sometimes suffers nightmares about the firmness and durability of its own sovereignty. It naturally bristles when the ugly head of extraterritoriality appears, especially if it is an American head").

243. Parrish, *supra* note 238, at 369-85; *see also* Neil Craik, *Return to* Trail*: Unilateralism and the Limits of Extraterritorial Jurisdiction: The Second* Trail Smelter *Dispute*, *in* TRANSBOUNDARY HARMS IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca Bratspies & Russell Millers eds., forthcoming 2006).

244. *See* Russell J. Weintraub, *How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 178-84 (1998) (describing the recognition of U.S. judgments abroad in Canada, Italy, China, the U.K., Germany, Austria, the Netherlands, Norway, and Brazil). For a discussion of judgment enforcement in the United Kingdom, see generally COMMITTEE ON FOREIGN & COMPARATIVE LAW ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SURVEY ON FOREIGN RECOGNITION OF U.S. MONEY JUDGMENTS 3-4 (July 31, 2001), *available at* http://www.brownwelsh.com/archive/ABCNY_study_enforcing_judgments.pdf ("In general, U.S. judgment creditors experience little apparent difficulty in enforcing judgments in England."). For a discussion of judgment enforcement in Canada, see Parrish, *supra* note 238, at 399-402; *see also* Joost Blom, *The Enforcement of Foreign Judgments:* Morguard *Goes Forth into the World*, 28 CAN. BUS. L.J. 373, 373-80 (1997) (explaining that "[a]s far as the Canadian law on the enforcement of foreign judgments is concerned, the world, in a literal sense, changed in 1990 with the Supreme Court of Canada's decision in *Morguard*" and the subsequent wide recognition of U.S. judgments); Janet Walker, *The Great Canadian Comity Experiment Continues*, 120 L.Q. REV. 365-69 (2004) (describing and criticizing Canada's continuing enforcement and deference to foreign judgments); Kate M.K. Matthews, Comment, *The Recent Trend of Canadian Enforcement of United States Judgments and the Future of the Trend Under a Proposed Private International Law Treaty*, 19 J.L. & COM. 309, 310-14 (2000) (discussing Canadian court recognition of U.S. judgments).

245. Silberman, *supra* note 225, at 321.

246. *Id.*; *see also* BORN, *supra* note 71, at 89 ("The United States is party to virtually no treaties dealing even indirectly with judicial jurisdiction."); Strauss, *supra* note 84, at 376 n.11 ("The United States has not entered into any

foreign defendants often "have only minimal assets within the forum state."[247] The result is that even if a court exercises jurisdiction over a foreign defendant, a plaintiff may face significant difficulties in collecting any judgment.[248]

The reluctance of other nations to recognize U.S. judgments is inextricably tied to how U.S. courts exercise personal jurisdiction. Judgments are generally enforced as a matter of comity[249] and

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bilateral treaties that comprehensively allocate the authority to exercise personal jurisdiction in international civil cases, but it has entered into a number of 'friendship, commerce and navigation treaties' that have jurisdictional implications."). For a discussion of the unsuccessful attempt to create a multilateral judgments convention, see generally JOHN J. BARCELÓ III & KEVIN M. CLERMONT, EDS., A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE (2002).

247. BORN, *supra* note 71, at 93.

248. Degnan & Kane, *supra* note 15, at 844-48 (describing the difficulties of enforcing judgments against alien defendants abroad); Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1205 (1984) (describing the difficulties in judgment enforcement against aliens and explaining that "pursuant to the laws of several European nations, jurisdiction is largely controlled by the law of the jungle, and unfortunately their [judgment] recognition practices are as narrow as their jurisdictional assertions are broad, except to the extent that treaties afford relief"); Lilly, *supra* note 5, at 118 ("Even if the American plaintiff successfully prosecutes an action in the United States against an alien, he may have difficulty securing the fruits of his victory. Nations uniformly deny the direct enforcement of foreign judgments." (footnotes omitted)). *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW, 109-36 (1996) (discussing recognition and enforcement of U.S. judgments abroad). For an older analysis of the problem of foreign judgment enforcement, see Beverly May Carl, *Recognition of Texas Judgments in Courts of Foreign Nations—and Vice Versa*, 13 HOUS. L. REV. 680, 686-87 (1976).

249. *See generally* Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and* Breard *Scenarios*, 50 CATH. U. L. REV. 591 (2001) (describing the use of comity); Brian Pearce, Note, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525 (1994) (discussing the "Comity Doctrine" and comparing U.S. and E.U. approaches to jurisdiction in international civil litigation). Courts have broadly defined comity. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation . . . whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"); *cf.* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982) (describing comity as "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith"); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 77 (1991) (arguing that comity operates outside domestic and international law

"respect for the sovereign power of the rendering state."[250] No uniform practice exists among foreign states regarding the recognition and enforcement of U.S. judgments.[251] Normally, however, a nation will only enforce a judgment if the enforcing court determines that the U.S. court properly exercised jurisdiction.[252] As a practical matter, U.S. jurisdictional rules are different and are perceived, rightly or wrongly, to be inappropriately broader than those of most civil law countries.[253] Most nations permit jurisdiction on the basis of the defendant's domicile, as well "as on the basis of transnationally related events occurring in the forum."[254] Most nations do not recognize, however, "doing business" jurisdiction, which permits assertion of jurisdiction based on a defendant's offices or substantial activity within a forum even when the claim is unrelated to those activities.[255] Also "noticeably absent from the jurisdictional rules of many countries is the requirement of purposeful availment."[256] Likewise, the rest of the world generally

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parameters).

250. Degnan & Kane, *supra* note 15, at 847.

251. BORN, *supra* note 71, at 942-43 (noting the lack of uniform practice and providing examples from Germany, Japan and England); NANDA & PANSIUS, *supra* note 84, at 204-49 (surveying the requirements for recognition and enforcement of U.S. judgments in foreign courts).

252. LOWENFELD, *supra* note 248, at 122 ("It goes without saying that no legal system would regard an *in personam* judgment rendered by a foreign forum binding on a party over whom that forum did not have jurisdiction."); Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 Am. J. Comp. L. 1, 13 (1988) (surveying twenty-one countries and finding that all but one "exercise some form of review of the rendition state's jurisdiction"); Strauss, *supra* note 84, at 419 ("Courts will, however, typically refuse to execute such foreign judgments if they consider the foreign court to have exorbitantly asserted jurisdiction in the underlying case.").

253. Silberman, *supra* note 225, at 322 (arguing that U.S. assertions of jurisdiction are often actually narrower than other those of other nations). Linda Silberman, in several articles, has noted in that "in many respects [rules of jurisdiction in the United States are] actually more restrictive than rules of jurisdiction in Europe." Silberman, *supra* note 215, at 329; *see also* Silberman, *supra* note 210, at 395.

254. Perdue, *supra* note 26, at 462 (footnote omitted); *see also* Heiser, *supra* note 72, at 1037 ("General jurisdiction is particularly controversial in international litigation involving foreign defendants who do business in the United States.").

255. Silberman, *supra* note 215, at 333-39; *see also* Patrick J. Borchers, *The Problem with General Jurisdiction,* 2001 U. CHI. LEGAL. F. 119, 137 (discussing "doing business" jurisdiction); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 190-93 (surveying recent cases on general jurisdiction with foreign nation defendants).

256. Perdue, *supra* note 26, at 462.

characterizes "tag" or transient jurisdiction as exorbitant.[257] Accordingly, other nations often do not recognize U.S. judgments because they believe U.S. courts improperly assert jurisdiction on suspect bases.[258]

The impact of other nations' judgment enforcement practices are therefore two-fold. For those countries that do not recognize U.S. judgments because of what is perceived to be broad jurisdictional principles, the United States has placed itself in a comparative disadvantage. The United States is one of the most hospitable countries to foreign judgments.[259] The imbalance was important enough that the U.S. State Department and the American Law Institute for years attempted to solve the problem through treaty negotiation.[260] Second, U.S. jurisdictional rules have made it nearly impossible to negotiate an international judgments treaty. The recent failure of the Hague Convention on Jurisdiction and Satisfaction of Judgments was largely attributable to the confusion existing in U.S. jurisdictional rules.[261] Certainly, jurisdictional

257. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 511-12 (2003); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(2)(a) (1986) (rejecting tag jurisdiction); Peter Hay, *Transient Jurisdiction, Especially Over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593, 602 ("[A]n exercise of 'general jurisdiction' over a transient foreigner is simply exorbitant with respect to international defendants."); Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 85-86 (1993) (describing how European nations find "tag" jurisdiction to be exorbitant and that the "United States has stubbornly refused to give [it] up"); Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 190-91 (2005) (explaining how "tag" jurisdiction is seen as exorbitant and not recognized in Germany).

258. Silberman, *supra* note 226, at 321, 331; *see also* Silberman, *supra* note 24, at 503 ("Given the perception of other countries that both the adjudicative and legislative jurisdictional reach of the United State is often excessive, they may not enforce and recognize United States judgments.").

259. LOWENFELD, *supra* note 248, at 129; *see also* Posch, *supra* note 214, at 365 (explaining that "[f]rom the U.S. perspective" an important goal of the Hague Judgment's Convention "was the facilitation of the enforcement of decisions of U.S. courts abroad, particularly in Europe, since the enforcement of decisions rendered by European courts is easier in most U.S. jurisdictions and does not depend on the requirement of reciprocity as it does in the majority of European States").

260. *See supra* note 20.

261. Posch, *supra* note 214, at 365 ("Europeans were particularly opposed to the ongoing U.S. practice of recognizing merely 'doing business in an American State' as a sufficient basis for exercising U.S. jurisdiction."); Rutherglen, *supra* note 40, at 372-73 (explaining how jurisdictional issues make agreement on an international judgments treaty difficult); Weintraub, *supra* note 244, at 187

confusion reduces U.S. negotiators' room for bargaining, and "deference to the [U.S. Supreme] Court's authority is bound to inhibit concessions to common sense and practicality."[262]

B. Suggested Frameworks for Analysis

Personal jurisdiction over alien defendants is doctrinally confused in light of the current approach to U.S. constitutionalism. Foreign defendants have numerous reasons to resent being hauled into a U.S. court. And our current jurisdictional law places the United States at a distinct disadvantage given other nations' unwillingness to enforce U.S. judgments as a result of that law. But does it have to be this way? A complete description of a comprehensive set of jurisdictional rules is beyond the scope of this Article (if not any article), but two broad possibilities suggest themselves. Both would enable the courts to rejuvenate personal jurisdiction law in the alien defendant context and reclaim doctrinal consistency. The first would impose only modest changes to the minimum contacts doctrine but would serve no more than as a partial fix. The second—a bolder, but doctrinally and pragmatically preferable approach—would deconstitutionalize personal jurisdiction when the defendant is a nonresident alien.

1. Adjusting Current Law

The first approach assumes that the U.S. Supreme Court may be disinclined to dramatically change the minimum contacts test and treat nonresident alien defendants differently. Under this approach, due process's continued dominance as the only limit on a court's exercise of jurisdiction is assumed.[263] If these assumptions are correct, at least two adjustments are needed to current doctrine: one theoretical, one practical. Notably, this approach would not solve the deep-rooted problems present in the U.S. jurisdictional rules, but would be a first, small step in the right direction.

From a theoretical or doctrinal perspective, the Court must stop its trend in focusing on an individual's liberty interest, when the case involves a nonresident, alien defendant. In the international context, even if personal jurisdiction remains connected to the Due

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(describing how U.S. jurisdictional law makes it difficult for U.S. negotiators to obtain agreement on a judgment convention).

262. Juenger, *supra* note 84, at 1043. *See generally* Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283 (1988) (explaining, from a European perspective, objections to U.S. jurisdictional rules).

263. Silberman, *supra* note 68, at 766 (taking that position that "[o]bviously, the Supreme Court is not going to unravel its long history of constitutional jurisdiction jurisprudence," but that "some shift is possible").

Process Clause, the jurisdictional calculus must be understood primarily to focus on and encapsulate concerns for comity and nation-state sovereignty. As described above, although it may well be the nature of our federalism that interstate sovereignty concerns are no longer relevant, sovereignty remains the key constraint on jurisdiction internationally.[264] Put simply, while jurisdictional assertions within the United States may be unlikely to create state jealousies, those jealousies can and do arise in the international context.[265] In this regard, the Court should reject the scholarly urgings of Martin Redish, John Drobak, Russell Weintraub, and others who suggest that personal jurisdiction restrictions are only a matter of individual liberty.[266] Regardless of that scholarship's merit, it is inapplicable when the defendant is foreign. The prerogatives of States are what constrain jurisdiction over alien defendants.

Practically, the change would come in how courts apply the fair play and substantial justice factors. Convenience and the defendant's burden should play little to no role in the jurisdictional analysis when the defendant is foreign, while state interests must play a greater role. Courts should refrain from making jurisdictional decisions based on the closeness of the foreigner to the forum state, or the availability of modern communications, or other superficial considerations such as the availability of discount plane tickets.[267] Instead, the fair play and substantial justice factors, set forth in *Asahi*, should determine whether jurisdiction would be reasonable as that term is understood under international principles.[268] Under this approach, courts would take much more to heart *Asahi*'s cautions that international cases raise unique concerns. Special care would be given to ensure that jurisdiction is not exercised when the case implicates foreign relations.[269] The

264. *See supra* Part III.B.

265. For a discussing of the origins of jurisdiction in the early constitutional period, see Weinstein, *supra* note 3, at 198 (noting that jurisdictional rules were intended, in part, to "bind several independent states into a coherent, cooperative nation").

266. *See supra* notes 124-27 and accompanying text.

267. *See supra* Part II.C.1.

268. LOWENFELD, *supra* note 248, at 228-30; Silberman, *supra* note 68, at 760; *see also supra* note 210.

269. Sound policy reasons exist for this, aside from the jurisdictional issue. Courts are not well suited to dealing with cases that implicate foreign relations. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 830 (1989) (discussing the dormant foreign commerce clause and noting the inappropriateness of federal courts deciding foreign affairs issues); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1668 (1997) (explaining why courts are poorly equipped to deal with

immediate effect would be that courts would exercise jurisdiction in fewer instances, even when minimum contacts are met.

To the extent a foreign defendant's burden or inconvenience is accounted for, it should weigh against asserting jurisdiction when the case is likely to involve significant substantive or procedural differences unique to U.S. litigation. Generally, however, convenience concerns should be addressed solely at the sub-constitutional level utilizing venue and forum non conveniens.[270]

2. A Bolder Approach

A bolder, yet doctrinally and pragmatically preferable, approach would be to decouple the personal jurisdiction analysis from the Constitution altogether. This does not mean that as a nation we should turn back to *Pennoyer*'s overly formalistic rules.[271] Instead, what courts must do is appreciate the concept of reciprocity between sovereigns and understand the comparative standards for exercising jurisdiction in foreign legal systems.[272] Like in the pre-*Pennoyer* days, notions of comity and the sovereign rights of foreign states, or other legislatively created restrictions, would limit jurisdiction.[273]

As a matter of policy, the decoupling of personal jurisdiction from due process would be sensible. Several commentators have explained the policy benefits of deconstitutionalizing personal jurisdiction law, and there is no reason to rehash them here.[274] At

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questions involving foreign relations); John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 763-75 (1997) (explaining why courts should not implement foreign policy).

270. For recent advocacy of this approach, see Perdue, *supra* note 26, at 468.

271. Borchers, *supra* note 27, at 125 (describing problems with doctrine developed from *Pennoyer* as both underinclusive and overinclusive); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769, 782-86 (1995) (describing the need for predictability and flexibility as a result of the problems *Pennoyer* caused); von Mehren, *supra* note 58, at 300-07 (discussing constraints and problems that *Pennoyer's* power theory created and the move to a theory of fairness).

272. Rutherglen, *supra* note 40, at 368.

273. Conison, *supra* note 31, at 1205-07 (describing the comity based approach to jurisdiction); Perdue, *supra* note 26, at 461 (arguing based on international law that the constraints on "U.S. exercises of sovereign judicial authority" should "be very modest"); *cf.* Albert A. Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OR. L. REV. 103, 109 (1971) (positing that venue and comity should govern jurisdictional questions). *See generally* Strauss, *supra* note 24 (discussing the international law approach to personal jurisdiction).

274. *See, e.g.*, Borchers, *supra* note 23, at 87-96 (explaining the benefits of ending due process as a limitation on personal jurisdiction); Borchers, *supra*

the very least, "we should pause before concluding that our government is constitutionally disabled from asserting jurisdiction over foreigners under circumstances in which other countries consider it entirely appropriate."[275] Moreover, it would allow the United States to approach jurisdictional rules pragmatically, "unencumbered by the theoretical musings that dominate the American jurisdictional landscape."[276] The only limits imposed would be those broad ones of international law to respect foreign state interests: interests that many cases will not implicate.[277]

Because the jurisdictional limits sovereignty imposes are meager, in a deconstitutionalized personal jurisdiction world, legislative choices, in the form of a treaty, would be necessary to sensibly regulate jurisdiction.[278] Personal jurisdiction cannot be a "free-for-all, unregulated phenomenon," and this Article does not suggest otherwise.[279] The deconstitutionalizing of jurisdiction would, therefore, presumably refresh the need to reach agreement on a multilateral judgments treaty. Such a treaty would yield significant benefits:

> A treaty would rationalize the U.S. law of jurisdiction and judgments on the international level, while moving the world toward justice without regard to international boundaries. Moreover, a treaty would give the United States the opportunity to untangle its jurisdictional law applied at home. That is, rethinking jurisdiction in the course of the treatymaking process could result in improvements on the interstate level.[280]

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note 27, at 154-56 (same).

275. Perdue, *supra* note 26, at 470.

276. Borchers, *supra* note 27, at 122.

277. Conison, *supra* note 31, at 1104-13; Strauss, *supra* note 24, at 1263-67; Strauss, *supra* note 84, at 416-23.

278. To adopt an international treaty of jurisdiction would be consistent with what many scholars have urged. As George Rutherglen has compellingly argued, the realist scholars who have embraced the jurisdictional principles articulated in *International Shoe*, called "for particularized rules to be developed either through legislation or through case law." Rutherglen, *supra* note 40, at 350, 359-61 (citing Hazard, *supra* note 40, at 241); *id.* at 371 (explaining that *International Shoe* "promised to foster the development of other, more concrete rules of decision").

279. Borchers, *supra* note 23, at 101.

280. Kevin M. Clermont & Kuo-Chang Huang, *Converting the Draft Hague Treaty into Domestic Jurisdictional Law*, *in* A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 192 (John J. Barceló III & Kevin M. Clermont eds., 2002); *see also* Borchers, *supra* note 27, at 123 (arguing that if jurisdictional norms could be developed legislatively the United States would

The ability to reach agreement on an international treaty would be enhanced, as constitutional doctrine would not unnecessarily and artificially constrain U.S. negotiators.[281]

Untethering personal jurisdiction analysis from the Due Process Clause, when the case involves alien defendants, is not as radical as might be first thought. Those scholars who have urged the Supreme Court to stop speaking of personal jurisdiction in constitutional terms[282] face a significant hurdle: well over a hundred years of consistent precedent—since *Pennoyer* in 1877—holding that jurisdictional principles are constitutionally derived.[283] But comparatively, no long-held precedent exists when the case involves nonresident aliens. The Supreme Court has only decided four personal jurisdiction cases involving foreign defendants.[284] In none of these cases was the issue directly addressed or even litigated. And the cases the Court has decided could easily be limited to their unique facts.

Other reasons exist to believe that in its next decision, the Court could well choose to change the analysis. First, in *Burnham,* the Court demonstrated its willingness to veer from precedent to arrive at what it believed to be a doctrinally and historically consistent result. Justice Scalia argued that history, antedating the Fourteenth Amendment, sanctioned transient jurisdiction, that *International Shoe* adhered to "traditional notions" of jurisdiction, and that nothing is more traditional that transient or "tag" jurisdiction.[285] International sovereignty principles have a similarly impressive historical lineage and are certainly traditional in the truest of senses. Second, in both *International Shoe* and *Shaffer v. Heitner*, the Court was willing to reexamine jurisdictional precepts and craft new, previously unapplied jurisdictional rules. As Justice Brennan once explained, "[the court was] willing in *Shaffer* to examine anew the appropriateness of the quasi-in-rem rule—until that time dutifully accepted by American courts for at least a century"[286] And of course, long practice does not necessarily make good law.[287] Lastly, the Court itself seems to be well aware of the

benefit greatly).

281. Borchers, *supra* note 27, at 122, 132.

282. *See supra* note 158.

283. *Supra* note 40 and accompanying text.

284. *Supra* note 121.

285. *Supra* notes 256-58 and accompanying text.

286. Shaffer v. Heitner, 433 U.S. 186 1977).

287. Sir. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 80 (17th ed. 1817) ("How long soever it hath continued, if it be against reason, it is of no force in law.").

shortcomings of its own jurisprudence,[288] which bode well for change.

V. CONCLUSION

The jurisdictional standards derived from the due process clause have blithely been assumed to apply to foreign defendants. No coherent explanation, however, exists for why nonresident, alien defendants are entitled to constitutional protections in the jurisdictional context. The current personal jurisdiction analysis, which provides foreign defendant due process rights, is at odds with the U.S. Supreme Court's broader approach to constitutionalism. The contrast is particularly stark given the recent decisions involving Guantánamo Bay detainees that reaffirm that foreigners outside United States control or territory have no constitutional rights. The result is to shackle and unnecessarily constrain U.S. courts with a constitutional jurisdictional standard, even when none should apply.

When the U.S. Supreme Court faces its next personal jurisdiction case, it may well have the opportunity to correct prior missteps and clear up the personal jurisdiction standard. Rather than blindly following doctrinally incoherent precedent, it would be wise to acknowledge that the personal jurisdiction standard that applies to nonresident aliens is different than the one that applies to domestic defendants. Sovereignty, not due process, limits a U.S. court's extraterritorial assertion of personal jurisdiction.

288. Juenger, *supra* note 84, at 1045; *see, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 628 (1990) (White, J., concurring) (criticizing the fairness inquiry for inviting "endless, fact-specific litigation"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting) (describing how the standards enunciated by *International Shoe* may already be obsolete); Shaffer, 433 U.S. at 217 (Powell, J., concurring) (referring to the "uncertainty of the general *International Shoe* standard).