ARTICLE

Legislating Transnational Jurisdiction

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Many scholars have observed, discussed, and debated Congressional interpretation of the Constitution. But few have considered Congress's power to interpret the Constitution in an increasingly important context: constitutional personal jurisdiction in transnational cases.

The Supreme Court has, in the past few years, turned the United States into one of the most jurisdictionally stingy countries in the world. The Court has done this in the name of interpreting and applying the supposed commandments of the Due Process Clause of the Fourteenth Amendment to the Constitution. The Court has so narrowed constitutional personal jurisdiction that numerous federal statutes are now being rendered wholly or partly inoperative. For example, Congress enacted the Anti-Terrorism Act in 1987 to enable U.S. nationals to overcome jurisdictional hurdles in order to bring civil claims against foreign terrorist organizations in U.S. courts. Court-crafted jurisdictional rules now turn away all but a small subset of these cases from U.S. courts. In the Foreign Sovereign Immunities Act, Congress expressly stated that U.S. courts would have personal jurisdiction over foreign sovereign entities for a variety of purposes, including recognizing arbitral awards. Many of these claims now too may be turned away.

This article recognizes the recent and growing tension between federal statutory law and federal constitutional law. This tension can be resolved by recognition that Congressional interpretation of constitutional jurisdiction should be entitled to respect by the courts. Congressional interpretation of constitutional jurisdiction in transnational cases offends neither constitutional rights nor constitutional structure. Moreover, all of the Court's cases on personal jurisdiction to date have interpreted jurisdiction deriving from the Fourteenth Amendment—applicable in cases arising in state court or applying state law—whereas cases involving claims under federal law implicate the Fifth Amendment, which can and should be interpreted more broadly. Recognition of Congress's role in interpreting Fifth Amendment personal jurisdiction will drive a truly transnational approach to jurisdiction, enable important international treaties, and deemphasize the courts' trans-substantive approach to jurisdiction.

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I. INTRODUCTION

The Constitution sets the limits of personal jurisdiction. The courts say what the Constitution requires. Therefore, the courts set the limits of personal jurisdiction.

Each part of this syllogism is wrong—or at least incomplete to the point of being misleading. Personal jurisdiction has been a constitutional doctrine since the Court decided *Pennoyer v. Neff* in 1878.[1] The courts have had a prominent hand in setting the boundaries of personal jurisdiction since *Pennoyer* at least. But the path of personal jurisdiction has been more complicated. It has been a conversation between the courts and legislatures.[2]

Congress has been a neglected player in personal jurisdiction for a simple reason—until very recently, the Supreme Court set very broad limits on jurisdiction. This left the other branches ample room in which to operate to achieve their policy objectives without bumping into court imposed limitations. That era is over.

In 2014, the Supreme Court decided *Daimler AG v. Bauman*, which dramatically tightened the limits on where a party could be sued for any conduct—so-called general or all-purpose jurisdiction.[3] For over half a century, a party could be sued on any claims where it had "continuous and systematic" contacts—for example, where it maintained a leased sales office with a handful of employees.[4] After *Daimler*, a party can only be sued where it is "at home"—absent exceptional circumstances, its domicile or principal place of business.[5] In 2011, the Court decided *J. McIntyre Machinery v. Nicastro*, which set sharp limits on where a party could be sued for conduct arising out of or relating to an injury—for example, where defective machinery injured a worker—usually called specific jurisdiction.[6] The Court has made

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1 95 U.S. 714, 733 (1878) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to deter mine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.") (Field, J.).

2 To take one example, the Supreme Court has repeatedly relied on state "special" jurisdictional statutes in shaping constitutional rules of jurisdiction, even though states have a weaker claim than the federal legislature to interpretative authority over the federal Constitution. *Infra* at section I.D.

3 134 S. Ct. 746, 760–61 (2014) (holding that an assertion of general jurisdiction in forums other than a corporation's place of incorporation or principal places of business is "unacceptably grasping," except in "exceptional" circumstances).

4 *See generally* Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. REV. 344, 359 (2016) (describing the breadth of general, all-purpose jurisdiction before *Daimler*).

5 134 S. Ct. at 760 (observing that "[w]ith respect to a corporation, the place of incorporation and principal place of business are" the paradigmatic forums for exercise of all-purpose jurisdiction).

6 131 S. Ct. 2780, 2791 (2011) ("[T]he stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures. . . . [T]he Constitution commands restraint before discarding liberty in the name of expediency.").

the United States one of the most jurisdictionally stingy countries in the world.[7]

This leaves Congressional statutes vulnerable to evisceration by restrictive Court-crafted jurisdictional rules. For example: The Anti-Terrorism Act (ATA) states that U.S. courts shall have jurisdiction to hear claims against certain entities when U.S. victims of international terrorism bring a suit for civil relief in U.S. courts.[8] The Foreign Sovereign Immunities Act (FSIA) provides that U.S. courts shall have personal jurisdiction over foreign sovereigns and their instrumentalities to confirm arbitral awards against them.[9] Both of these statutes would now seem to be ineffective in many of their applications—empty attempts by Congress to authorize U.S. courts to hear certain claims against foreign parties.

Some have assumed that, with these statutes seemingly beyond the constitutional outer bounds of jurisdiction as interpreted by the Court, they must fall.[10] This is not necessarily so. Many scholars have observed that Congress interprets the Constitution.[11] Until relatively recently, these Congressional determinations, as expressed by statutes, would receive significant deference from the Court unless they violated either a constitutionally guaranteed right or a fundamental "postulate" of constitutional structure.[12] Transnational personal jurisdiction certainly implicates no constitutional postulate—unlike assertions of jurisdiction by the several states, assertions of judicial jurisdiction by the federal sovereign over foreign parties trenches on neither horizontal nor vertical federalism.[13] Transnational personal jurisdiction may also not implicate a settled

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7 *See* Linda J. Silberman, *The End of Another Era: Reflections on* Daimler *and its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 680 (2015) ("[T]he Court offers a broad solution for cases it has not even considered and dramatically changes the regime of judicial jurisdiction in the United States.").

8 *See* 18 U.S.C. § 2331 *et seq.*

9 *See* 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611.

10 *See, e.g.*, Victoria A. Carter, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts*, 82 VA. L. REV. 357, 357 (1996) ("[T]he FSIA does not violate international law. Ironically, it may violate the Constitution.").

11 *See* Lee Epstein, *"Who Shall Interpret the Constitution?" Congress and the Constitution*, 84 TEX. L. REV. 1307, 1307–08 (2006) (book review) ("Volumes devoted to the 'Constitution outside the courts' by authors including Louis Fisher, Larry Kramer, Mark Tushnet, David P. Currie, and J. Mitchell Pickerill, to name only a few, now fill several of my bookshelves. And surely I'll need to make room for even more.").

12 *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947, (2003) ("[T]he policentric model more accurately reflects the understandings and practices that make up our constitutional practice than does the enforcement model.").

13 *See* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 55 (2006) ("[A]lthough it may well be the nature of our federalism that interstate sovereignty concerns are no longer relevant, sovereignty remains the key constraint on jurisdiction internationally.").

constitutional right. The Court has assumed, but never held,[14] that foreign parties enjoy Due Process jurisdictional protections—an assumption in tension with the general rule that foreign parties acquire constitutional rights in proportion to their connections to the United States.[15]

The Supreme Court has not had the opportunity to properly consider this question. Each of the Court's cases on transnational personal jurisdiction either originated in state court or in a federal court applying state law in a diversity case.[16] The Fourteenth Amendment governs assertions of state court jurisdiction or federal court jurisdiction in diversity cases.[17] The Fifth Amendment governs assertions of jurisdiction in cases arising under federal law[18]—cases arising under statutes passed by Congress are exactly those where Congress' interpretative authority over the Constitution should be felt. There is broad agreement among courts and commentators that the Fifth Amendment should allow more flexibility than the Fourteenth. The Court noted in a recent decision narrowing specific jurisdiction under the Fourteenth Amendment that "we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."[19]

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14 A long line of Supreme Court cases has assumed that private foreign parties enjoy Due Process jurisdictional rights. *See infra* at sections I.A and I.B. However, this issue has never been litigated before the Court and so remains only an assumption. *See* GSS Grp. Ltd v. Nat'l Port Auth., 680 F.3d 805, 818 (D.C. Cir. 2012) ("[T]he cases applying minimum contacts analysis to foreign corporations appeared to rest on a hitherto unchallenged *assumption* of the due process clauses' applicability . . . ." (emphasis in original)) (Williams, J., concurring, joined by Randolph, J.). Two federal appellate courts have held that foreign sovereigns do not enjoy Due Process jurisdictional rights, in part because imposition of those rights would "frustrate the United States government's clear statutory command" to subject foreign sovereigns to the power of U.S. courts for certain claims. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 98–99 (D.C. Cir. 2002); *see also* Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 582 F.3d 393, 399 (2d Cir. 2009) (overturning the district court's holding that "foreign states and their instrumentalities are entitled to the jurisdictional protections of the Due Process Clause").

15 *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 262–63 (1990). "[T]he claim that extraterritorial aliens are entitled to rights under the Fifth Amendment — which speaks in the relatively universal term of 'person' — has been emphatically rejected." *Id.* at 260.

16 *See* FED. R. CIV. P. 4K 4(1) ("Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.")

17 U.S. Const. amend. XIV.

18 U.S. Const. amend. V; *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 1068.1 (3d ed. 2014) (Personal Jurisdiction in Federal Question Cases) (noting that, "proponents of a uniquely federal jurisdictional standard governed by the Due Process Clause of the Fifth Amendment have argued that it would be anomalous for a federal court adjudicating federally created rights" to be bound by "limitations developed under the Fourteenth Amendment, which by its own language applies only to the several states and is not a restraint on the federal government").

19 Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773, 1784, 198 (2017) (citing Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102, n. 5 (1987)).

Congress' role in shaping personal jurisdiction is likely to change jurisdictional rules in particular ways. As illustrated by the ATA and the FSIA, Congress is more likely to take an active interest in transnational jurisdiction than in determining domestic jurisdictional questions among the several states.[20] Congress can thus drive the development of a truly distinct approach to transnational jurisdiction—a notion to which the courts have, to this point, only paid occasional lip service.[21]

The power of Congress is at its height when it exercises the treaty power.[22] Court-imposed limitations on jurisdiction have played a prominent role in scuttling treaty negotiations on jurisdiction and judgment enforcement.[23] Recognition of Congress' role in setting the limits of personal jurisdiction would open the field for greater regulation of transnational jurisdiction by treaty—a consummation devoutly to be wished by constituencies ranging from international human rights advocates to major international commercial entities.[24]

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20 *Infra* at section IV.B.

21 *See* Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L. J. 109, 110 (1993) (noting that courts typically treat jurisdictional protections as "apply[ing] to alien defendants in the same way they apply to domestic defendants"). A recent empirical study of post-*Asahi* decisions showed that, in fact, courts do make *de facto* distinctions between domestic and foreign defendants in determining whether jurisdiction is "reasonable." *See* Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third — Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMP. & INT'L L. 405, 408 (2017) (observing "that courts in practice only dismiss on reasonableness grounds where the defendant is foreign, whereas they effectively never dismiss in interstate cases on grounds of reasonableness"). Commentators have also observed that, although the *Daimler* decision does not itself distinguish between domestic and foreign defendants, its impact is clearly different in that domestic defendants will always be "at home" in some U.S. forum, while foreign defendants will not, leaving specific jurisdiction "as the only alternative." *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. at 4 (forthcoming Spring 2018).

22 *See* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2263–65 (2015) (describing the importance of broad Congressional power to enter into and enforce treaty obligations).

23 *See* Audrey Feldman, *Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations*, 89 N.Y.U. L. REV. 2190, 2198 (2014) (arguing that "the most important difference between personal jurisdiction in the United States and Europe is not substantive; rather, it is the constitutionalization of the U.S. law of specific jurisdiction" and discussing the impact of that difference on point-of-injury jurisdiction and the obstacles it continues to pose for treaty negotiations); *see also* Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 326 (2002) (noting that the "proposed Hague Convention's basic jurisdictional principle in consumer and individual employment cases — habitual residence of the plaintiff — is somewhat alien to the American tradition" and that, "[t]o the extent the rule does not require a nexus with the defendant, it may well be regarded as violating due process limitations on the exercise of jurisdiction in courts of the United States").

24 *See* Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1505–06 (2013) ("The transnational litigation narrative is now fragmented. Considerable attention is still given to the effects of globalization on the law, to international human rights issues, and to treaty issues.").

Congress is also likely to legislate, in particular, substantive areas of importance to the political branches. This makes a marked contrast with the jurisdiction jurisprudence of the courts, which has been resolutely trans-substantive.[25] Indeed, trans-substantivity of judicially created rules may function as a needed check on the authority of otherwise unaccountable judges.[26] The increased role of the politically elected branches is likely to move the United States away from a trans-substantive approach to jurisdiction. A more flexible approach to jurisdiction would bring the United States closer to the jurisdictional rules long adopted in the European Union and elsewhere.[27]

Finally, an expanded role for Congress may lead to an effective de-constitutionalization of personal jurisdiction.[28] Jurisdiction was not a constitutional doctrine until the Court's watershed decision in *Pennoyer*.[29] As every other aspect of *Pennoyer* has eroded, the Court's power over jurisdictional rules has remained.[30] The United States is an outlier in assigning personal jurisdiction constitutional stature—few other nations take a similar approach.[31] Deference to Congressional statements about jurisdiction would bring the development of jurisdiction much closer to the

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25 *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 375 (2010) ("Even as the theoretical underpinnings of trans-substantivity weaken, institutions with rulemaking power manifest by their actions continued respect for the principle.").

26 *See* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1229 (2013) ("Trans-substantivity constrains a judge's policymaking flexibility and thus protects against encroachments on legislative terrain. It denies judges the authority to discriminate among substantive regimes and thus to make arguably political choices better left to coordinate branches.").

27 In *Daimler*, Justice Ginsburg herself noted the Court's desire to bring U.S. jurisdiction into closer parity with the E.U. approach. 134 S. Ct. at 763 ("The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, ...").

28 A few scholars have speculated about the benefits of a total decoupling of the Constitution from personal jurisdiction. *See generally* Childress, *supra* note 24; Parrish, *supra* note 13; Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

29 Borchers, *supra* note 28, at 23 ("Jurisdiction did not take on a constitutional dimension until *Pennoyer*. *Pennoyer* traditionally has been interpreted as incorporating the territorial principles of jurisdiction into the due process clause, thereby making personal jurisdiction a matter of constitutional concern.").

30 *See* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 479–80 (1987) ("Field, the 'prophet' of substantive due process, seized on *Pennoyer* as a vehicle to entrench the due process clause of the fourteenth amendment as a barrier to state action inconsistent with natural law rights, and went far beyond the facts and issues before him to do so.").

31 *See* Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DePaul L. Rev. 319, 330 (2002) ("[C]onstitutional limits on judicial jurisdiction in the United States stress the relationship between the individual defendant and the forum — an inquiry quite different from the approach of civil law countries, where the focus is on the relationship between the dispute and the forum and usually carries no constitutional overlay.").

ordinary process of legislation—and further from the court-directed process of common law constitutional decision-making.

II. CONSTITUTIONAL JURISDICTION

Without repeating for "the thousandth time the history of in personam jurisdiction," a few important observations can be drawn from the constitutionalization of jurisdiction in the United States and what followed after.[32] First, the notion that jurisdictional protections derive from the Fourteenth or Fifth Amendments to the Constitution has always rested on sandy ground—the Court has never explained why jurisdiction is rooted in the Constitution. Second, the Court has developed the U.S. law of transnational jurisdiction almost entirely by interpreting the Fourteenth Amendment, which imposes limitations on the power of the several states, rather than the Fifth Amendment, which applies to the federal government. Third, the Court has failed to settle on a consistent constitutional value protected by Due Process personal jurisdiction, instead vacillating between "liberty" and horizontal federalism. Fourth, even while articulating the constitutional boundaries of Due Process personal jurisdiction, the Court has repeatedly deferred to jurisdictional statutes enacted by state legislatures, even though state legislatures have a weaker claim than the federal legislature to interpret the federal Constitution.

A. Origins of Constitutional Limits on Jurisdiction

At the time of the Framing, personal jurisdiction was understood as purely a doctrine of international law.[33] Sovereign states had absolute authority within their territorial borders.[34] If a sovereign acted in contravention of international law—for example, by issuing a judgment when a defendant had no notice or opportunity to defend—no other sovereign state would give that judgment any effect.[35]

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

33 Jacob Kreutzer, *Incorporating Personal Jurisdiction*, 119 PENN ST. L. REV. 211, 216 (2014) ("[T]he court felt free to draw on the principles of international law — widely regarded at the time as a transcendental body of law based on universal principles of justice — in deciding matters of jurisdiction.").

34 *Id.* at 217 ("If a state wished to exercise jurisdiction more broadly than was generally recognized, it was free to have its own courts do so.").

35 *Id.* ("The restriction of the personal jurisdiction doctrine protected other states from being required to recognize such grandiose claims of jurisdiction, but it did not act to prevent the forum state's courts from recognizing any particular intra-state exercise of jurisdiction."). Few cases ever grappled with this principle as, in effect, the absent defendant was immune from the judgment unless he or she was unlucky or unwise enough to wander into the state that had issued the judgment.

The U.S. Constitution introduced the Full Faith and Credit Clause for sister state judgments.[36] The law of recognition of judgments under that Clause gave rise to the law of personal jurisdiction. In a series of cases, the Supreme Court held, first, that the Full Faith and Credit Clause required that sister states recognize each other's judgments;[37] and second, that recognition of sister state judgments was still open to collateral attack. Sister state judgments could be denied recognition if the judgment-rendering state had violated "international law" by issuing a judgment against an absent defendant who had not been "served with process or [had not] voluntarily made defence."[38] The Court enforced rules of personal jurisdiction according to principles of international law but "without any specific constitutional directive."[39] Jurisdictional challenges arose only in the context of interstate collateral attacks on recognition of judgments. Personal jurisdiction played no role in *intra*state challenges to assertions of state power. In short, a state could do whatever it pleased with its judgments within its territorial borders—unless some other Constitutional provision applied to limit its power.[40]

Justice Stephen Johnson Field changed that. Justice Field's career-long project was to restrain the actions of government that could constrain individual liberty, broadly conceived. For Field, this project extended to the power of state courts to issue orders against absent defendants. In *Galpin v. Page*,[41] decided shortly before *Pennoyer*, the plaintiff served the defendant using the California service by publication statute. The plaintiff obtained a default judgment.[42] The defendant commenced an action for ejectment in California federal court on the basis that the state court lacked jurisdiction.[43]

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36 U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."). Congress also passed a statute in 1790 implementing the Full Faith and Credit Clause, which provided that states could deny recognition to judgments rendered in violation of international law. *See* 28 U.S.C. § 1738.

37 This displaced the common law rule that foreign judgments were merely evidence of an obligation. *See* Borchers, *supra* note 28, at 28.

38 D'Arcy v. Ketchum, 52 U.S. 165, 176 (1850).

39 Borchers, *supra* note 28, at 28; *See D'Arcy*, 52 U.S. at 176 (describing personal jurisdiction as a creature of common and international law). In later cases, the Court made clear that it would accept some degree of jurisdictional creativity, including the fiction of implied consent by foreign corporations — a development that would "come to be the centerpiece of the Court's jurisdictional jurisprudence several decades later." *See* Borchers, *supra* note 28, at 29.

40 The Court's position at the time is aptly summarized in *Cooper v. Reynolds*, a case involving a question of jurisdiction arising from a Tennessee default judgment. 77 U.S. 308, 321 (1870) (holding that Tennessee court had jurisdiction because "we believe this to be the law, as held by the courts of Tennessee").

41 85 U.S. 350, 353 (1873).

42 *Id.* at 354.

43 *Id.* at 355–56.

Under prior case law, this was an easy case. The "international" principles of territorial jurisdiction that might cause a judgment to be denied recognition in an interstate case had no application in an intrastate case. Indeed, after a recitation of this jurisprudence, Justice Field confirmed that California was free to pass whatever service statutes it liked—but Field held that the court in this case lacked jurisdiction because the statute had not been precisely followed.[44] Field wrote that, where a statute deviated from the principles of traditional territorial jurisdiction, it must be narrowly construed and compliance by plaintiffs strictly enforced.[45] Justice Field cited no constitutional source of authority to pronounce this doctrine.

Pennoyer added nothing to *Galpin* except for one thing—the Due Process Clause of the Fourteenth Amendment.[46] The facts of *Galpin* and *Pennoyer* were materially identical.[47] The lower federal court, following the commands of *Galpin*, strictly construed the service by publication statute and held that the underlying plaintiff had failed to follow its requirements.[48] Justice Field authored the opinion upholding the ruling, but invoked a different reason. Field noted at the outset that a majority of the court disagreed with the lower court's narrow statutory construction.[49] Field then proceeded to his now-familiar exposition on in personam and in rem jurisdiction.[50] He then canvassed the law to that point on intrastate recognition of judgments.[51] But this left the central analytical difficulty—on what basis to convert these principles of interstate recognition into limitations on a state's power to define its own intrastate jurisdiction.

Field selected the Due Process Clause of the Fourteenth Amendment, holding that, without service or a voluntary appearance within the state, the

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44 *Id.* at 373. ("The provisions mentioned were not strictly pursued with respect to the infant defendant.").

45 *Id.* at 369. ("When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation . . . every principle of justice exacts a strict and literal compliance with the statutory provisions.").

46 *See* Borchers, *supra* note 28, at 38 ("Another major difficulty was Field's treatment (or more correctly nontreatment) of *Galpin*. *Galpin* involved facts almost precisely parallel to *Pennoyer*.").

47 Mitchell commenced an action against Neff for less than $300 in unpaid legal fees in Oregon. Neff was absent from Oregon. Mitchell served him using the service by publication statute. After obtaining a judgment, Mitchell seized a parcel of land owned by Neff and sold it to Pennoyer. Returning to Oregon, Neff commenced an action to remove Pennoyer from the land on the basis that the Oregon court had lacked jurisdiction. For Justice Field's recitation of these facts, *see Pennoyer*, 95 U.S. at 720. For a more in-depth examination of the surprisingly entertaining cast of characters in the case, *see generally* Perdue, *supra* note 30.

48 For example, by obtaining an affidavit of service from the newspaper's "editor" rather than its "printer," as required by the statute. *Pennoyer*, 95 U.S. at 721.

49 *See id.* ("The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the 'affidavit of the printer, or his foreman, or his principal clerk,' is satisfied when the affidavit is made by the editor of the paper.")

50 *Id.* at 725–28.

51 *Id.* at 729–30.

judgment was void.[52] The irregularities in Field's decision are too numerous to catalog here. The most telling problem is the complete absence of *Galpin*. In *Galpin*, Field approached the question of jurisdiction as purely one of statutory interpretation and affirmed the ability of states to exercise their own power beyond territorial limitations, even if those exercises of power would receive no recognition from other states.[53] It appears that Field tried to deal with *Galpin*, but abandoned the attempt.[54]

Pennoyer is the foundation of constitutional jurisdiction, but the Constitution plays no obvious role in *Pennoyer*. The lower court articulated a statutory approach to denying jurisdiction fully consistent with *Galpin*. Field's aims in inserting the Due Process Clause of the Fourteenth Amendment into intrastate jurisdictional jurisprudence are highly unclear. Field was the "pioneer and prophet" of substantive due process, using the Due Process Clause to instantiate rights that would restrain the government.[55] The "substantive due process" line of cases that descended from Field's work has been greatly diminished since its arguable high-water mark in *Lochner v. New York*.[56] But any distinction between "procedural" and "substantive" due process rights would have been unknown to Field. Placed in that context, the survival and fantastic growth of Field's marquee achievement in "procedural" due process seems an aberration.

Over the next forty years, the Court interpreted the Due Process Clause to guarantee that a defendant had at least one opportunity, even in intrastate cases, to make sure that the state's rules were correctly followed—but not that it dictated the content of jurisdictional rules.[57] The Supreme Court then changed course with little explanation or analysis, holding that it was "self-evident" that the Due Process Clause of the Fourteenth Amendment empowered courts to impose limitations on states' exercise of their own

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52 *Id.* at 733–34.

53 *Galpin*, 85 U.S. at 353.

54 In his dissent, Justice Hunt noted that "the case of *Galpin v. Page* . . . is cited in hostility to the views I have expressed." *Pennoyer*, 95 U.S. at 743 (Hunt, J., dissenting). "The inescapable inference is that some earlier draft of the *Pennoyer* majority opinion did attempt to deal with *Galpin*, and that Field eventually abandoned the task, realizing that the rationales, if not the holdings, of the cases were inconsistent." Borchers, *supra* note 28, at 38.

55 Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 653 (1909) (calling Field the "pioneer and prophet" of substantive due process).

56 198 U.S. 45, 53 (1905) ("Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment."); *see* Howard J. Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851, 853 (1941) (observing that "[t]he whole modern interpretation of the Fourteenth Amendment rests upon" Justice Field's opinions).

57 Borchers, *supra* note 28, at 40 ("The limited view of Pennoyer is that Field intended for the due process clause to provide an avenue for challenging a state's exercise of personal jurisdiction in all cases, whether or not recognition of the judgment was sought interstate or intrastate, but did not intend to have the due process clause dictate the contents of those rules of jurisdiction.").

jurisdiction.[58] After this turn, the Court—in opinions dealing either with non-resident motorists or corporations—founded its Due Process jurisprudence on the notion of implied "consent." Implied consent could be manifested by appointing an agent for service[59] or simply by using a state's roads.[60]

In *International Shoe v. Washington*,[61] the Court did away with the cumbersome fiction of implied consent. The Court did not, however, give any further explanation or analysis to the role of the Due Process Clause in giving content to jurisdictional limitations. Rather, the Court traded one cumbersome fiction, implied consent, for another more workable fiction, "corporate presence."[62] The Court defined corporate presence as requiring a non-resident corporate defendant to have "certain minimum contacts" with the forum state such that jurisdiction over it did not offend "tradition notions of fair play and substantial justice."[63]

International Shoe may not have answered the questions that surrounded the constitutional stature of personal jurisdiction—but it did make another important contribution. The Court noted that a corporation could have contacts so "continuous and systematic" with the forum state that it was appropriate for the forum's courts to hear "suits unrelated" to a corporation's activities in the forum state.[64] The Court also observed that a corporation could be haled into court for claims that "arise out of or are connected with [its] activities within the state."[65] In their seminal article, Arthur von Mehren and Donald Trautman designated these categories general jurisdiction, the "power to adjudicate any kind of controversy when jurisdiction is based on relationships, direct or indirect, between the forum

58 *See* Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 196 (1915) (noting that "[i]t is however, unnecessary to pursue the subject from an original point of view," as in prior cases "these principles were treated as self-evident"); *see also* Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899); Dewey v. Des Moines, 173 U.S. 193 (1899).

59 *See* Kane v. New Jersey, 242 U.S. 160, 164 (1916) ("[A] nonresident owner shall appoint the secretary of state his attorney upon whom process may be served 'in any action or legal proceeding caused by the operation of his registered motor vehicle within this state against such owner.'").

60 *See* Hess v. Pawloski, 274 U.S. 352, 357 (1927) ("The difference between the formal and implied appointment is not substantial, so far as concerns the application of the due process clause of the Fourteenth Amendment.").

61 326 U.S. 310, 318–19 (1945) ("Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.")

62 Borchers, *supra* note 28, at 53 ("Unlike previous cases, which had fixed on the fictional notion of consent to justify jurisdiction over out-of-state corporations the International Shoe Court fixed on the equally fictional notion of corporate 'presence.'"). For more on the influence of legal fictions on the development of jurisdiction, *see* Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT'L L. & POL. 259, 270–92 (2015).

63 *International Shoe*, 326 U.S. at 316.

64 *Id.* at 317–18.

65 *Id.* at 319.

and the person or persons whose legal rights are to be affected," and specific jurisdiction, the "the power to adjudicate with respect to issues deriving from, or connected with" activities in the forum.[66]

Overall, the path dependency is striking in the historical development of constitutional personal jurisdiction. The U.S. approach to jurisdiction may have turned out very differently had Justice Field not made *Pennoyer* part of his long-standing campaign to restrain the power of the state. Indeed, there is a telling contrast between the power of Congress to regulate foreign *conduct* and the power of Congress to regulate foreign *persons*.

Congress' power to pass legislation regulating foreign conduct might face constitutional limitations. Judge Learned Hand noted in *United States v. Alcoa,* his seminal decision on the extraterritorial reach of U.S. antitrust law, "that the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so."[67] Nonetheless, the Supreme Court has never articulated any such restrictions. In its 2010 decision in *Morrison v. National Australia Bank*,[68] the Court imposed a "presumption against extraterritoriality" on U.S. securities law, but made clear that this restriction was a mere "canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress' power to legislate." Meanwhile, the Constitution severely restricts on Congress' power over foreign persons.

To the extent a distinction between constitutional limits on Congress' power over conduct and its power over persons is appropriate, current law would seem to have it exactly backwards. The Restatement (Third) of The Foreign Relations Law of the United States observes that limits on the power to prescribe the applicable law for conduct—which it terms "jurisdiction to prescribe"—is a much weightier concern for international law than the power of courts to adjudicate particular claims against persons,

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66 Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966).

67 United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).

68 561 U.S. 247, 255 (2010). The current draft of the Restatement (Fourth) of The Foreign Relations Law of the United States notes that, to "satisfy the Due Process Clauses of the Fifth and Fourteenth Amendments, the application of federal and State statutes must be neither arbitrary nor fundamentally unfair." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: FEDERAL CONSTITUTIONAL LIMITS § 202 COMMENT C. (Dec. 11, 2015) (Council Draft No. 2). The Reporters' Notes observe that this test derives from cases concerning application of state law under the Fourteenth Amendment, but that the "Supreme Court has not addressed in modern times whether the same test governs the application of federal law under the Fifth Amendment." *Id.* at Reporters' Note 4. *But see Lea* Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1263 (1992) (arguing in the context of extraterritoriality and choice of law that, "[w]hen standards of the Fifth Amendment Due Process Clause are treated as parallel to those of the Fourteenth Amendment…[f]oreigners will possess the same due process protection against federal overreaching as American citizens possess against the laws of sister states," and that "d]enying this basic protection is hard to justify.").

which the Restatement terms "jurisdiction to adjudicate."[69] This makes perfect sense. In Linda Silberman's memorable phrase, elevating jurisdiction over choice of law "is to believe that an accused is more concerned with where he will be hanged than whether."[70]

Jurisdiction to prescribe never had a *Pennoyer* moment. Without Justice Field's intervention, Congress' power to regulate foreign conduct by passing statutes has proceeded without constitutional interference. If Congress wishes to regulate an entirely foreign securities transaction, it can probably do so if it speaks clearly.[71] This rule may sound familiar: It was the Court's approach to personal jurisdiction in *Galpin*[72] — the case materially identical to *Pennoyer* that was decided right before it. Under *Galpin*, a state legislature could authorize personal jurisdiction over non-residents in whatever manner it chose,— but those jurisdictional provisions would be narrowly construed and strictly applied.[73] Had the problematic decision in *Pennoyer* never happened, jurisdiction to adjudicate and jurisdiction to prescribe might still look quite similar and lack any hard constitutional limitations.

B. Problems of Constitutional Limits in Transnational Cases

The Court delivered its first notable limits on transnational jurisdiction in 1987, when the Court decided *Asahi Metal v. Superior Court of California,*[74] which sharply curbed specific jurisdiction in transnational cases. The case arose from a products liability claim filed in California, where a tire on the plaintiff's motorcycle blew out, injuring him and killing his wife.[75] The plaintiff sued the Taiwanese manufacturer, Chen Shin Rubber Industrial, which in turn filed a claim for indemnity against the Japanese component manufacturer, Asahi.[76] The plaintiff settled, leaving only the Taiwanese manufacturer and the Japanese component maker battling in California court.[77] The Supreme Court failed to deliver a majority opinion. However, eight Justices did agree that jurisdiction was "unreasonable" in this case.[78]

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69 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, Chapter 2, Introductory Note (1987).

70 Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 82–83, 85–90 (1978).

71 *See Morrison*, 561 U.S. at 255.

72 85 U.S. at 353.

73 *See id.*

74 480 U.S. 102 (1987).

75 *Id.* at 105–06.

76 *Id.* at 106.

77 *Id.*

78 *Id.* at 114 ("A consideration of these factors in the present case clearly reveals the unreasonableness of the assertion of jurisdiction over Asahi, even apart from the question of the placement of goods in the stream of commerce." (O'Connor, J. plurality opinion)); *id.* at 116 (stating

The Court also agreed that something more than "minimum contacts" was required to ground jurisdiction—and this had the effect, in "stream-of-commerce" cases, of essentially forbidding jurisdiction at the point of injury unless there existed significant additional contacts between the defendant and the forum state.[79]

Beginning in 2011, the Court embarked on a series of decisions that further narrowed transnational personal jurisdiction. In *J. McIntyre v. Nicastro*, the plaintiff was injured in New Jersey by a piece of metal-shearing equipment.[80] The defendant manufacturer was based in London and had contracted an independent distributor in the United States to sell its products throughout the country.[81] In a plurality opinion authored by Justice Kennedy, this was not enough to ground jurisdiction.[82] The defendant might have had sufficient contacts with the United States — but had managed, through its distributor, to ship only one machine into New Jersey.[83] Therefore, Justice Kennedy concluded that "[a]t no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws."[84] Justice Ginsburg authored a dissent, joined by Justices Sotomayor and Kagan.[85]

The Court further restricted U.S. courts' constitutional jurisdictional power in two recent transnational cases concerning general jurisdiction. The first case, *Goodyear Dunlop Tires v. Brown*, [86] was easy. The North Carolina Supreme Court had held that the mere sale of tires into North Carolina could support general, all-purpose jurisdiction against a manufacturer.[87] This result was clearly at odds with the Court's prior decisions on general

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"[t]his is one of those rare cases" where jurisdiction is unreasonable even though the defendant has purposefully availed itself of the jurisdiction (Brennan, J., concurring in the judgment)).

79 *See* Walter W. Heiser, *A "Minimum Interest" Approach to Personal Jurisdiction*, 35 WAKE FOREST L. REV. 915, 922 (2000) (noting that, in *Asahi*, "the Supreme Court focused on the defendants' lack of purposeful activities within the forum state to the exclusion of other, rational reasons for the exercise of jurisdiction in the place of injury").

80 131 S. Ct. at 2786.

81 *Id.*

82 *Id.* at 2785 ("[T]he [New Jersey Supreme Court] concluded that a British manufacturer of scrap metal machines was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State. That decision cannot be sustained.").

83 *Id.* Justice Breyer concurred in the judgment, joined by Justice Alito, stating that, because this case did not implicate "recent changes in commerce and communication," he would simply decide the cased based on the *Asahi* rule that a single sale into a state was insufficient to ground jurisdiction — but would not adopt "plurality's seemingly strict no-jurisdiction rule." *Id.* at 2791–92 (Breyer, J., concurring).)

84 *Id.* at 2791.

85 *Id.* at 2794 (Ginsburg, J., dissenting).

86 546 U.S. 915 (2011).

87 *Id.* at 920 ("Some of the tires made abroad by Goodyear's foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through 'the stream of commerce'; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations.").

jurisdiction.[88] Justice Ginsburg's unanimous majority opinion overturning the decision below was therefore not particularly notable, except for its suggestion that general jurisdiction was only appropriate where a corporation was "at home."[89] Justice Ginsburg gave two paradigmatic examples for corporations–the place of incorporation and the principal place of business–but did not state that these were exclusive.[90]

In *Daimler AG v. Bauman*, the Court "confirmed what it had only hinted at previously"[91]—that general jurisdiction would be sharply limited to only those states where the corporation was "at home."[92] The Court further defined "at home" to comprise only a corporation's place of incorporation or principal place of business, except in "exceptional" circumstances.[93] The Court made clear that "exceptional" circumstances would have to be truly *exceptional*—as an example, the Court pointed to *Perkins v. Benguet*,[94] where the Court found general jurisdiction over a Philippines corporation that had relocated all its operations to Ohio to avoid the Japanese occupation.[95] In other words, the Court reduced the number of forums in which a large multinational corporation would be subject to general jurisdiction from scores to just two.

In *Daimler*, the Court held out specific jurisdiction as the cure to any ills that the contraction of general jurisdiction might create. However, the Court failed "to appreciate the impact that its recent decisions on specific jurisdiction have for this new regime of general jurisdiction."[96] And the Court has continued to narrow specific jurisdiction in subsequent cases. In

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88 Silberman, *supra* note 31, at 612 ("Goodyear was an easy case. Mere sales into the forum state whether direct or as part of the stream of commerce would not seem to manifest the presence of the corporation there.").

89 *Goodyear*, 564 U.S. at 919 ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." (quoting *International Shoe*, 326 U.S., at 317)).

90 *Id.* at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

91 Silberman & Simowitz, *supra* note 4, at 344; *see* 134 S. Ct. at 760–61 ("*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums." (internal quotation marks and citations omitted)).

92 *Daimler*, 134 S. Ct. at 760–61 ("Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, and approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business. That formulation, we hold, is unacceptably grasping." (internal quotation marks and citations omitted)).

93 *Id.* at 761 n.19 ("We do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home . . . .").

94 342 U.S. 437 (1952).

95 *Daimler*, 134 S. Ct. at 756, n.8.

96 Silberman, *The End of Another Era*, *supra* note 7, at 682.

Walden v. Fiore, the Court held that intentional torts committed against residents of another state, with knowledge that effects would be felt in that state, could not, without additional actions directed to that forum, ground jurisdiction.[97] The Court admonished that a defendant's "suit-related conduct" must create a "substantial connection" with the forum, and that this connection "must arise out of" the defendant's contacts with the forum, perhaps calling into question the continued vitality of jurisdiction based on effects in a forum.[98] In *Bristol-Myers Squibb v. Superior Court of California*, the Court declined to broaden the nexus needed to assert specific jurisdiction—the requirement that defendants must have jurisdictional contacts in the forum that arise out of or relate to the claim. The Court rejected the argument that California could hear the claims of non-resident plaintiffs that stemmed from conduct essentially identical to that which has injured California plaintiffs. Rather, the Court emphasized that "[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue."[99] In short, specific jurisdiction was likely narrower that the *Daimler* decision supposed; it has grown even narrower since.

C. Constitutional Values Protected by Jurisdiction

The Court, even in the bedrock decisions of *Pennoyer* and *International Shoe*, failed to articulate why the content of jurisdictional rules is a matter of constitutional stature. The Court has also failed to clearly state what underlying constitutional values are protected by these jurisdictional rules. The Court has consistently held that "sovereignty" and individual "liberty" are the guideposts of the jurisdictional analysis, but the Court has been unable to articulate which factor predominates or how they relate. The Court's problematic transnational decisions are symptomatic of this confusion, but its origins are a good deal older.

In *Hanson v. Denckla*,[100] the Court noted that state jurisdiction was constrained by "sovereignty" and by "territorial limitations." In *Shaffer v. Heitner*, the Court described the minimum contacts test as embodying "the relationship among the defendant, the forum, and the litigation, rather than

97 134 S. Ct. 1115, 1122 (2014) (holding that the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there").

98 *Id.* at 1121–22; *See* Allan Erbsen, *Personal Jurisdiction Based on the Local Effects of Intentional Misconduct*, 57 WM. & MARY L. REV. 385, 390 (2015); Lee Goldman, *From* Calder *to* Walden *and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357, 358 (2015).

99 137 S. Ct. 1773, 1781 (2017).

100 357 U.S. 235, 251 (1958) ("[R]estrictions [on jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." (internal citations omitted)).

upon the mutually exclusive sovereignty of the States."[101] In *World-Wide Volkswagen v. Woodson*, Justice White's majority opinion stated that the minimum contacts test performs "two related, but distinguishable functions."[102] First, "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum."[103] Second, "it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[104] "[A]cting as an instrument of interstate federalism," the courts could hold that a state court lacked jurisdiction "[e]ven if the defendant would suffer minimal or no inconvenience."[105]

In *Insurance Corporation of Ireland v. Campagnie des Bauxites*, the Court held that jurisdictional defenses could be struck as a discovery sanction because personal jurisdiction is waivable—a fact that Justice White, writing for the Court again, justified on the grounds that personal jurisdiction is not "a matter of sovereignty," but is rather "a matter of individual liberty."[106] Justice White explained the obvious tension with *World-Wide Volkswagen* by reasoning that the individual liberty interest protected by the Due Process Clause is ultimately what necessitates the limitations on state power.[107] In *Keeton v. Hustler Magazine*, Justice Rehnquist picked up this line of reasoning, writing that the forum state's interest is, in fact, a "surrogate" for other concerns.[108]

In its transnational cases, the Court continued to struggle to articulate the constitutional values protected by jurisdiction. In *Asahi*, the Court did not invoke the explicit sovereignty-based rationales of earlier cases, but did agree on the importance of "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."[109] In *Nicastro*, Justice Kennedy relied on the importance of sovereignty and horizontal federalism, stating that, "whether a judicial judgment is lawful depends on whether the sovereign has authority to render

101 433 U.S. 186, 204 (1977).

102 444 U.S. 286, 291–92 (1980).

103 *Id.* at 292.

104 *Id.*

105 *Id.* at 294.

106 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

107 *Id.* at 792 n.10 ("It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-à-vis other States.").

108 465 U.S. 770, 776 (1984).

109 *Asahi*, 480 U.S. at 113 (citing *World-Wide Volkswagen*, 444 U.S., at 292) (citations omitted).

it," and that restrictions on sovereign authority are a "corollary" of protection of individual liberty interests.[110] Justice Kennedy explained that, "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State,"[111] and among the quasi-sovereign states, "if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States."[112] Justice Kennedy did not explain how this concern applied when, as in this case, a foreign defendant and sovereign were concerned.

In her *Nicastro* dissent, Justice Ginsburg took the plurality to task for deepening the confusion over the constitutional roots of jurisdiction. First, Justice Ginsburg argued that "the constitutional limits on a state court's adjudicatory authority derive from considerations of due process, not state sovereignty," citing *Insurance Corp. of Ireland* and *Shaffer*.[113] Second, Justice Ginsburg wrote that, even if sovereignty played a role, "no issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present," because "New Jersey's exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State."[114] Justice Ginsburg's final point seems unassailable. However, it commanded the votes of only four justices, while four others signed on to Justice Kennedy's endorsement of horizontal sovereignty as the basis of jurisdictional rules, even in transnational cases. Indeed, the Court's forays into transnational disputes have only deepened the long-running confusion and disagreement over the constitutional values protected by jurisdiction.[115]

D. Influence of Statutes on Constitutional Limitations

Even as the Court has claimed for itself the primary role in determining the content of constitutional jurisdictional rules, it has repeatedly looked to

110 *Nicastro*, 131 S. Ct. at 2789.

111 *Id.* ("This is consistent with the premises and unique genius of our Constitution.").

112 *Id.*

113 *Id.* at 2798 (Ginsburg, J., dissenting).

114 *Id.*

115 The Court's recent domestic jurisdiction cases evince the same confusion. For example, the Court's decision in *Bristol-Myers Squibb*, the Court again stated that the "primary concern" of personal jurisdiction "is the burden on the defendant," but that this burden consists of both "the practical problems resulting from litigating in the forum" as well as "the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Squibb*, 137 S. Ct. at 1780. *See* Dodge & Dodson, *supra* note 21, at 26 ("*Bristol-Myers Squibb* is not entirely clear on how fairness and federalism relate to each other doctrinally, but it does make clear that both have roles to play.").

legislative enactments for guidance in shaping these rules. Indeed, the Court has relied on *state* statutes, although the argument that *federal* statutes should influence constitutional decision-making is far stronger. The Supreme Court has referred to state statutes for three purposes: 1) to establish the "forum state interest," a factor used in some cases as part of the constitutional balancing; 2) as a reflection of the modern realities of travel and communication, which the Court may not be well-suited to assess; and 3) as evidence of a nationwide consensus on constitutional norms.

First, the Court has looked to state statutes—or their absence—to evaluate the forum state's interest in exercising jurisdiction. For example, in *McGee v. International Life Insurance*, the Court relied on California's "manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims"[116]—an interest demonstrated by California's enactment of a special statute giving resident policyholders jurisdiction in California to pursue their claims against non-resident insurers.[117] In *Keeton*, the Court noted that New Hampshire had demonstrated a strong interest in deterring deception of its citizens by "specifically delet[ing] from its long-arm statute the requirement that a tort be committed 'against a resident of New Hampshire.'"[118] In *Hanson*, the Court distinguished *McGee*, in part by noting that Florida had not enacted a "special" statute that would confer jurisdiction on Florida courts to resolve trust disputes.[119] In *Shaffer*, the plaintiffs argued that Delaware had a strong interest in adjudicating claims of mismanagement of corporations organized under Delaware law, but the Court noted that "this argument is undercut by the failure of the Delaware Legislature to [specifically] assert the state interest" in its long-arm statute.[120]

Second, the Court has looked to state statutes as evidence of economic or practical realities. For example, in *McGee*, the Court used state

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116 355 U.S. 220, 223 (1957) ("California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable.").

117 *Id.* at 221 ("The California court based its jurisdiction on a state statute which subjects foreign corporations to suit in California on insurance contracts with residents of that State even though such corporations cannot be served with process within its borders.").

118 465 U.S. at 777.

119 357 U.S. at 252 ("This case is also different from *McGee* in that there the State had enacted special legislation . . . to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional.").

120 433 U.S. at 214 ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification."). In *Kulko v. Superior Court*, the Court held that a non-resident defendant could not be haled into California court to litigate child-support obligations, in part, because California's long-arm statute was not a "particularized" jurisdictional statute that indicated a strong forum interest. 436 U.S. 84, 98 (1978) ("And California has not attempted to assert any particularized interest in trying such cases in its courts by, *e. g.*, enacting a special jurisdictional statute.").

jurisdictional statutes giving courts power over non-resident insurers as evidence of a "fundamental transformation of our national economy over the years," in which "many commercial transactions [now] touch two or more States and may involve parties separated by the full continent."[121] These statutes also indicated that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."[122] Finally, the particular statute at issue represented a policy concern that non-resident defendants could be effectively "judgment proof" if it became uneconomical to pursue low value claims in foreign courts.[123]

Third, the Court has relied on state statutes as evidence of a national consensus on constitutional norms. In *Burnham v. Superior Court of California*,[124] Justice Scalia wrote for the Court (although only two other Justices joined his opinion in full) and held that so-called "tag jurisdiction," power obtained solely by in-state service on a natural person, remained constitutional and unfettered by the "minimum contacts" jurisprudence of *International Shoe*.[125] Justice Scalia noted that "the States have overwhelmingly declined to adopt such limitation or abandonment, evidently not considering it to be progress."[126] Justice Scalia observed that "[w]e do not know of a single state or federal statute…that has abandoned in-state service as a basis of jurisdiction."[127] Justice Scalia explicitly linked the content of court-created jurisdictional rules with the constitutional judgments of the legislatures: "Due process (which is the constitutional text at issue here) does not mean that process which shifting majorities of this Court feel to be due; but that process which American society—self-interested American society, which expresses its judgments in the laws of self-interested States—has traditionally considered due."[128]

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121 355 U.S. at 222–23.

122 *Id.* at 223.

123 *Id.* ("When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum — thus in effect making the company judgment proof.").

124 495 U.S. 604, 615 (1990).

125 *Id.* at 615–17.

126 *Id.* at 627. Justice Brennan disagreed with much of Justice Scalia's analysis — but his "solution was to reformulate the minimum contacts test in a way that was much more deferential to the states, and consequently more in accord with the rationality standard generally demanded by substantive due process" — an approach arguably even more deferential to legislatures. *See* Borchers, *supra* note 28, at 91. *Burnham* was not itself a transnational case — although many of the defenders of tag jurisdiction justified on the basis of its important role in transnational human rights cases. *See, e.g.*, Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing A Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 280 (2004) (noting that tag jurisdiction plays an important role in "prevention of human rights abuses").

127 *Id.* at 615.

128 *Id.* at 627 n. 5 (internal quotation marks omitted) ("The notion that the Constitution, through some penumbra emanating from the Privileges and Immunities Clause and the Commerce Clause,

On its face, the Court's decision in *Daimler* continued this longstanding respect for statutes. Justice Ginsburg justified *Daimler*'s dramatic diminution of general jurisdiction by noting that, in this particular case, it would not undermine the federal statutes under which plaintiffs brought suit. The Court of Appeals for the Ninth Circuit had upheld jurisdiction in part because it would be "supportive" of two federal statutes particularly designed to address issues in the "transnational context"—the Alien Tort Statute and the Torture Victim Protection Act.[129] Justice Ginsburg wrote that this reliance was misplaced, however, as the Court's recent decisions in *Kiobel v. Royal Dutch Petroleum*[130] and *Mohamad v. Palestinian Authority*[131] had rendered plaintiff's particular federal claims "infirm."[132] Justice Sotomayor concurred in the judgment but sharply differed in reasoning, in part because of her view that the majority's approach would in fact deprive many U.S. plaintiffs of the benefits of U.S. law and U.S. courts.[133]

Daimler actually represents a sharp break from the Court's approach in *Burnham*, which looked to state long-arm statutes as representative of national consensus on constitutional norms. Many states have long-arm statutes that authorize so-called "doing business" jurisdiction—power over a foreign party that has contacts with the forum "not occasionally or casually, but with a fair measure of permanence and continuity."[134] Justice Scalia's statements about tag jurisdiction could have been equally applied to these statutes: With the exception of states that had altered their long-arm statutes to simply extend to the limits of due process, the states had declined to abandon "doing business" jurisdiction.[135] *Nicastro* also breaks with the Court's tradition of looking to state statutes for guidance on the constitutional limitations of jurisdiction. Many state long-arm statutes also authorize jurisdiction where a defendant "commits a tortious act without the state causing injury to person or property within the state," if it "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."[136]

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establishes this Court as a Platonic check upon the society's greedy adherence to its traditions can only be described as imperious.").

129 *Daimler*, 134 S. Ct. at 762.

130 133 S.Ct. 1659, 1669 (2013) (holding that the presumption against extraterritorial application controls claims under the Alien Tort Statute).

131 132 S.Ct. 1702, 1704–05 (2012) (holding that only natural persons are subject to liability under the Torture Victims Protections Act).

132 *Daimler*, 134 S. Ct. at 762–63.

133 *Id.* at 773.

134 Tauza v. Susquehanna Coal Co., 266, 115 N.E. 915, 917 (N.Y. 1917). The statutory sources for this authority in New York is N.Y. C.P.L.R. 301, which provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." (J. McKinney).

135 *See generally* Paul D. Carrington, *Business Interests and the Long Arm in 2011*, 63 S.C. L. REV. 637, 638 (2012).

136 *See, e.g.*, N.Y. C.P.L.R. 302 (McKinney).

This provision, as interpreted by some courts, "is clearly at odds with the plurality opinion in *Nicastro*."[137] Justice Ginsburg included in her *Nicastro* dissent a non-exhaustive appendix on the many cases where jurisdiction had been sustained under such statutes.[138]

In *Daimler* and *Nicastro*, the Court has departed from its prior practice of looking to state statutes for guidance on the forum state's interest, on modern commercial conditions, or for a picture of national norms of constitutional jurisdiction. Perhaps this partly explains why these cases seem to come untethered from previous Supreme Court case law. The Court's departure from its respect for state statutes might be a considered decision, but its evisceration of federal statutes is almost certainly accidental. In *Daimler*, Justice Ginsburg was very careful to observe that the Court's reduction of general jurisdiction would not undermine the ATS or the TVPA in that particular case, but the Court gave no thought to the effect of the ruling on other statutes in other cases. Indeed, the Court's approach suggests that if the case before the Court had presented such a conflict with a federal regulatory scheme, it may well have come out differently.[139]

III. CONGRESSIONAL POWER TO INTERPRET CONSTITUTIONAL JURISDICTION

Numerous scholars have argued that, "Congress has the means, motive, and opportunity to contribute to constitutional law."[140] It is "a fact of American political life" that there is no single "ultimate constitutional interpreter."[141] But hard questions arise when the various constitutional

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137 Oscar G. Chase & Lori Brooke Day, *Re-Examining New York's Law of Personal Jurisdiction After Goodyear Dunlop Tires Operations, S.A. v. Brown and J. Mcintyre Machinery, Ltd. v. Nicastro*, 76 ALB. L. REV. 1009, 1047 (2013).

138 131 S. Ct. at 2804 n.19 (Ginsburg, J., dissenting).

139 The issue of Congress's power to shape jurisdictional rules recently came before the Court in *Spokeo v. Robins*, albeit in a different context — Congress's power to confer standing by elevating a possibly speculative injury into a statutory right. In *Spokeo*, the Court reaffirmed the importance of "the judgment of Congress" but also cautioned that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016) (remanding for further consideration of whether the alleged harm was sufficiently "concrete"). *See also* Heather Elliott, *Balancing as Well as Separating Power: Congress's Authority to Recognize New Legal Rights*, 68 VAND. L. REV. EN BANC 181, 187 (2015) ("[T]he Court should hesitate before it rejects out of hand Congress's ability to recognize solely legal injuries.").

140 *See* Epstein, *supra* note 11 ("Volumes devoted to the 'Constitution outside the courts' by authors including Louis Fisher, Larry Kramer, Mark Tushnet, David P. Currie, and J. Mitchell Pickerill, to name only a few, now fill several of my bookshelves. And surely I'll need to make room for even more.").

141 Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986).

interpreters—say, Congress and the courts—have varying views of constitutional law. The Supreme Court's dramatic diminution of personal jurisdiction now forces courts to consider what influence federal legislation should have on the content of the constitutional law of jurisdiction.

A. "Policentric" Interpretation of Constitutional Jurisdiction

"Not only did the early Congress almost always interpret the Constitution before the courts…in many cases congressional debates provide our only official discussion of constitutional issues, for many crucial constitutional controversies have never been judicially resolved."[142] David Currie made clear that the early and nineteenth-century Congress "played a central part in shaping our understanding of the Constitution."[143] Other scholars have made an equally compelling case for the contemporary Congress.[144] The question is therefore: "In case the legislature passes a statute which it regards as constitutional but which the Supreme Court regards as unconstitutional, whose view is to prevail?"[145]

Even a summary of the vast literature on this subject is beyond the scope of this paper, which offers just a very brief sketch of the major approaches to legislative constitutionalism. Bruce Ackerman,[146] Larry Kramer,[147] and others[148] have propounded theories of popular constitutionalism. These scholars argue that statutes like the Civil Rights Act of 1964 and the Administrative Procedure Act embody a dramatic shift in the people's interpretation of the Constitution and therefore should (and in some instances, did) displace the Court's more conservative tendencies.

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142 David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution*, 1789–1896, in CONGRESS AND THE CONSTITUTION 22 (Neal Devins & Keith E. Whittington eds., 2005).

143 *Id.* at 33.

144 *See e.g.*, Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in CONGRESS AND THE CONSTITUTION, supra note 142, at 87; *see also* Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, in CONGRESS AND THE CONSTITUTION, supra note 142, at 64; John C. Yoo, *Lawyers in Congress*, in CONGRESS AND THE CONSTITUTION, supra note 142, at 131; Bruce G. Peabody, *Congressional Attitude Toward Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION, supra note 142, at 39; Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 707–08 (1985) (defending Congress's "institutional capacity" to engage in constitutional interpretation).

145 Walter F. Murphy, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 433 (Walter F. Murphy & C. Herman Pritchett eds., 1961).

146 *See generally* Bruce Ackerman, WE THE PEOPLE: FOUNDATIONS (1991); Bruce Ackerman, WE THE PEOPLE: TRANSFORMATIONS (1998); Bruce Ackerman, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

147 *See generally* Larry D. Kramer, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

148 *See, e.g.*, Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 YALE L.J. 2237 (1999) ("Professor Bruce Ackerman has been engaged in a mighty effort to reconceptualize American constitutional development.").

Ackerman argues that fundamental constitutional change can occur outside the Article V process when the people are engaged in and attentive to the creation of a new constitutional order—a "constitutional moment."[149]

Statutes like the FSIA do not represent a popular constitutional "moment" in Ackerman's sense. Due Process personal jurisdiction has typically lacked the political or popular salience that could give rise to this sort of popular constitutionalism, as mediated through Congressional legislation. But this does not mean that legislation in more technocratic areas can never shape the courts' constitutional interpretation.

Other scholars—sometimes called "departmentalists"—ground Congress' interpretative authority in its status as a coordinate branch in the constitutional structure. Although departmentalism comes in a broad range of varieties, many of which use different nomenclature,[150] each variation likely falls under Keith Whittington's definition: an approach to extrajudicial constitutional interpretation recognizing that, "each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties" and "is supreme within its own interpretive sphere."[151]

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149 Ackerman, *supra* note 146, at 34–37, 210–12.

150 *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., 105, 111 (Summer 2004) ("[M]any critics use terms other than departmentalism to describe their preferred theories, sometimes with substantially different meanings: 'presidential' or 'coordinate' review, 'constitutional protestantism,' 'policentric constitutionalism,' 'constitutional construction,' 'constitutional dialogue,' and 'populist constitutionalism.'" (footnotes omitted)).

151 Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 783 (2002). William Eskridge and John Ferejohn have charted another course, "sympathetic to departmentalism and popular constitutionalism," but distinct from each. Edward L. Rubin, How Statutes Interpret the Constitution, 120 YALE L.J. ONLINE 297, 301 (2011). Eskridge and Ferejohn identify "superstatutes." William N. Eskridge, Jr. & John Ferejohn, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 27 (2010); *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001). Superstatutes change constitutional "baselines" by setting out a new regulatory system that fills constitutional gaps, Eskridge, *supra* note 151, at 6, that become "entrenched" through deliberation and incorporation into government structures, *id.* at 7–8, and that, in turn, "guide judicial interpretation of the Constitution as judges should give greater deference to super-statutes that have a legitimacy that is closer to that of the Constitution than ordinary lawmaking." Paul Frymer, *Statutes, Courts, and Democracy in America*, 47 TULSA L. REV. 229, 232–33 (2011); *see* Eskridge, A REPUBLIC OF STATUTES, *supra* note 151, at 8–9. Superstatutes "resemble Constitutional rules" in that "[t]hey reflect foundational principles that influence law and policy beyond their formal authority," are "durable, adaptable, and dynamic as applied across decades," spawn "both legal chains" and "legal webs," and "exercise normative gravitational force." Eskridge, A REPUBLIC OF STATUTES, *supra* note 151, at 27. Eskridge and Ferejohn argue that "superstatutes sometimes rival Constitutional rules, bending an ambiguous or even hostile Constitutional tradition to acquiesce in superstatutory innovations." *Id.* Edward Rubin proposes that superstatutes not only "add[] to our small 'c' constitution," and "influence[] interpretation of the Large 'C' Constitution," but also function "*as* an interpretation of the Large 'C' Constitution — the document itself." Rubin, *supra* note 151 (emphasis in original) (international quotation marks omitted). Examples include the Sherman Act, the 1964 Civil Rights Act, and the Endangered Species Act. Eskridge, *Super-Statutes*, *supra* note 151, at 1227–47. The FSIA, for example, may lay a strong claim to "superstatute" status. The FSIA represented

Among the departmentalist theorists, Robert Post and Reva Siegel propose a model of "policentric constitutional interpretation" that may be the most helpful approach for addressing fields of less political and popular salience.[152] In the Post-Siegel model, Congress' interpretative authority plays an important role in connecting constitutional law with constitutional politics, without undermining the rule of law values that drove Chief Justice Rehnquist's majority opinion in *City of Boerne v. Flores*.[153] Therefore, courts should only strike down legislation expressing a constitutional interpretation that, "violates judicially enforceable rights or that impermissibly impairs other constitutional values such as federalism."[154] Courts should not strike down such legislation simply because it embodies a constitutional interpretation that varies from the courts' constitutional view.[155]

At first blush, the Post-Siegel framework may not seem to counsel in favor of a Congressional role in interpreting Fifth Amendment Due Process. It is not necessarily the case that Congressional statutes in this area embody constitutional values in the grand sense of the Civil Rights Act, or even the Family Medical Leave Act (the immediate subject of Post and Siegel's inquiry).[156] But Congressional legislation on transnational claims does represent constitutional interpretation in the sense that it expresses a view on when plaintiffs—often U.S. persons—should be able to seek redress in U.S. courts.[157] It also injects necessary information into the constitutional decision-making process.[158] As a constitutional doctrine, Due Process jurisdiction has always turned on fact intensive, expertise dependent

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the culmination of decades of reconsideration by all three branches of the relationship between the United States for foreign sovereigns, embodying a decisive shift away from the old "the King can do wrong" model to the "restrictive" model of sovereign immunity. *See generally* Andreas F. Lowenfeld, INTERNATIONAL LITIGATION & ARBITRATION, 720–800 (2006). The FSIA has continued to evolve and become entrenched in the U.S. system of foreign relations law, setting out a guiding principle that "when a foreign sovereign acts like a private party — it should be accountable for its actions the way a private party would be." *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If A Sovereign Acts Like A Private Party, Treat It Like One*, 5 CHI. J. INT'L L. 675, 682 (2005). The ATA similarly represented a step in the long evolution of the U.S. response to international terror, and could arguably be included in what Eskridge and Ferejohn term the "national security constitution." Eskridge & Ferejohn, *supra* note 151, at chap. 9.

152 *See generally* Post & Siegel, *supra* note 12.

153 521 U.S. 507, 519 (1997) (stating that Congress is not empowered "to determine what constitutes a constitutional violation").

154 Post & Siegel, *supra* note 12, at 2023.

155 *Id.*

156 *See* Post & Siegel, *supra* note 12, at 1971 ("The analytic and normative deficiencies of the enforcement model become apparent if we attempt to apply the model to the family leave provisions of the FMLA . . . .").

157 Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1108 (2015) (noting the importance of various types of statutes to interests of U.S. persons).

158 *See* Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301, 1348 (2014) ("Personal jurisdiction is complex enough that the right answers, constitutionally speaking, are usually less obvious than the right policies.").

questions, such as when it is "reasonable" to be haled across state or local boundaries.[159]

In transnational cases applying federal law, the nature or extent of a right itself is contested. The right of foreign defendants to benefit from the protections of the Fifth Amendment Due Process personal jurisdiction is unclear. Every Supreme Court case to address the issue has assumed that there is such a right—but none have expressly so held.[160] Indeed, the issue is further clouded by the fact that every Supreme Court case considering transnational personal jurisdiction has involved a foreign defendant's right to be free from process in U.S. state courts or in federal courts exercising diversity jurisdiction and applying state law.[161] These cases have therefore been governed by the Fourteenth Amendment to the Constitution, which applies against the states, as opposed to the Fifth Amendment, which applies against the federal government and allows for more jurisdictional flexibility.

B. Transnational Personal Jurisdiction and "Liberty"

Persons normally benefit from the protections of the U.S. Constitution if they have some connection with the United States.[162] The Court has stated that, "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[163] Robin Effron has observed that, in the context of transnational personal jurisdiction, "the nature of the relationship of the person to the United States sovereign matters in evaluating the extraterritorial application of constitutional rights," and "further constitutional concerns internal to the structure of the Constitution itself are relevant to the decision to apply a constitutional right either extraterritorially or to nonresidents (or both)."[164] In short, the status of due

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159 *Id.*

160 *See* GSS Grp. Ltd v. Nat'l Port Auth., 680 F.3d 805, 819 (D.C. Cir. 2012) ("These concerns suggest that in a suitable case it may be valuable for courts to reconsider both the merits of the assumption in *Asahi Metal* and kindred cases that private foreign corporations deserve due process protections . . . .") (Williams, J., concurring, joined by Randolph, J.).

161 *See* note 171.

162 *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 262–63 (1990). The Court observed that the Court's "rejection of extraterritorial application of the Fifth Amendment" has been "emphatic." *Id.* at 269.

163 *Id.* at 271; *see also* Boumediene v. Bush, 553 U.S. 723, 765-66 (2008) (applying the right of habeas corpus extraterritorially because, *inter alia*, it is "an indispensable mechanism for monitoring the separation of powers"); Johnson v. Eistentrager, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

164 Robin Effron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. ONLINE --- (2018, Forthcoming), available at

process jurisdictional protections owed to a foreign defendant should be analyzed in the context of their relationship with the United States and against the backdrop of U.S. constitutional structure. This analysis is neither simple, nor clearly established, nor necessarily identical to the situation of the domestic defendant in an inter-state dispute.

It is not clear in how the relationship or connections between the United States and foreign defendants should shape the jurisdictional protections available under the Fifth Amendment. A recent concurring opinion by Judge Stephen Williams speculated that this "contact" exists the moment a foreign defendant is haled into a U.S. court. [165] This is not entirely implausible—although it highlights a tension with the rights of U.S. persons in U.S. federal court. A U.S. person can, consistent with the Constitution, be haled into any U.S. federal court.[166] The rules protecting U.S. persons are sub-constitutional: Rule 4(k)(a)(1) adopts state long-arm statutes unless certain conditions are met. It is somewhat strange that a U.S. person can be haled from Hawaii to New York, potentially without any constitutional protections, whereas a Torontonian cannot be haled into federal court in the Northern District of New York without implicating the protections of the Fifth Amendment.[167]

It is similarly odd that, in suits between the citizens of two quasi-sovereign states, the entirely U.S. defendants receive about the same jurisdictional protections as foreign defendants in a transnational dispute.[168] Even if a foreign corporate defendant has some connection with the United States — perhaps because a party is attempting to hale them into a U.S.

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164679 (visited May 1, 2018); see also Karen Nelson Moore, Aliens and the Constitution, 88 N.Y.U. L. REV. 801 (2013); Parrish, *supra* note 13. Effron argues that these principles support a "single-market theory under which (if adopted) a nonresident alien defendant may be subject to personal jurisdiction in a constituent forum state based on aggregate national contacts with the United States as a whole." She offers this proposal grounded in *Verdugo-Urquidez* and *Boumediene* as a friendly amendment to Bill Dodge and Scott Dodson's proposal to permit aggregation of national contacts for foreign defendants in a wide variety of cases. *See* Dodge & Dodson, *supra* note 21. This proposal has much to recommend it. However, it does not deal with the hobbling of federal statutes discussed here. Aggregation of national contacts would have reversed the much-criticized result in *Nicastro.* 564 U.S. at 877. But it would not have changed the outcome in any of the cases discussed *infra* at in Section VI. Indeed, in many of the cases, the courts were authorized to aggregate national contacts and did so. Dodge, Dodson, and Effron solve the *Nicastro* problem—but this may not be the most serious problem created by the Court's jurisdictional retrenchment.

165 *See* GSS Grp., 680 F.3d at 819 (noting that the most common argument for such jurisdictional protections is that foreign persons have "contact" with the United States when haled into a U.S. court) (Williams, J., concurring, joined by Randolph, J.).

166 *See* WRIGHT & MILLER, *supra* note 18, at § 1068 ("Just as a state may exercise jurisdiction over any defendant found within its borders, it is argued, the federal courts likewise should have equally unencumbered jurisdictional powers over anyone found within the United States." (citing *Stafford v. Briggs*, 100 S.Ct. 774 (1980)).

167 *See* Sachs, *supra* note 158, at 1313.

168 To the extent that differences exist, they seem to emerge in application, rather than in formulation, of jurisdictional tests. *See* Silberman & Yaffe, *supra* note 21, at 408.

court—it would be unusual for the foreign defendant to have constitutional jurisdictional protections identical to that of a U.S. defendant. This oddity is a symptom of the Court's tendency to simply export jurisdictional rules from the domestic to the transnational context, while paying only lip service to the notion that transnational cases raise distinct concerns.[169]

Judge Williams expressed some skepticism about the extension of Due Process personal jurisdiction to foreign persons, but felt that an intermediate appellate court could not entertain such arguments as the Supreme Court had "repeatedly held that foreign corporations may invoke due process protections to challenge the exercise of personal jurisdiction over them," even though they are "alien to our constitutional system."[170] This is not precisely accurate. The Court has repeatedly assumed that foreign persons are entitled that to the full personal jurisdiction protections conferred by the U.S. Constitution, but has never so held.

But there is a more telling gap in the Supreme Court's transnational jurisdiction cases: every one addresses a case that originated in state court or in a federal court exercising diversity jurisdiction.[171] Every case, that is, except for *Daimler* itself, in which Justice Ginsburg specifically noted that petitioners' federal claims had been rendered "infirm,"[172] leaving only claims based on international law, federal common law, and the "[s]tatutes and common law of the State of California, including but not limited to, wrongful death, negligence, and recklessness."[173]

The Fourteenth Amendment to the Constitution applies against the states, and therefore governs personal jurisdiction in cases arising in state courts or in federal courts applying state law while sitting in diversity.[174] The Fifth Amendment applies against the federal government and therefore

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169 *See, e.g.*, Afram Export Corp. v. Metallurgiki Halyps, S.A. 772 F.2d 1358, 1362 (7th Cir. 1985), abrogated on other grounds by Salve Regina Coll. v. Russell, 499 U.S. 225 (1991) ("Countless cases assume that foreign companies have all the rights of U.S. citizens to object to extraterritorial assertions of personal jurisdiction.").

170 GSS Grp., 680 F.3d at 813.

171 *See Perkins*, 342 U.S. at 438 ("This case calls for an answer to the question whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States precludes Ohio from subjecting a foreign corporation to the jurisdiction of its courts in this action in personam."), 456 U.S. at 694 n. 10 (1982) (indemnity actions), Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 412 (1984) (wrongful-death actions), *Asahi*, 480 U.S. 102 at 116 (indemnity action), *Nicastro*, 131 S. Ct. at 2786 (products-liability suit), *Goodyear*, 564 U.S. at 918 ("an action for damages in a North Carolina state court").

172 *Daimler*, 134 S. Ct. at 763.

173 First Amended Complaint, Bauman *ex rel* v. Daimler AG, 2004 WL 6341017, at para. 57 (N.D.Cal. Feb. 11, 2004).

174 *See* WRIGHT & MILLER, *supra* note 18, at § 1068 ("When a federal court adjudicates state-created rights under subject matter jurisdiction based on diversity of citizenship, the constitutional inquiry regarding questions of personal jurisdiction is guided by the Constitution's Fourteenth Amendment due process standards enunciated by the Supreme Court.").

governs personal jurisdiction in cases arising under federal law[175]—the very cases where Congress's power to interpret constitutional jurisdiction comes to bear. The Court has never held that the Fifth Amendment confers personal jurisdiction protections for foreign persons, let alone that foreign persons enjoy the same benefits as derived from the Fourteenth Amendment or that Congress could not influence those limitations through its own interpretation of the Fifth Amendment. In fact, courts have repeatedly held that the Fifth Amendment should be interpreted more flexibly than the Fourteenth so as to permit aggregation of all contacts in the United States in federal question cases.[176] In recent anti-terrorism litigation, an amicus brief on behalf of former federal officials argued for a more expansive jurisdictional standard under the Fifth Amendment,[177] but the United States Court of Appeals for the Second Circuit rejected the argument, even while aggregating national contacts.[178]

None of this is to say that foreign persons should be haled heedlessly into U.S. courts. Rather, the question is whether the courts or Congress is the appropriate institution to make the initial determination on whether such power is appropriate. Restrictions on transnational personal jurisdiction serve important purposes, but it is not clear that court-created constitutional law is necessary to serve those ends.

First, it is important to precisely identify those ends, particularly as the Court has failed to do so. Although the Supreme Court defined Due Process

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175 *See id.* (noting that it is "clear that the Due Process Clause of the Fifth Amendment applie[s] in cases based on some form of federal law")

176 *See id.* The Court settled the issue of which amendment governs in federal question cases in *Omni Capital v. Rudolf Wolff*, where it held that only the Fifth Amendment governed issues of service (and relatedly, jurisdiction) in a case brought under the Commodities Exchange Act. 484 U.S. 97, 103 (1987). The debate between the Fourteenth and Fifth Amendments took place principally in the context of whether a court could aggregate national contacts when determining jurisdiction to hear a claim arising under federal law — an issue that would later by settled by the amendments to Rule 4. *See* FED. R. CIV. P. 4(k)(2). Prior to the amendments, both courts and commentators had observed that the Fifth Amendment should govern and that the increased flexibility permitted by the Fifth Amendment should allow national aggregation of contacts. *See, e.g.*, Herbert Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis*, 67 IOWA L. REV. 485 (1982).

177 Brief of Former Federal Officials as Amici Curiae Supporting Appellees at 3, *Waldman et al. v. Palestinian Liberation Organization, Palestinian Authority et al.* (No. 15-3151) (arguing that "the theory of specific jurisdiction urged by" the defendants "would nullify Congress' decision to provide a United States forum for families seeking redress for harm to United States nationals from international terrorism" and that "[t]heir theory rests on the unexamined and erroneous assumption that the Fifth Amendment incorporates the same interstate federalism principles used to referee jurisdictional conflicts among the sovereign states and to confine the territorial reach of state courts under the Fourteenth Amendment").

178 The court acknowledged the importance of the argument and noted that *Daimler* concerned only jurisdiction under the Fourteenth Amendment, but considered itself bound by circuit precedent holding that, although the Fifth Amendment permits aggregation of national contacts, it is otherwise "basically the same" as the Fourteenth Amendment. *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 330 (2d Cir. 2016) (citing Chew v. Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1998)).

personal jurisdiction as protecting "liberty" in *Insurance Company of Ireland*, it never articulated why exercise of jurisdiction is an infringement on liberty when the defendant has notice and a full opportunity to defend the suit.[179] Some scholars have sought the connection between jurisdiction and constitutionally protected liberty by arguing that jurisdiction protects individuals from improperly exercised coercive power of the state—Lea Brilmayer being the leading proponent of this view.[180] Stephen Sachs has also defended the importance of personal jurisdiction on the basis of political philosophy, rather than litigational convenience (while arguing that Congress should essentially take over the field of domestic jurisdiction in light of the Court's failure to articulate clear and predictable rules).[181] In his example, it is troubling for a New York City resident to be haled into a Hoboken, New Jersey court not because it is inconvenient (it is more convenient than being haled into court in Buffalo, New York), but because the New Yorker is not part of the political community of New Jersey and should have certain protections before claims against her are decided by an unfamiliar sovereign.[182] The Court's repeated emphasis on "purposeful availment" and Justice Kennedy's emphasis on "consent" also seem to invoke notions of political legitimacy and social contract theory.[183]

Some of these scholars have also suggested that personal jurisdiction is connected with the so-called dormant commerce clause by functioning to protect a state from imposing costs on outsiders not represented in its political process.[184] At least one Supreme Court decision provides some

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179 456 U.S. 694 at 702 (holding that jurisdictional rules represent "a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty").

180 *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 86–87 (1980) ("The two bases of jurisdiction-unrelated and related contacts therefore constitute alternative aspects of a State's sovereignty, namely, self-governance and territoriality."); Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) ("The link with political theory lies in the argument that such issues should be analyzed in terms of a state's right to exercise coercive power over the individual or dispute. Traditionally, political theory has treated as central the issue of the legitimacy of the state's exercise of coercive power."); *see also* Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 19 (1989) ("Those not within the polity, those without the right to participate in the creation and control of its authority, those who are 'unconnected,' cannot be subject to its authority, whether regulatory or judicial."); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 884 (1989) (arguing that the Court has failed "to articulate and enforce a coherent and comprehensive body of federal common law rules regulating all assertions of state judicial power over noncitizens," because "it has yet to ground its jurisdictional rules in a single, defensible theory of state judicial power," and that "political consent is such a principle").

181 Sachs, *supra* at 158, at 1313 ("Even Justice Ginsburg takes account of such sovereignty concerns, though her *McIntyre* dissent suggests otherwise.").

182 *Id.* at 1323 ("Justice Ginsburg's objection confuses two very different questions: where the case may be heard, and who may hear it.").

183 *See Nicastro*, 131 S. Ct. at 2799 (arguing that "the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court") (Ginsburg, J., dissenting).

184 *See* Brilmayer, *supra* note 180, at 86–87; *see also* Trangsrud, *supra* note 180, at 881.

support for this view. In *Bendix Autolite Corp. v. Midwesco Enterprises*, the Court expressed concern about the "burden" of imposing general jurisdiction on non-resident motorists[185]—a concern that has resurfaced recently with regard to general jurisdiction imposed on non-resident corporations through registration statutes.[186]

Brilmayer in particular argues that general, all-purpose jurisdiction is appropriate only for "political insiders"—domiciliaries, for example.[187] These insiders are properly subject to the broad adjudicatory authority of the state because they have access to the political process and, through it, have power to shape the manner in which the state exercises its coercive power.[188] Brilmayer reasons that foreign defendants require a greater measure of constitutional protection because they lack this political protection.[189] Therefore, the greater constitutional restrictions that attach to specific jurisdiction—the jurisdictional theory normally invoked for 'outsiders'—are warranted.

In the transnational context, foreign defendants have access to the diplomatic process as a form of 'political' protection. Foreign defendants are not on equal footing with insiders that have direct access to the political machinery of the U.S. system—but foreign sovereigns may nonetheless advocate on their behalf[190]. Brilmayer's theory was developed for the very different context of disputes between citizens of quasi-sovereign U.S. states. Diplomacy between the quasi-sovereign states is not unheard of—but is rare, precisely because the federal system exists to resolve such disputes.[191] There is no such supranational authority in private transnational disputes.

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185 486 U.S. 888, 891 (1988) ("Where the burden of a state regulation falls on interstate commerce . . . there may be either a discrimination that renders the regulation invalid without more, or cause to weigh and assess the State's putative interests against the interstate restraints.").

186 For discussion of the current controversy over registration statutes, *see* Kevin D. Benish, Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609 (2015) (arguing that imposition of general jurisdiction by registration statutes constitutes an unconstitutional burden); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343 (2015) (arguing that imposition of general jurisdiction by registration statutes is coerced consent as an unconstitutional condition); *see also* New York City Bar, Report on Legislation, at 4, available at http://www2.nycbar.org/pdf/report/uploads/20072900-OppositiontoBilltoConsenttoJurisdictionbyForeignBusinessOrganizationsAuthorizedtodoBusinessin NewYork.pdf. (arguing that such statutes are bad policy).

187 *See* Brilmayer, *supra* note 180, at 86–87.

188 *See id.*

189 *See id.*

190 *See, e.g.*, Brief for the United States as Amici Curiae Supporting Petitioners, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 2010 WL 4735597 (U.S.), *2 (2011) (No. 10-76) (urging the Court to consider "[f]oreign governments' objections to state courts' broad assertions of personal jurisdiction over non-United States corporations").

191 *See* Jill Elaine Hasday, *Interstate Compacts in A Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 4 (1997) ("Thus far, there have been few compacts — about 175 in all of United States history.").

Therefore, the diplomatic process is the means by which stakeholders in foreign sovereigns assert their "right" to be free from the adjudicatory power, and associated burdens, of U.S. courts.

Foreign defendants likely have some connection with the United States and therefore some level of constitutional jurisdictional protections. The foreign manufacturers in *Asahi* and *Nicastro*, for example, did produce products that eventually were sold in the United States, albeit through intermediaries.[192] For about forty years after *Pennoyer*, the Court held that the Due Process Clause of the Fourteenth Amendment required only a hearing in which the foreign defendant could contest whether the state jurisdictional statute applied to it.[193] The opportunity for a hearing is the bedrock guarantee of Due Process.[194] Even a foreign defendant that, by its own admission, has only the most attenuated contacts with the United States would seem to retain such a right in a civil dispute. Furthermore, once a foreign defendant has fully submitted to the jurisdiction of a U.S. court, it would enjoy the same procedural protections as a U.S. party.

This is all hypothetical, however; Congress has shown no inclination to pass a statute that both expresses a broad view of transnational personal jurisdiction and also eliminates an opportunity to contest jurisdiction. Indeed, there is a little reason to think that Congress would rush to push the outer constitutional limits of jurisdiction. For at least a century, the Court set broad limits on constitutional jurisdiction. Congress legislated well within those limits, never testing their outer bounds.[195] The conflict between Court and Congress arises now because the Court has suddenly contracted the bounds of constitutional jurisdiction to a point far narrower than even the modest ambit of Congressional legislation.

It is also important to remember that jurisdiction implicates not only the "liberty" interest of the defendant, but also the plaintiff's right to court access.[196] The Court's diminution of transnational jurisdiction has limited access of U.S. plaintiffs to U.S. courts in purely private law disputes, forcing them to bring more suits abroad.[197] However, the effect on plaintiffs is even starker in the cases at issue here, where a U.S. plaintiff invokes a cause of action created under U.S. public law, such as statutes governing patent

192 *See* text accompanying notes 74–85.

193 *See* text accompanying notes 57–58.

194 *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 3 (2006) ("[T]he idea that the essential character of procedural due process is a right to notice and a hearing has deep[] roots.").

195 Congress did consider pushing back on the Court's constitutional rulings regarding foreign manufacturers. *See infra* at note 224.

196 *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 325 (1964) ("The right to have a case tried locally and be spared the likely injustice of having to litigate in a distant or burdensome forum is as ancient as the Magna Charta.") (Black, J., dissenting).

197 *See* Bookman, *supra* note 157, at 1130–31.

infringement, antitrust, or securities. All of these areas are classic "public law"—regulations so closely bound up with sovereign authority that another sovereign will not apply them. This implicates the so-called "public law taboo."[198] Simply put, only a U.S. court is likely to apply U.S. patent, antitrust, or securities law. If the plaintiff cannot sue in the United States, it probably cannot sue anywhere.

C. Transnational Personal Jurisdiction and "Sovereignty"

The 'right' at issue here is the contested and uncertain right of Due Process personal jurisdiction as it is enjoyed by foreign persons. If a Congressional interpretation of the Fifth Amendment does not trench on a clearly established right, then Post and Siegel argue that Congress' interpretation should stand unless it offends a "constitutional postulate"—a deeply embedded structural constitutional value.[199] Congressional interpretation of transnational personal jurisdiction does not offend any "constitutional postulate;" rather, constitutional structure militates strongly in favor of assigning matters concerning foreign commerce and trade to Congress and the Executive.

Congress naturally has more interpretative authority where the Constitution assigns it a particular enumerated power that gives it primacy in the constitutional structure. Two constitutional powers undergird Congress' actions on transnational jurisdiction. The Constitution assigns to Congress the power "[t]o regulate Commerce with foreign Nations,"[200] and the power to make laws "necessary and proper" to the making of treaties.[201]

Congress' power to regulate commerce with foreign nations is quite broad—broader, indeed, than its power to regulate interstate commerce. The Court has made clear that, "[a]lthough the Constitution, Art. I § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."[202] Although "the power to regulate commerce is conferred by the same words of the commerce clause with respect to both foreign commerce and interstate commerce…the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate

198 *See* Lowenfeld, *supra* note 151, at Chap. 1.

199 Post & Siegel, *supra* note 12, at 1952 (proposing that courts inquire whether legislation "impermissibly infringes on essential postulates of federalism").

200 U.S. Const. art. I, §8, cl. 3.

201 U.S. Const. art. I, §8, cl. 18.

202 Japan Line, Ltd. v. County of L.A., 441 U.S. 434, 448 (1979). *See generally* Anthony J. Colangelo, The Foreign Commerce Clause, 96 VA. L. REV. 949, 1041 (2010).

commerce."[203] Congress' power over Foreign Commerce is "exclusive and plenary."[204] Congress also possesses the power to make laws "necessary and proper" to the implementation of treaties.[205] Congress does not act pursuant to its treaty power every time it passes legislation that implicates issues of transnational personal jurisdiction, but in many significant instances (such as section 1605(a)(6) of the FSIA), it has.

It is difficult to point to any other Constitutional "postulates" that might be offended by Congressional interpretation of transnational personal jurisdiction. Domestically, personal jurisdiction reinforces horizontal federalism—it helps to ensure that the quasi-sovereign states do not inappropriately interfere with each others' citizens. Where the federal sovereign is acting vis-à-vis foreign sovereigns, there can be no issue of horizontal federalism.[206]

Similarly, there is no issue of vertical federalism—the federal sovereign is not taking actions that may intrude on the quasi-sovereign states, but again, is instead taking action that affects foreign sovereigns. To the extent that vertical federalism is relevant, it points toward a distinction between the Supreme Court's cases applying the Fourteenth Amendment and the cases at issue here, which apply the Fifth Amendment. The federal sovereign might well have an interest in reigning in states that are too aggressive in haling foreign persons into their courts—this is exactly why the Court was compelled to intervene in a relatively simple case like *Goodyear*.[207] The Constitution assigns "exclusive and plenary" power over foreign commerce (and related foreign affairs issues) to the federal government.[208]

IV. CONGRESSIONAL INTERPRETATIONS OF CONSTITUTIONAL JURISDICTION

Congress has interpreted the Fifth Amendment in numerous contexts. In some instances, Congress has explicitly stated: there shall be personal

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203 Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932).

204 Bd. of Trustees of Univ. of Illinois v. United States, 289 U.S. 48, 56 (1933) ("It is an essential attribute of the power that it is exclusive and plenary.").

205 U.S. Const. art. I, §8, cl. 18.

206 *See* Dodge & Dodson, *supra* note 21, at 34.

207 *See* Silberman, *supra* note 31, at 612 (describing *Goodyear* as an "easy case" that the Court was compelled to take because the North Carolina courts had committed an obvious error in asserting general jurisdiction over a foreign party). States are permitted some latitude in, for example, prescribing extraterritorial application of their laws — but are always subject to check by the federal government. *See* Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293, 3325 (2015) ("States are entitled to, and do, have their own policies regarding extraterritoriality. Indeed, the New York Court of Appeals recently made plain that the extraterritorial reach of federal and state antitrust law should not be 'viewed as coextensive.'" (quoting Global Reinsurance Corp. U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 196 (N.Y. 2012))).

208 *Bd. of Trustees of Univ. of Illinois*, 289 U.S. at 56.

jurisdiction. It would make little sense for Congress to enact such provisions if it expected them to be rendered a nullity by Court-imposed constitutional limitations. In some instances, Congress' interpretation is implicit in the statute, such as where a statute creates a cause of action specifically directed at foreign parties. And in some intermediate cases, Congress enacts statutes with venue provisions—but using the language of jurisdiction in setting out where a suit can be brought under the statute.

A. Explicit Interpretation: Arbitration

The Foreign Sovereign Immunities Act (FSIA) is a bit of an odd statute.[209] It "muddles" the traditional ways of thinking about sovereign immunity, subject matter jurisdiction, and personal jurisdiction.[210] The FSIA states that sovereigns shall be immune from suit in the United States unless the claim falls into one of several exceptions, enumerated in section 1605.[211] If one of these exceptions is met, the court has both subject matter and personal jurisdiction, provided that service is made consistent with other provisions of the FSIA.[212]

U.S. courts have long observed that the FSIA provides statutory personal jurisdiction—courts must decide whether statutory personal jurisdiction is satisfied, and then proceed to query whether the requirements of Due Process personal jurisdiction are satisfied.[213] Some of the 1605 exceptions were consciously designed to ape the requirements of constitutional minimum contacts analysis—indeed, many courts have observed that the FSIA's requirement of a "substantial connection" with the United States imposes higher requirements.[214]

In 1988, Congress amended section 1605 of the FSIA to include 1605(a)(6), providing for a statutory exception to immunity, and therefore both subject matter jurisdiction and personal jurisdiction, when:

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209 28 U.S.C. §§ 1330, 1602–11.

210 *See generally* Silberman & Simowitz, *supra* note 4, at 369 ("To some extent, the FSIA muddles the traditional ways one thinks about subject matter jurisdiction, personal jurisdiction, and immunity.").

211 28 U.S.C. § 1605.

212 28 U.S.C. § 1608.

213 *See, e.g.*, Texas Trading & Mill. Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981), overruled by, Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 582 F.3d 393 (2d Cir. 2009) ("The Act, therefore, makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction. But, the Act cannot create personal jurisdiction where the Constitution forbids it." (international citation omitted)).

214 *See, e.g.*, Hanil Bank v. PT. Bank Negara Indonesia (Persero), 148 F.3d 127, 134 (2d Cir. 1998) (stating that that the court need not decide whether a foreign state has due process rights because the defendant's conduct satisfied the commercial activity exception to immunity and was therefore sufficient to satisfy due process requirements).

> [T]he action is brought…to confirm an award made pursuant to…an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States; (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral award; (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court…[215]

The clear purpose of the amendment to the FSIA was to ensure recognition and enforcement of arbitral awards against sovereigns and sovereign instrumentalities, particularly those governed by the New York Convention.[216] U.S. courts had recognized such awards before under the implicit waiver exception of the FSIA contained in section 1605(a)(1),[217]but Congress regarded that as too uncertain a basis for such an important species of claim.[218]

In the view of U.S. courts, section 1605(a)(6) provided an exception to immunity, subject matter jurisdiction, and statutory personal jurisdiction. U.S. courts uniformly required a jurisdictional nexus to recognize and enforce an arbitral award and, with one exception, held that this nexus could be satisfied by either personal or property-based jurisdiction.[219] But constitutional personal jurisdiction was rarely a bar to recognition and enforcement under the generous pre-*Daimler* standard for general jurisdiction.

It did not take long for this issue to come to the fore after *Daimler*. In *Corporacion Mexicana De Mantenimiento (COMMISA) v. Pemex-Exploracion Y Produccion (PEP)*,[220] COMMISA obtained a Panama Convention award against PEP, a subsidiary of Mexico's state oil company. COMMISA sought to confirm the award in federal court in New York notwithstanding that a Mexican appellate court had set aside the award. The district court exercised

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215 28 U.S.C. § 1605(a)(6).

216 *See* Crowell & Moring LLP, *The Foreign Sovereign Immunities Act: 2012 Year in Review*, 20 L. & BUS. REV. AM. 565, 588 (2014) (noting that U.S. courts have "continued to hold that arbitral awards made pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the International Convention on the Settlement of Investment Disputes (the ICSID Convention) were precisely the types of awards section 1605(a)(6) was intended to cover" (internal quotation marks omitted)).

217 *See* Ipitrade International SA v. Fed. Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978) (extending the implied waiver exception to New York Convention arbitrations).

218 *See* Creighton Ltd. v. Gov't of State of Qatar, 181 F.3d 118, 123–24 (D.C. Cir. 1999) (noting that the New York Convention "is exactly the sort of treaty Congress intended to include in the arbitration exception" in § 1605(a)(6) (quoting Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1018 (2d Cir.1993)).

219 *See* Silberman & Simowitz, *supra* note 4, at 352–53.

220 832 F.3d 92 (2016) [hereinafter COMMISA].

subject matter and personal jurisdiction over PEP pursuant to section 1605(a)(6) and confirmed the award. Prior to *Daimler*, the district court determined that the exercise of personal jurisdiction over PEP was consistent with due process based on PEP's activities in the forum state.[221] On appeal, and in addition to its argument that the district court should not enforce an arbitration award nullified at the seat, PEP claimed that it did not have sufficient activities to satisfy general jurisdiction as a matter of due process. Relying on *Daimler*, PEP emphasized that, as a Mexican corporation formed to develop petrochemical resources in Mexico, it could not be "fairly regarded as at home" in New York.[222] Following argument, the panel requested the views of the Solicitor General's office. The Government argued that, because the FSIA's provision of statutory personal jurisdiction is presumptively consistent with the requirements of the Due Process Clause, the court should reject any approach that would render 1605(a)(6) an empty grant of statutory personal jurisdiction.[223]

Section 1605(a)(6) embodies numerous important Congressional policies, including a restrictive approach to sovereign immunity and the importance of arbitration, particularly as it occurs under the New York and Panama Conventions and against sovereigns. But 1605(a)(6) will be hollowed out, at least greatly diminished, unless U.S. courts recognize Congress' power to interpret Due Process jurisdiction as it pertains to foreign persons. If anything, Congress' power should be even greater in this instance, where foreign sovereigns and their instrumentalities are concerned.[224]

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221 Transcript of Oral Argument at 27:14–28:20, *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v.* Pemex-*Exploracion y Produccion*, 962 F. Supp. 2d 642 (S.D.N.Y. 2013).

222 Brief of Appellant-Respondent at 25, *COMMISA* (No. 13-04022).

223 The United States Court of Appeals for the Second Circuit did not take the Government's suggestion — instead it went far further (albeit in dicta), suggesting that foreign corporations may lack due process protections if they are too closely associated with the foreign sovereign. *See* COMMISA, 832 F.3d at 102 ("PEP's due process argument fails because PEP is a corporation owned by a foreign sovereign."). For a critique of this reasoning, *see infra* at Section IV(A). As for its holding, the court decided that PEP had forfeited its jurisdictional argument — a conclusion vigorously disputed by Judge Winter, who concurred in the judgment. *See id.* at 112 ("[M]y colleagues' forfeiture ruling is not only sua sponte, but also unprecedented.").

224 The long-gestating Foreign Manufacturers Legal Accountability Act (FMLAA) could bring this conflict — between explicit statutory grants of personal jurisdiction and constitutional limitations — to a head. *See* Foreign Manufacturers Legal Accountability Act, S. 1946, 112th Cong. (2011). For almost 30 years, Congress had periodically taken up the question of foreign manufacturers liability for injuries caused in the United States — expressing dissatisfaction with the "stream-of-commerce" cases, like *Asahi*, that often prevent foreign manufacturers from being haled into U.S. courts. *See* Eric Porterfield, *A Domestic Proposal to Revive the Hague Judgments Convention: How to Stop Worrying About Streams, Trickles, Asymmetry, and A Lack of Reciprocity*, 25 DUKE J. COMP. & INT'L L. 81, 113 (2014) ("In response to well-publicized foreign defective products like toxic drywall and children's toys contaminated with lead, members of Congress from both sides of the aisle have proposed legislation designed to establish personal jurisdiction over foreign manufacturers whose products are sold in the United States."). The current incarnation of the FMLAA would require foreign

B. Ambiguous Interpretation: Patent Infringement

Numerous federal statutes include provisions specifying the venues where a claim can be brought, while using the language of jurisdiction.[225] For example, 28 U.S.C. § 1400(b) provides that, "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." Courts have disagreed about whether such ambiguous provisions should be construed as speaking purely to venue or also to jurisdiction.[226]

The conflict between *Daimler* and federal statutes using such language nearly came to a head before the Supreme Court in a recent domestic case. In *BNSF Railway v. Tyrell*, the Court addressed tension between the Federal Employers' Liability Act (FELA) and *Daimler*'s restrictions on general jurisdiction.[227] FELA provides that railroad employees injured on-the-job may bring an action for money damages "in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action" and that, "[t]he jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."[228] The plaintiffs brought suit in Montana state court arguing, *inter alia*, that FELA authorized personal jurisdiction over the defendant BNSF Railway because it was doing business in Montana.

The Montana Supreme Court held that this provision of FELA authorized general personal jurisdiction over BNSF in Montana. The Montana court emphasized that the relevant language had been added to FELA specifically to prevent "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties, away from their

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manufacturers to register an agent for service in one state, which would function as consent to personal jurisdiction in that state. U.S. courts are already split, in the wake of *Daimler*, on whether such jurisdiction founded on compliance with registration statutes is constitutional. *See infra* note 240. For reasons discussed above, there may well be reasons to treat federal and state registration statutes differently.

225 *See infra* note 278. Special thanks to Jacob Sherkow for bringing to my attention the effect of *Daimler* on patent litigation.

226 *Compare* Securities Training Corp. v. Securities Seminar, Inc., 633 F. Supp. 938, 940–41 (S.D.N.Y. 1986) (holding that 28 U.S.C.A. § 1400 is purely a venue statute), *with* Boltons Trading Corp. v. Killiam, 320 F. Supp. 1182, 1183 (S.D.N.Y. 1970) ("Title 28 U.S.C.A. § 1400 governs both personal jurisdiction and venue.").

227 137 S. Ct. 1549 (2017).

228 45 U.S.C. § 56 (2012).

homes."[229] The Montana court distinguished *Daimler* on the basis that it "did not involve a FELA claim or a railroad defendant"[230] The U.S. Supreme Court essentially ducked the problem of *Daimler* neutralizing a federal regulatory scheme by holding that FELA authorized only venue and subject matter jurisdiction over defendant railways and did not speak at all to personal jurisdiction.[231] The Court interpreted FELA such that no conflict existed.[232]

In instances when these statutes are understood as speaking to jurisdiction, many are now in conflict with the Court's restrictive constitutional jurisprudence of jurisdiction. Section 1400 provides an excellent example, authorizing an action for patent infringement where the alleged infringer "where the defendant has committed acts of infringement and has a regular and established place of business"—a standard plainly rejected by *Daimler* as a basis for general jurisdiction.[233] In fact, section 1400

229 Tyrrell v. BNSF Ry. Co., 383 Mont. 417, 421 (2016), *and rev'd and remanded*, 137 S. Ct. 1549 (2017) (quoting Balt. & Ohio R.R. Co. v. Kepner, 314 U.S. 44, 50 (1941)).

230 *Id.* at 424.

231 *See BSNF*, 137 S.Ct. at 1557–58.

232 In fact, the BNSF case represented a much more aggressive assertion of jurisdiction than the proposal advocated in this article. First, the plaintiffs argued that FELA conferred *general* jurisdiction, whereas this article advocates for more flexible approach to *specific* jurisdiction. Indeed, at argument, counsel for the government repeatedly emphasized that specific jurisdiction was the preferred approach — echoing Justice Ginsburg's own language in *Daimler*. Second, the plaintiffs argued that FELA authorized general jurisdiction in *state* court, rather than exclusively in *federal* courts. This peculiar construction might well implicate the Fourteenth Amendment, rather than the Fifth, because of the use of the courts of the several states. As noted above, there are good reasons to construe the Fifth Amendment's due process standard more flexibly than the Fourteenth Amendment's in this context. Third, the *BNSF* case involved a domestic, rather than a foreign, defendant.

233 For a proposal endorsing such a standard, *see* Silberman, *supra* note 7, at 681–83. The second clause of 28 U.S.C. § 1400(b) could map on to specific jurisdiction, if there was a nexus between the place of business and the particular act of infringement—though the statute tellingly omits any such nexus requirement. Before *Daimler*, courts had viewed the second clause of § 1400(b) as a restriction on "doing business" jurisdiction. *See, e.g.*, Kearney & Trecker Corp. v. Cincinnati Mill. Mach. Co., 254 F. Supp. 130, 131 (N.D. Ill. 1966) ("It is clear, initially, that 'residence' under the above section must be defined classically as state of incorporation, for to impose the mere 'doing business' standard of Section 1391(c) would be to make absurd the alternative provision requiring infringement and a regular and established place of business.").

The first clause of § 1400(b), permitting suit where a corporate defendant resides, does not conflict with *Daimler* thanks to the judicial gloss provided by the U.S. Supreme Court that a "domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute." TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517, 197 L. Ed. 2d 816 (2017); *see also* Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 226 (1957) (same). The Federal Circuit's more expansive interpretation of residence, rejected by the U.S. Supreme Court in *TC Heartland*, would also not have raised any conflict as it simply mapped the statute's definition of residence onto personal jurisdiction, as with the general venue statute. *See* 137 S. Ct. at 1517. Note that the patent venue statute does not raises a separate venue problem for foreign defendants as the Court held in *Brunette Machine Works, Ltd. v. Kockum Industries* that the patent venue statute follows the general rule that it does restrict venue in suits against foreign defendants. 406 U.S. 706 (1972). However, the Court did add an ominous footnote to its *TC Heartland* opinion: "The parties dispute the implications of petitioner's argument for foreign corporations. We do not here address that question, nor do we

operates in tandem with the Drug Price Competition and Patent Term Restoration Act of 1984,[234] better known as the Hatch-Waxman Act, to provide a comprehensive and complex system to govern both protection of drug patent rights and entry of generic drug competition into the U.S. market. The Hatch-Waxman Act provides that a generic drug manufacturer can file an abbreviated new drug application (ANDA) to market a generic version of a drug in the United States,[235] and that such a filing constitutes a "highly artificial" act of patent infringement, thus giving the patent holder the immediate ability to sue in U.S. federal court (rather than having to wait for actual injury to accrue from the sale of the generic drug).[236]

Daimler has thrown a tremendous wrench into this federal scheme by, in essence, rendering it impossible to bring an action on this congressionally created tort in *any* U.S. court when the generic manufacturer is a foreign entity (let alone any of the forums identified specifically in section 1400). The Federal Circuit has long held the act of filing an ANDA does not give rise to specific jurisdiction in the District of Maryland, where the Federal Drug Administration sits (and the only possible forum for specific jurisdiction when the generic manufacturer is a foreign party).[237] Therefore, these suits typically proceeded under general jurisdiction.[238] *Daimler* foreclosed this option.[239]

Since *Daimler*, courts have turned to various creative, but problematic, bases of jurisdiction, such as general jurisdiction imposed by compliance with state registration statutes,[240] or variations on specific jurisdiction so

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express any opinion on this Court's holding in *Brunette Machine Works* . . . ." TC Heartland LLC, 137 S. Ct. at 1520, fn. 2. *Brunette* was described as "determining proper venue for foreign corporation under *then existing* statutory regime." *Id.* (emphasis added).

234 Pub. L. No. 98-417, 98 Stat. 1585.

235 21 U.S.C. §355(j)(2)(A)(vii)(IV)(2012).

236 Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 678 (1990).

237 *See* Zeneca Ltd. v. Mylan Pharm., Inc., 173 F.3d 829, 836 (Fed. Cir. 1999) ("I believe that Mylan's filing of an ANDA did not fairly warn of the possibility of implicit submission to Maryland courts. Mylan's contacts with Maryland, then, are insufficient to establish personal jurisdiction.") (Rader, J., concurring).

238 *See, e.g.*, In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig., 693 F. Supp. 2d 409, 421 (D. Del. 2010) (finding the general jurisdiction existed over the defendant generic manufacturer because it obtained "substantial revenue" from sales in the forum); Eli Lilly & Co. v. Mayne Pharma (USA) Inc., 504 F. Supp. 2d 387, 394–95 (S.D. Ind. 2007) ("Mayne Pharma does have continuous and systematic contacts with Indiana which permit an exercise of general personal jurisdiction over it here. The fact that Mayne Pharma sells products in Indiana through out-of-state, independent wholesalers, rather than through 'direct' sales to Indiana customers, does not change our conclusion.").

239 *See, e.g.*, AstraZeneca AB v. Mylan Pharm., Inc., 72 F. Supp. 3d 549, 554 (D. Del. 2014), *aff'd* sub nom. Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 817 F.3d 755 (Fed. Cir. 2016) ("The court finds that AstraZeneca has failed to allege sufficient facts to demonstrate that Mylan is 'essentially at home' in Delaware.").

240 *See* Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 78 F. Supp. 3d 572, 587 (D. Del. 2015), *aff'd* sub nom. Acorda, 817 F.3d at 755 ("[T]he undersigned Judge concludes that this Court may

aggressive that they will almost certainly run afoul of Supreme Court precedent.[241]

C. Implicit Interpretation: Terrorism

Congress enacted the Anti-Terrorism Act (ATA) specifically to provide an avenue of civil relief to U.S. victims of terror who had previously been without a clear cause of action.[242] The ATA provides: "Action and jurisdiction. Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his

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exercise general jurisdiction over Mylan Pharma based on Mylan Pharma's consent, consent which Mylan Pharma gave when it complied with the Delaware business registration statute by appointing a registered agent in Delaware to accept service of process."). *But see* Genuine Parts Co. v. Cepec, 137 A.3d 123, 126 (Del. 2016) ("We conclude that after *Daimler*, it is not tenable to read Delaware's registration statutes" to confer general jurisdiction, as that precedent "rested on a view of federal jurisprudence that has now been fundamentally undermined by *Daimler* and its predecessor *Goodyear Dunlop Tires Operations, S.A. v. Brown*.").

241 For example, the Federal Circuit held in *Mylan v. Acorda* that a manufacturer could be subjected to specific personal jurisdiction in Delaware because it "plans to market its proposed drugs" there — in other words, subjecting it to jurisdiction based on contacts it did not yet have. 817 F.3d at 762. One of the district courts below made the even more radical suggestion that jurisdiction could be had at the residence of the plaintiff. *See* AstraZeneca, 72 F.Supp.3d at 559, *aff'd* sub nom. *Acorda*, 817 F.3d at 755 ("The court finds that the only possible alternative forum is the state of residence for the patent holder."). Meanwhile, a concurring judge on the Federal Circuit panel would have sustained general jurisdiction under the Delaware registration statute. *See Acorda*, 817 F.3d at 768 (O'Malley, J., concurring) ("The Supreme Court's subsequent decisions in *International Shoe* and *Daimler* did not overrule this historic and oft-affirmed line of binding precedent. Indeed, both cases are expressly limited to scenarios that do not involve consent to jurisdiction."). Exactly one month later, the Delaware Supreme Court rejected that interpretation of the statute as inconsistent with *Daimler*. *See Genuine Parts Co.*, 137 A.3d at 126. In its petition for certiorari, Mylan argued that the Federal Circuit's holding would subject it to specific jurisdiction "any state where it might someday market the drug" — in other words, in every state. Petition for Writ of Certiorari at i, Mylan Pharm. Inc. v. Acorda Therapeutics Inc., 137 S. Ct. 625 (2017) (No. 16-360). Later case law bears out this concern. *See* Torrent Pharm. Ltd. v. Daiichi Sankyo, Inc., 196 F. Supp. 3d 871, 881 (N.D. Ill. 2016) ("Plaintiffs note that the effect of Acorda is that a generic company that files an ANDA may be sued anywhere in the United States, and the exercise of personal jurisdiction over that company will be proper. Where it appears that the generic company would market or sell the product in every state following FDA approval of its ANDA, Plaintiffs' statement about Acorda's effect is probably accurate." (international citations omitted)). Observers concerned with the functioning of the Hatch-Waxman system urged the Court to clarify this "murky" state of affairs. Shannon Kidd, *Supreme Court Urged to Consider Post*-Daimler *Personal Jurisdiction In Hatch Waxman Cases*, 29 INTELL. PROP. & TECH. L.J. 16, 17 (2017) ("With so many competing theories of jurisdiction, or lack thereof, among these litigants, the district judges and Federal Circuit judges, this is a murky area of the law that may be ripe for clarification."). The Supreme Court denied certiorari in *Mylan v. Acorda* — preserving the Hatch-Waxman system for now. *See* Mylan Pharm. v. Acorda Therapeutics, 137 S. Ct. 625 (2017). Nonetheless, it is hard to see how the Federal Circuit's novel approach in *Acorda* can be squared with the Court's later holding in *BMS*, with its emphasis on a connection between the forum and the particular claims at issue.

242 Alison Bitterly, *Can Banks Be Liable for Aiding and Abetting Terrorism?: A Closer Look into the Split on Secondary Liability Under the Antiterrorism Act*, 83 FORDHAM L. REV. 3389, 3398 (2015) (describing how cases "holding that under the [Alien Tort Statute] there was no private cause of action for victims of international terrorism" led to enactment of the ATA).

or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States…"[243]

Courts interpreted this language as providing for subject matter jurisdiction and a cause of action, but not as having any effect on the issue of whether constitutional due process jurisdiction could be obtained over a foreign terrorist organization.[244] Prior to *Daimler*, broad U.S. general jurisdiction typically provided the necessary jurisdictional hook for claims to proceed in U.S. courts against terrorist organizations and entities accused of providing financial support for terrorism.[245]

After *Daimler*, the viability of claims under the ATA has become much less clear. Some claims for financial support of terrorism have been sustained under specific jurisdiction arising from some banks' use of financial services—such as correspondent bank accounts—in the United States.[246] But many claims that would seem to be at the heart of the ATA have been dismissed from U.S. courts.

Four recent cases illustrate the problem. In *Kleiman v. Palestinian Authority*, the decedent was a U.S. national visiting Israel when he was the victim of a terrorist attack.[247] Prior to *Daimler*, the district court held that it had general personal jurisdiction over the Palestinian Authority, one of the defendants.[248] Kleiman's relatives brought claims under the ATA, among other claims.[249] After *Daimler*, the district court granted reconsideration on jurisdiction, held that the Palestinian Authority was not "at home" in the United States, and did not endorse any of plaintiff's theories of specific jurisdiction.[250] In *Livnat v. Palestinian Authority* and *Safra v. Palestinian Authority*, U.S. relatives of the decedents brought claims under the ATA. They too were dismissed because the Palestinian Authority was not

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243 18 U.S.C. § 2333 (2012).

244 *See* Biton v. Palestinian Interim Self-Government Authority, 310 F. Supp. 2d 172, 178 (D.D.C. 2004) (rejecting plaintiffs' argument for "a due process analysis specifically fitted to the unique circumstances of civil actions against foreign terrorists and their sponsors" because the ATA does not contain an explicit grant of personal jurisdiction).

245 *See, e.g.*, Estates of Ungar ex rel. Strachman v. Palestinian Authority, 153 F. Supp. 2d 76 (D.R.I. 2001).

246 *See, e.g.*, Licci v. Lebanese Canadian Bank, 732 F.3d 161, 171–72 (2d Cir. 2013) ("It should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of [proceedings] in that forum for [information] related to, and arising from, that use.").

247 Estate of Klieman v. Palestinian Auth., 82 F. Supp. 3d 237, 239 (D.D.C. 2015) ("Esther Klieman, an American schoolteacher, was killed in a terrorist attack in Israel in 2002.").

248 *See id.* ("In 2006, the Court determined that it could exercise general personal jurisdiction over the PA and PLO based on their 'continuous and systematic' contacts with the United States.").

249 *See id.* at 240. ("Klieman's estate, survivors, and heirs have brought this action under Section 2333 of the Antiterrorism Act.").

250 *See id.* at 239. ("Due to the intervening change in the law, this Court concludes that it cannot exercise general personal jurisdiction over the PA and the PLO. The Court also finds insufficient bases for the exercise of specific personal jurisdiction.").

amenable to general jurisdiction in the United States.[251] *Livnat* and *Safra* also rejected specific jurisdiction as a ground to hale the Palestinian Authority into a U.S. court—another avenue that been sometimes to used to bring foreign terrorist entities into U.S. court[252]—noting that the Supreme Court's recent decision in *Walden v. Fiore* foreclosed exercise of specific jurisdiction based on defendant's knowledge that their actions would likely harm U.S. citizens.[253] The court expressly rejected the argument that, "a more flexible inquiry is necessary because Congress has demonstrated clear intent for the Anti-Terrorism Act to apply extraterritorially."[254] The only similar case that survived dismissal before the district court, *Sokolow v. Palestinian Liberation Organization*, did so on the unlikely conclusion that the record before the court was "insufficient to conclude that either defendant is 'at home' in a particular jurisdiction other than the United States."[255] On appeal, the

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251 *See* Livnat v. Palestinian Auth., 82 F. Supp. 3d 19, 22 (D.D.C. 2015) ("The Court concludes that it has no personal jurisdiction over the Palestinian Authority with respect to the claims at issue in this action. The Court also concludes that jurisdictional discovery is not warranted."), aff'd, 851 F.3d 45 (D.C. Cir. 2017), Safra v. Palestinian Auth., 82 F. Supp. 3d 37, 40 (D.D.C. 2015) (same), aff.d sub nom. Livnat v. Palestinian Auth., 851 F.3d 45 (D.C. Cir. 2017).

252 *See, e.g.*, Sisso v. Islamic Republic of Iran, 448 F.Supp.2d 76, 90 (D.D.C. 2006) ("[I]t is nonetheless entirely foreseeable that an indiscriminate attack on civilians in a crowded metropolitan center such as Tel Aviv will cause injury to persons who reside in distant locales — including tourists and other visitors to the city, as well as relatives of individuals who live in the area.").

253 *See* Livnat, 82 F. Supp. 3d at 51 ("Plaintiffs' argument that specific jurisdiction may be based on the effects of the Palestinian Authority's acts on the U.S. *citizens* living in Israel is vitiated by the Supreme Court's holding in *Walden*."); *see also* Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (holding that the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there").

254 Livnat, 82 F. Supp. 3d at 46-47. On appeal, the United States Court of Appeals for the District of Columbia rejected the argument that "Fifth Amendment jurisdictional limits should be more permissive" because "federalism concerns do not apply" as "that Amendment limits only the federal government, not the states." Livnat v. Palestinian Auth., 851 F.3d 45, 54 (D.C. Cir. 2017). The appellate court did not address the importance of the ATA, but rather stated that, "[w]ithout any compelling justification for developing a new personal-jurisdiction doctrine, we decline" to consider "what separate Fifth Amendment personal-jurisdiction standards would consist of, and how exactly they would differ from Fourteenth Amendment standards." *Id.* at 56.

The appellate court was dismissive of the notion that its holding could undermine a congressional statutory scheme. The court chided that *Livnat* concerned mere "civil cases alone." Its holding did not "threaten extraterritorial law enforcement." The court stated that "our holding merely adheres to the status quo of personal-jurisdiction doctrine," but did not acknowledge the radical changes in personal-jurisdiction doctrine over the preceding three years. Finally, the court consigned the coordinate branches to a strictly subservient role in the jurisdictional analysis: "In any event, although congressional interests may be relevant to whether personal jurisdiction comports with due-process standards . . . they cannot change the standards themselves." *Id.* at 56.

255 *Waldman*, 835 F.3d at 326 (2d Cir. 2016) (quoting Sokolow, 2014 WL 6811395, at *2). The United States Court of Appeals for the Second Circuit emphasized that "*Walden* forecloses the plaintiffs' arguments." *Id.* at 337. The court observed that "the mere knowledge that United States citizens might be wronged in a foreign country goes beyond the jurisdictional limit set forth in *Walden*." *Id.* at 338. The court held out the possibility that terrorist attacks "specifically targeted against United States citizens" could meet *Walden*'s requirements, but did not so hold as "plaintiffs point[ed] us to no evidence" of such targeting in this case. *Id.*

United States Court of Appeals for the Second Circuit ordered the case dismissed.[256] The U.S. Supreme Court denied certiorari, notwithstanding amicus briefs in support of the petition from the U.S. House of Representatives, 23 currently serving U.S. Senators, and former federal officials.[257]

Congress passed the ATA expressly to eliminate instances in which U.S. nationals were the targets of terrorism abroad and then could not obtain civil relief in U.S. courts. After *Daimler*, the ATA covers only claims against terrorists whose attacks have a significant additional nexus with the United States. This is manifestly not what Congress envisioned.[258]

Compared to the explicit language in the FSIA and even the ambiguous language in statutes like section 1400, the relative silence of the ATA may be less compelling as a Congressional statement on constitutional meaning. However, there is good reason to consider statutes like the ATA to be implicit interpretations of the Constitution. Congress passed the ATA in 1987, against a backdrop of broader general and specific jurisdiction. There would have been no need to make any statement regarding the power to hale foreign terrorist entities into U.S. court. Congress' interpretation of the limits of Fifth Amendment jurisdiction could have been well within the outer bounds set by the Court.

Moreover, Congress may now amend the statute to explicitly state that personal jurisdiction shall exist in U.S. courts over defendants covered by the ATA (perhaps accompanied by a signing statement or similar expression expressly indicating the other branches' view that this provision is consistent with the Constitution). Congress is particularly likely to do so in the aftermath of *Daimler* and *Walden* and in a politically salient area like terrorism. The question of whether Congress can do so (and can expect its statement to be respected by the courts) is at least as important as whether Congress has already done so.

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256 *See id.* at 344.

257 *See* Sokolow v. Palestine Liberation Org., No. 16-1071, 2018 WL 1568032, at *1 (U.S. Apr. 2, 2018). The Court called for the views of the Solicitor General, which recommended against a grant of certiorari. The Solicitor General's office did not defend the correctness of the decision below, but simply stated that it did not create a conflict with decisions of the Court or of another court of appeals and that review "of petitioners" broad Fifth Amendment arguments would be premature." Sokolow v. Palestine Liberation Organization, 2018 WL 1251857 (U.S.), *17 (U.S. 2018). The Solicitor's General's office particularly emphasized that it "is far from clear that the court of appeals' approach will foreclose many claims that would otherwise go forward in federal courts," because, "[a]s the court of appeals explained, its approach permits U.S. courts to exercise jurisdiction over defendants accused of targeting U.S. citizens in an act of international terrorism." *Id.* at *17-18. To support this reading of the lower court's opinion, the Solicitor's General's brief cited only pre-*Walden* case law. *See id.*

258 For example, Senator Charles Grassley, one of the sponsors of the ATA, stated before the Senate that the ATA enabled plaintiffs to circumvent "jurisdictional hurdles" and would "empower victims with all the weapons available in civil litigation." 137 Cong. Rec. 3304 (1991). For more discussion of the legislative history of the ATA, *see* Bitterly, *supra* note 242, at 3396–40.

Indeed, Congress is already pushing back at limitations imposed on terrorism cases, albeit in the context of amending the FSIA. The Justice Against Sponsors of Terrorism Act (JASTA) became law on September 28, 2016.[259] In JASTA, Congress found that, "entities…that knowingly…contribute material support or resources," to U.S.-designated Foreign Terrorist Organizations "necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities."[260] Indeed, the *Sokolow* plaintiffs argued that this finding supported jurisdiction because "due process challenge like the one presented here requires deference to legislative findings."[261]

V. CONSEQUENCES OF CONGRESSIONAL INTERPRETATION

There is danger in failing to recognize Congress's role in interpreting personal jurisdiction in transnational cases. The conflict between federal statutes and the Court's restrictive view of jurisdiction is not going away—it will only increase unless the Court makes a dramatic doctrinal turn. Lower courts will repeatedly be confronted with the problem of rendering federal statutes largely inoperative. They will naturally respond with various jury-rigged solutions to try to ameliorate this conflict. This is a poor way to make constitutional law and may well lead to a jurisdictional landscape far more complicated, and less defensible, than one that recognizes Congress's role.

There are also many benefits to recognizing Congress' power to interpret personal jurisdiction in transnational cases. Congress will be able to drive the creation of a truly transnational jurisdiction jurisprudence—a trope that the Court has repeatedly invoked, but mostly for rhetorical effect. Congress will also be able to loosen the Court's constitutional straightjacket in ways that greatly assist a treaty-based approach to transnational jurisdiction. Finally, the United States will gradually be drawn away from a trans-substantive approach to jurisdiction that puts it odds with many other nations and lacks theoretical justification.

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259 18 U.S.C. § 2331, *et seq*.

260 Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2.

261 F.R.A.P.28(j) letter of Plaintiff-Petitioners at 2, Sokolow v. Palestinian Liberation Organization, 60 F.Supp.3d 509 (S.D.N.Y. 2014) (Nos.15-3135 & 15-3151).

The JASTA findings raise numerous relevant questions, including whether jurisdictional findings are entitled to deference under *Holder v. Humanitarian Law Project*, in the U.S. Supreme Court previously held that it must give "significant weight" to "the considered judgment of Congress and the Executive," and therefore rejected a First Amendment challenge to the ATA. 561 U.S. 1, 33–36 (2010).

A. Dangers of Constitutional Avoidance

Even if U.S. courts fail to explicitly acknowledge a role for Congress in defining personal jurisdiction, they can be expected to respond in several ways that constitute implicit respect for Congressional interpretation. In several instances where courts have come up against Congressional interpretations of personal jurisdiction, they have been presented with doctrinal 'safety valves'—ways to effectuate Congress' purpose without obviously allowing that purpose to shape the limitations imposed by the Fifth Amendment. However, there is good reason to be concerned about proliferation of these constitutional quick-fixes while the underlying tension between Congress and the courts goes unrecognized.

In *Price v. Socialist People's Libyan Arab Jamahiriya*, the United States Court of Appeals for the D.C. Circuit faced the conflict between the ATA and limitations on jurisdiction. The court held that sovereign states do not receive due process jurisdiction protections. The court reasoned that sovereigns are not "persons" who require the protections of the due process clause from the overreach of U.S. courts. Rather, they are co-equals with the United States.[262] Other courts have struggled with whether to extend *Price* to foreign state owned corporations. The United States Court of Appeals for the D.C. Circuit declined to do so,[263] while the United State Court of Appeals for the Second Circuit in *Pemex* firmly endorsed the suggestion, albeit in dicta.[264] This line of reasoning sweeps quite broadly, despite its shaky doctrinal roots.[265] It would essentially remove the tension between Congressional statements on jurisdiction and the Court's interpretation of the Fifth Amendment, at least with respect to foreign sovereigns.

At first blush, this seems like an easy fix, even with the questionable doctrine behind it. But as a quick-fix, it sweeps both too broadly and not broadly enough. The D.C. Circuit created this rule in a suit for civil relief for acts of terror.[266] In the terrorism context, this rule has led to the bizarre

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262 *See Price*, 294 F.3d at 98 ("Unlike private entities, foreign nations are the juridical equals of the government that seeks to assert jurisdiction over them."); *Frontera*, 582 F.3d at 399 ("If the States, as sovereigns that are part of the Union, cannot 'avail themselves of the fundamental safeguards of the Due Process Clause,' we do not see why foreign states, as sovereigns wholly outside the Union, should be in a more favored position.") (international citation omitted) (citing *Price*, 294 F.3d at 97).

263 *See, e.g.*, *GSS Grp.*, 680 F.3d at 813 ("GSS Group contends that the same logic applies to foreign, state-owned corporations. These entities, GSS Group claims, are just as 'alien to our constitutional system' as the sovereigns that own them.").

264 *See* 832 F.3d at 102–03, cert. dismissed, 137 S. Ct. 1622 (2017).

265 *See supra* text accompanying note 269. *But see* Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 521 (1987) (arguing that foreign states interact with the United States "as juridical equals on the level of international law and diplomacy *outside* the constitutional system" (emphasis in original)).

266 *See Price*, 294 F.3d at 87–89 (describing plaintiffs' causes of action).

result that acts of terror committed by foreign sovereigns can readily be litigated in U.S. courts, but acts of terror committed by non-sovereign entities cannot. This makes little sense and clearly does not reflect either the purposes of the statute or Congressional intent. Indeed, the cases most responsible for pushing Congress to action involved claims against non-sovereign entities.[267] This rule has also, because it is a trans-substantive constitutional holding, swept into areas far removed from terrorism, such as recognition of commercial arbitral awards.[268] In this context, it makes little sense to draw dramatic distinctions between sovereigns and private parties when the entire structure of the FSIA is premised upon the principle that, when sovereigns act like private parties, they will be treated like private parties.[269]

The *Price* decision and its progeny represent a species of constitutional decision-making harshly criticized by many scholars. Neal Katyal and Thomas Schmidt recently termed it "generative avoidance"—the creation of constitutional doctrine motivated by the desire to preserve a statute from a "constitutional doubt."[270] The Court's restrictive jurisdiction jurisprudence would not result in literal invalidation of statutes like the ATA—it would merely render them wholly or partly inoperative as the parties that are the subject of the statute could not haled into U.S. court—but the same dynamic applies. Courts like the *Price* court are engaging in constitutional reasoning that is weaker "because a court can announce a constitutional principle without actually having to strike down a law," thus freeing "a court from the useful discipline of facing the real ramifications of that principle."[271] The result is a decision that, "lack[s] the rigor and deliberateness of a full constitutional analysis."[272] Mila Sohoni has argued that, "avoiding novel constitutional doubts should be a *highly disfavored* way

267 Bitterly, *supra* note 242, at 3397 ("The ATA was first enacted in 1987. At that point, the legislation was predominantly focused on the Palestinian Liberation Organization (PLO)."). Indeed, this is the doctrinal issue that dominated the *Sokolow* case, described *supra* at section II.C., and likely would have commanded the Court's attention if the petition for certiorari had been granted. In *Sokolow*, the plaintiffs/petitioners relied principally on the argument that, following *Price* and *Frontera*, due process rights should not be extended to foreign "governments" — regardless of whether these are governments of states or of non-state political entities. *See* Brief for Petitioner at 22–27, Sokolow v. Palestinian Liberation Org., 2017 WL 913120 ,No. 16-1071 (Mar. 3, 2017), *petition for cert. filed*).

268 *See, e.g.*, *Frontera*, 582 F.3d at 398 (applying *Price* to commercial arbitral award recognition and enforcement), *see also COMISSA*, 832 F.3d at 107.

269 *See* Morrissey, *supra* note 151, at 682 (noting that the "heart" of FSIA is based on the "the premise that when a foreign sovereign engages in private commercial activities — essentially when a foreign sovereign acts like a private party — it should be accountable for its actions the way a private party would be").

270 Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2122 (2015) ("The avoidance canon enables — even demands — sloppy and cursory constitutional reasoning.").

271 *Id.* at 2123.

272 *Id.* at 2123.

of resolving a case, a method of last resort."[273] Caleb Nelson has gone still further, advocating for total abandonment of the constitutional "questions" canon.[274]

U.S. courts will repeatedly be tempted to use such quick-fix solutions where federal statutes come into conflict with restrictive jurisdictional rules set down by the Supreme Court. These solutions are likely to be both under-inclusive, in failing to fully effectuate the purposes of the statute, and over-inclusive, in creating a constitutional doctrine that will be applied *a fortiori* in other substantive areas. Because these errors will tend to be constitutional, they threaten ossification of transnational jurisdiction. It is far better for courts to recognize that these repeated conflicts between federal law and the supposed strictures of Due Process stem from a failure to recognize Congress as a coordinate branch with power to interpret the Fifth Amendment as it applies to personal jurisdiction in transnational cases. This will permit substance specific innovation that fully effectuates federal statutes—while also driving the creation of a truly transnational jurisprudence of jurisdiction.

B. Development of Transnational Jurisdiction

The Court has paid frequent lip service to the concept of transnational jurisdiction—but it has failed to do more than that.[275] The law of transnational jurisdiction remains yoked to jurisdictional concepts developed in the very different context of disputes involving the several states.[276] This linkage operates to the detriment of both domestic and transnational jurisdiction.

The Court's foundational cases on the law of personal jurisdiction were domestic. But from *Asahi* onward, the Court's docket on personal jurisdiction has been mostly transnational cases.[277] In some of these cases, members of the Court have flagged the transnational character of these

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273 Mila Sohoni, *The Problem with "Coercion Aversion": Novel Questions and the Avoidance Canon*, 32 YALE J. ON REG. ONLINE 1, 13 (2015) (emphasis in original).

274 Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. F. 331, 333 (2015) (advocating for "abandoning the 'questions' canon even more thoroughly than Katyal and Schmidt propose").

275 *See* Parrish, *supra* note 13, at 4 ("This focus on the Due Process Clause, and the jurisdictional principles derived from it, is universally assumed appropriate whether the case involves a domestic or a foreign defendant. With few exceptions, scholars do not distinguish between the two. Neither do the courts."); *see also* Childress, *supra* note 24, at 1493 ("[E]mpirical analysis of the work of U.S. courts in transnational cases surprisingly undercuts the practical relevance of the globalization narrative for judicial decision making."). *But see* Silberman & Yaffe, *supra* note 21, at 408.

276 *See* Childress, *supra* note 24, at 1494 (noting that the majority opinions in *Goodyear* and *Nicastro* "never addressed the transnational facts of the cases in the controlling opinions").

277 *See supra* section I.D.

cases, but it is far from clear how much it has influenced the Court's decisions. The Court's transnational decisions have been applied with equal force to domestic jurisdiction. The Court's domestic decisions on jurisdiction have been applied with equal vigor to the transnational cases.

A role for Congress promises a path for a truly transnational law of jurisdiction. Congress is less likely to legislate on jurisdictional disputes among the several states. Congress can and has legislated on the jurisdiction of federal courts—and has, in some instances, provided for nationwide service in some cases arising under certain federal laws.[278] But Congress has resisted calls to replace state long-arm statutes.[279] It seems clear that the federal Congress would have a far stronger interest in legislating on transnational disputes where, indeed, its power would be at its highest.[280]

C. Emergence of Treaty Jurisdiction

The proposed Hague Convention on Jurisdiction and Judgments was to be the most ambitious development in transnational jurisdiction since the New York Convention on Recognition and Enforcement of Arbitral Awards.[281] It failed.[282] The most prominent treaty on jurisdiction since—the Hague Choice of Court Agreement—is essentially an attempt to salvage one specific and uncontroversial part of the larger treaty.[283]

The Hague Convention failed for several reasons, but two of the most prominent were, 1) the U.S. attachment to broad general and tag jurisdiction and, 2) the U.S. rejection of internationally accepted grounds of specific jurisdiction, such as point-of-injury jurisdiction.[284] Congressional power to shape the constitutional limitations of constitutional jurisdiction would have greatly ameliorated this second problem and opened a path for the Hague

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278 For example, antitrust actions against corporations under Section 12 of the Clayton Act, *see* 15 U.S.C. § 22 (1914); certain securities fraud actions, including actions under SEC Rule 10b-5, *see* 15 U.S.C. § 78aa(a) (2010); statutory interpleader actions, *see* 28 U.S.C. § 2361 (1949); U.S.C. § 1335 and shareholder derivative actions, *see* 28 U.S.C. § 1695 (1948).

279 For an argument in favor of complete federal abandonment of reference to state-long arm statutes, *see* Sachs, *supra* at 158, at 1302.

280 *See supra* section II.

281 For a prescient examination of the promise and challenges of the Convention, *see* Silberman, *supra* note 23, at 349 ("Even a limited convention would offer a foundation on which to build greater consensus about jurisdictional rules for transnational cases and international enforcement of judgments.").

282 *See* Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 543 (2005) (discussing the factors the led to the failure of the treaty negotiations).

283 *See id.* ("[I]t was from this larger project that the new Choice of Court Convention was recast.").

284 *See* Silberman, *supra* note 23, at 349 (discussing how both the breadth of U.S.-style "doing business" jurisdiction and the narrowness of U.S.-style specific jurisdiction could undermine the proposed Convention).

Convention to succeed and would have given the elected branches a much freer hand in future treaty negotiations.[285]

The importance of the Court-imposed limitations on specific jurisdiction to treaty negotiations has been reinforced by *Daimler*—the Court's diminution of broad U.S.-style general jurisdiction has essentially removed one of the major obstacles to the Hague Convention.[286] U.S. general jurisdiction now essentially maps on to 'domicile jurisdiction'—the version of all-purpose jurisdiction used by most civil law countries and embodied in the Brussels Regulation.[287] (Indeed, the U.S. approach may now be even narrower than its E.U. analog).[288]

The second obstacle, Court-imposed constitutional restrictions, remains. Congress could always limit general or tag jurisdiction by statute, but could do nothing to lift the Court imposed restrictions on specific jurisdiction.[289] The Court's decisions in the "stream-of-commerce" cases, made in the name of international comity, undermined a genuinely international approach to jurisdiction.[290] If Congress had possessed the ability to push against these constitutional limitations, perhaps the Convention negotiations would have at least been able to overcome one serious obstacle.[291]

Elevating Congress to a co-equal interpreter of due process jurisdiction may herald an era of treaty-based international jurisdiction. Some commentators have observed that court-imposed constitutional checks have hampered treaty negotiations.[292] This concern, in and of itself, does not demand a Congressional role, especially where treaty negotiations implicate issues of the U.S. federal structure.[293] But transnational

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285 *See id.*

286 *See* Porterfield, *supra* note 224, at 122 ("The Court's recent opinions in *Goodyear* and *Daimler* should remove some of our negotiating partners' anxiety regarding excessive assertions of general jurisdiction.").

287 *See id.* ("The 'essentially at home' standard should help resolve European fears that American courts will exercise general jurisdiction over foreign corporations based on thin contacts.").

288 *See* Silberman, *supra* note 7, at 678 n.21.

289 *See* Silberman, *supra* note 23, at 330 (noting that "a classic basis of jurisdiction over torts — that jurisdiction can be exercised by the State where either the tortious act or injury occurs — is adopted by the European Court of Justice in construing the Brussels Convention and appears in various drafts of the proposed Hague Convention," but that such a provision "may not satisfy the required nexus with a defendant as demanded by American constitutional jurisprudence").

290 Feldman, *supra* note 23, at 2205 (noting that *Nicastro* has "increased the uncertainty surrounding American personal jurisdiction rules" and affected the Hague negotiations).

291 *See id.* at 2205–07 (discussing the recent state of negotiations and other proposed solutions, such as a reservation providing that the United States would not have to recognize any basis of jurisdiction not consistent with the Constitution).

292 *See* notes 289–290.

293 *See supra* section II.C. The Supreme Court recently grappled with a case in which the petitioner argued that U.S. obligations under the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction conflicted with the U.S. federal

commercial treaties present an exceptionally strong case for unfettered exercise of the treaty power.[294] Even the Court's most conservative interpretation of the treaty power—laid out by Justice Thomas's concurring opinion in *Bond v. United States*—would support a broad approach to the treaty power in an international commercial context.[295]

In addition to paving the way for treaties like the Hague Convention, an interpretative role for Congress has the potential to help the U.S. meet its current treaty obligations. Several commentators have observed that the U.S. approach to jurisdiction may place the U.S. in breach of its obligations under the New York Convention (along with the U.S. approach to forum non conveniens).[296] These concerns have added bite after *Daimler*—the jurisdictional-nexus requirement for recognition and enforcement of arbitral awards now threatens to turn away many more foreign arbitral awards.[297]

The New York Convention is perhaps the most successful international commercial treaty in existence.[298] Congress passed Chapter 2 of the Federal Arbitration Act (FAA) to implement it.[299] The FAA states that courts "shall" recognize foreign arbitral awards unless one of the defenses set out in Article V of the Convention is met. Numerous courts have observed that the most natural interpretation of that language is that courts should not interpose the additional defense of lack of personal jurisdiction. However, these courts have felt compelled to apply what they view as protections required by the Fifth Amendment of the Constitution.[300] William Park and Alex

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structure. *See* Bond v. United States, 134 S. Ct. 2077, 2083 (2014) ("The question presented by this case is whether the Implementation Act also reaches a purely local crime") [hereinafter *Bond*]. The Court construed the Convention and its implementing legislation to not reach the conduct at issue, but emphasized the importance of the U.S. federal structure in interpreting the treaty's implementing legislation. *See id.* at 2088 (noting that the implementing legislation "must be read consistent with principles of federalism inherent in our constitutional structure").

294 In *Bond*, Justice Thomas concurred in the judgment and, among the members of the *Bond* Court, set out the narrowest vision of the treaty power — but even he would recognize Congressional primacy in the international commercial sphere. *See id.* at 2108 (arguing that the original understanding as well as the "postratification theory and practice of treaty-making accordingly confirms the understanding that treaties by their nature relate to intercourse with other nations (including their people and property), rather than to purely domestic affairs").

295 *Id.*

296 *See* William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 253 (2006) ("American judges remain under a duty to avoid, if at all possible, placing the United States in breach of its international obligations.").

297 *See* Silberman & Simowitz, *supra* note 4, at 349–50 (noting that *Goodyear* and *Daimler* potentially limit a creditor's ability to obtain personal jurisdiction over an award or judgment debtor).

298 *See e.g.*, S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 504 (2013) ("[W]ith over 145 states parties, the New York Convention is one of the most successful commercial treaties in the world.").

299 Federal Arbitration Act, ch. 2, 9 U.S.C. §§ 201–08 (1970).

300 *See, e.g.*, Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1120–21 (9th Cir. 2002) (noting that "the mandatory language of the Convention itself and of the FAA" reflect Congressional policy in favor of recognition of arbitral awards, but nevertheless applying the

Yanos have argued that there should be a presumption against the assertion of this defense because it may violate the Unites States' obligations under the New York Convention.[301]

Section 1605(a)(6) constitutes a specific Congressional statement prescribing personal jurisdiction for recognition and enforcement of arbitral awards against sovereign states and their instrumentalities.[302] Congress could prescribe a similar rule for arbitral awards generally (and arguably has).[303] This might implicate the interests of arbitral award debtors; after all, award debtors have defenses that they must assert or lose in the forum of enforcement.[304] It could well be problematic to force debtors to assert these defenses in a short time frame in the United States if they have no connections of any kind here.[305] But these concerns could be alleviated by sub-constitutional rules, such as permitting motions to vacate the recognition judgment once it is used to seek enforcement against assets in the forum.

A role for Congress as constitutional interpreter could also reinforce federal primacy in international commercial negotiations. This may seem like a foregone conclusion, but arguments invoking principles of federalism have bedeviled even the modest goals of the Hague Choice of Court agreement.[306]

"bedrock principle of civil procedure and constitutional law that a 'statute cannot grant personal jurisdiction where the Constitution forbids it.'" (citing Gilson v. Republic of Ir., 682 F.2d 1022, 1028 (D.C. Cir. 1982)).

301 *See* Park & Yanos, *supra* note 294, at 255 ("One line of argument, supported by this Article, suggests that the cases place the United States in breach of its treaty obligations under the New York Convention, which limits non-recognition of foreign awards to a narrowly-drafted litany of defenses.").

302 *See supra* section III.A.

303 *See* Park & Yanos, *supra* note 294, at 264 (arguing that the FAA creates a strong pro-enforcement bias and that, "[e]ven absent this legislation, however, good arguments exist for reading the Convention to exclude invocation of national procedural rules that vitiate arbitration awards.").

304 *See* Silberman & Simowitz, *supra* note 4, at 354 ("Although the costs and litigation burdens on a debtor in a recognition/enforcement action are less than in a full plenary action, a debtor nonetheless can assert defenses to recognition and enforcement of a foreign award or judgment.").

305 *See id.* ("A judgment debtor has a number of defenses available to challenge the original judgment and should not be forced to raise those defenses in any forum in which the judgment creditor might choose to bring a recognition/enforcement action.").

306 See Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIVATE INT'L L. 287, 289–92 (2006) (discussing challenges to the Choice of Court Agreements); *see also* Alexander Kamel, *Cooperative Federalism: A Viable Option for Implementing the Hague Convention on Choice of Court Agreements*, 102 GEO. L.J. 1821, 1837 (2014) ("The federal-legislation-only approach seems to be a politically difficult means of implementing the Convention, and the state law approach seems aspirational. Perhaps the best method of implementation is a combined federal and state approach, or what is called cooperative federalism.").

D. Decline of Trans-substantive Jurisdiction

The U.S. law of procedure generally has been trans-substantive since at least the adoption of the Federal Rules in 1936.[307] This is not to say that identical procedures and criteria are used in every instance—rather, a general set of rules is applied across almost every substantive area of law that leads to variations adapted to certain types of cases.[308]

For example, the U.S. test for claim-specific jurisdiction is trans-substantive. To invoke a U.S. court's specific jurisdiction, a plaintiff must demonstrate that the defendant has jurisdictional contacts in the forum "arising out of or related to" the claim alleged.[309] Over time, the Supreme Court has refined this test, adding that specific jurisdiction requires that a defendant have "targeted" or "purposefully availed" itself of the benefits of the forum state.[310] This test is applied across every substantive area of law, whether antitrust, intellectual property, or personal injury.[311] The Supreme Court, however, has further specified the test in cases involving cross-border sale of goods—so-called "stream of commerce cases"[312] or intentional tort cases.[313]

Trans-substantive rules have come under criticism from several commentators.[314] The drafters of the Federal Rules had a laudable goal in

307 *See* Marcus, *supra* note 25, at 372 ("The trans-substantivity principle reduces complexity for a straightforward reason. It requires that the procedural treatment that the Federal Rules prescribe for simple contracts disputes mirrors exactly what applies in complicated employment discrimination litigation.").

308 *See id.* at 377 ("[A] system would be disuniform if, for example, one set of deposition rules applied to class actions, while another applied to individual suits. This hypothetical system would nonetheless remain trans-substantive, provided that the same deposition rules applied regardless of the substance of the class action.").

309 *See Helicopteros*, 466 U.S. at 414 n.8 (1984) ("[W]hen a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." (citing Arthur Von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144–64 (1966)).

310 Lee Goldman, *From Calder to Walden and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases*, 52 SAN DIEGO L. REV. 357, 363 (2015) (discussing the evolution and current state of specific jurisdiction).

311 *See, e.g.*, *Calder v. Jones*, 465 U.S. 783, 790 (1984) ("We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry."). *But see* Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment,* 66 TEX. L. REV. 215, 268 (1987) (arguing that the foregoing statement was "at most a half-truth").

312 *See, e.g.*, *Nicastro*, 131 S. Ct. at, 2783 (2011) (discussing the stream of commerce "metaphor").

313 *See* Goldman, *supra* note 310, at 363 (discussing the current test for specific jurisdiction intentional tort cases).

314 *See, e.g.*, Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 271–72 (1989) (arguing that the trans-substantivity of the Federal Rules of Civil Procedure detrimentally affects specific groups). *But see* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Gene R. Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85 (1991).

the early 20th century, but many have observed that a single seamless web of doctrine is either impossible or undesirable in the an era where U.S. courts entertain cases of greater diversity, complexity, and number.[315] Streamlined in 1936 may be a straightjacket today.

A Congressional role in constitutional jurisdiction is likely to lead away from trans-substantive rules and toward a substance-specific approach. Personal jurisdiction writ large is not a politically salient issue that is likely to drive federal legislation. Congress' last action on personal jurisdiction generally was the approval of Rule 4(k)(2)—the so-called federal long-arm statute.[316] Congress did not take this step until it was specifically requested by the Supreme Court.[317]

Congress is far more likely to legislate in specific substantive areas such as arbitration, terrorism, and intellectual property, for example. If the courts interpret these acts as interpretations of the constitutional limits of due process, the constitutional limits of due process will naturally become more substance-specific. A Congressional move toward substance-specific transnational jurisdiction would bring the United States closer to the practice of other nations, would satisfy the critics of trans-substantive procedure, and would even satisfy the defenders of trans-substantivity.[318]

The Unites States has long been a jurisdictional outlier. Until recently, the United States was unusual in the breadth of its jurisdiction.[319] Very quickly, the United States has become unusual for the stinginess of its jurisdiction.[320] Throughout, the Unites States has been unusual in its trans-substantive approach to jurisdiction.[321] The European Union, freed of the

315 Marcus, *supra* note 25, at 372 ("Trans-substantivity and the simplicity it engenders have a certain aesthetic appeal, but while perhaps appropriate in 1938, they may not suit the complexity of the twenty-first century legal world. The Federal Rules have drawn critical fire as a relic of a kinder, gentler era.").

316 *See* J. Christopher Gooch, *The Internet, Personal Jurisdiction, and the Federal Long-Arm Statute: Rethinking the Concept of Jurisdiction*, 15 ARIZ. J. INT'L & COMP. L. 635, 652 (1998) (describing issues with the "Long-Arm-Statute of the Federal Courts, Rule 4(k)(2)").

317 Writing for a unanimous Court, Justice Blackmun noted that "the network of statutory enactments . . . argue strongly against devising common-law service of process provisions at this late date," and that, "[l]egislative rulemaking better ensures proper consideration of a service rule's ramifications within the pre-existing structure and is more likely to lead to consistent application." *Omni*, 484 U.S. at 110.

318 See Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992) ("Both writers [Mullenix and Shreve] also asked about the increased emphasis that commentators have accorded procedure's detrimental effects on specific rights, such as civil rights, and on particular groups or litigants, such as minorities. The preferable response to these plaints is a single word: Congress.").

319 Bookman, *supra* note 157, at 1091 ("The evolution of personal jurisdiction is a tale of the journey away from territoriality and back again.").

320 *See id.* (describing the narrowing of personal jurisdiction and its consequences in transnational suits).

321 Silberman, *supra* note 31, at 608–09 (summarizing the differences between jurisdiction regimes in the United States, Canada, and the European Union).

constitutional bounds imposed on jurisdiction in the United States, has long had a substantive-specific approach to jurisdiction, most prominently embodied in the special and exclusive heads of jurisdiction in the Brussels Regulation.[322] For example, the Brussels Regulation provides special jurisdictional rules to protect 'weaker' parties such as employees, insureds, and consumers; these are substance-specific jurisdictional rules motivated by particular policy concerns.[323] In her *Daimler* majority opinion, Justice Ginsburg identified a desire to bring the United States into closer parity with the E.U. as one of the prominent reasons for curtailing general jurisdiction.[324] But the trans-substantive constitutional limitation on specific jurisdiction has prevented the United States from any move toward the Brussels approach to substance-specific jurisdiction.

Critics of trans-substantive procedure have identified multiple problems with the "utopian" approach of the Federal Rules.[325] At least in the realm of jurisdiction, a Congressional role in defining constitutional jurisdiction would satisfy many of these concerns. A Congressional push to substantive specific jurisdiction would also satisfy defenders of trans-substantivity. David Marcus has identified a compelling institutional defense for trans-substantive "process." It operates to constrain otherwise unaccountable judges from targeting or favoring specific groups.[326] But a push away from trans-substantivity led by the elected braches would satisfy Marcus's institutional framework. Congress has both the accountability and the expertise to craft substance specific rules.[327]

VI. CONCLUSION

Congress can and does interpret the Fifth Amendment of the Constitution when it provides that foreign parties can be sued under U.S. law in U.S. courts. Courts should recognize these statutes as constitutional interpretation and respond accordingly. Where such laws offend neither a constitutional right nor constitutional structure—as in suits under federal law against foreign persons—the courts should not impose their views of the Fifth Amendment so as to render these statutes essentially inoperative.

Recognition of and deference to Congressional interpretation on constitutional jurisdiction better comports with constitutional structure,

322 *See id.* (describing the special heads of jurisdiction under the Brussels Regulation).

323 *See id.* at 609 ("Specialized circumstances — concern for the 'little guy' — lead to specialized rules for maintenance creditors, consumers, and insureds, who are permitted to sue defendants at the domicile of the plaintiff (or habitual residence if it is a claimant seeking support).").

324 *Daimler*, 134 S. Ct. at 763 ("The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.").

325 WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 234 (1968).

326 *See* Marcus, *supra* note 26, at 1229 (describing the institutional role of trans-substantivity).

327 *Id.*

which assigns powers involving foreign sovereigns to the elected branches. Highlighting Congress's power to interpret the Constitution will also helpfully reform the U.S. approach to personal jurisdiction, ushering in a truly transnational approach to jurisdiction, releasing trans-substantive bonds, and opening up opportunities for treaties governing transnational jurisdiction.

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