ARTICLE

# Personal Jurisdiction: The Transnational Difference

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*This Article engages with some of the key debates that have emerged among international law and civil procedure scholars by examining the flurry of recent transnational cases that have become a common feature on the U.S. Supreme Court's docket. It makes three principal contributions. First, it explains how the recent decisions involving personal jurisdiction should be understood within, and partly limited to, their international contexts. Disputes involving non-resident foreign defendants raise different considerations than those involving defendants in the United States, and this Article canvasses those differences. If a concern previously was that courts gave too short shrift to the international aspects of a case, the concern now is that lower courts may make the reverse mistake by overstating the applicability of recent decisions to the domestic, interstate context. Second, it details how international law imposes modest constraints on national court adjudicatory authority, and pushes back on recent attempts to reimagine public international law. It shows how the Fourth Restatement of the Foreign Relations Law of the United States—which asserts that personal jurisdiction in civil cases is unregulated under international law—advances a position inconsistent with the overwhelming weight of authority. The Restatement's attempt to fashion new customary law and reshape the existing legal regime in the personal jurisdiction arena is problematic, and this Article serves as a counterpoint to that effort. Third, it describes an interplay between unilateral domestic extraterritorial regulation and international lawmaking, and aligns personal jurisdiction with the closely-related area of legislative jurisdiction. Constraints on broad jurisdictional assertions in transnational disputes may be one of the predicates necessary to spur U.S. multilateral engagement.*

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## I. INTRODUCTION

Following a more-than-twenty year hiatus, personal jurisdiction cases[1] are again front and center on the U.S. Supreme Court's docket.[2] Over the last eight years, the Court has clarified the jurisdictional landscape directly on six occasions.[3] Partly the decisions have reimagined doctrine, but at the same time they have also reaffirmed long-standing principles.[4] Strikingly, many of the cases have transnational elements. [5] The number of transnational decisions is even greater if one includes those decided in the related, but distinct, area of legislative jurisdiction.[6] The Court's appetite for hearing cases with foreign conduct involving non-citizens in U.S. civil litigation appears, at least for the time being, unwaning.

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1. Personal jurisdiction, also referred to as judicial or adjudicatory jurisdiction, is the power of the courts to subject particular persons, things, or entities to judicial process. CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351, 239-61 (1992). Legislative jurisdiction, in contrast, is the authority of a nation to make laws applicable to persons or conduct. INTERNATIONAL BAR ASSOCIATION, REPORT ON THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 8 (2009), *available at* ibanet.org. And executive jurisdiction is sometimes used to refer to the executive branch's authority to enforce laws. *Id.*

2. Before 2011, the last personal jurisdiction case decided by the U.S. Supreme Court was Burnham v. Superior Court, 495 U.S. 604 (1990). A similar twenty-year hiatus existed before the Supreme Court's landmark decisions in the 1980s. When the Supreme Court decided Shaffer v. Heitner, 433 U.S. 186 (1977), and the series of cases that followed, it reentered an area that had laid dormant since Hanson v. Denckla, 357 U.S. 235 (1958).

3. J. McIntyre Machinery v. Nicastro, 131 S. Ct. 2780 (2011); Goodyear Dunlop Tire Operations, S.A. v. Brown, 564 U.S. 915 (2011); Daimler v. Bauman, 134 S. Ct. 746 (2014); Walden v. Fiore, 134 S. Ct. 1115 (2014); Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017); BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

4. A number of commentators have noted the changes, and are usually critical of them. For some of the most recent, see, e.g., Aaron D. Simowitz, *Legislating Transnational Jurisdiction,* 57 VA. J. INT'L L. 325 (2018) (arguing that "the Supreme Court has, in the past few years, turned the United States into one of the most jurisdictionally stingy countries in the world."); Scott Dodson, *Personal Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 76 (2018) (describing the narrowing of jurisdiction and how since 2011 the Court's jurisprudence has taken a "restrictive turn"); Michael Hoffheimer, *The Stealth Revolution in Personal Jurisdiction,* 70 FLA. L. REV. 499, 505 (2018) (describing new restrictions on personal jurisdiction and arguing that the Supreme Court "is implementing radical law reform"); William Grayson Lambert, *The Necessary Narrowing of Personal Jurisdiction*, 100 MARQ. L. REV. 375, 427 (2016) (describing "a revolution in personal jurisdiction").

5. *Nicastro*, 131 S. Ct. at 2780 (lawsuit against a British manufacturer of a recycling machine used to cut metal); *Goodyear*, 564 U.S. at 915 (families of two North Carolina teenagers killed in a bus crash in France involving allegedly faulty tires made in Turkey, sued Goodyear subsidiaries located in Turkey, France, and Luxembourg); *Daimler,* 134 S. Ct. at 746 (workers and relatives of a manufacturing plant in Argentina sued a German company and its subsidiaries for human rights violations).

6. For recent decisions, *see* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018); RJR Nabisco, Inc. v. European Community, 36 S. Ct. 2090 (2016); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Morrison v. Nat'l Australia Bank, 561 U.S. 247 (2010). The Supreme Court decided these cases "after a decades-long increase in the volume of cases brought under statutes with potentially extraterritorial effects." *Racketeer Influenced and Corrupt Organizations Act — Extraterritoriality — RJR Nabisco, Inc. v. European Union*, 130 HARV. L. REV. 487, 487 (2016) (citing Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 818 (2009)).

As the Supreme Court has shown its willingness to engage with jurisdiction doctrines anew,[7] old debates among legal academics and practitioners have reemerged. At the forefront is a now-familiar one: the nature of the limits on jurisdiction and whether they serve primarily to allocate sovereign power or to protect individual liberty.[8] Less thoroughly examined are the decision's international or transnational aspects. With the notable exception of a flurry of recent scholarship,[9] personal jurisdiction cases are rarely situated within the Court's international and foreign affairs jurisprudence.[10] That's unfortunate. Divorcing the Court's most recent decisions from their international contexts risks lower courts overstating their relevance to purely domestic disputes and misinterpreting them. Also, the Court's personal jurisdiction jurisprudence involving international disputes does not live in a vacuum. Instead, it is one of the doctrinal plains upon which broader and more salient debates related to global governance, international law, and sovereign authority are waged.[11] Recognizing the differences between transnational and domestic cases, and appreciating the stakes involved, helps one to better understand the Court's decisions and their limits.

This Article examines personal jurisdiction jurisprudence involving foreign, nonresident defendants while advancing three core themes. First, commentators and courts still tend to treat international cases as simple extensions of domestic disputes, with little thought to how the

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7. For a description of the Court's reengagement with civil procedure issues more broadly, see Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313 (2012).

8. *See*, *e.g.*, George Rutherglen, *Personal Jurisdiction and Political Authority*, 32 J. LAW & POL. 1, 1 (2016) (describing "a deeper, more abstract problem, over the nature of the limits on jurisdiction: do those limits serve primarily to allocate power between sovereign states-by reference to contacts and territory—or do they protect individual rights-by reference to fairness?"); Alan M. Trammel & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129, 1152-57 (2015) (describing principles underlying personal jurisdiction, including fairness and state sovereignty).

9. *See*, *e.g.*, Simowitz, *supra* note 4; Robin Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. ONLINE 123 (2018); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018); Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws – Personal jurisdiction Over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMP. INT'L L. 391 (2017); Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties,* 19 LEWIS & CLARK L. REV. 643 (2015); Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489 (2013).

10. For a discussion over a decade ago of this oversight and the relevant literature, *see* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident, Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006).

11. George Rutherglen recently has made a similar observation. Rutherglen, *supra* note 8, at 6 ("[P]ersonal jurisdiction cannot be considered as an esoteric specialty, divorced from the broad trends in legal theory, constitutional law, international human rights, and international trade . . . [and that it] remains central to the ever more salient and pressing questions that have arisen over the scope of national sovereignty.").

circumstances are different.[12] That tendency is problematic and is likely to continue to occur if courts are not mindful. It has also caused practical and conceptual difficulties with the way personal jurisdiction doctrine has developed. Second, territorial sovereignty considerations appropriately play a more significant role in international cases than in domestic ones. The restraints on national power in the international system serve related, but different, ends than the restraints, if any, imposed by horizontal federalism. While in the domestic context, the Court has drawn both on individual liberty and sovereignty considerations in interpreting the Due Process Clause, public international law's constraints are all about the sovereign limits on state power. In this way, legislative and personal jurisdiction doctrine for transnational cases are more twinned to one another than they are to their domestic counterparts. Third, the recent U.S. Supreme Court decisions should remain tethered to their international moorings. If a concern previously was that courts gave too short shrift to the international aspects of a case, the concern now is that lower courts may make the reverse mistake by overstating the applicability of recent decisions to the purely domestic context.[13]

The article also contributes to some of the more critical prevailing debates among international law scholars. Expanding on a position advanced in prior work, it describes an interplay between jurisdictional doctrines and international law, and how aggressive extraterritorial national law has the potential to undermine international lawmaking.[14] In this way, it breaks with scholars who view the recent decisions curtailing the broadest assertions of jurisdiction as isolationist or necessarily indicative of the Court turning inward.[15] It also critiques recent attempts to remake international

12. Parrish, *Sovereignty, Not Due Process*, *supra* note 10, at 4-5; Silberman & Yaffe, *supra* note 9 (exploring difference between domestic and transnational cases).

13. Katherine Florey has recently made a similar point, but justified on different grounds, principally focused on choice-of-law considerations. Katherine Florey, *What Personal Jurisdiction Doctrine Does—And What It Should Do*, 43 FLA. ST. U. L. REV. 1201, 1237 (2016) ("The Court cannot have it both ways; if a more stringent standard for foreign defendants is appropriate because of the special burdens they face, then the personal jurisdiction standard should be more lenient for domestic defendants."); *id.* at 1249 ("The second risk is that courts will heedlessly apply principles forged in cases involving foreign defendants to domestic defendants as well, thus providing them redundant protection they do not need and depriving plaintiffs of the chance to be heard.").

14. Most recently, *see* Austen L. Parrish, *The Interplay between Extraterritoriality, Sovereignty, and the Foundations of International Law, in* STANDARDS AND SOVEREIGNS: LEGAL HISTORIES OF EXTRATERRITORIALITY (Routledge 2019); *see also* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009).

15. *See, e.g.*, Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015); *cf.* Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 944 n.1 (2017) (listing commentary which worries that "U.S. courts are shirking cases that involve foreign litigants, foreign laws, or foreign harms"). For a lecture that critiques this view, see Austen L. Parrish, *Fading Extraterritoriality and Isolationism? Developments in the United States*, 24 IND. J. GLOBAL LEGAL STUD. 207 (2017).

law through suggestions that a court's adjudicatory jurisdiction is unregulated.[16] International law imposes modest constraints on personal jurisdiction, and appropriately so.[17] A reimagining of international law that permits, without any limit, one nation's courts to unilaterally claim authority over the citizens of another would be to return to an approach more akin to the empire-building of colonial times: an approach that modern international law sought to inter.

This Article has five parts, beginning with this introduction and ending with a conclusion. Part II sets out, in summary fashion, why personal jurisdiction over foreign defendants remains a timely issue with important implications and worthy of analysis. It also shows how personal jurisdiction doctrine can impact international lawmaking. Part III describes the current state of the doctrine as it relates to international litigation in U.S. courts. It proposes that the leading personal jurisdiction cases in the 1970s and 1980s are best understood as "national" cases, where the Court grappled with a growing national economy, evolving notions of federalism, and particular social and political changes. At the time, the case's international dimensions, when they appeared, were often ignored or downplayed.[18] In contrast, the Court's most recent forays into personal jurisdiction—while also influenced by a particular vision of American horizontal federalism as well as some of the Justices' inclinations to cabin the role of private rights litigation—can be understood, in part, as the Court grappling with the case's transnational dimensions. While the recent decisions remain often fractured, they respond more to the realities of globalization and implicitly reaffirm, in modest ways, foundational principles of public international law.

Part IV begins by identifying international law's limits on adjudicatory jurisdiction. The Article explains why the American Law Institute's recent Fourth Restatement of the Foreign Relations Law of the United States attempts to reshape the existing legal regime when it states that international law no longer constrains personal jurisdiction. The Fourth Restatement's new approach is against the great weight of authority and is problematic for those concerned with protecting individuals from overreaching state power. Part IV then explores other differences between international and domestic cases. It concludes that these differences are meaningful and that the latest decisions are less a a break from the past if the decisions are kept to their international contexts.[19] This does not mean the decisions are free from

16. *See infra* section IV.A.ii.

17. *See infr*a section IV.A.i; notes 170-96.

18. *See generally* Friedrich K. Juenger, *A Shoe Unfit for Globetrotting,* 28 U.C. DAVIS L. REV. 1027, 1037–38 (1995) (describing how the Court now "tends to treat transnational cases as if they were interstate in nature").

19. *Cf.* Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Personal Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 677-81 (2015).

criticism. But on the margins, the withdrawal from some of the broadest assertions of jurisdiction over foreign, nonresident defendants may help provide the breathing space from aggressive unilateral regulation that may serve as a necessary predicate for international lawmaking. While often under-appreciated, constraining exorbitant jurisdictional assertions can play a role in creating an environment where consensual multilateral—as opposed to unilateral—approaches to transnational issues are possible.

## II. THE WORLD IN ALL OUR COURTS[20]

The number of transnational cases involving noncitizen, nonresident defendants are substantial, both inside and outside the United States, and the cases have important access to justice implications. The scope of a court's adjudicatory jurisdiction is not simply a where-to-sue doctrinal question. Rather, it raises the question whether certain kinds of global challenges should primarily be resolved at the national or international level, and whether the process of transnational dispute resolution should be mostly unilateral or mostly collaborative.

### *A. The Growth of Transnational Litigation*

Cases in U.S. courts with transnational or international dimensions are increasingly prevalent, and have been for some time.[21] This isn't news, especially so in the personal jurisdiction context. Part of the cause for the trend is globalization: as travel, business, trade, and commerce across borders have become common, so too have cross-border disputes.[22]

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20. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456 (1991) (reviewing GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (1989)). Since Prof. Burbank wrote his review, transnational litigation has expanded significantly outside the U.S. too. *See infra* notes 36-40.

21. Bookman, *supra* note 15, at 1083-84 ("Transnational suits—cases involving foreign parties, foreign conduct, foreign law, and foreign effects—and the law that governs them have growing significance in the United States and around the world."); Dodge & Dodson, *supra* note 9, at 1206 ("Litigation in the United States is increasingly international" and describing "[t]he increasing prevalence of noncitizens in U.S. civil litigation."). This has long been a recognized trend. Burbank, *supra* note 20, at 1456 (describing the increased practical importance of international litigation); 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) ("It is trite but true to observe [that transnational litigation] is increasingly steadily and doubtless will continue to do so."); Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 116 (1983) ("The flourishing activity of international commerce has resulted in increased numbers of claims against alien defendants brought in American courts.").

22. *See, e.g.*, Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 432 (2003) (describing the growth of transnational litigation as a result of the internet and increased cross-border activity).

Changes in technology, including the expansion of the internet, have meant localized conduct can have far-reaching impact. [23] The "growth of multinational corporations doing business across borders and on a global scale . . . the globalization of banking and stock exchanges . . . and the emergence of transnational criminal enterprises and activities have combined to encourage states" to broaden their jurisdictional reaches.[24] Third parties financing transnational litigation may also play a role.[25]

The trend is also partly attributed to the U.S. reluctance to enter into international agreements for reciprocal court access or to create international regulatory mechanisms.[26] This reluctance has rendered private rights litigation in domestic courts under national law as sometimes the only avenue for seeking redress.[27] U.S. courts also have become attractive forums for litigants when their home nation's judicial system is ill-equipped or insufficiently developed to handle complex regulatory claims.[28]

American lawyers have become more comfortable with transnational cases too, which may have also contributed to the growth.[29] Law schools now commonly teach the subject,[30] a wide-range of institutes, centers and

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23. *See generally* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 179-83 (2006). On the broader topic, see Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L. L. 1 (2004).

24. INTERNATIONAL BAR ASSOCIATION, *supra* note 1, at 5.

25 Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation,* 44 CASE W. R.ES. J. INT'L L. 159 (2001) (describing the rise of this phenomenon).

26. Nico Krisch, *More Equal than the Rest? Hierarchy, Equality, and U.S. Predominance in International Law, in* UNITED STATES HEGEMONY AND THE FOUNDATION OF INTERNATIONAL LAW 135, 156 (Michael Byers & Georg Nolte eds., 2003) (describing the U.S. shift away from international law to using national law as a tool of foreign policy). For reciprocal court access, s*ee* Transboundary Pollution Reciprocal Access Act, R.S.O. ch. T.18 (1990) (Can.) (providing reciprocal court access to victims of transboundary pollution).

27. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (questioning the litigation explosion narrative in the U.S.).

28. Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against "Judicial Imperialism,"* 73 WASH. & LEE L. REV. 653, 696-98 (2016) (systematically analyzing when foreign sovereigns initiate lawsuits in the U.S.).

29. THE AMERICAN BAR FOUNDATION AND THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION, AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 35 (2009) (indicating that nearly half of U.S. lawyers are called upon to solve transnational legal problems for their clients, with almost two-thirds of lawyers at large law firms and serving as inside counsel report an international component to their practices); *see also* DONALD E. CHILDRESS III ET AL., TRANSNATIONAL LAW AND PRACTICE 4 (2015) (describing the increase in transnational practice)

30. Transnational law is now taught in law schools as a separate course from international law. Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 U.C. IRVINE L. REV. 97, 100 (2011); *see also* Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479, 479 (2006) (noting "the move to globalize the curriculum at other law schools has gathered steam, fueled by conferences, symposia, and workshops . . . with current efforts aimed at ensuring 'that the vast majority, if not all, of law school graduates have exposure to issues of international, transnational, and comparative law.'") (quotes omitted); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT'L L. REV. 745, 751-52 (2006) (describing how law

programs focus on the topic,[31] law firms have created new practice groups devoted to transnational disputes,[32] and the American Bar Association has attempted to facilitate transnational practice.[33] Whatever the primary cause, cases involving foreign elements and noncitizen defendants have increased in number and are here to stay.[34]

The growth of this kind of litigation in the United States is only part of the story. As other non-U.S. courts have expanded their jurisdictional reaches—perhaps mirroring the once-broad ambitions of U.S. doctrine[35]—competition now exists among forums.[36] While dismissal in a U.S. court once meant the practical end of litigation,[37] other forums increasingly

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schools include transnational law in the first-year curriculum).

31. *See, e.g.*, Stewart Center on the Global Legal Profession (IU Maurer School of Law); Center on the Legal Profession (Harvard Law School); Center for Transnational Litigation, Arbitration, and Commercial Law (NYU School of Law); Center for Transnational Legal Studies (Georgetown University Law Center); Center for Transnational Law and Business (University of Southern California Gould School of Law); The Dickinson Poon Transnational Law Institute (King's College London).

32. For a discussion of some of these developments, *see* Childress, *Rethinking Global Legalization, supra* note 9, at 1492, n. 5; Paul Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 303 (2008) (describing creation of specialized practices); *see also* Press Release, Gibson, Dunn & Crutcher LLP, *Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group* (Dec. 15, 2010).

33. *See* Laurel S. Terry and Carole Silver, *Transnational Legal Practice*, 49 ABA/SIL YIR (n.s.) 413 (2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641159.

34. The introduction to the Fourth Edition of Gary Born and Bo Rutledge's well-known casebook sums up the changes well. GARY BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS ix (5th ed. 2011) ("When the first edition of this book was completed in 1988, the field of international civil litigation did not exist in the United States. No case book addressed the subject and virtually no course at any major law school dealt with litigation of international disputes. Today, almost twenty years later, the fourth edition of this book has been joined by nearly a dozen ably-written competing casebooks on the subject of international civil litigation, a course which is taught at law schools around the United States. Practitioners, as well as academics, now regard international civil litigation as a vital, and profoundly challenging, area of the law."). For a discussion of academic discourse focused on transnational litigation, see Childress, *Rethinking Legal Globalization, supra* note 9, at 1501-06.

35. Mark A. Behrens, Gregory L. Fowler & Silvia Kim, *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 166 & n.4 (2008) (describing spread of U.S.-style litigation, including class action litigation, litigation funding, and punitive damages); R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT'L ORG. 103, 103 (2004) (taking the position that "American legal style is spreading to other jurisdictions" driven by functional pressures and political incentives). For a nuanced discussion of EU practice and how it differs from the U.S. approach, see Joanne Scott, *Extraterritoriality and Territorial Extension of EU Law*, 62 AM. J. COMP. L. 87 (2013).

36. Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31 (2012); *see also* Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States,* 54 HARV. INT'L L.J. 459 (2013) (describing increase of transnational disputes in foreign courts); Eugene Gulland, *All the World's a Forum*, NAT'L L. J., Feb. 11, 2002, at B13 ("Foreign courts are increasingly asserting jurisdiction over U.S. companies . . . ."); *see generally Developments in the Law: Extraterritoriality,* 124 HARV. L. REV. 1226 (2011) (describing increase in extraterritorial jurisdiction).

37. David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction*," 103 LAW Q. REV. 398, 418-20 (1987) (describing how those ousted from U.S. courts rarely pursue

appear receptive to transnational law claims by foreign litigants.[38] As Pamela Bookman recently described in depth:

> Three major developments signal foreign courts' growing attractiveness to transnational litigants: the increasing availability of higher damages awards, aggregate litigation, and alternative litigation funding arrangements. These features are evolving against a backdrop where the United States may no longer have the substantive law with the strictest liability standards or with the greatest extraterritorial reach, and foreign courts have relatively permissive rules of adjudicatory jurisdiction. The result . . . [is a] legal landscape with increasingly diverse forum choices for plaintiffs.[39]

Dismissed cases now also more often return to the U.S. in the form of judgment enforcement proceedings.[40] At the very least, with broad jurisdictional assertions the likelihood of parallel proceedings and concurrent assertions of jurisdiction increase.[41]

As the number of transnational cases have grown, so too have their complexity. From intricate securities and derivatives regulation[42] to transnational class actions,[43] courts struggle not only applying adjudicatory jurisdiction principles—themselves often convoluted—but also to understand the factual circumstances from which the cases arise. A number of unresolved doctrinal questions[44] and thorny conceptual and technical

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litigation elsewhere).

38. Bookman, *Litigation Isolationism, supra* note 15, at 1108-19 (describing in detail the growing potential of foreign courts to attract transnational litigation); Donald E. Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015) (describing forum competition in transnational cases); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation,* 94 CORNELL L. REV. 1, 3 (2008) (encouraging the filing of cases in foreign courts and for "litigants from countries with ineffective judicial systems to have their cases adjudicated in the courts of other nations that have better-functioning judicial systems").

39. Bookman, *Litigation Isolationism*, *supra* note 15, at 1110.

40. Pamela Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016). *See also* Christopher A. Whytock and Cassandra B. Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011) (describing "forum shopper's remorse" with cases being heard by foreign judiciaries after being dismissed from a U.S. court on *forum non conveniens* grounds); Whytock, *The Evolving Forum Shopping System*, *supra* note 27, at 506-16 (exploring through empirical analysis transnational forum shopping).

41. Austen L. Parrish, *Duplicative Foreign Litigation,* 78 GEO. WASH. L. REV. 237 (2010).

42. *See, e.g.*, Hannah Buxbaum, *Multinational Class Actions Under Federal Securities Laws: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L. L. 14 (2007); *see also* Junsun Park, *Global Expansion of National Securities Laws: Extraterritoriality and Jurisdictional Conflicts*, 12 U.N.H. L. REV. 69 (2014).

43. Debra Lyn Bassett, *Implied "Consent" to Personal Jurisdiction in Transnational Class Litigation*, 2004 MICH. ST. L. REV. 619 (2004); Debra Lyn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 FORDHAM L. REV. 41 (2003).

44. *See generally* Parrish, *Sovereignty*, *supra* note 10; *see also* Friedrich Juenger, *Personal Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1198 (1984).

issues (e.g., how to treat the internet and cyberspace in a territorial-based system)[45] also have led to confusion and a degree of uncertainty.

While issues of personal jurisdiction have immediate significance to the litigants—will the case go forward in a particular court—the question of adjudicatory authority also implicates a range of court access questions.[46] Where a plaintiff sues is often as important as under what law and how the plaintiff litigates. If courts narrow the places a plaintiff can sue, some suits are less likely to be filed. That concern is amplified in the international context, where a foreign forum may be largely unavailable. Jurisdictional decisions can also be a way for the courts to reach a particular outcome without directly addressing the merits or the substantive law.

On the other hand, if U.S. courts provide broad court access, disconnected from international agreement, forum shopping is encouraged and reciprocity questions come to the fore.[47] Are we comfortable encouraging other nations to provide forums for noncitizen plaintiffs to sue U.S. individuals and companies even when the plaintiffs and the U.S. entities have little or no connection to the foreign state? Other litigation strategies—what one scholar has characterized as forum selling, reverse auctions, and nonresident bias—may also be more pronounced in the international litigation context.[48] In this way, broad assertions of jurisdiction can lead to greater regulatory divergence, overlapping concurrent jurisdiction, and inconsistent obligations.

In international cases, personal jurisdiction doctrine has also become a tool for avoiding violations of international norms. Under legislative jurisdiction principles, Congress can assert that U.S. law applies anywhere in the world even when doing so violates international law.[49] While courts do not lightly presume that Congress has regulated the conduct of foreigners outside the United States[50] or in a way that would violate international law,[51] those presumptions can be overcome and U.S. law now routinely applies

45. *See* Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 365-78 (2015).

46. *See* Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. Rev. 2033, 2037 (2013) (empirical analysis finding that "the likelihood of meaningful court access in the foreign state is often low when court access is denied in the United States.").

47. Frederich K. Juenger, *Forum Shopping, Domestic and International*, 63 TULANE L. REV. 553, 560, 564 (1989) (describing international forum shopping and foreign shopping abroad).

48. Daniel M. Klerman, *Rethinking Personal Jurisdiction*, 6 J. OF LEGAL ANALYSIS 245, 246 (2014).

49. *See* Murray v. Schooner Charming Betsy (The Charming Betsy), 6 U.S. (2 Cranch) 64 (1804); Eric A. Posner & Cass R. Sunstein, *Chevroning Foreign Relations Law*, 116 YALE L.J. 1170, 1182-83 (2007) (noting that "Congress frequently enacts statutes that violate international law, apply extraterritorially, or otherwise ignore notions of comity.").

50. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Morrison v. National Australia Bank, Ltd., 561 U.S. 247 (2010).

51. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

outside U.S. borders.[52] Regulating conduct and activity anywhere in the world runs the risk of violating international jurisdictional law, which requires some substantial connection between the dispute and the nation where the litigation is pending.[53] As the Court has read almost no limits into Congress's authority to regulate extraterritorially—so long as it says so clearly—personal jurisdiction becomes a safeguard to prevent exorbitant U.S. government overreach, and from exceeding the enforcement limits imposed by public international law.[54] It is also important in cases where courts apply international law or foreign law, because in those instances issues of prescriptive jurisdiction[55] often disappear. In contexts when foreign and international law controls, personal jurisdiction may be the key limitation on a court's power.[56] And it can be the only backstop in cases involving unilateral extraterritorial civil discovery, where personal jurisdiction is often the critical, and only, restraint.[57]

At minimum, jurisdictional issues in international cases have the potential for greater spillover effects than their domestic counterparts. Broad assertions of jurisdiction, at least in some cases, may impact foreign relations and frustrate diplomatic initiatives.[58] How often cases ultimately implicate these concerns is unclear, but broad assertions of personal jurisdiction, when perceived to be exorbitant, raise many of the same

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52. *See, e.g.*, CHARLES DOYLE, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 94-166, at 1 (Congressional Research Service, 94th ed. 2007) ("A surprising number of federal criminal statutes have extraterritorial application . . . ."); *see also* Int'l Law Comm'n, Rep. on the Work of its Fifty-Eighth Session, UN Doc. A/61/10, at Annex E, 516 (2006) (describing the "increasingly common phenomenon" of U.S. laws regulating foreign conduct). For an argument that common law choice-of-law principles lead to extraterritorial application of law, see Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1091 (2009).

53. *See infra* sections IV.A and IV.C, notes 168 and 179. *Cf.* Florey, *What Personal Jurisdiction Doctrine Does*, *supra* note 13, at 1238-42 (describing how personal jurisdiction "prevent borderline applications of forum law).

54. Adjudicatory jurisdiction also becomes critical if the law that's being applied is itself derived from international law. Anthony Colangelo, Kiobel: *Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65, 68-70 (2013) (describing the issue).

55. Prescriptive jurisdiction, also sometimes referred to as legislative jurisdiction, is the power of a state "to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 401(a) (Am. Law Inst. 1987). In the U.S., prescriptive jurisdiction questions often focus on the issue of what conduct Congress intended to regulate when it enacted a statute.

56. Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 89 (2013).

57. BORN & RUTLEDGE, *supra* note 34, at 968, 997 (describing how U.S. courts are often willing to order broad unilateral discovery of evidence located abroad if the court has personal jurisdiction).

58. Bassett, *Implied "Consent*," *supra* note 43, at 634; Gary B. Born, *Reflections on Personal Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 28-29 (1987) (describing how broad jurisdictional assertions "can readily arouse foreign resentment" and "provoke diplomatic protests").

frustrations that extraterritorial legislative jurisdiction engender. In this way, the separation of powers issues (between the judicial and executive branch) have the potential to be more pronounced in the international context.[59] And, of course, classic questions of resource allocation and judicial competency exist related to what kinds of cases, against what kinds of defendants, U.S. courts are best equipped to hear.[60]

### *B. The Interplay with International Law*

These issues surrounding jurisdiction in international cases, while sometimes overlooked, are generally understood. Less appreciated is how issues of personal jurisdiction, at least on the margins, can impact vertical questions of law development. To the extent that domestic courts are readily available to resolve transnational disputes, the incentive for the executive and legislative branches to enter into collaborative bilateral or multilateral solutions may be reduced.[61] And while sub-state and local efforts can be critical complements to multilateral, global efforts,[62] on their own they can often lead to fragmentation and balkanization[63] and undermine meaningful, more effective, global governance.[64]

Political scientist Tonya Putnam's recent work, while focused on extraterritorial legislative jurisdiction, describes how this phenomenon can occur.[65] The antitrust law context is the classic example. The ability of plaintiffs to sue foreigners for foreign activity in the U.S. provided a remedy where none existed internationally, but ultimately reduced incentives for the

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59. LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 289 (1986).

60. *See* Jose Alvarez, *The Internationalization of U.S. Law*, 47 COLUM. J. TRANSNAT'L L. 537 (2009).

61. TONYA L. PUTNAM, COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY 6 (2016) ("Where U.S. extraterritoriality has proven effective in safeguarding the transnational interests of U.S. entities, there is often little urgency for the U.S. government to bargain with others over coordinated rules.").

62. *See generally* ALFRED AMAN & CAROL GREENHOUSE, TRANSNATIONAL LAW: CASES AND PROBLEMS IN AN INTERCONNECTED WORLD (2017).

63. For a general discussion, see EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY: THE ROLE OF NATIONAL AND INTERNATIONAL COURTS (2017). For a recent description in the context of financial regulation, see Matthias Lehmann, *Legal Fragmentation, Extraterritoriality and Uncertainty in Global Financial Regulation*, 37 OXFORD J. LEG. STUD. 406, 407-08 (2017) (describing how legal fragmentation and extraterritoriality are bemoaned, analyzing the causes of fragmentation, and proposing the necessity of collaborative approaches).

64. *Cf.* Ellen Gutterman, *Banning Bribes Abroad: U.S. Enforcement of the Foreign Corrupt Practices Act and Its Impact on the Global Governance of Corruption*, EUR. POL. SCI. (Apr. 13, 2018), *available at* https://doi.org/10.1057/s41304-018-0153-z (arguing that U.S. extraterritorial application of the Foreign Corrupt Practice Act "shapes international anti-corruption efforts in ways that may run counter to effective governance practices and meaningful anti-corruption reform in the global economy").

65. PUTNAM, *supra* note 61, at 6-7.

U.S. to enter into a harmonized international regime.[66] Opening up domestic courts to resolve international cases filled an enforcement gap, but at the same time lessened pressure for the U.S. to find a politically palatable or harmonized international solution. While in theory high-profile cases might engender legislative solutions,[67] usually they have not.[68] Personal jurisdiction cases impose particular challenges because the constitutional nature of the doctrine can later hamstring international negotiations, making agreements more difficult to reach.[69]

At one time commentators thought differently. Scholars once speculated that unilateral extraterritorial regulation, enforced through the courts, might spur international efforts or serve as a stop-gap measure.[70] This proved true in narrow set of cases. When a foreign nation refuses to engage or consider harmonized solutions, unilateral extraterritorial regulation may potentially serve as a political tool to bring the recalcitrant party to the table. And it may be the only approach possible when dealing with a small number of so-called rogue nations, unwilling to engage at all with international norms.

But for the most part, the speculation proved wrong. International harmonization is usually not the final result, and temporary measures have often developed into long-standing practice even with allies where multilateral agreement is possible. Moreover, in recent years, it is the U.S. that has often been the stumbling block to international, collaborative agreement. The U.S. has had a tendency, at least in the public law context, to at times ignore its international legal obligations,[71] to read them

66. For example, the United States began applying its antitrust laws extraterritorially in the 1940s. Yet not until 1999 did the United States enter its first bilateral antitrust agreement. Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 912-13, 921 (2003); *see also* Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U. L. REV. 1142 (2001) (proposing internationalization over extraterritorial national regulation). *See generally* PUTNAM, *supra* note 61, at 149-51 (describing forces motivating U.S. preference for unilateralism).

67. *See, e.g.*, Jennifer Daskal, Microsoft Ireland, *the CLOUD Act, and International Lawmaking 2.0*, 71 STAN. L. REV. 9, 9 (2018) (describing how the CLOUD Act mooted "one of the most closely watched Supreme Court cases" of the term).

68. Parrish, *Reclaiming International Law, supra* note 6, at 871-72 (explaining how extraterritoriality interferes with harmonization and multilateralism).

69. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 320-27, 330-31 (2002); *see also* Fredrich K. Juenger, *The American Law of General Jurisdiction,* 2001 U. CHI. LEGAL F. 141, 163-65.

70. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 166-67 (1998) (suggesting that extraterritorial regulation can spur cooperation by providing incentives to negotiate); John C. Coffee, Jr., *Extraterritorial Financial Regulation: Why E.T. Can't Come Home*, 99 CORNELL L. REV. 1259, 1261 (2014) (arguing that the assertion of extraterritorial authority can be viewed as an "interim stage in the eventual development of meaningful soft-law standards").

71. For a provocative argument along these lines, see PHILIPPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES 227-28, 233 (2005) (arguing that

narrowly,[72] or to exhibit outright hostility to international norms.[73] In these situations, extraterritorial regulation, instead of having a salutary effect, further reduces the incentive for the U.S. to negotiate or compromise, because it can achieve its short-term goals unilaterally.[74] The consensus position outside the U.S. is that this unilateral action is also often unlawful and illegitimate, further straining relationships.[75]

At any rate, the deck is artificially stacked in favor of unilateral action, of which extraterritorial regulation is a particular form. Bilateral and multilateral solutions take time, require sophisticated diplomacy, and often demand compromise.[76] The benefits of extraterritorial regulation for courts and legislature are usually felt more immediately (providing relief for an individual litigant), while the benefits of harmonized regulation can be longer-term. Sometimes portraying foreigners and foreign systems as causing harm is simply politically expedient. Xenophobia and the rhetoric of strident nationalism, as well as anti-immigrant sentiment, can play a role, too. Political incentives also may exist to target foreign activity and conduct.[77] This was particularly true in the tough-on-crime movement following the terrorist attacks of September 11, 2001.

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the U.S. had "such scant regard for the international rule of law" that after 9/11 it believed "the rewriting of international conventions could be achieved unilaterally" and therefore would "trash an international treaty by arguing that it posed a threat to American sovereignty"). More recently, a wide-range of U.S. actions, from strikes in Syria to U.S. treatment of immigrants and refugees has been said to violate international law. *See, e.g.*, Harold Hongju Koh, *The Trump Administration and International Law,* 56 WASHBURN L.J. 413 (2017) (delivering the Foulston Siefkin Lecture) (describing international law violations); Nick Cumming-Bruce, *Taking Migrant Children From Parents is Illegal, U.N. Tells U.S.,* NEW YORK TIMES (June 5, 2018), https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.htm (U.N. asserting that U.S. was violating international law).

72. Margaret F. McGuinness, Medellin, *Norm Portals and the Horizontal Integration of Human Rights*, 82 NOTRE DAME L. REV. 755, 759 (2006); *see also* MICHAEL IGNATIEFF, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 3-11 (Michael Ignatieff ed. 2005) (describing how the U.S. embraces exceptionalism and double standards).

73. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2354 (2006) (describing a strategy of "strategic unilateralism and tactical multilateralism characterized by a broad antipathy toward international law"); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1197 (2005) (describing the "dazzlingly broad" U.S. disengagement from multilateral treaties and international legal obligations); *see also* Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 458-60 (1998) (describing the U.S. failure to fully respect its treaty obligations in the 1990s).

74. For some of the problems with this approach, *see* Alfred P. Rubin, *Can the United States Police the World?*, 13 FLETCHER F. WORLD AFF. 371, 374 (1989) ("Our actions would be more effective if aimed at achieving international cooperation in ways consistent with the international legal order, instead of simply asserting wider American prescriptive, adjudicatory, and enforcement jurisdiction.").

75. For a discussion, *see* Paul B. Stephan, *A Becoming Modesty—U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 639-40 (2002) ("International lawyers have complained about U.S. civil litigation for almost sixty years.").

76. Oona A. Hathaway, *Treaties' End: The Past, Present and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1241 (2008) (describing the limits of traditional treaties).

77 Paul B. Stephan, *The Political Economy of Extraterritoriality*, 1 POL. & GOVERNANCE 92, 93-94 (2013) (explaining how one would predict that Congress would seek to protect domestic producers and push for extraterritorial application of U.S. regulation because "foreign interests do not participate

A form of exceptionalism may also be at play.[78] Usually extraterritorial regulation is driven by the belief that U.S. laws are better, or at least substantively different, than foreign laws.[79] Once enacted, eliminating existing extraterritorial regulation of foreigners is challenging and often not politically viable. Those who are most impacted by extraterritorial laws do not have a formal say in the political system, and are less equipped to prevent their passage or to push for their repeal. Taken together, powerful nations like the U.S. tend to embrace extraterritorial regulation.[80] This is extraterritoriality's creep.

Cases involving non-resident foreign defendants—particularly those cases brought by foreign plaintiffs—can have an impact on international law and foreign law formation, too. Part of this is how legal norms migrate between different legal systems,[81] but also how international and domestic law and politics feed off one another.[82] Broad assertions of extraterritorial power by the U.S. has led other nations to adopt similar, and sometimes broader, approaches.[83] If U.S. influence wanes somewhat as its role on the

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in elections" and "it lacks foreign interlocutors to challenge its choices").

78. *See* James C. Hathaway, *America, Defender of Democratic Legitimacy*, 11 EUR. J. INT'L L. 121 (2000) (describing American exceptionalism); Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480-87 (2003) (same); *see generally* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005) (a collection of essays describing American exceptionalism in its different forms).

79. IGNATIEFF, *supra* note 72 at 8-9 (describing in the human rights context a "judicial attitude" "anchored in a broad popular sentiment that the land of Jefferson and Lincoln has nothing to learn about rights from any other country").

80. Krisch, *More Equal than the Rest?*, *supra* note 26, at 156 (describing U.S. use of domestic law as a tool of foreign policy); *see also* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 388 (2005) (describing U.S. reluctance to use international treaties and resort to extraterritorial regulation).

81. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1574 (2006); *see also* Yves Dezalay & Bryant Garth, *Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimization in State Transformation, 1960-2000*, *in* TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 199 (Michael Likosky ed., 2002) (describing how ideas and norms are imported and exported).

82. *See* YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); *see also* Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U. L. REV. 635 (2011); Alfred C. Aman, Jr., Professor of Law, Indiana University Maurer School of Law, Remarks at Conference: University Pantheon-Assas (Paris 2) The Internationalization of Administrative Law: The Transnationalization of Domestic Law: A Perspective from the United States (May 24-26, 2018) (describing how globalization has resulted in the transnationalization of domestic administrative law in the U.S.). For an example, see Gutterman, *supra* note 64 (describing how "the international regime of anti-corruption is an attempt by the USA to internationalize specifically American norms concerning the conduct of international business" and "that the central purpose of FCPA enforcement is to ensure competitive access to global markets by US firms—not to control corruption more generally").

83. *See generally* Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012); *cf.* Sarah C. Kaczmorek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORGANIZATION 745 (2011) (empirical analysis

international stage diminishes and as other competitors arise, it may be that other domestic court systems will vie to become the primary generators of substantive international norms. This is particularly true as the legal profession in many respects globalizes. The worry is that norms developed in other court systems through a global common law approach will not necessarily be consistent with U.S. interests or consistent with basic notions of human and environmental rights. At least one should anticipate that courts in other countries will act strategically and in their own citizen's interests.

## III. THE LEGAL LANDSCAPE

Given the importance of international cases and their implications, one might expect the U.S. Supreme Court to have given these cases more sustained attention. The awareness of the transnational dimensions of personal jurisdiction, however, is a relatively new phenomenon. Only in its most recent decisions does the Court appear more alert to their international contexts,[84] with hints that the Justices recognize that cases with foreign, non-resident defendants raise distinct and different issues.

### *A. The Beginnings of Modern Doctrine (1945-1958)*

The canonical story of personal jurisdiction is well understood. In 1945, *International Shoe* broke with the past, moved beyond the strict territorial conceptions of power articulated in *Pennoyer* and its progeny, and the minimum contacts test was born.[85] Since then, the Court has struggled to determine how much of *Pennoyer*'s older scheme remains, and how much has been replaced entirely.[86] Oversimplified, *Pennoyer* is often painted as the champion of sovereignty with a rigid territorial conception of power, while *International Shoe* is viewed as the fountainhead of a modern doctrine focused on fairness and individual liberty.[87] Certainly as a descriptive matter, over time the touchstone for determining adjudicatory jurisdiction in the interstate context moved away from the geographic question of the defendant's location, and moved toward asking whether requiring a defendant to defend in a foreign forum was reasonable. Commentary on

describing responses to U.S. extraterritorial laws and identifying spillover effects).

84. Lower courts have struggled as well. *See* Childress, *Rethinking Legal Globalization*, *supra* note 9, at 1523, nn.175-80 (listing lower court decisions).

85. Pennoyer v. Neff, 95 U.S. 714 (1877).

86. Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 CAL. L. REV. 257, 270, 298 (1990).

87. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

these developments in the domestic context is extensive, with hundreds of law review articles detailing the doctrinal twists and turns.[88]

The canonical story is incomplete. For one, it is oversimplified. Sovereignty-based considerations never fully disappeared. Indeed, *International Shoe*'s minimum contacts standard remains dependent on territorial considerations, requiring a certain relationship with the forum.[89] The difference is that *Pennoyer* limited jurisdiction by express reference to existing and fixed international and common law rules, while *International Shoe* suggested states could "fashion new bases of jurisdiction."[90] Arguably, *International Shoe* was more focused on making "plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded."[91]

In this vein, *International Shoe* can't be divorced from a number of its cousins decided in the same era that advanced a particular approach to judicial decision-making. *International Shoe* and its progeny reflected less a coherent and overarching account of the allocation of state adjudicatory authority in an international system, and more the triumph in the domestic context of legal realism over legal formalism, a move to a more individualized case-specific approach to judicial decision-making, and the perceived value of standards over rules. Cases like *Mullane*[92] and *Erie*[93] are the most well-known of these cousins. But similar trends occurred in a wide swath of law.[94]

*International Shoe* and the cases that followed also reflected broader changes occurring in the nation. By the 1950s, no longer were civil disputes

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88. For several well-known examples, see Lea Brilmayer, R*elated Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box,* 32 B.C. L. REV. 529 (1991); Martin H. Redish, D*ue Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Arthur T. von Mehren & Donald T. Trautman, J*urisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121 (1966). For several recent examples, see Adam Steinman, *Access to Justice, Rationality, and Personal Jurisdiction,* 71 VAND. L. REV. 1401 (2018); Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1313-1327 (2017); Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129 (2015).

89. Willis L.M. Reese, *Legislative Jurisdiction,* 78 COLUM. L. REV. 1587, 1591-92 (describing how that without minimum contacts "a state can have no interest would justify its hearing the case" and that "[f]or it to do so under such circumstances would constitute an improper infringement on the interests of one or more other states").

90. For this point, see Juenger, *Personal Jurisdiction*, *supra* note 44 at 1198.

91. Nicastro, 131 S. Ct. at 2798 (Ginsburg, J., dissenting) ("[I]n *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably 'presence' and 'implied consent,' should be discarded, for they conceal the actual bases on which jurisdiction rests."); *see also* Burnham v. Superior Court of Cal., County of Marin, 495 U.S. 604, 618 (1990) (plurality opinion) (*International Shoe* "cast … aside" fictions of "consent" and "presence").

92. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

93. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

94. George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347, 347 (describing how doctrines of adjudicatory and legislative jurisdiction were "swept clear of nearly all rules, at least those that [could] be applied in more or less determinate fashion").

so local. Interstate disputes were increasingly becoming common in the post-World II economy as corporations and other entities grew in size and number, and law took on a more prominent role in a national economy.[95] The great changes in the 1930s and 1940s had enhanced federal power,[96] and following the Second World War the expansion of civil and individual rights with the Warren Court depended on relatively strong federal judicial power.[97] Broad assertions of federal power, including federal judicial power, were essential to carrying out the expansion of regulatory authority that existed post-New Deal.[98] Shortly after, the great revolution in choice of law and conflicts made state territorial limitations on power—in whatever context they appeared—seem quaint.[99] And soon after it became popular to declare sovereignty dead, at least when describing "our federalism."[100]

These cases from the 1940s and 1950s, as focused as they were on the growth of national power relative to state power within the U.S., did not particularly pay attention to the international system. In some respects, they represented a step back from international law. In *Pennoyer*, public international law was the backdrop upon which the Due Process Clause operated,[101] and *Pennoyer* specifically relied on Wheaton's treatise on

95. *See* Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1146-47 (1966) (explaining how the "growing mobility and complexity of modern life" lies behind jurisdictional developments in the field).

96. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (broadly interpreting the Federal's Government's power under the Commerce Clause).

97. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL COURT SYSTEM (1st ed. 1953); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688 (1989) (book review).

98. KAL RAUSTIALA, DOES THE CONSTITUTIONAL FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009); *see also* Kal Raustiala, *The Architecture of International Cooperation*: *Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 12-13 (2002) ("In the New Deal and immediate postwar eras, domestic regulatory law expanded markedly in the U.S. and across the globe.").

99. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1194-1205 (1987) (describing revolution in American choice of law); *see also* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2454-70 (1999) (setting out history of choice of law theory and move away from territorial theories most associated with Joseph Beale and the Restatement (First) of Conflict of Laws). For a recent discussion, see Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy,* 27 DUKE J. COMP. & INT'L L. 381, 386-95 (2017).

100. Heather Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 7 (2010) (noting "that scholars regularly announce the death of sovereignty" but that "they remain haunted by its ghost") (citing Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950)); Heather Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1698 (2017) (noting "the stubborn facts of modernization shifted federalism debates away from the separate spheres approach, which depicts states and the federal government as dual sovereigns confined to their own regulatory empires.").

101. *See* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 CAL. L. REV. 257, 270, 298 (1990) (explaining how personal jurisdiction doctrine in the United States was "clearly an outgrowth of common law principles of international sovereignty" and that *Pennoyer* engrafted "the sovereignty-based international law approach to territorial jurisdiction").

international law in reaching its decision.[102] *International Shoe*, while still drawing from international law principles, broke with this tradition, creating its own standard for domestic cases by purporting to interpret what the Due Process Clause itself required. While it may or may not have encapsulated a federalism principle for interstate interaction, it did not purport to consider the structural limits of the international system.

Only one personal jurisdiction case in this era involved a foreign defendant. In 1952, in *Perkins v. Benguet Consolidated Mining Co.*,[103] a plaintiff sued a Philippines corporation doing business in Ohio during World War II on claims arising in the Philippines. But in many ways the case was not an international case at all, given that the foreign corporation had fully relocated its headquarters to Ohio. But the court did not distinguish foreign defendants of other countries from "foreign" defendants of other U.S. states. The Court certainly didn't discuss international law, and restricted itself to questions of federal due process.[104]

This is not entirely surprising. The 1950s was hardly a friendly time for international law (jurisdictional or otherwise).[105] As much as federal rights were overshadowing state rights,[106] so too was federal authority, in the form of American exceptionalism, amassing power relative to international law. The shadow of *Erie* also perhaps loomed large. Just as federal law became more important, *Erie* made integrating international law more difficult.[107] At the same time, in the U.S., territorial limits on other forms of jurisdiction[108] and in conflicts of law[109] were also beginning to erode, and in both contexts sometimes arguably in violation of international norms.[110] And for a variety

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102. *Pennoyer*, 95 U.S. at 722. This reliance on international law was consistent with a large number of early decisions. *See* Galpin v. Page, 85 U.S. (18 Wall.) 350, 367 (1873); D'Arcy v. Ketchum, 52 U.S. (11 How.) 165, 174 (1850); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 255 (1827); *see generally* Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction,* 57 GEO. WASH. L. REV. 849, 872 & nn.116-20 (1989) (listing cases approaching personal jurisdiction using principles from the Law of Nations).

103. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

104. *Id.*

105. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

106. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA (2000).

107. *See* Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121 (1998).

108. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (expanding jurisdiction based on effects). For a general overview, see KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009).

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

110. P.C.F. Pettite & C.J.D. Slyles, *The International Response to the Extraterritorial Application of United*

of reasons, defendants rarely invoked international law to check jurisdictional overreach.[111]

### *B. The National Cases (1975-1990)*

From 1958 until 1977, the Court decided no personal jurisdiction decisions. The next line of cases, from the late 1970s and 1980s—cases like *World-Wide Volkswagen Corp. v. Woodson,*[112] *Burger King Corp. v. Rudzewicz,*[113] and *Asahi Metal Industries Co. v. Superior Court*[114]—are usually portrayed as the Court struggling to apply the new doctrine laid down in *International Shoe*. And that's true. From a transnational perspective, though, the 1970s and the 1980s decisions were squarely national cases—focused on national issues, federalism debates, and the rise of legal realism—even when those cases had international elements.

Common law limits on jurisdiction drawn from public international law had been replaced in domestic, interstate cases with independent Constitutional limits. As the American economy continued to grow and transform, the Court continued to feel pressure to expand the scope of personal jurisdiction. Federal power was still ascendant in the 1970s and early 1980s, as this was before the height of the state rights movement of the Rehnquist Court,[115] and long before the new federalism backlash that sought to constrain the power of state court authority vis-à-vis other states.[116] Interstate relations faded so far into the background that state borders began to mean less in the personal jurisdiction context. Indeed, in the early 1980s, the majority of academic commentary sought to explain

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*States Antitrust Laws*, 37 BUS. LAW. 697 (1982) (describing defensive measures imposed in response to aggressive U.S. regulation).

111. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process,* 105 HARV. L. REV. 1217, 1219 (1992).

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

113. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

114. Asahi Metal Industries Co. v. Superior Court, 480 U.S. 102 (1987).

115. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003) (describing the first Rehnquist Court lasting from 1986 to 1994 and the focus in the 1990s on federalism and localism); *see also* Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331, 1339 (2006) (describing the narrowing and constraining of federal power under the Rehnquist Court).

116. For a discussion of these issues, *see* Thomas B. Colby, *In Defense of Equal Sovereignty,* 65 DUKE L. J. 1087 (2016); Allen Erbsen, *Horizontal Federalism,* 93 MINN. L. REV. 493 (2008) (a systematic scrutiny of horizontal federalism); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (describing constitutional limits on state power); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007) (discussing the horizontal aspects of federalism). For scholarship discussing extraterritoriality in the U.S. state context, see Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009).

either how the court's personal jurisdiction doctrine still reflected at least some aspect of interstate federalism or didn't reflect anything about federalism at all.[117]

Against this backdrop, the small number of personal jurisdiction cases that had international dimensions were lumped together with their domestic counterparts.[118] From 1952 (when *Perkins* was decided) through 2011, only three cases before the Supreme Court had international elements: *Insurance Co. of Ireland v. Compagnie des Bauxites*,[119] *Helicopteros Nacionales v. Hall*,[120] and *Asahi Metal Industries Co. v. Superior Court*.[121] With the exception of *Asahi*, none of them paid explicit attention to the international aspects of the case, and none mentioned international law. The "cases routinely applied the minimum contacts test developed in domestic cases, without addressing whether the standard was appropriate in the international context."[122] At the same time, scholarly commentary about international litigation was sparse, with the most influential articles not appearing until the 1980s.[123]

In hindsight there were reasons for this approach. For over a century, the international limits on jurisdiction were basically the same as the domestic limits. No need existed to make a distinction because both were largely drawn from the same limits of sovereign authority. It was only as domestic law moved away from state sovereignty as a limit on authority that domestic and international law began to diverge. Domestically, the Court began to place increased emphasis on "traditional notions of fair play and substantial justice," focusing on the reasonableness and fairness of jurisdiction.[124] This change occurred at the same time that the more formal,

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117. Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981) (famously arguing that state borders and federalism should not play any role in personal jurisdiction); John N. Drobak, *The Federalism Theme in Personal Jurisdiction,* 68 IOWA L. REV. 1015 (1983) (explaining the limited role that federalism plays in the personal jurisdiction analysis); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction,* 65 TEX. L. REV. 689, 689 (1987) (arguing for the continued importance of state borders and that jurisdictional assertions should "reflect the general limits on state sovereignty inherent in a federal system").

118. Parrish, *Sovereignty*, *supra* note 10, at 4-5 (collecting sources and describing how courts and commentators traditionally do not distinguish between domestic and international cases in the personal jurisdiction context); *see also* 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) (explaining how the same standards apply for personal jurisdiction over foreign defendants and U.S. defendants).

119. 456 U.S. 694 (1982).

120. 466 U.S. 408 (1984).

121. 480 U.S. 102 (1987).

122. Born, *supra* note 58, at 6; *cf.* Juenger, *Personal Jurisdiction in the United States, supra* note 44, at 1202.

123. *See, e.g.*, Degnan & Kane, *supra* note 21; Lilly, *supra* note 21.

124. *See* Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105 (1991) (describing how *International Shoe* and later cases broke from the theory of sovereignty underlying adjudicatory jurisdiction).

brighter lines rules of jurisdiction gave way to more free-flowing interest-balancing, similar to what had happened in the conflicts revolution and the interest balancing that briefly held sway in the legislative jurisdiction context in the late 1970s and 1980s.[125]

A striking example is found with *Insurance Corp. of Ireland*. That case involved a Delaware company doing business only in the Republic of Guinea, which bought insurance from a broker in London, England to cover the Guinea operations.[126] After the non-U.S. insurance companies failed to pay on a claim, the Delaware company brought suit in Pennsylvania.[127] The London insurers claimed the U.S. court lacked personal jurisdiction and filed for summary judgment.[128] The plaintiff served discovery, the defendants refused to respond, and the court issued sanctions.[129] The question was whether jurisdiction existed for the lower court to issue discovery sanctions.

While a relatively short decision, the Court's opinion is most known for Justice White's focus on individual liberty. His opinion observed that "the personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." Any restrictions imposed by individual U.S. state sovereignty, White explained, "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."[130] In this way, the statement in *Insurance Corp of Ireland* appeared to be a retreat from the Court's explanation in *World-Wide Volkswagen* that, in the domestic context, the Due Process Clause served two related functions: (1) to "protect[] the defendant against the burden of litigating in a distant . . . forum"; and (2) to "ensure that the States . . . d[id] not reach out beyond the limits imported on them by their status as co-equal sovereigns in a federal system."[131]

Yet it was clear that White was addressing interstate federalism and the sovereignty of states, not the sovereignty of nations. Many believe the

125. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 612-15 (9th Cir. 1976) (applying interest balancing); Mannington Mill, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979) (same); *see also* Hannah L. Buxbaum, *The Private Attorney General in a Global Age; Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 227 (2001) (describing the rise and fall of interest balancing). The Supreme Court appeared to reject the reasonableness requirement in 1993. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

126. 456 U.S. at 696-98.

127. *Id.* at 698.

128. *Id.*

129. *Id.* at 698-700.

130. *Id.* at 703, n.10.

131. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) ("The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions.").

Court's decision in *Insurance Corp. of Ireland* and its rejection of sovereignty considerations was a direct response to Martin Redish's seminal 1981 article, which objected to the use of federalism considerations in the personal jurisdiction analysis.[132] But similar to White, Redish's article was limited to addressing whether the Fourteenth Amendment's Due Process clause encapsulated interstate federalism concerns. His article did not address the structural limitations of the international system. At best it might be said that Redish believed the Due Process Clause did not encapsulate those international considerations. Or said differently, Redish's point was not that a nation-state's sovereign power was limitless, but rather that the Constitution wasn't the source of those limits.[133]

It was not until *Asahi* was decided in 1987 that the Court expressly recognized that international cases presented special considerations.[134] That case arose when a motorcycle's rear tire exploded in California, causing the motorcycle to collide with a tractor.[135] The California motorcyclist sued several defendants, including the Taiwanese manufacturer of the tire tube, alleging the parts were defective.[136] Ultimately, the plaintiffs' claims were settled, leaving only an indemnity claim that had been brought by the Taiwanese tire manufacturer against a Japanese manufacturer of the tire's stem valve assembly. The issue before the Court was whether the California court had specific jurisdiction over the Japanese corporation by virtue of it having placed "goods into interstate or international commerce" that eventually caused harm in California.[137]

In *Asahi*, the Court ultimately found it unreasonable for the Japanese corporation to have to defend an indemnity claim in California brought by

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132. Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); *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, 79 n.163, 88 n.229 (2004) (noting how 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) (describing how Professor Redish influenced the Court and "forced a hasty retreat" from reliance on interstate federalism as a concern of personal jurisdiction).

133. Redish, *supra* note 132, at 1114 (describing how the interests of private parties should be the raison d'etre for constitutionally limiting the reach of state personal jurisdiction, rather than concerns of interstate sovereignty); Degnan & Kane, *supra* note 21, at 815, n.69 (noting how Redish and others, whether right or wrong in the interstate context, "do not undercut the validity of the Court's statements regarding the sovereignty basis for jurisdiction in the international order").

134. *See* Childress, *Rethinking Legal Globalization*, *supra* note 9, at 1521 (describing "transnational reasonableness factors" as: (1) the "procedural and substantive policies of other nations"; (2) the "unique burdens" placed upon one who must defend oneself in a foreign legal system; and (3) the foreign relations implications of the cases).

135. *Asahi*, 480 U.S. at 105-06.

136. *Id.* at 106.

137. *Id.*

the Taiwanese corporation.[138] The Court warned that the burden of mounting a defense in a foreign legal system is "unique." As the Court cautioned: "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." And due process requires a court to "consider the procedural and substantive policies of other nations whose interests are affected" by the assertion of jurisdiction.[139] *Asahi* made clear with its two-pronged approach that the Court must first have power to hear a case (determined by the relationship between the forum and the defendant), before it would consider various interests in deciding whether to decline jurisdiction. In this respect, while not addressing the differences between state power in the interstate versus international context, it adopted an approach that: (1) would limit authority of courts through principles of sovereignty; and (2) then apply comity-based considerations to decline jurisdiction when doing so was appropriate under the facts of the case.[140]

*Asahi* raised more questions than it answered. The Court mostly "focused on the distance that the [foreign] defendant would be forced to travel to defend itself," and the other burdens the defendant would face.[141] The Court did not articulate what exact weight to afford foreign interests,[142] and lower courts after *Asahi* displayed a great deal of uncertainty as to how to account for them.[143] It was unclear how interest balancing (reasonableness analysis) mapped onto other comity-based doctrines (e.g., *forum non conveniens*). Following *Asahi,* the stream of commerce analysis—the other main issue in the case—dominated the jurisdictional landscape and the international aspects of cases were largely overlooked.[144]

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138. For a discussion, *see* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1437, nn.202-204 (2018).

139. *Asahi,* 480 U.S. at 115.

140. Comity in the form of second prong of the personal jurisdiction analysis is used in a way akin to its use in judicial abstention, *forum non conveniens*, and other contexts. For the seminal article, *see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); *see also* Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982).

141. Earl M. Matz, *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, 679 (1987).

142. Degnan & Kane, *supra* note 21, at 800 (noting that *Asahi* only recognized that courts should be aware of the special burdens imposed on aliens, but "failed to adequately come to grips with what special consideration ought to be given").

143. *See* Parrish, *Sovereignty, supra* note 10, at 22–25 (citing cases); *see also* 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 (1991).

144. Dubinsky, *supra* note 32, at 306, 355-57; *see also* BORN & RUTLEDGE, *supra* note 34; Childress, *Rethinking Legal Globalization*, *supra* note 9.

### *C. The International Cases (2011-Present)*

After *Asahi*, the Supreme Court neglected personal jurisdiction in international cases for almost a quarter century. Beginning in 2011, however, the U.S. Supreme Court began to hear a flurry of transnational cases in the personal jurisdiction and legislative jurisdiction contexts.[145] The cases' transnational elements, for the first time, seemed more at the forefront of the Court's attention,[146] even though the Court continued to decline to explicitly create a different doctrinal standard when non-resident, foreign defendants are involved.[147] Convoluting the analysis in all these cases, however, was the Court's turn away from the legal realism driven approaches developed in the 1970s and 1980s, the resuscitation of bright line rules, as well as the dislike by some justices of private rights litigation. Indeed, these other considerations, animated by a strikingly different vision of judging than what existed during the earlier era (at least until the mid-1980s), may well have motivated the results. Nevertheless, the international context also loomed large.

The first significant case was *J. McIntyre Machinery v. Nicastro*. In that case, a plaintiff suffered a serious injury while operating a shearing machine in New Jersey, at the company where he worked.[148] The plaintiff filed a lawsuit in New Jersey against the British manufacturer of the shearing machine.[149] The issue was whether personal jurisdiction existed over the British corporation. Writing for a plurality in a splintered opinion, Justice Kennedy found jurisdiction lacking because the foreign defendant had insufficient contacts with New Jersey.

The plurality relied heavily on sovereignty-based considerations in its

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145. As Linda Silberman recently noted, "we are in an era in which transnational cases are the norm rather than the exception." Silberman, *End of an Era, supra* note 19, at 692.

146. Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 777 (2017) (arguing that in recent cases the "Court was driven more by a commitment to formalist evaluation of individual cases and a generalized resistance to allowing United States courts to serve as a magnet for transnational litigation."); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 42 (2014) (explaining how in diverse areas, including in the personal jurisdiction context, "the Supreme Court has restricted private regulatory enforcement in U.S. courts to prevent interference with foreign nations' efforts to regulate harm"); *cf.* Childress, *Rethinking Legal Globalization*, *supra* note 9, at 1494 (arguing that the Court "never addressed the transnational facts of the cases [in *McIntyre* and *Goodyear*]").

147. Florey, *supra* note 13, at 1248 ("Although it is at times clear that members of the Court have been primarily driven by concern for non-U.S. defendants, the Court in its recent cases has not made any formal distinction between the doctrine applicable to foreign defendants and U.S. ones . . . ."); Childress, *Rethinking Legal Globalization*, *supra* note 9, at 1494 (explaining how the Court based its decisions on domestic personal jurisdiction doctrine).

148. *Nicastro*, 131 S. Ct. at 2786.

149. *Id.*

decision, emphasizing that the "United States is a distinct sovereign."[150] As others have described, Justice Kennedy "repeatedly spoke about personal jurisdiction in structural terms of judicial power, sovereignty, and sovereign authority, submission by the defendant (through its conduct) to the power of the sovereign, and the invalidity of a 'judgment rendered in the absence of authority.'"[151] While noting that different considerations can be in play,[152] Justice Kennedy drew a direct connection to the Court's legislative jurisdiction cases, explaining that the limitation on lawful power "with respect to the power of the sovereign to resolve disputes through judicial process" exist just as they do "with respect to the power of the sovereign to prescribe rules of conduct."[153] Perhaps this could have been predicted. The Court the prior term had decided a landmark legislative jurisdiction case in *Morrison v. National Australia Bank* that had imposed territorial limitations on legislative jurisdiction through a strong version of the presumption against extraterritoriality.[154]

Justice Ginsburg in her dissent reached a different conclusion on the facts. But while she was not inclined to focus on sovereignty (particularly as it related to New Jersey as a state), she too was keenly aware of the lawsuit's international context. While Justice Ginsburg found that the defendant had targeted the United States (something Justice Kennedy did not agree with factually, as his focus was on New Jersey), she was clear that domestic federalism concerns were not in play and that the critical issue related to the United States as a nation within an international system.[155]

The Court's decision in *Daimler v. Bauman*—decided just a few years later—was also motivated, in part, by a recognition that foreign, nonresident defendants raise different considerations. In *Daimler*, the case involved Argentinian plaintiffs suing Mercedes-Benz for actions taken during the Argentinian "Dirty War."[156] The Court concluded that doing business in a state was insufficient; rather, the key question was whether the defendant was "at home" in the forum.[157] The Court was "driven in substantial part by concern for the plight of foreign defendants,"[158] worried that a "global

150. *Id.* at 2789.

151. Wasserman, *supra* note 7, at 320 (citing *McIntyre*, 131 S. Ct. at 2790-91).

152. *Nicastro*, 131 S. Ct. at 2790 ("A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts.").

153. *Id.* at 2787-88.

154. 561 U.S. 247 (2010).

155. *Nicastro*, 131 S. Ct. at 2798 ("[N]o issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case.").

156. *Daimler*, 134 S. Ct. at 751-52.

157. *Id.* at 760-62.

158. Florey, *supra* note 13, at 1247.

reach" would lead to "exorbitant" jurisdictional assertions.[159] Writing for the Court, Justice Ginsburg noted specifically that "the transnational context of [the] dispute bears attention" and "the risks to international comity" should be part of the jurisdictional analysis, recognizing that broad jurisdictional approaches had previously "impeded negotiations of international agreements" on jurisdictional and judgment enforcement,[160] and that general jurisdiction based on "doing business" had resulted in "international friction."[161] In her concurrence, Justice Sotomayor also paid particular attention to the international context while disagreeing with the majority's approach.[162]

Regardless of whether one agrees with the Court's ultimate result and its "at home" formulation, two aspects of the decision are notable for international litigation. First, *Daimler* (and the earlier *Goodyear* decision) responded to earlier calls that suggested "doing business" jurisdiction was not consistent with international norms.[163] In this respect, the decisions better align practices in U.S. courts with international practice.[164] Second, the motivations behind the Court's pronouncements in general jurisdiction cases seemed not too far divorced from what was occurring in the legislative jurisdiction context.[165] For legislative jurisdiction, the Court presumes that Congress generally does not intend to usually utilize extraterritorial jurisdiction, precisely because of its disfavored status under international law.[166]

Reading the cases in their international context also helps make sense of

159. *Daimler*, 134 S. Ct. at 761-62.

160. *Id.* at 763.

161. *Id.*

162. *Id.* at 764 (Sotomayor, J., concurring in the judgment) (finding the exercise of jurisdiction unreasonable "given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available").

163. *See, e.g.*, Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171 (recommending limitations on general jurisdiction when foreign country defendants are involved); *see also* Mary Twitchell, *The Myth of General Jurisdiction,* 101 HARV. L. REV. 610, 611-22, 633-34 (1988) (recommending elimination of "doing business" jurisdiction and restricting general jurisdiction to the defendant's home–that is, to its place of incorporation and principal place of business).

164. Bookman, *Litigation Isolationism*, *supra* note 15, at 1140 (describing how the Court's decisions in *Daimler* and *Goodyear* "brought general personal jurisdiction doctrine into line with international accepted ideas"); *see also* Tanya J. Monestier, *Where is Home Depot "At Home"?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233 (2014).

165. RJR Nabisco Inc. v. Euro. Cmty., 136 S. Ct. 2090, 2116 (2016) (Breyer, J., concurring) (invoking international jurisdictional law to support the majority's conclusion); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 131-32 (2013) (Ginsburg, J., concurring in part and dissenting in part) (reaching the same conclusion as Justice Breyer in *Kiobel*); *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 274-86 (2010) (Stevens, J., concurring) (expressing concern over the breadth of U.S. jurisdictional assertions).

166. *See* Rutherglen, *supra* note 8 (proposing a presumption against personal jurisdiction similar to the presumption against extraterritoriality).

the greater unanimity between the Court's more liberal and more conservative wings. Some commentators predicted that "one might have expected the liberal wing of the Court to push for a longer jurisdictional reach for state and federal courts."[167] But while the more liberal justices disagreed with the implications of what appeared to be the Court stepping back from its earlier precedent they appeared, at least partly, disturbed with the broadest projection of judicial power around the world.[168] Some of the justices specifically "sought to alleviate discord between the procedural regimes of the United States and those of other countries."[169]

## IV. THE TRANSNATIONAL DIFFERENCE

The Justices' inclination to treat international cases as distinct is undoubtedly correct. The primary difference is that public international law imposes limits in those cases, which do not apply in the domestic context. Other key practical and logistical differences exist. This section renews the call for courts to more explicitly distinguish interstate from international cases.[170]

### *A. International Law's Limits*

While often overlooked by U.S. courts, public international law modestly constrains a state's jurisdictional authority over non-resident alien defendants for conduct occurring abroad. These procedural jurisdictional limits constrain U.S. courts—at least absent an explicit and clear statement by Congress that it wishes to authorize U.S. courts to engage in activity prescribed as unlawful under international law.

#### *i. The Weight of Authority*

Canonical treatises underscore how some form of connection is usually always necessary between the state and the defendant to comply with

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167. *See* Michael Vitiello, *Limiting Access to U.S. Courts: The Supreme Court's New Personal Jurisdiction Case Law*, 21 U.C. DAVIS J. INT'L L. & POL'Y 209, 211 (2015).

168. The Court's more liberal justices are cognizant of the global context. *See, e.g.*, STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES (2015).

169. Alan M. Trammell, *Isolating Litigants: A Response to Pamela Bookman*, 68 STAN. L. REV. ONLINE 33, 35 (August 15, 2015) (arguing that Justice Ginsburg is the opposite of a litigation isolationist); *see also* Parrish, *Fading Extraterritoriality*, supra note 15, at 212-13 (describing the Court's concerns about the overextension of American power in a number of cases).

170. Parrish, *Sovereignty*, *supra* note 10. For two recent examples: Childress, *Rethinking Legal Globalization*, *supra* note 9, at 1518 ("Transnational cases are different from domestic ones when questions of personal jurisdiction arise."); Florey, *supra* note 13, at 1234-40 (arguing for different jurisdictional approaches to foreign defendants).

international law.[171] Courts have traditionally reached the same conclusion that international law imposes some constraints.[172] So too have many scholars from long ago,[173] more recently,[174] and today.[175] U.S. Government

171. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298, 306-08 (4th ed. 1990) (describing the requirement of a sufficient nexus between the subject matter and the state to justify a state's assertion of jurisdiction); LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW §§ 136-37, at 456 (9th ed. 1992) ("[I]nternational law . . . determines the permissible limits of a state's jurisdiction . . . ."); Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 342 (Malcolm D. Evans ed., 2d ed. 2006) (same); *see also* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 224-49 (1989) (describing the allocation of international adjudicatory jurisdiction); MARY KEYES, JURISDICTION IN INTERNATIONAL LITIGATION 190 (2005) (discussing different opinions but explaining how public international law limits the scope of adjudicatory jurisdiction).

172. *See, e.g.*, Baker v. Baker, Eccles & Co., 242 U.S. 394, 401 (1917) (noting that before the Fourteenth Amendment courts applied "the rules of international law" to resolve jurisdiction questions). *See also* Arrest Warrant of 11 April 2000 (Dem. Repub. Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) (describing customary international law as imposing limits on the exercise of jurisdiction by national courts); *Regie Nationale des Usines Renault SA* v. Zhang (2002), 210 CLR 491, 528-29 (Austl.) (Kirby, J.) (explaining that principles of public international law require "a substantial and bona fide connection between the subject matter and the source of jurisdiction" and concluding that "no country's legal system can ignore the influence of public international law").

173. *See, e.g.*, Joseph H. Beale, *The Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 243 (1923) ("[T]he sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law."); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUIEL DES COURS 1, 14, 17, 73-81 (1964) ("Wherever its international implications are concerned, 'jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law'" and that international law imposes substantial limits on civil jurisdiction); L.I. De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L.Q. 706 (1968) (describing areas of exorbitant adjudicatory jurisdiction under private international law).

174. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 47, 80 (1996) (noting that "the subject of judicial jurisdiction is best understood within a framework of international law"); Francesco Francioni, *Extraterritorial Application of Environmental Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 125 (Karl Matthias Meessen ed.) (1996) (exploring "the assertion that extraterritorial adjudicatory jurisdiction" in some circumstances "may well constitute a breach of an international 'due process' standard"); 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 (1995) (describing the international law related to adjudicatory jurisdiction); Campbell McLachlan, *The Influence of International Law on Civil Jurisdiction, in* HAGUE YEARBOOK OF INTERNATIONAL LAW 128 (1993) (describing international law's limits on civil jurisdiction); Brilmayer & Norchi, *supra* note 107, at 1221-22 (noting that while "the authority is rather thin" that "international law limits federal long arm statutes, at least if Congress has not been specific about its intent to override it"); Degnan & Kane, *supra* note 21, at 814-15 (describing how as "a principle of international law" personal jurisdiction is limited and that "[n]otions of sovereignty and territoriality form the basis for limiting extraterritorial personal jurisdiction in the international realm"); Born, *supra* note 57, 16-20 (explaining that personal jurisdiction is limited by international law).

175. *See, e.g.*, Donald Earl Childress III, *Jurisdiction: Limits under International Law*, *in* 2 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1051, 1052–53 (2017) (setting out international law limits, but noting "[t]he view that international law imposes restraints on personal jurisdiction is, however, not universally accepted."); Ralf Michaels, *Jurisdiction: Foundations*, *in* 2 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1042, 1043 (2017) (describing how public international law sets "the outer boundaries of jurisdiction" through public international law's limits on the exercise of sovereign power and through human rights law); Alex Mills, *Rethinking Jurisdiction in International* Law, 84 BRIT. Y.B. INT'L L. 187 (2014) (describing how public international law limits judicial jurisdiction); Dubinsky,

officials agree, too.[176]

This is not to say that international law's limits in civil cases are well-defined. They are not. The limits are amorphous, leading the specifics to be developed by individual states.[177] The limits that do exist come into play only at the margins, and notably international law has not specified what to do in the face of conflicting and overlapping jurisdiction.[178] The limits have also regularly been neglected by American commentators where, as a result of our dualist system,[179] international law is not often the focus of analysis. And in recent years, legislative jurisdiction has been front and center of most discussions of jurisdictional limits, which has often obviated the need for addressing adjudicatory jurisdiction.[180] In Europe, in contrast, the limits imposed by customary international law have been supplanted by EU regulation, which means that common law development has stalled.[181] But absent party consent, generally some connection, if not a "substantial connection," must exist between the state and the defendant for the exercise of jurisdiction to be lawful.[182]

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*supra* note 32, at 333 ("Because of the dearth of U.S. treaties relating to adjudicative jurisdiction, in a transient jurisdiction case in a U.S. court, the key international law question is whether the exercise of jurisdiction violates customary international law."); *cf.* CHARLES T. KUTOBY JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES, 164–65 (2017) ("Perhaps the most that can be said is that the exercise of jurisdiction without any articulable or logical connection to the parties and the dispute is rare, difficult to justify, and unlikely to be recognized elsewhere.").

176. *See, e.g.*, David R. Robinson, Speech Before the Association of the Bar of the City of New York (Feb. 14, 1984), *in* 1981-1988 2 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, at ch. 6, §1 at 1330 (statement by then-Legal Advisor to the U.S. Department of State that "[i]f there is a universally recognized prohibitive rule, it is that a state may not exercise jurisdiction over events or persons abroad unless that state has some genuine link with those events or persons."); David H. Small, *Managing Extraterritorial Jurisdictional Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS. 283, 292 (1987) (noting that "U.S. government spokesmen identified only one firmly established international law limit—a threshold requirement that a state have a sufficient nexus with the matter to justify an assertion of jurisdiction."); *see also* BORN & RUTLEDGE, *supra* note 34, at 100 (citing diplomatic protests in the 1940s and 1970s where the U.S. government protested other nation's exercise of personal jurisdiction as violating U.S. sovereignty).

177. Childress, *Jurisdiction: Limits*, *supra* note 175, at 1052 ("the international law standards applicable to assertions of judicial jurisdiction are best described as amorphous").

178. CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW at 5, 142-43 (2d ed. 2015).

179. JG Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. YB INT'L L. 66 (1936); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., *supra* note 55, § 115 (1), § 403, cmt. y; *see also* BORN & RUTLEDGE, *supra* note 34, at 604 ("If Congress enacts legislation in violation of international law, it is well settled that U.S. courts must disregard international law and apply the domestic statute.").

180. *See supra* note 6.

181. *See, e.g.*, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1 (Brussels I Regulation (Recast)); Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L339) 3 (Lugano Convention).

182. *See* ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 18-19, 104

These personal jurisdictional limits are an essential structural component of an international legal system designed to reduce conflict and support democratic self-governance. A requirement that some connection or link exist between the state and the defendant derives from basic public law principles of state equality,[183] sovereignty, self-determination, and non-intervention.[184] Broad assertions of judicial power over conduct or parties abroad and the unilateral projection of a state's own regulatory interests interferes with the rights of foreign states to control their own affairs and of individuals to be free from foreign state control. Not even the most strident advocates for cosmopolitanism argue that no constraints exist.[185] This is particularly true with public law litigation in the U.S., where civil litigation serves important regulatory goals.

Limits on the broadest forms of extraterritorial jurisdiction is therefore an essential bulwark to democratic self-governance and self-determination. Exorbitant jurisdictional assertions are often viewed as unseemly meddling in the affairs of another, and a vestige of colonial legal imperialism.[186] As Michael Akehurst described in a related context:

> A State is entitled to impose its ideology on its nationals and on all persons present in its territory; it is also entitled to oblige both categories of persons to take its side in its struggles against other States. But it is not entitled to make such demands on aliens living

(2006) (setting out in Principle 2 and its comments, and Rule 4, that absent consent of the parties that generally there must be "a substantial connection between the forum state and the party or the transaction or occurrence in dispute" and that the "standard of 'substantial connection' has been generally accepted for international disputes").

183. Admittedly normative rather than descriptive, no state is any more autonomous or legitimate than any other state. U.N. Charter, art. 2, ¶ 1 (basing the United Nations on the "principle of the sovereign equality" of all states).

184. This is what some have referred to as "the political conception of jurisdiction"—that authority is "premised on some notion of membership to a political community." Adeno Addis, *Imagining the International Community: The Constitutive Dimension of Universal Jurisdiction*, 31 HUM. RTS. Q. 129, 134 (2009) (describing in the prescriptive jurisdiction context how "the regulated person or act must be connected, however, thickly or thinly, to the political community we call the state."). Perhaps the best-known articulation on the limitation of a state's right to exercise power over an individual or dispute from a political theory perspective comes from Lea Brilmayer. *See* Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293 (1987); Lea Brilmayer, *Liberalism, Community and State Borders,* 41 DUKE L.J. 1 (1991); *see also* LEA BRILMAYER, AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE-SUPERPOWER WORLD (1994).

185. For example, while rigorous debate exists as to whether universal jurisdiction exists in a category of human rights cases, the general rule aside from those cases is that law can only "justifiably coerce people when it emanates from some political association . . . ." Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1025, 1049-53 (2005) (explaining theories beyond political conceptions of power in universal jurisdiction cases).

186. *See* David H. Moore, *United States Courts and Imperialism*, 73 WASH & LEE L. REV. ONLINE 338 (2016). For a detailed discussion of exorbitant jurisdiction, see Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 MAINE L. REV. 474 (2006).

> in foreign countries. Any such attempt would be incompatible with the political independence of the State of the aliens' nationality or residence.[187]

Or more simply: The "suggestion that every individual is or may be subject to the laws of every State at all times and in all places is intolerable."[188]

U.S. courts once clearly recognized and relied on these international law limits. As described above, in early jurisdictional cases international legal constraints were explicitly incorporated into domestic doctrine.[189] Therefore, in the landmark *Pennoyer* case, public international law provided the basis for the limits imposed by the Due Process Clause.[190] Even long after *International Shoe* recast jurisdiction in terms of fairness and minimum contacts, it was still widely understood that a state's territorial authority limited adjudicatory jurisdiction.[191] And "[t]he doctrine of minimum contacts originated in international law."[192]

Leading commentators and scholars reached the same conclusion consistently over a long period of time. In the Second Restatement, adjudicatory jurisdiction, as a component of enforcement jurisdiction, was

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187. Michael Akehurst, *Jurisdiction in International Law,* 46 BRIT. Y.B. INT'L L. 145, 159 (1973) (questioning whether international law limits adjudicatory jurisdiction but describing limits on the protective principle).

188. J.L. Brierly, *The Lotus Case*, 44 L. Q. REV. 154, 162 (1928).

189. *See* Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1273 (2017) ("And the law of nations *did* regulate jurisdiction over the parties. According to Marshall and Justice Story . . . a judgment that exceeded international limits on personal jurisdiction would not be 'regarded by foreign courts' as binding . . . ."). For famous cases see D'Arcy v. Ketchum, 52 U.S. (11 How.) 165 (1850); Galpin v. Page, 85 U.S. (18 Wall.) 350, 367-68 (1873); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 255 (1827); *see also* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 872 & nn.116-20 (1989) (listing early cases approaching personal jurisdiction using principles from the law of nations).

190. 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."); Transgrud, *supra* note 102, at 871-76 (discussing how the original federal common law rules of jurisdiction were based on territorial rules derived from international law). That domestic Due Process Clause limits were drawn from international law's limitations is well understood and recognized. Jay Conison, W*hat 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"); 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).

191. Reese, *supra* note 89 at 1589 (noting that due process "also serves as an instrument of federalism (or presumably of internationalism in an international case) by preventing a state from taking jurisdiction of a case when to do so would improperly impinge upon the interests of one or more other states or would otherwise conflict with the needs of the interstate or international system").

192. Lilly, *supra* note 21, at 124.

limited under international law to the same extent as prescriptive jurisdiction.[193] The Third Restatement—which sought to bend international law's limits to more closely mirror developing U.S. fairness considerations and incorporate interest balancing through a rule of reasonableness—was clear that limits exist to prevent untrammeled national court authority.[194] Writing in the mid-1980s, noted international lawyer Gary Born observed that "[m]any authorities argue that today nations treat 'assertions of jurisdiction that [are] considered extravagant as violations of international law.'" [195] The same sentiment was expressed later in the 1990s when commentators argued over whether jurisdiction based on transient presence violated international law.[196] More recently, in 2006, the ALI and Unidroit set out a "substantial connection" standard as being "generally accepted" for personal jurisdiction in international cases.[197]

193. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (Am. Law Inst. 1965) (permitting jurisdiction to enforce in a state's territory any rule of law that the state has jurisdiction to prescribe under one of the established bases of jurisdiction, such as nationality and territoriality); *see also* Stanley Metzger, *The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction*, 41 N.Y.U. L. REV. 7, 11-12 (1966).

194. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Introductory Note U.S., *supra* note 55, intro. note (describing how the "exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement" and "set[ting] forth some international rules and guidelines for the exercise of jurisdiction to adjudicate in cases having international implications"); § 421(2) (listing circumstances where the exercise of jurisdiction is reasonable, including principles of territoriality and nationality); *see also* § 403 cmt. a ("The principle that an exercise of jurisdiction . . . is . . .unlawful if it is unreasonable is established in United State law, and has emerged as a principle of international law as well.")

195. Born, *supra* note 58, at 18 (citations omitted).

196. After *Burnham* was decided, commentators questioned whether jurisdiction based on transitory presence (tag jurisdiction) violated the jurisdictional limits of international law. Whether *Burnham* did so was contested, but no one simply argued that international law was entirely silent on adjudicatory jurisdiction. *See, e.g.*, Peter Hay, *Transient Jurisdiction, Especially over International Defendants: Critical Comments on* Burnham v. Superior Court of California, 1990 U. ILL. L. REV. 593 (criticizing based on international practice); Russell Weintraub, *An Objective Basis for Rejecting Transient Jurisdiction*, 22 RUTGERS L.J. 611, 615-16 (1991) (arguing that transient jurisdiction may violate international law); *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S., *supra* note 55, § 421, cmt. e, Reporter's Note 5 (1987) (noting that jurisdiction based on transient presence can violate international law and that "[J]urisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law.").

197. ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 18, at 104 (2006). The same understanding of international law and its limit on personal jurisdiction was made in connection with discussions on a treaty on enforcement of judgments. *See* Catherine Kessedjian, Hague Conference on Private International Law, June 1997, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Prelim. Doc. No. 7 (Apr. 1997), at 22-23, § 65 (explaining how under public international law "that there has to be some 'substantial' or 'significant' connection between the forum and the case" for jurisdiction to exist).

*ii. Attempts to Remake International Law*

Despite this history, some U.S. legal scholars have recently advanced a different, radical approach. Most prominently, the American Law Institute's Fourth Restatement of the Foreign Relations Law has adopted what previously had been a minority position: that aside from sovereign immunity, international law does not constrain personal jurisdiction.[198] Professors William Dodge and Scott Dodson—two well-respected scholars in the areas of international law and civil procedure—recently implied that this minority position was doctrinal canon in a *Michigan Law Review* article. For them, any concern about violating international law is "easily dismissed" because customary international law imposes no limits outside the exception of sovereign immunity.[199] Professor Dodge, one of the co-reporters of the Fourth Restatement, has been a particular strong advocate for this new, controversial approach, advancing it in a number of contexts.[200]

While it may be true that international law constraints are rarely in play given often stricter domestic statutory and constitutional constraints, and U.S. courts only sporadically, at best, directly consider international limitations,[201] the assertion that international law has nothing to say about exorbitant jurisdictional assertions is an odd one. No evidence is given in the text or its notes to support the Fourth Restatement's position, nor is an explanation given for why other approaches upon which the ALI placed its

198. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: Jurisdiction § 302, intro. note (Am. Law Inst., Tentative Draft No. 2, 2016) ("[w]ith the exception of sovereign immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate."). Before the Fourth Restatement, only a small number of scholars advanced the idea that international law imposes no limits on personal jurisdiction. *See generally* Mills, *supra* note 175, at 228-30 (citing and discussing scholarship advancing the above-mentioned conception of personal jurisdiction limitations).

199. Dodge & Dodson, *supra* note 9, at 1234. The claim is an odd one in the context of this article, and appears an unnecessary aside, because international law's limits support their thesis that international and domestic defendants should be treated differently. International law supports a national contacts approach.

200. William S. Dodge, *Jurisdiction in the Fourth Restatement of Foreign Relations Law,* 18 YB OF PRIVATE INT'L L. 143, 147 (2017) (noting that customary international law imposes some constraints, but only in connection with immunity doctrines); William S. Dodge, *The Customary International Law of Jurisdiction in the Fourth Restatement of Foreign Relations Law*, OPINIO JURIS, March 8, 2018, *available at* http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/ (asserting that customary international law imposes "no limitations on jurisdiction to adjudicate outside the area of immunity"); William S. Dodge, *United States v. Microsoft: Why the Government Should Win the Statutory Interpretation Argument*, Just Security, Feb. 19, 2018, *available at* https://www.justsecurity.org/52681/united-states-v-microsoft-government-win-statutory-interpretation-argument-2/ (arguing that customary international law does not regulate personal jurisdiction).

201. Although this is not always true. *See, e.g.*, *Kiobel*, 569 U.S. 108 at 131-32 (Breyer, J., concurring) (indicating he would have "looked to established international jurisdictional norms to help determine the statute's substantive reach . . . .").

imprimatur—set out in the Third Restatement and the *Principles of Transnational Civil Procedure*—were so mistaken in their fundamental assumptions about international law (as with the Third Restatement) or as to state practice (as with the *Principles*).[202] Similarly, no explanation is provided for how the understanding of international law—once relied on by both courts and so many leading commentators—changed so dramatically. "Although some international lawyers have questioned the need for a separate category of 'adjudicative jurisdiction,' few if any would maintain that adjudicative jurisdiction is unregulated in international law."[203] Indeed "the weight of authority agrees with the Third Restatement in supporting the existence of some international law limits on national assertions of personal jurisdiction."[204] And contrary to what the Fourth Restatement implies, "there is little in practice or policy to support the idea that an assertion of jurisdiction . . . in civil proceedings is anything other than an exercise of state regulatory power," which is "restricted by public international rules on jurisdiction."[205]

That territorial borders and territorial sovereignty play a less prominent role in many international law contexts than they once did doesn't change this conclusion. Over the last several decades, international law moved beyond the old Westphalian notion of near impermeable state sovereignty as international law scholars attempted to universalize human rights.[206] That

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202. This is not to argue that the Third Restatement's reasonableness standard itself reflects international law. *See* David B. Massey, *How the American Law Institute Influences Customary International Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law,* 22 YALE J. INT'L L. 419, 423, 428-37 (1997) (noting "numerous commentators" who argue that the reasonableness requirement of the Third Restatement did not reflect customary international law, but noting that there must be a "genuine link" between the state and the regulated person or activity); Cecil J. Olmstead, *Jurisdiction*, 14 YALE J. INT'L L. 468, 472 (1989) (disputes that the reasonableness requirement is a principle of international law). While the nature of international law's limit is open to debate, there's widespread agreement that some limits exist.

203. Mills, *supra* note 175 at 195; *see also* 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, 375, n.9 (1995) ("While the content of international jurisdictional law is perhaps unclear, most authorities agree that this category of international law exists.").

204. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 101 (5th ed. 2011); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., *supra* note 55, § 421, reporters' note 1. ("The modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution" and "[t]he exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement.").

205. Mills, *supra* note 175, at 201.

206. *See* W. Michael Reisman, *Editorial Comment, Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 872 (1990) (describing how human rights "shift[ed] the fulcrum of the system from the protection of sovereigns to the protection of people"); Anne Peters, *Humanity as the A and Omega of Sovereignty,* 20 EUR. J. INT'L L. 513, 513 (2009) (arguing that sovereignty is being ousted as the first principle of international law and that territorial sovereignty is not "merely

innovation, however, sought for the rule of law to further constrain state power, not enlarge it. The aim was to prevent nations from using territorial sovereignty as a shield when human rights abuses of its own citizens were involved. Yet while it refocused its attention on the individual as a subject of primary concern, international law did not relinquish its constraint on state power vis-à-vis other states.[207] If anything, international law began to recognize even more sharply the right of states and their citizenry—within the confines of human rights norms—to develop and be free from foreign oversight.[208] International law therefore has sought to protect democratic independence by constraining unbridled national power and by checking powerful nations from imposing their worldviews. As a result, structurally it remains the preference that transnational and global challenges usually be resolved through consensual bilateral and multilateral engagement—finding mutually acceptable solutions to shared challenges—not the exercise of unilateral, hegemonic prerogative.

Those suggesting that international law's adjudicatory jurisdictional limits have disappeared altogether must explain how and why international law sought to expand state power over foreign individuals without constraint. Extraterritorial power, where one state unilaterally asserts power over foreign citizens, particularly when doing so interferes with the laws and policies of another state, is usually the sort of empire building project and offense to popular sovereignty that modern international law was intended to forestall.[209] Said differently, the principles of sovereign equality and respect for human rights rejects the idea of unconstrained state power over foreigners, so the burden is on those who believe states can adjudicate the rights of citizens of other states without limit, to demonstrate how such a view is compatible with fundamental principles of our modern international system.[210] This is particularly true where in other areas—for example, choice of law, legislative jurisdiction, and enforcement jurisdiction[211]—limits exist even as territoriality has played a more limited role. No principled reason exists for why public international law would impose limits on state

limited by human rights, but should be seen to exist only in function of humanity"); RUTI TEITEL, HUMANITY'S LAW (2011).

207. *See generally* Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029 (2003) (describing how sovereignty demarcates state power).

208 . JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM (2012).

209. Krisch, *More Equal than the Rest?*, *supra* note 26.

210. Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT'L AFFAIRS 17 (2004).

211. Fourth Restatement (see comment note) (§§ 407–13 for legislative jurisdiction/prescriptive; and § 432 for enforcement)

executive and legislative power[212] but grant the judicial branch unbridled authority in the civil context.[213]

Two arguments are usually proffered for why international law no longer imposes any constraint on state power, at least when exercised by the judiciary in civil litigation. The first is that states from time to time have ignored the structural limitations of the international legal system.[214] But evidence of state noncompliance is insufficient. Contrary state practice is as much evidence of unlawful activity as it is of the nonexistence of a customary norm.[215] Evidence that some states ignore international law's limits from time to time, or disagree as to whether all exorbitant assertions are violations of international law, show at most that the limits of international law and its contours are contested. It does not establish that no limits exist. Or said differently, just because some exorbitant bases of jurisdiction may not violate international law, does not mean that all exorbitant bases are lawful. More fundamentally, if the foundational structural limits of the international system no longer exist—as the Fourth Restatement implies—then some explanation must be offered for why fundamental principles of national sovereignty and the long-established public law limits on state power suddenly disappeared.[216]

A more fundamental problem exacerbates the Fourth's Restatement's mistake. Accepting the Fourth Restatement's approach would turn modern jurisdictional analysis on its head because it assumes that adjudicatory jurisdiction "is plenary and discretionary," absent a prohibitive rule.[217] But

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212. McLachlan, *supra* note 174, at 140 ("A claim to personal jurisdiction is still, one one level, an exercise of state power.").

213. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298 (6th ed. 2003) (noting no reason exists in principle to distinguish between jurisdictional limits in civil and criminal cases); McLachlan, *supra* note 174, at 128 ("In classical public international law theory, there is no material distinction between the exercise of civil jurisdiction and the exercise of any other type of jurisdiction.").

214. William S. Dodge, *The Customary International Law of Jurisdiction in the Restatement (Fourth) of Foreign Relations Law*, OPINIO JURIS, (Aug. 3, 2018), http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/ ("An honest look at state practice and *opinio juris* today reveals no limitations on jurisdiction to adjudicate outside the area of immunity.").

215. *See, e.g.,* 2 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ 14, 98, para. 186 (June 27) (noting that state practice need not "have been perfect" and that "instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule") (https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf). For an argument that occasional breaches do not nullify customary international rules, particularly those with strong moral imperatives, *see* Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation,* 98 AM. J. INT'L L. 757, 789-90 (2001).

216. As Gary Born and Bo Rutledge underscore, "When long-established jurisdictional limits rests on fundamental principles of national sovereignty, is detailed evidence of state practice necessary?" BORN & RUTLEDGE, *supra* note 34, at 101.

217. Mills, *supra* note 175, at 192-93 (describing the rules of international jurisdiction and explaining how the outdated position that "[t]he starting point is that jurisdiction, like sovereignty

established practice requires instead affirmative evidence of a permissive rule for universal civil jurisdiction.[218] One cannot reach the Restatement's position by pointing to the absence of state practice limiting jurisdiction as the Reporters have done.[219] Instead, one needs affirmative evidence of consistent state practice and *opinio juris* to show the traditional bases of personal jurisdiction (e.g., territoriality and nationality) no longer apply in the civil context. No such consistent state practice exists. And with the exception of possibly universal civil jurisdiction arising from a small subset of egregious international crimes (e.g., genocide, war crimes, crimes against humanity, and torture), states have not accepted universal, civil, adjudicatory authority.[220]

The second is to argue that states can resist exorbitant jurisdictional assertions at the judgment enforcement stage.[221] But this no-harm-no-foul rejoinder lacks force, too. The violation of international law at the beginning of the lawsuit is not remedied through defensive maneuvering at the enforcement stage. Even if a lawsuit is ultimately unenforceable, the costs

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itself, is plenary and discretionary" has been rejected if it was "ever tenable—and there is good reason to doubt it ever was…."); ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 17 (9th ed. 1992) (freedom [of a state to act] is derived from a legal right and not from an assertion of unlimited will, and is subject to international law). Even the *Lotus* case, whose dicta has been at times cited for an everything-is-permitted-if-not-prohibited principle, itself recognized that a state "should not overstep the limits which international law places upon its jurisdiction." SS 'Lotus' (Fr. v Turk.) 1927 P.C.I.J. (ser A) No 10, at 19 (Sept. 7). *See also* Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 11, *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) (No. 10-1491), *available at* https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neutralamcunetherlands-uk-greatbritain-andirelandgovs.authcheckdam.pdf ("[I]t is now widely accepted that an internationally recognized principle must be identified before a State can exercise extraterritorial civil jurisdiction") (citations omitted).

218. Alex Mills, *Private Interests and Private Law Regulation in Public International Law, in* OXFORD HANDBOOK ON JURISDICTION IN INTERNATIONAL LAW 5, fn. 28 (Stephen Allen et al. eds., 2019) (forthcoming) (manuscript at 5, n.28); *see also* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW: UNITED STATES AND EUROPEAN PERSPECTIVES 32-34 (2015) (noting the approach that "has been taken by most States and the majority of the doctrine" and has "crystallized" as "a consensus opinion" requires that "States justify their jurisdictional assertion in terms of a permissive international law rule.").

219. *See, e.g.*, William S. Dodge, *The Customary International Law of Jurisdiction in the Fourth Restatement of Foreign Relations Law*, OPINIO JURIS, (Mar. 8, 2018), *available at* http://opiniojuris.org/2018/03/08/the-customary-international-law-of-jurisdiction-in-the-restatement-fourth-of-foreign-relations-law/ (arguing based on the absence of a prohibitive rule); William S. Dodge, Anthea Roberts, and Paul Stephan, *Jurisdiction to Adjudicate Under Customary International Law*, OPINIO JURIS, (Sept. 11, 2018), *available at* http://opiniojuris.org/2018/09/11/33646/ (arguing based on the absence of a prohibitive rule).

220. Mills, *supra* note 175, at 199 ("These different aspects of public international law on jurisdiction . . . all recognise that jurisdiction is limited by positive grounds, and thus an act of regulation must be justifiable based on a positive rule conferring jurisdiction.").

221. *See* McLachlan, *supra* note 174, at 140 (noting that "[t]he exercise of enforcement jurisdiction sheds little light on appropriate bases for original jurisdiction" and rejecting the idea that the only limit on a state's personal jurisdiction to adjudicate is at the execution of a judgment).

of litigation and the potential for enforcement forces companies and individuals to account for foreign regulations. This is particularly so because judgment enforcement laws can be hard to predict.[222] And, in any case, lawsuits can play important symbolic roles separate and apart from any ability to collect on a judgment.[223] It would also effectively ostracize a defendant and the defendant's property from the foreign country, so long as the judgment remained standing.[224] Also this deterrent-based solution—discouraging litigants from filing because they may not later obtain relief—doesn't constrain unlawful state action, avoid friction with foreign nations, or remedy the burden on defendants having to defend in place where the defendant may have no connection.[225] Of course, in the domestic context, the idea that a defendant can sufficiently protect itself from exorbitant jurisdictional assertions through the defendant's home state declining to enforce a judgment was long ago rejected as inadequate.[226]

Finding that international law imposes no limits on judicial adjudicatory power would also lead to a particularly absurd result. U.S. states, when ratifying the Constitution, relinquished some degree of sovereignty as part of the formation of the federal system, but maintained a measure of sovereignty, too.[227] As described in Part III, much of the debate around federalism and personal jurisdiction is how much or to what extent, if any, the rights of states as once-independent nations were incorporated into the Due Process Clause (the premise being the more that states retain characteristics of foreign nations, the greater restrictions on personal jurisdiction remain).[228] The Fourth Restatement, however, concludes that

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222. S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 85 (2014) ("[T]he law regarding enforcement and recognition of judgments in the United States is extremely convoluted. As a result, it is nearly impossible for litigants to anticipate either the procedural or substantive principles that will govern in any particular case.")

223. Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Case*s, 60 HASTINGS L.J. 61, 64 n.11 (2008) ("ATS judgments against individual defendants provide invaluable symbolic vindication."); *see also* Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102, 106 (noting that one of the principal benefits of human rights litigation may be the "public attention they generate").

224. Rutherglen, *supra* note 8, at 8, n. 32 (making this point).

225. *See* Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 W. & M. L. REV. 1159 (2007) (describing the vagaries of foreign judgment enforcement).

226. Fed. R. Civ. P. 12(b)(2) (permitting preanswer motion for lack of personal jurisdiction); Bristol-Myers Squibb Co., 137 S. Ct. 1773 (2018) (explaining how due process protects against inconvenient and distant litigation and serves as a territorial limit on state power).

227. At independence, U.S. states claimed the same rights and position as foreign nations. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (claiming all rights of "free and independent states"); ARTICLES OF CONFEDERATION OF 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

228. For an explanation of how the Framers "understood the States as sovereign entities bound together in an interdependent coexistence very much like the community of nations, and they therefore

the inherent sovereignty of foreign nations includes no limits on personal jurisdiction. Accepting this would thereby flip the entire premise, rendering the great debates of federalism in the personal jurisdiction context meaningless. Why debate what remains of independent nation sovereignty for personal jurisdiction purposes if none existed to begin with?[229]

If accepted, it also means that, for the first time, U.S. domestic law would be fully divorced from its international counterpart. In early cases, U.S. domestic law mirrored international law principles. The Third Restatement also tried to create a general parity between emerging U.S. domestic jurisdictional law (and its emphasis in the 1980s on fairness) and international law by focusing on a reasonableness requirement. Only now would there exist a time when domestic law imposes limits, and international law imposes none. It would also make longstanding debates in international law—such as the precise scope of universal civil jurisdiction—somewhat nonsensical. Why debate for which international crimes and under what circumstances a state can claim universal jurisdiction over an accused in a civil case, if no limitation exists under any circumstances regardless of whether a universal norm is implicated?[230]

Acknowledging international law's existence, even if its constraints are not often implicated and its contours ill-defined, is important. The tendency to downplay or devalue international law in the U.S. often seems part of a

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frequently consulted international law and political theory to craft rules conducive to a peaceful and mutually respectful coexistence" see Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1031, 1032-41 (2002) (showing "how the founding generation borrowed from the law of nations to address issues of constitutional federalism"); *see also* Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003).

229. Charles W. "Rocky" Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 264-65 (2014) (arguing that the Court's personal jurisdiction "framework must give due regard to the state's regulatory and adjudicatory interests"); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 620 (2006) (stating that state sovereignty is one factor "central to determining adjudicatory jurisdiction"); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 689-90 (1987) (arguing that "assertions of jurisdiction . . . ought to reflect the general limits on state sovereignty inherent in a federal system" and that interstate federalism plays a "central and unavoidable role" in jurisdictional decisions); Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 85 (1980) ("[I]t is possible to make purely structural arguments in defense of sovereignty limitations which would be persuasive even if the Due Process Clause did not exist.").

230. Seven D. Roper, *Applying Universal Jurisdiction to Civil Cases: Variations in State Approaches to Monetizing Human Rights Violations*, 24 GLOBAL GOVERNANCE 103 (2018); *see also* Addis, *Imagining the International Community*, *supra* note 184, at 133-36. *See also* Meno T. Kamminga, *Universal Civil Jurisdiction: Is it Legal? Is it Desirable?*, 99 AM. SOC'Y. INT'L L. 123, 124-25 (2005) ("No rule of international law specifically authorizes let alone obliges the exercise of universal civil jurisdiction" in human rights cases, but argues it should exist for injuries arising from genocide, war crimes, crimes against humanity, and torture).

larger effort to discredit it.[231] This strategy is also a particularly short-sighted. U.S. constitutional limits already constrain our courts, and increasingly so. The risk then is that we promote an international legal order where other countries can claim unchecked judicial power, even when our own power is more tightly constrained. The dramatic growth of transnational litigation outside the U.S. makes this risk more poignant.[232] The demeaning of international law in this way should also worry those committed to developing an effective international legal system. Ignoring international law's limits on personal jurisdiction pushes power to judges in other countries, and risks creating a pluralistic free-for-all.

### *B. Differently Situated*

Aside from international law's limits, cases involving non-resident foreign defendants are different in other ways.[233] Appreciating these differences amplifies why personal jurisdiction implicates different considerations in the context of transnational litigation.[234]

#### *i. The Limits of Due Process*

The first difference, which the Court has never directly addressed, is the application of due process standards to foreign defendants. It remains unclear whether the Due Process Clause should apply to foreign defendants

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231. JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW (2015); *see e.g.*, JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (setting forth a skeptical account of international law).

232. *See, e.g.*, R. Daniel Kelemen & Eric S. Sibbitt, *The Globalization of American Law*, 58 INT'L ORG. 103, 103 (2004) (describing the spread of U.S.-style of litigation in other countries).

233. This Article is not focused on litigation where foreign plaintiffs bring suit against U.S. defendants. For a number of reasons, U.S. courts appear to be progressively preventing litigation brought by foreign plaintiffs against U.S. corporations. That trend may well be problematic. Litigation that seeks to hold U.S. defendants liable at home in compliance with U.S. law does not raise the international and personal jurisdiction issues that transnational lawsuits against nonresident, foreign defendants do. For an analysis, see Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081 (2010).

234. The U.S. system has long been criticized for being too focused on the domestic. *See, e.g.*, Dubinsky, *supra* note 32, at 306 ("When American courts are confronted with disputes with a transnational dimension, they reach for a familiar toolbox—one with tools for fixing domestic problems. They extrapolate from their experience with familiar domestic litigation, especially interstate litigation."); *cf.* Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM J. COMP. L. 369, 388 (2001) ("[M]ainstream American conflicts law continues to focus too much on purely domestic issues and to treat international problems as an exotic sideshow."); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CAL. L. REV. 1599, 1599-1600 (1966) ("To apply mechanically a rule developed in interstate cases to an international situation without a consideration of its policy relevance is both wrong and dangerous.").

in the same way as it applies to domestic defendants. In an earlier article,[235] I explained why providing foreign defendants the same due process rights as domestic defendants is conceptually paradoxical, given the Court's approach to constitutional rights in other contexts.[236] A second related and unresolved question is whether the Fifth Amendment offers foreign defendants identical protections in federal courts as the Fourteenth Amendment does in interstate cases.[237]

A number of courts and commentators have noted the disconnect described above and questioned whether a different jurisdictional analysis should apply to foreign, non-resident defendants. Most recently, Professor Robin Effron described the "nonresident alien due process paradox."[238] Professor Lea Brilmayer and Professor John Drobak in separate articles made similar observations following the Court's decisions in *Nicastro* and *Goodyear*.[239] So too have other commentators[240] and courts.[241] Another

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235. Parrish, *Sovereignty, supra* note 10, at 28-38; *see also* Paul R. Dubinsky, *Challenging the Assumption of Equality: The Due Process Rights for Foreign Litigants in U.S. Courts*, 5 SANTA CLARA J. INT'L L. 2 (2007) (panel discussion of the due process of rights of aliens). For an earlier argument along similar lines, see Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109 (1993).

236. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Johnson v. Eisentrager, 339 U.S. 763 (1950).

237. *Civil Procedure — Personal Jurisdiction — D.C. Circuit Dismisses Suit Against National Port Authority of Liberia for Lack of Personal Jurisdiction. — GSS Group Ltd. V. National Port Authority, 680 F.3d 805 (D.C. Cir. 2012)*, 126 HARV. L. REV. 1691, 1695 (2013); Wendy Perdue, *Aliens, the Internet, and "Purposeful Availment": A Reassessment of Fifth Amendment Limits on Personal Jurisdiction*, 98 NW. U. L. REV. 455, 456 (2004).

238. Effron, *supra* note 9, at 123 ("[T]he constitutional right to resist personal jurisdiction enjoyed by the nonresident alien defendant in a civil lawsuit is remarkably out of alignment with that same nonresident alien's ability to assert nearly every other constitutional right.").

239. Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by* Goodyear Dunlop Tires v. Brown *and* J. McIntyre Machinery v. Nicastro, 63 S.C L. REV. 617, 633 (2012) ("[T]he idea that foreign nationals acting in foreign countries can claim U.S. constitutional rights is both highly controversial and contrary to other Supreme Court precedent."); John N. Drobak, *Personal Jurisdiction in a Global World: A Comment on the Supreme Court's Recent Decisions in Goodyear Dunlop Tires and Nicastro*, 90 WASH. U. L. REV. 1707, 1707-08 (2013) (arguing "that non-resident, non-citizens defendants are not protected by the constitutional personal jurisdiction law developed in domestic litigation").

240. Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 847 (2013) ("the extension of due process rights to aliens abroad in the civil procedure context stands in contrast with the treatment of [other constitutional rights] . . . where courts have extended fewer protections to aliens, especially those outside U.S. borders."); Colin Miller, C*omplete Disconnect: Does It Make Sense To Apply A Due Process-Based Personal Jurisdiction Test to Aliens?*, CIVIL PROCEDURE AND FEDERAL COURTS BLOG, April 11, 2011, *available at* http://lawprofessors.typepad.com/civpro/2011/04/i-recently-read-a-couple-of-interesting-opinions-and-a-juxtaposition-of-the-two-raises-a-thought-provoking-question-one-add.html (describing inconsistent treatment); BORN & RUTLEDGE, *supra* note 34 (describing the issue and potential inconsistent treatment); *cf., e.g.*, Michael Farbiarz, *Accuracy and Adjudication: The Promise of Extraterritorial Due Process*, 116 COLUM. L. REV. 625 (2016) (arguing that if due process limits personal jurisdiction in civil cases, it must also place curbs on extraterritorial criminal prosecutions).

241. GSS Group Ltd. v. National Port Auth., 774 F. Supp. 2d 134, 139 (D.D.C. 2011) ("It is not

group of scholars have advocated for a national contacts approach under the Fifth Amendment.[242]

Two things should be emphasized. First, suggesting that the Due Process Clause may apply differently to non-resident alien defendants is not to argue that foreign defendants should be unable to contest exorbitant jurisdiction. Rather, it is to underscore that finding foreign corporations have greater protections in the civil context than individual defendants have in a host of other contexts is paradoxical. Indeed, it could well be that due process rights should be expanded in other contexts to mirror the Due Process Clause's applicability to foreign defendants in civil litigation.[243] Second, and related, examining the Due Process Clause's scope as to non-resident foreign defendants is not to suggest that personal jurisdiction should be unregulated. On the contrary, as described above, public international law provides some modest limits and a multilateral convention on jurisdiction and judgments may become essential.[244]

*ii. Structural Differences*

The applicability of the Due Process Clause is not the only difference. For the domestic, interstate context, a number of federal constitutional provisions—from the Full Faith and Credit Clause, to the Dormant Commerce Clause, to the Privileges and Immunities Clause—protect the structure of the federal system.[245] The "absence of readily identifiable

clear why foreign defendants, other than foreign sovereigns, should be able to avoid the jurisdiction of United States courts by invoking the Due Process Clause when it is established in other contexts that nonresident aliens without connections to the United States typically do not have rights under the United States Constitution.").

242. Dodge & Dodson, *supra* note 9; *See, e.g.*, Jonathan R. Nash, *National Personal Jurisdiction*, (Emory Legal Stud. Res. Paper, Feb. 6, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119383; Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction,* 108 NW. U. L. REV. 1301 (2014) (suggesting a system of nationwide federal personal jurisdiction). For an earlier approach, see Degnan & Kane, *supra* note 21, at 816-17.

243. *See, e.g.*, Gerald L. Neuman, *Whose Constitution?,* 100 YALE L. J. 909, 981-90 (1991) (arguing that the government should "afford constitutional rights whenever it asserts legal obligation against any human being"); *cf.* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957-59 (2002) (describing the constitutional double standard in treatment of citizens and noncitizens, particularly post-September 11, 2001).

244. *See generally* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Saved?*, 52 DEPAUL L. REV. 319 (2002).

245. For a strong territorial position, *see* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

international constitutional protections" make the transnational context different.[246]

The stakes are different as a result of the Full Faith and Credit Clause.[247] In domestic cases, the Full Faith and Credit Clause requires not only that states enforce sister-state judgments where personal jurisdiction exists, but also that states open their courthouse doors under sister-state laws.[248] The Privileges and Immunities Clause reinforces judgments in similar ways. U.S. courts traditionally have been more liberal in foreign judgment recognition. These differences play out in different ways.

Foreign relations can also be implicated in transnational cases in a way they are not in domestic interstate ones.[249] As Gary Born has explained, the appearance of an exorbitant jurisdictional assertion "can readily arouse foreign resentment," "provoke diplomatic protests," "trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields."[250] Similarly, "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."[251] While foreign relations concerns don't arise in many garden-variety claims, they are more likely to arise if domestic courts interpret their jurisdictional reaches broadly.

*iii. Different Burdens and Access*

These structural differences lead to other challenges. The burdens faced by foreign defendants in transnational cases are different than those faced by domestic defendants, and usually are more significant. Foreign

246. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 289 (1982).

247. U.S. CONST. art. IV, § 1.

248. Hughes v. Fetter, 341 U.S. 609, 613 (1951).

249. Born, *supra* note 58, at 28 (Jurisdictional assertions over foreign defendants with little connections to the nation "can affect United States foreign relations in ways that domestic claims of jurisdiction cannot"); *see also* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 115–16 (1987) (noting that the assertion of jurisdiction in California over a Japanese corporation might strain foreign relations).

250. Born, *supra* note 58, at 28-29; *see also* Bassett, *Implied "Consent," supra* note 43, 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."); LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 289 (1986) ("The resolution of [international cases] is a 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.").

251. 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, 363-64 (2004). For a more detailed discussion, see Parrish, *Sovereignty*, *supra* note 10, at 47-50.

procedures can be difficult to maneuver and substantive law can be different,[252] which may make foreign litigants "more subject to procedural default or tactical errors."[253] A number of other factors also exist that are not present in interstate case, "including familiarity with the legal system, linguistic capacity, and especially the ability to retain local counsel."[254] Nonresident, alien defendants also find the U.S. right to jury trials and contingency fees unfamiliar and hard to navigate.[255] Alien defendants also often characterize U.S. discovery procedures as free-wheeling "fishing expeditions" compared to their home country procedures, and international lawsuits from a foreign perspective "are expensive, difficult to investigate and defend, and legally complex."[256] At the very least, they "present different issues of litigation planning and forum choice" and choice of law issues take on heightened importance.[257] The concerns may be especially acute in particular kinds of cases.[258]

The concerns are not limited to the U.S. When fashioning personal jurisdiction, the Court must be wary of the standard it sets as U.S. litigants will later have difficulty complaining about foreign judicial systems that follow U.S. jurisdictional rules. But generally U.S. parties worry about

252. For recent discussion of the burdens faced by foreigners in U.S. courts, see Katherine Florey, *supra* note 13, at 1234-35 ("[F]oreign defendants are burdened more than domestic ones, not only because of the universal problems of travel and unfamiliarity with the legal system . . . but also because aspects of the U.S. legal system are significantly at odds with norms in most other countries."); Robertson, *Transnational Litigation, supra* note 233, at 1085 (describing different aspects of the U.S. legal system compared to others).

253. Florey, *supra* note 13, at 1236.

254. Silberman & Yaffe, *supra* note 9, at 419, nn.50-52 (citations omitted); *see also* Dubinsky, *Transnational Litigation*, *supra* note 32, 325-27 (describing unique burdens and cultural differences).

255. Linda Silberman, *Comparative Jurisdiction*, *supra* note 244, at 320 (noting that complaints about 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"); *see also* 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) (explaining 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").

256. Trek C. Doyle & Roberto Calvo Ponton, *The Renaissance of the Foreign Action and a Practice Response*, 33 TEX. TECH. L. REV. 293, 295 (2002).

257. Childress, *Rethinking Legal Globalization*, *supra* note 9, at 1518-20, 1543-48.

258. *See* Kimberly A. Moore, *Xenophobia in American Courts,* 97 NW. U. L. REV. 1497 (2003) (describing perceived foreign bias in patent cases); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 2 (2009) (describing how the U.S. system can be viewed as exceptional because of "class actions, primarily on an opt-out basis; contingency-fee financing of litigation; rejection of Euro-style 'loser-pays' rules that link responsibility for the fees of both sides to the outcome of the litigation; extensive reliance on juries as fact-finders; costly pre-trial discovery; and the availability of punitive damages in substantial areas of civil litigation").

foreign litigation as much as foreigners do, often believing foreign courts to be biased or corrupt.[259] "Differences across nations in the quality of courts are profound. . . . Lack of judicial independence, corrupt and biased judges, long delays, and highly formalistic procedures are among the judicial shortcomings that commentators frequently identify."[260] In recent years, there has been some high-profile transnational cases outside the U.S.[261] and foreign forums may be more pro-plaintiff than they once were.[262]

Courts have often recognized the burdens in litigating in a foreign forum.[263] In *Asahi*, the Supreme Court recognized that the burden of mounting a defense in a foreign legal system can be "unique" and should be afforded "significant weight" in assessing the reasonableness of extending jurisdiction "over national borders."[264] As a result, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[265] More recently, some on the Court have suggested it would be fundamentally unfair to require "a small Egyptian shirt maker, or a Brazilian manufacturing cooperative, or a Kenyan coffee farmer" to defend far from home.[266] Access concerns may also arise in the transnational context, which don't arise domestically. In an interstate case, dismissal likely means the plaintiff will refile in a different state. The same may not be true in international cases.[267]

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259. Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner's Dilemma*, 94 N.C. L. REV. 751, 752 (2016) (noting the "perceptions of widespread corruption in the judicial processes in many, usually low- income, countries" and calling for an international court of civil justice); ERIC POSNER, THE PERILS OF GLOBAL LEGALISM 228 (2009) (noting that "American legalism does not extend very far from its shores" and that Americans do not support decisions unless made by "American courts, which are staffed by Americans who share American values and interests").

260. Dammann & Hansmann, *supra* note 38, at 7.

261. Whytock & Robertson, *supra* note 40, at 1447-49 (describing the Chevron-Ecuador litigation); *see also* R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT'L ORG. 103, 103 (2004) (explaining how "American legal style is spreading to other jurisdictions"); *supra* note 38.

262. Whytock & Robertson, *supra* note 40, at 1449, n. 21 (noting how foreign systems have begun "favoring qualities of the U.S. legal system," and "appear more likely to grant relief to plaintiffs and to do so in larger amounts than they previously were"); *see also* Shill, *supra* note 36, at 462 ("Plaintiffs now routinely litigate the merits phase of such disputes in foreign forums, where they benefit from newly favorable substantive law and sometimes from a politicized or corrupt judiciary, and then come to American courts to collect on their judgments, where they enjoy a tradition of hospitality to foreign judgments.").

263. Florey, *supra* note 13, at 1235 ("[T]he Court's recent jurisprudence is full of references to the hardships of foreign defendants.").

264. Asahi Metal Industries Co. v. Superior Court, 480 U.S. 102, 103-04, 112 (1987).

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

266. *Nicastro*, 131 S. Ct. at 2791 (Breyer, J., concurring).

267. Linda J. Silberman, Goodyear *and* Nicastro: *Observations from a Transnational and Comparative Perspective,* 63 S. C. L. REV. 591, 595-96 (2012) ("[T]here is a concern that the plaintiff, if he cannot sue the foreign defendant in the United States, may not be able to sue at all.").

A final concern focuses on fairness and the perception of bias. As Maggie Gardner describes, commentators "worry that the courts are ignoring foreign sovereign interests in the cases they do take, whether by compelling broad extraterritorial discovery, declining to apply foreign or international law, or attempting to block foreign proceedings."[268] The procedures themselves may lead to parochial outcomes, favoring U.S. litigants over foreign ones.[269] At the very least, U.S. courts apply U.S. choice of law rules and decide cases with U.S. judges and juries, which is often interpreted as necessarily promoting U.S. interests.[270] Foreign defendants generally believe U.S. courts favor U.S. litigants.[271] Indeed, while not necessarily empirically correct,[272] "perceptions that American courts are hostile to foreign parties are widespread."[273] Related to this perception of bias are the very issues of self-determination that modern notions of sovereignty seek to protect. As Heather Gerken describes in the domestic context: "It's unsettling, after all, when one state's policies stretch beyond

268. Gardner, *supra* note 15, at 944 (citing sources).

269. *Id.*; *cf.* Silberman, *supra* note 267, at 596 ("More generally, domestic institutions and attitudes within a particular country can differ markedly from those in foreign states, increasing the litigation burden of the foreign defendant.").

270 . Christopher L. Doerksen, *The Restatement of Canada's Cuban (American) Problem*, 61 SASKATCHEWAN L. REV. 127, 134 (1998) ("Canada believes that a judge raised with the cultural construct of the United States will necessarily tend to favor U.S. interests . . . ."); 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, 374 (2004) ("For Europeans, it is common belief that members of a U.S. jury, even if carefully selected, will usually be inclined to sympathize with the U.S. plaintiffs rather than the foreign defendants."). Statements by some judges, speaking even in the interstate context, aid fuel to this appearance. Richard Neely, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS 4 (1988) (a West Virginia Supreme Court justice noting that "[a]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me."). This is not a new fear. Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121 (1996) ("As James Madison said of state courts: 'We well know, sir, that foreigners cannot get justice done them in these courts . . . .") (citations omitted).

271. Kevin M. Clermont & Theodore Eisenberg, X*enophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 452 (2007) (noting the perception of bias, but concluding that the data offer no support for the existence of xenophobic bias in U.S. courts); *see also* Clermont & Eisenberg, *Xenophilia in American Courts*, *supra* note 270, at 1121-22, 1143 (1996) (concluding empirically that foreigners do not fare badly in U.S. courts); 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, 22-25 (1996) (describing fear and perception of bias against foreigners).

272. Christopher A. Whytock, *Myth or Mess? Choice of Law in Action,* 84 N.Y.U. L. REV. 719, 732-34 (2009) (finding perception of bias against foreigners not empirically true).

273. Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497 (2003).

its territories. It's unsettling for the simplest of reasons: *no one wants to live under someone else's law*."[274]

## V. CONCLUSION

Personal jurisdiction remains a critically important area for those interested in the developing field of transnational law. This Article has sought to inform the discussion by making three principal contributions. First, it describes how personal jurisdiction over foreign, nonresident defendants remains an important and timely issue and emphasizes how an interplay exists between domestic jurisdictional doctrines and international lawmaking. Broad conceptions of unilateral, extraterritorial regulation—where courts assert jurisdiction over claims against foreign, nonresident defendants for foreign harms—risks undermining broader multilateral engagement. Second, the U.S. Supreme Court's recent decisions involving personal jurisdiction should be understood within, and partly limited to, their international contexts. Civil disputes involving foreign, nonresident defendants raise different considerations—both practical and conceptual—than domestic disputes. The tendency for courts and commentators to conflate and treat international disputes as variations of domestic disputes continues to be problematic, particularly because sovereignty considerations play a different and more significant role in international cases. Lower courts should be careful to not overstate the applicability of the U.S. Supreme Court's most recent decisions to the purely domestic, interstate context. Third, public international law imposes restraints on personal jurisdiction. The newly adopted Fourth Restatement of the Foreign Relations Law of the United States is simply incorrect when it suggests that personal jurisdiction is unregulated under international law. The weight of authority is against that minority position, which would overturn settled practice. Courts and commentators must be careful to not unintentionally rely on the Fourth Restatement's controversial approach.

274. Heather Gerken, *The Taft Lecture: Living Under Someone Else's Law*, 84 U. CIN. L. REV. 377, 378 (2016) (emphasis in original) (noting this sentiment and arguing against this powerful intuition in the horizontal federalism context); *see also* Stephen Sachs, *Why Not Bill Gates, or the Pope? in* SCOTUS OT16 Symposium: Jurisdiction and Power in Bristol-Meyers Squibb, PRAWFSBLAWG, (June 19, 2017), *available at* http://prawfsblawg.blogs.com/prawfsblawg/2017/06/scotus-ot16-symposium-jurisdiction-and-power-in-bristol-meyers-squibb.html ("Let's grant that California can determine whether those California sales were lawful. But where do its officials get power to make the same decision about the Kansas ones? Who put them in charge? Why should BMS have to obey the pronouncements of a California judge, appointed by California officials and retained by California voters, using California rules on procedure, discovery, evidence, or jury trial? Maybe what BMS did in Kansas was okay, maybe not. But why do Californians get to decide?").

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