Incorporating Personal Jurisdiction

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ABSTRACT

As the Supreme Court continues to struggle to produce a coherent doctrine of personal jurisdiction, a growing number of commentators argue that personal jurisdiction lacks a constitutional foundation. On this view, the decision to elevate personal jurisdiction to a constitutional requirement following the Civil War was a mistake only partially remedied when the Court loosened the reins by adopting a more flexible requirement in the line of cases following World War II.

What advocates of curtailing or eliminating the personal jurisdiction requirement overlook is both the historic pedigree of personal jurisdiction and its ongoing vitality as a substantive due process right. The concept of jurisdiction as a tool for policing the boundaries between sovereign states predated the Constitution and was embraced from ratification through the Civil War. The novel idea developed by the Supreme Court at that time was the transformation of personal jurisdiction into an individual right to be free from ill founded assertions of government authority. This transformation foreshadowed the similar transformations that the Bill of Rights would undergo in the process of incorporation.

This Article argues that treating personal jurisdiction as an incorporated right both explains its constitutional status and suggests a new framework for the debate regarding the scope of the right.

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INTRODUCTION

The doctrine of personal jurisdiction is surprisingly unsettled, especially considering that thousands of first-year law students are expected to master the subject every year. That is not to say that the doctrine is completely up in the air: the U.S. Supreme Court has developed a set of rules that resolve many cases in satisfactory fashion and has even identified the source of the personal jurisdiction requirement in the Due Process Clause. What is missing is an explanation of how the two are tied together. The Supreme Court has not supplied much more than an *ipse dixit* to explain how the Due Process Clause leads to the current state of personal jurisdiction, and most commentators seem more inclined to tear down existing doctrine than to explain its foundations.[1] This Article aims to fill that gap.

1. *See generally* Jay Conison, *What Does Due Process Have To Do With Jurisdiction?*, 46 RUTGERS L. REV. 1071 (1994); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529 (1991); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative*

Besides the sense of intellectual satisfaction felt when the United States Constitution is interpreted in a manner that makes sense, there are two direct benefits that derive from a coherent theory of the personal jurisdiction requirement. First, it allows for a rational approach to difficult cases. The complex framework that the Court has built is ultimately grounded in "fair play and substantial justice."[2] This vague notion is sufficient to dispose of cases that fit within the framework, where the justices share an underlying consensus as to the correct result. When dealing with difficult cases that split the Court, however, the existing framework provides little guidance. This Article aims to provide a more solid foundation for decision making by grounding the personal jurisdiction inquiry on an individual right, incorporated through the Due Process Clause but with roots stretching back to the earliest days of American history. Second, a coherent theory of personal jurisdiction allows for the development of a single test, enabling the Court to do away with the artificial constructs of "general" and "specific" personal jurisdiction.[3]

Where this Article departs from the crowd is in locating the personal jurisdiction doctrine in the context of other rights protected by the Fourteenth Amendment, particularly those set forth in the Bill of Rights. By the mid-nineteenth century, state courts—and ultimately the Supreme Court—had established the requirement of personal jurisdiction quite firmly in the context of the Full Faith and Credit Clause. In fact, personal jurisdiction was sufficiently fundamental to the federalist structure of the United States to merit incorporation under the Due Process Clause.

Reexamination of the Full Faith and Credit and Due Process Clauses (Part One), 14 CREIGHTON L. REV. 499 (1981) [hereinafter Whitten, *Full Faith and Credit*]; Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735 (1981) [hereinafter Whitten, *Due Process*]; Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015 (1983); Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983); 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); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169 (2004); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010).

2. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

3. The distinction between general and specific jurisdiction relies on a sharp line between related and unrelated contacts that is difficult to justify. *See* Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 80–88 (1980).

Drawing on the work of Professor Akhil Amar,[4] this Article shows that the modern rule of personal jurisdiction is best understood as resulting from the refined incorporation of the pre-existing rule of personal jurisdiction. Unfortunately, the *Pennoyer v. Neff*[5] Court did not complete the incorporation process by evaluating how personal jurisdiction should change as a result of passing through the prism of the Fourteenth Amendment. Instead, through *Pennoyer* the Court embedded a relatively rigid jurisdictional requirement as a constitutional rule. When the Supreme Court revisited the need for a more flexible rule of jurisdiction in 1945, it lost sight of the right's history and began applying its own sense of fair play and substantial justice, rather than building on the cases that had come before.

A renewed focus on the origins of personal jurisdiction, together with the changes that result from shedding the "state-right husk before [the] citizen-right core can be absorbed by the Fourteenth Amendment,"[6] will both clarify personal jurisdiction doctrine and put it on firmer constitutional footing. This Article will show that a proper focus on the individual right source of the personal jurisdiction requirement strongly suggests that the Supreme Court's repeated plurality insistence on purposeful availment in the form of deliberate acts targeting the forum state is well-founded. This Article will also suggest how specific and general jurisdiction might be melded into a single inquiry.

This Article will begin by examining the history of the personal jurisdiction requirement, which in turn will require an examination of the history of the Full Faith and Credit Clause. The Article will then discuss how *Pennoyer v. Neff* transformed the doctrine of personal jurisdiction and how that transformation was left incomplete. Next, the Article will consider how courts might draw from the experience of the incorporation of the Bill of Rights to determine how best to approach personal jurisdiction. The Article will then compare this approach to how the Supreme Court has actually addressed personal jurisdiction in the modern era. Finally, the Article will address some current issues in personal jurisdiction and how treating personal jurisdiction as an individual right should affect their resolution.

4. Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

5. Pennoyer v. Neff, 95 U.S. 714 (1878).

6. Amar, *supra* note 4, at 1197.

I. THE FOUNDATIONS OF PERSONAL JURISDICTION

A. Personal Jurisdiction and the Full Faith and Credit Clause

State courts dealt with matters of personal jurisdiction before the ratification of the Constitution[7] and indeed, before the Revolutionary War.[8] Courts decided the earliest cases based on principles of international law or on particular compacts between states.[9] The creation of the Full Faith and Credit Clause in the Articles of Confederation[10] and, later, in the Constitution, changed the legal landscape. However, despite the new constitutional command, states remained relatively consistent on one point: a judgment rendered without jurisdiction was a nullity.

The Full Faith and Credit Clause[11] and the associated implementing statute[12] require that each state give "full faith and credit" to, among other things, the judicial proceedings of every other state. Both the Clause and the Act were vague as to the meaning of "full faith and credit." Shortly after their enactment, a debate ensued over whether foreign state judgments were entitled to conclusive effect or were merely to be treated as prima facie evidence.[13] The Supreme Court resolved the debate in favor of the former position in *Mills v. Duryee*.[14]

While this initial debate was being resolved, another question emerged: what was to be done if a party alleged that the state rendering judgment lacked jurisdiction over the case? The Massachusetts Supreme Judicial Court laid down an early marker in *Bissel v. Briggs*,[15] a case decided in the same year as *Mills v. Duryee*:

> But neither our own statute, nor the federal [C]onstitution, nor the [A]ct of Congress, had any intention of enlarging, restraining, or in any manner operating upon, the jurisdiction of the legislatures, or of the courts of any of the *United States* . . . . Whenever, therefore, a record of a judgment of any court of any state is produced as conclusive evidence, the jurisdiction of the court rendering it is open

7. Whitten, *Full Faith and Credit*, *supra* note 1, at 535.
8. *Id.* at 527.
9. *See id.*
10. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3.
11. 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.").
12. 28 U.S.C. § 1738 (1948).
13. Whitten, *Full Faith and Credit*, *supra* note 1, at 559–63.
14. Mills v. Duryee, 11 U.S. 481 (1813).
15. Bissell v. Briggs, 9 Mass. 462, 467 (1813).

> to inquiry; and if it should appear that the court had no jurisdiction of the cause, no faith or credit whatever will be given to the judgment.[16]

The choice of language here is telling: the court did not identify jurisdictional rules as constitutionally derived, but rather as remaining unchanged from the pre-Constitutional regime. The analysis seems to begin from the starting point of the states as independent sovereigns. With the advent of the Constitution, the states are no longer completely sovereign: among other changes, the Compact Clause prevents states from coming to arrangements between each other regarding the treatment of each other's judgments, and the Full Faith and Credit Clause allows Congress to decide how each state must treat foreign judgments. However, in the court's view, in areas where neither the Constitution nor Congress has explicitly abrogated state sovereignty, the starting point for analysis is the assumption that the states are separate sovereigns.

Accordingly, the court understood the relationship between states to be equivalent to the relationship between foreign nations, at least as to the issue of jurisdiction. Thus, the 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[17]—in deciding matters of jurisdiction.

The *Bissel* opinion proved influential.[18] State courts asked to rule on the validity of foreign state judgments explained that "no effect or validity would be given to [such a judgment], if it appeared that the court rendering it had not jurisdiction of the *person* as well as the *subject matter*;"[19] that "upon a matter without [its jurisdiction], the decree of judgment is a nullity every where;"[20] and that "if the tribunal had no jurisdiction, the judgment would be a nullity every where."[21] Similar sentiments were expressed in most cases that addressed the subject.[22]

The Supreme Court embraced the reasoning of *Bissel* in *D'Arcy v. Ketchum*,[23] both in terms of the content of the jurisdictional rule and the reasoning behind it. In *D'Arcy*, the Court was confronted with a New York statute that allowed New York courts to exercise jurisdiction over individuals who neither lived in New York nor had been given any notice

16. *Id.* at 467.
17. *See* Conison, *supra* note 1, at 1103.
18. *Id.* at 1114.
19. Starbuck v. Murray, 5 Wend. 148, 156 (N.Y. Sup. Ct. 1830).
20. Picket v. Johns, 1 Dev. Eq. 123, 131 (N.C. 1827).
21. Wernwag v. Pawling, 5 G. & J. 500, 507 (Md. 1833).
22. *See, e.g.*, Wilcox v. Kassick, 2 Mich. 165, 171 (1851).
23. D'Arcy v. Ketchum, 52 U.S. 165 (1850).

of the case.[24] The Court confirmed the *Bissel* court's use of international law as the appropriate starting point for the analysis.[25] The Court went on to explain that the international law among the states in 1790 required that "a judgment rendered in one [s]tate, assuming to bind the person of a citizen of another, was void within the foreign [s]tate, when the defendant had not been served with process or voluntarily made defence."[26] Because neither the Full Faith and Credit Clause nor the Act of Congress had overturned that pre-existing law,[27] such judgments should be treated as void.[28]

As a product of international law, the personal jurisdiction doctrine naturally focused on mediating interactions between sovereigns. If a state wished to exercise jurisdiction more broadly than was generally recognized, it was free to have its own courts do so.[29] 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.[30]

Some commentators have suggested that to the extent that protecting individuals was a concern, courts primarily focused on ensuring that individuals received notice of the suit. While notice was important, I believe it goes too far to claim that notice was the only concern. Failure to notify the defendant of a pending case was of course a common reason that the forum state might lack jurisdiction, and courts naturally took a dim view of such things.[31] However, when called upon to make a distinction, courts recognized that jurisdiction required more than mere notice and that, for example, a resident of New York who

24. *Id.* at 173. The Court quoted a New York statute:

> [W]here joint debtors are sued and one is brought into court on process, he shall answer the plaintiff; and if judgment shall pass for plaintiff, he shall have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process . . . .

Id.

25. *D'Arcy*, 52 U.S. at 176.
26. *Id.*
27. *Id.*
28. *Id.*
29. Conison, *supra* note 1, at 1103.
30. *Id.*
31. *See, e.g.*, Chew v. Randolph, 1 Miss. 1, 4 (1818) ("It is certainly contrary to our ideas of justice in legal proceedings, as well as in the common transactions of life, to determine and adjudicate upon a question, in which a man's life, liberty, or property is involved, without affording him an opportunity of being heard in his defence.").

never left New York could not be served with process sufficient to bring him within the jurisdiction of Massachusetts.[32]

Notice to the defendant was generally necessary for personal jurisdiction but was not sufficient. Service of process within the forum state universally constituted sufficient notice; traveling to New York to inform somebody that he or she was being sued in Massachusetts did not alone establish jurisdiction in Massachusetts unless the defendant voluntarily appeared in person or through counsel.

The general content of the personal jurisdiction doctrine was derived from the sovereign relationship between states and operated to prevent one state from being forced to follow the dictates of another state in a case in which the foreign state lacked jurisdiction.[33] However, as courts applied the doctrine in individual cases, it also necessarily operated to protect individual defendants from being haled into foreign states to defend themselves.

B. Pennoyer v. Neff*: A Subtle Revolution*

The Civil War and the Reconstruction Amendments that followed irrevocably altered the relationship between individual citizens, states, and the federal government. *Pennoyer v. Neff*[34] presented a vehicle for the Supreme Court to address how those changes affected the law of personal jurisdiction. Over the course of its opinion, the Supreme Court wrought a change in the treatment of personal jurisdiction that has been highly criticized but not fully understood.

The facts of the case are familiar and need not be belabored: Mitchell, a resident of Oregon, brought suit against Neff, a resident of California.[35] Neff was not personally served with process in the state and did not appear in the case.[36] Neff's failure to answer the complaint following constructive service of process by publication resulted in a default judgment being entered against him.[37] Pennoyer acquired the land in the subsequent sheriff's sale.[38] Thus, when Neff later brought

32. Kilburn v. Woodworth, 5 Johns. 37, 41 (N.Y. 1809) ("The defendant was not a resident of *Massachusetts*, when the suit was commenced; his domicil was in this state, and being in person here, and not within the jurisdiction of the court of *Massachusetts*, he was not, and could not have been served with process.").

33. Conison, *supra* note 1, at 1103.

34. Pennoyer v. Neff, 95 U.S. 714 (1878).

35. *Id.* at 719.

36. *Id.* at 719–20.

37. *Id.* at 720.

38. *Id.* at 719.

suit over the ownership of the property, the result turned on the validity of the judgment in the original suit between Mitchell and Neff.[39]

The Supreme Court proceeded to analyze the question presented in three steps. First, it announced what it considered to be the universal principles of personal jurisdiction.[40] Second, it surveyed the preceding cases, decided pursuant to the Full Faith and Credit Clause, to confirm that the development of the personal jurisdiction doctrine conformed to the principles it described.[41] Finally, the Court considered the change in the legal landscape caused by the Fourteenth Amendment.[42]

The Court grounded its universal principles of jurisdiction very firmly in the concept of state sovereignty.[43] States, the Court held, "possess and exercise the authority of independent [s]tates" except as limited by the Constitution.[44] One feature of this authority is that "every [s]tate possesses exclusive jurisdiction and sovereignty over persons and property within its territory."[45] As a corollary to this authority, no other state may exercise authority over persons and property within another state. The Court expanded the principle to cover the entire federal system, holding that no state may "exercise direct jurisdiction and authority over persons or property without its territory."[46] Accordingly, Oregon could not exercise power over Neff without having appropriately served him with process, and the default judgment must be vacated.

The cases decided under the Full Faith and Credit Clause largely reflected this analysis.[47] Judgments against individuals made without service of process were held to be void,[48] while judgments against property located in a state owned by an individual not within the state were only treated as binding up to the value of the attached property.[49] The only obstacle to a holding that the lack of personal jurisdiction rendered the initial judgment in *Pennoyer* invalid was the issue that, as the Court rather delicately put it, many of the state opinions the Court relied upon had language "implying that in [the rendering] [s]tate [the judgment] may be valid and binding."[50]

39. *Pennoyer*, 95 U.S. at 719.
40. *Id.* at 722–28.
41. *Id.* at 729–32.
42. *Id.* at 733.
43. *Id.* at 722.
44. *Pennoyer*, 95 U.S. at 722.
45. *Id.*
46. *Id.*
47. *Id.* at 729–30.
48. *Id.* at 730.
49. *Pennoyer*, 95 U.S. at 730–31.
50. *Id.* at 732.

As commentators have pointed out, the problematic language did not so much imply as outright declare that the state that rendered a judgment was free to assign whatever weight it wanted to such judgment regardless of jurisdictional principles.[51] Personal jurisdiction only became an issue when the plaintiff sought enforcement of the judgment in another state.[52] What is more, this is a result that followed from the nature of personal jurisdiction as an issue between sovereign states. Personal jurisdiction has deep roots in principles of international comity, a notion expressed in the Full Faith and Credit context by protecting one state from being forced to respect the judgment of another when rendered without jurisdiction. Those issues disappear when the rendering state and the enforcing state are the same: Oregon courts hardly need a federal doctrine to protect them from the depredations of Oregon courts.

The Court took two rather unconvincing cracks at this problem before settling on a viable ground for its holding. First, the Court suggested that the contrary language in state opinions was mere dicta;[53] the weight of the evidence assembled on the matter suggests that this characterization is simply wrong.[54] Second, the Court suggested that, historically, same-state judgments could not be questioned for lack of personal jurisdiction only because no mechanism existed for their review, a defect remedied by the passage of the Fourteenth Amendment.[55] However, the inability to question same-state judgments followed directly from the nature of personal jurisdiction as a tool for mediating disputes between sovereigns. Finally, the Court held that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law."[56]

The move to locate personal jurisdiction in the Due Process Clause was relatively low-key, and remains underappreciated—not to mention disputed[57]—to the present day. Such a shift necessarily entails a change in focus from sovereign relations to individual rights, from protecting California courts from being pushed around by Oregon courts to protecting Californians from being forced to go to Oregon to defend themselves.

51. Conison, *supra* note 1, at 1103.
52. *Id*.
53. *Pennoyer*, 95 U.S. at 732.
54. Conison, *supra* note 1, at 1103.
55. *Pennoyer*, 95 U.S. at 732.
56. *Id.* at 733.
57. *See* Conison, *supra* note 1, at 1209.

Though the question is somewhat anachronistic, one gets a strong sense that the *Pennoyer* Court would answer in the affirmative if asked whether personal jurisdiction was a fundamental principle—the requirement later settled on by the Supreme Court as the bar that must be cleared for a right to be incorporated under due process—at least in the context of the federalist structure of the United States.[58] Considering that courts of all levels had consistently affirmed the principle of requiring personal jurisdiction before treating a judgment as valid for over 75 years at the time *Pennoyer* was decided, it is an understandable conclusion to draw.

C. Pennoyer v. Neff*: A Missed Opportunity*

The *Pennoyer* Court relocated the center of gravity of the personal jurisdiction inquiry to the Due Process Clause of the Fourteenth Amendment.[59] In so doing, the Court transformed what had been a doctrine governing sovereign interactions into a doctrine protecting an individual right. Unfortunately, the Court did not adapt the doctrine itself to reflect this change in emphasis.

The Court did engage in one change to the pre-existing doctrine: it applied the personal jurisdiction requirement to attempts to enforce a judgment in the rendering state, not just in other states. This kind of change is exactly what one would expect from the shift to an individual right. If personal jurisdiction is to protect individuals from being haled into distant courts, then all that should matter is the relationship between the individual and the court that rendered the original decision. The relationship between the enforcing court and the court that rendered the judgment is irrelevant in assessing whether an individual right has been violated. However, the Court did not choose to justify the change in the operation of personal jurisdiction in this fashion, but instead chose to pretend that the only change caused by the Fourteenth Amendment was the availability of a means to challenge same-state judgments.[60]

58. *See* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). The Court noted:

> Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. . . . The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems . . . .

Id.

59. *Pennoyer*, 95 U.S. at 733.

60. *Id.* at 732–33.

It is understandable that the *Pennoyer* Court would have preferred to leave the constitutional underpinnings of personal jurisdiction relatively unexplored. The Court had recently decided the *Slaughterhouse Cases*,[61] and the proper interpretation of the Fourteenth Amendment was a hot button issue—as, in other ways, it still is. Simply expanding the applicability of a broadly accepted test for personal jurisdiction—personal service of process—had the appeal of being relatively uncontroversial. An extended discussion of the Constitutional underpinnings of personal jurisdiction would have been more trouble than it was worth.

After all, at the time it was decided, the *Pennoyer* rule perfectly sufficed as a practical tool for deciding cases. In fact, a court in 1866 that anachronistically found itself bound to follow the modern cases on personal jurisdiction—*International Shoe v. Washington*,[62] *World-Wide Volkswagen v. Woodson*,[63] *Asahi Metal Industry Co. v. Superior Court*,[64] the whole lot—would as a practical matter likely have found no difference than if it were simply bound by *Pennoyer*.[65] In nineteenth century America, people rarely engaged in activity that purposefully affected something in another state. Starting with a requirement of personal service and patching over obvious problem cases with a fictional consent exception would allow a court to reach the right result without any need to radically restructure a constitutional command. One might draw an analogy to how one can solve most practical physical problems—throwing a ball, merging into traffic, and so on—with a solid intuitive grasp of Newtonian mechanics, even if a true understanding of what is happening requires a comprehensive grasp of general relativity.

Nevertheless, the failure to appropriately explore the shift to personal jurisdiction as an individual right embedded a very rigid definition of personal jurisdiction into constitutional law.[66] Eventually this structure proved inadequate at handling new situations that arose as technology advanced and presented more and more situations in which the exercise of jurisdiction seemed appropriate despite the plaintiffs' inability or failure to serve the defendant in the forum state. More than anything else, this change in the facts on the ground forced the Supreme

61. Slaughter-House Cases, 83 U.S. 36 (1873).
62. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
63. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
64. Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987).
65. The elimination of in rem jurisdiction would of course have had a major effect. Shaffer v. Heitner, 433 U.S. 186 (1977).
66. Pennoyer v. Neff, 95 U.S. 714, 722–23 (1878).

Court to revisit the subject of personal jurisdiction in *International Shoe*.[67]

II. REFINED INCORPORATION AND PERSONAL JURISDICTION

A. Incorporation and the Bill of Rights

Shifting the basis of personal jurisdiction from sovereign-to-sovereign relations to the Fourteenth Amendment requires identifying the individual right that personal jurisdiction protects. In so doing, it is helpful to review the incorporation of the individual rights in the Bill of Rights and how, in some cases, these individual rights were transformed in the incorporation process.

The incorporation debate primarily focused on which rights to include. Justice Black argued for full incorporation of the first eight amendments,[68] while Justice Frankfurter advocated a clause by clause assessment of whether each right merited incorporation.[69] In practice the Supreme Court never settled on a fully coherent theory of incorporation, though at present the Court has incorporated almost all of the rights that appear in the Bill of Rights through individual analysis of whether each right is fundamental.[70]

Professor Akhil Amar identified two key insights in his influential article on the topic: first, the decision as to whether a right should be incorporated ought to turn on whether it "really guarantees a privilege or immunity of individual citizens rather than a right of states or the public at large,"[71] and second, that putting a right through the incorporation process can result in a change to the right itself. As a right is incorporated, Amar argues:

> [W]e must be attentive to the possibility, flagged by Frankfurter, that a particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment . . . . Certain hybrid provisions of the original Bill—part citizen right, part state right—may need to shed their state-right husk before their citizen-right core can be absorbed by the Fourteenth Amendment.[72]

Amar described his approach to the problem as "refined incorporation."[73]

67. *Int'l Shoe*, 326 U.S. at 311.
68. Adamson v. California, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting).
69. *Id*. at 67–68 (Frankfurter, J., concurring).
70. *See* Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968).
71. Amar, *supra* note 4, at 1197.
72. *Id.*
73. *Id.* at 1260.

One example of refined incorporation in action took place in the subtle transformation of the First Amendment right to peaceably assemble. As originally understood, the right of "the people" peaceably to assemble was linked up with popular sovereignty theory.[74] The paradigmatic example of "the people" assembling would have been political rights holders gathering at a constitutional convention.[75] By 1866 the term had grown to encompass those who were clearly not political rights holders, including women and minorities.[76]

The incorporation of the Establishment Clause requires a similar transformation. Under the original understanding, the First Amendment is perfectly compatible with a state government establishing an official religion and in fact would have prevented Congress from interfering with the state churches of Connecticut and Massachusetts at the time of ratification. The Supreme Court revisited that interpretation during the incorporation of the Bill of Rights via the Fourteenth Amendment and developed an individual right to separation between church and state. It was only after the Amendment was passed through the prism of an individual rights focus that it could serve as the foundation for the Establishment Clause jurisprudence familiar to modern lawyers.[77]

B. Taking a Refined Incorporation Approach to Personal Jurisdiction

The requirement of personal jurisdiction ought to undergo a similar reinterpretation in light of the Fourteenth Amendment. State courts and the Supreme Court originally developed a rule of personal jurisdiction in the Full Faith and Credit context that primarily aimed at determining when one sovereign would be required to honor the actions of another.[78] This rule also had the effect of protecting an individual from being haled into a distant court and forced to defend himself.[79] In the context of a federalist system, courts should regard such a ground rule concerning interaction between states and between states and citizens as fundamental and ripe for incorporation.

The personal jurisdiction rule thus stood in need of a form of refined incorporation: the aim of Full Faith and Credit Clause jurisprudence may have been primarily to defend the sovereignty of the enforcing government, but in so doing it also protected the right of the

74. *Id.* at 1282–83.
75. *Id.*
76. Amar, *supra* note 4, at 1282–83.
77. Akhil Reed Amar, THE BILL OF RIGHTS 215–30 (1998) [hereinafter Amar, BILL OF RIGHTS].
78. *See supra* notes 15–30 and accompanying text.
79. *See supra* notes 15–30 and accompanying text.

individual to be free from coercive action by a foreign sovereign. The incorporation process should have brought this secondary protection to the forefront, establishing the personal jurisdiction requirement as a tool for the protection of the right of the individual to be free from illegitimate governmental coercive action.

The *Pennoyer* Court initiated the incorporation of the personal jurisdiction requirement by shifting the foundation of the rule from international law to individual rights. The Court altered the substance of personal jurisdiction slightly to allow individuals to question the jurisdiction of judgments even when such judgments were made by the state now attempting to enforce them.[80] However, the Court shied away from any further consideration of what such a shift should have entailed.

By leaving the constitutional connection between the Due Process Clause and personal jurisdiction somewhat vague, the Court inhibited clear analysis of the content of the right protected by personal jurisdiction. The Court's decision also had the effect of enshrining a relatively rigid rule of personal jurisdiction as a constitutional rule.

In the ongoing evolution of the law from *Pennoyer* to *International Shoe* to *Nicastro*, the Supreme Court has largely neglected to explain the connection between the constitutional protection of due process and the requirement of personal jurisdiction. As a result, while the common law process of refinement has resulted in a generally reasonable rule governing personal jurisdiction, there is little underlying the rule to provide guidance for difficult cases. The absence of a satisfying explanation for the personal jurisdiction requirement helps explain the Court's inability to produce a solid majority opinion in the recent major cases on the issue.

In essence, *Pennoyer* performed what Amar would describe as a "jot-for-jot" incorporation, simply taking the existing rule and applying it against the forum state. The modern line of cases, on the other hand, attempts to start from scratch and develop a personal jurisdiction requirement from the need for fair play.[81] The Supreme Court has failed to bring the two approaches together, and as a result has never managed

80. Pennoyer v. Neff, 95 U.S. 714, 732 (1878).

81. The common law process of refinement that began in *International Shoe* has of course resulted in more specific requirements than simple fairness. However, when one searches for the source of those detailed requirements, one eventually reaches the command of ensuring fair play and substantial justice. Thus, any question that forces the Supreme Court to reach outside of the constructed framework of the common law of personal jurisdiction results in individual Justices being left largely to rule on their individual conception of fairness.

to identify the individual right protected by the pre-*Pennoyer* jurisdictional rules.

What, then, is the kernel of the individual right contained within the husk of the pre-*Pennoyer* rule of jurisdiction? Although "the right to avoid the enforcement of judgments not supported by personal jurisdiction" has the clean logical appeal of the tautology, such a tightly defined right is difficult to identify in the Constitution or in the American tradition. On the other hand, the right to something like "treatment consistent with fair play and substantial justice" is the kind of noble ideal that one might think of as a natural right, but such a vague standard does not clearly lead to modern jurisdictional rules. Attempting to derive a concrete result from a series of euphemisms will not work. Courts should instead directly approach the question of when jurisdiction is appropriate without the intervening buffer of phrases like "fair play."

Referring back to the jurisdictional requirement as it was understood in the time of *Pennoyer*, there were three primary components: (1) the protection of one sovereign state from being forced to honor an invalid judgment of another sovereign; (2) a general right to notice and an opportunity to be heard before judgment; and (3) the limitation of appropriate notice to include only personal service while in the forum in question. The first of these protections is the state-focused husk that ought to be disregarded as part of the Fourteenth Amendment inquiry. The second is protected by procedural due process. It is the third component that provides the basis for a unique individual right: a sort of right to be free from arbitrary assertions of government power—in particular the right to remain untouched by baseless assertions of power by foreign states.[82] Such a right fits neatly into the American tradition and also leads to the modern rule of personal jurisdiction in a rather straightforward fashion.[83]

The rights identified in the Bill of Rights generally place certain acts beyond the reach of any government or prohibit any government from taking certain actions. Another way to characterize this would be to say that most of these rights are substantive.[84] The First Amendment protects freedom of speech, freedom of the press, freedom of religion,

82. This right could, in practice, be quite similar to the right to remain unaffiliated with a sovereign that Professor Stewart has suggested is implicit in the Constitutional structure. Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5, 18 (1989).

83. *Id.*

84. One might argue that the Framers viewed these protections as in some sense procedural, but the modern view of these rights as incorporated is firmly substantive. *See generally* Amar, *supra* note 4; Amar, BILL OF RIGHTS, *supra* note 77.

and the right of the people to peaceably assemble. The Fourth Amendment prohibits unreasonable searches and seizures. There is no suggestion that some states or some departments of the federal government are free to penalize speech or grant general warrants while some are not. Entire areas of regulation are simply off limits for the government generally once such rights have been incorporated via the Fourteenth Amendment.

On the other hand, the right to be free from the exertion of power by a foreign government is more procedural in nature. In defining such a right, no claim is being made that the individual should be beyond all government assertions of power. The right simply seeks to restrict which government may assert power over the individual.

While such a right is distinct in some ways from the rights written into the Bill of Rights, the right would hardly be foreign to early American thought. As an initial matter, one might note that the country adopting the Constitution had only recently finished fighting a war over perceived illegitimate assertions of power by a distant government. Protecting citizens from attempts by the states to engage in similar abuses would be entirely consistent with that experience. In addition, much of the Constitution can be seen as addressing concerns regarding the division of power. The Constitution grants the federal government supremacy in certain areas, while state governments are left with the general police power; further, it subdivides the power of the federal government between its constituent branches. The idea of a right concerned with the division of power between states fits naturally with such provisions.

The most compelling evidence that such a right would be consistent with Founding-era thinking is the fact that courts worked to protect the right despite the lack of an explicit constitutional provision. Following the lead of the Massachusetts Supreme Judicial Court in *Bissel v. Briggs*, most state courts—and eventually the Supreme Court—held it to be obvious that judgments lacking jurisdiction were not entitled to Full Faith and Credit. While courts may have been motivated to render such judgments by a desire to protect state sovereignty, as a practical matter, state sovereignty could only be protected by protecting individuals from the effects of such judgments.

1. Defining the Scope of the Right

Generally speaking, defining a constitutional right is not a simple binary endeavor. One cannot simply chart out a list of situations in which the right applies and a list of those where it does not. Rather, it is

more helpful to think in terms of a core area, in which the right applies most strongly, and a sort of fringe area, where the right arguably applies but must often give way to other considerations. Of course, all rights do have limits and situations in which they do not apply.

The public forum doctrine associated with the First Amendment reflects such a structure.[85] In "quintessential public forums," the government is limited to "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication[]" and to content-based exclusions that are "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[86] Public property that the state has opened for use by the public as a place for expressive activity may be shut down completely if the state so desires; if it chooses not to do so, it is subject to similar restrictions as with traditional public forums.[87] By contrast, property owned by the government that is not a forum for public communication is subject to much looser restrictions: "the [s]tate may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[88] Some forms of activity, such as shooting somebody in the head over a difference of opinion, though arguably expressive, receive no protection whatsoever from the First Amendment.

In the area of personal jurisdiction, the core right must be preventing assertions of jurisdiction by states that have no connection to either the defendant or to the activity that gave rise to the cause of action.[89] In a federal system, citizens should be able to exercise at least some control over which entities may pass judgment on them. Forcing an individual to answer to a state with which the individual has never interacted and in which he arguably has never even caused harm is beyond the pale.[90] To require individuals to respond to arbitrary complaints filed in any of the 50 states would make a mockery of the Full Faith and Credit Clause.

On the other hand, the right clearly does not apply in the home state of the rights holder. The purpose of the right is protection from the arbitrary exercise of authority, but authority exercised by the sovereign

85. Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37, 45 (1983).
86. *Id.* at 45.
87. *Id.*
88. *Id.* at 46.
89. *See* Stewart, *supra* note 82, at 18.
90. *See id.*

governing an individual's home can hardly be arbitrary. This lack of arbitrariness justifies so-called "general jurisdiction"—there is no requirement to show a connection between the case and the forum when the defendant has no right to avoid assertions of authority by the forum.[91]

The intermediate terrain of the right to be left alone involves states where the defendant does not reside but where the defendant has conducted some activity or arguably caused some harm. This is the realm of specific jurisdiction. Much can be written regarding the requirements of specific jurisdiction, but framing the question in terms of an individual right clarifies a few things.

First, if the defendant conducts activities in a state, it seems improper to allow suit to be brought concerning unrelated activities, while related activities are fair game.[92] Precisely how closely the activities must be related is difficult to define, although one can again start with clear examples and gradually move into more difficult territory. If a product manufactured in Maryland explodes in Delaware and injures a plaintiff, it seems the plaintiff must be able to bring suit in Maryland, even if the plaintiff's theory of the case does not include an allegation of manufacturing defect. The very product complained of was produced in the state of Maryland, after all.[93] However, if the defendant operates multiple factories, and the plaintiff brings suit in a state other than the one where the product was built (or the plaintiff does not identify which factory produced the product), the answer is less clear. One could argue that the defendant who operates a manufacturing plant in a state should not be permitted to avoid a suit relating to the product being manufactured. Alternatively, one could argue that a suit regarding a particular item should not be permitted to proceed in a state that has no connection to that item. Framing the question in terms of an individual right does not reveal an easy answer to all questions, but it does direct the analysis more helpfully than a broad based inquiry into "fair play and substantial justice."

This framing also suggests that a defendant who directs activity towards a particular state that causes harm in that state ought not be able to avoid the courts of that state.[94] It is hardly arbitrary for a state to

91. *See id.* at 20.

92. See *id.* at 19.

93. Such a situation may seem contrived, but the Supreme Court would have been faced with just this question if the manufacturer had not conceded jurisdiction in *World-Wide Volkswagen*. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980).

94. *See* Stewart, *supra* note 82, at 20–21.

assert power over a defendant whose deliberate acts have harmed a resident of the state.

Activity that may foreseeably have an effect in a given state presents a more difficult question. This is the question presented by the so-called "stream of commerce" cases.[95] When a defendant takes an action that has a chance of affecting residents of a state, has the defendant assumed the risk that the action will cause harm and create a jurisdictional association? Such a position seems inconsistent with a focus on deliberate associative action by the defendant.[96]

Rather than focusing on including limitations as part of the definition of the right, it might be more natural to define the right to cover a broad scope of behavior, while carving out separate areas where the right does not apply. The following section will attempt to derive a reasonable approach to identifying the far reaches of the right underlying personal jurisdiction.

2. Identifying Limitations on the Right

a. Relatively Narrowly Defined Right

Constitutional rights are not absolute. Even our most cherished rights must give way if the government is able to identify a reason to override them that passes strict scrutiny.[97] When dealing with rights that are not as well established, or applications of established rights that are on the fringe of the area that they cover, the government may often overcome them by demonstrating that its proposed actions pass some intermediate level of scrutiny.[98]

Translating this type of analysis into the area of personal jurisdiction is not straightforward. The idea of weighing the government's interest in an assertion of power against an individual's constitutional right is awkward when the right itself is the independence from governmental assertions of power. It's a funny way of protecting individuals from the arbitrary assertion of government power when the government is allowed to exert power whenever it is able to convince a court that it is really important that the government be allowed to do so.

However, the task is not impossible. The situation here is not comparable to prosecutorial immunity, where searching judicial scrutiny

95. *See, e.g.*, Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 105 (1987); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011).

96. *See* Stewart, *supra* note 82, at 33–34.

97. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326–28 (2003).

98. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

of a privilege is tantamount to destroying the privilege. Fully and fairly litigating the issue of personal jurisdiction deprives the defendant of some of the protections provided by the requirement—such as freedom from suit—but ultimately the court will be able to provide the protection from the assertion of authority that makes up the core of the right, if such protection is appropriate.

While the requirement of personal jurisdiction does not create an absolute bar to the consideration of governmental interests, the nature of the right precludes some interests from consideration. After all, every government has an interest in asserting universal jurisdiction, if only to provide a convenient forum for plaintiffs in the state to vindicate their rights. However, allowing such a generalized interest to count against the protection provided by the requirement of personal jurisdiction seems to run counter to the very existence of the requirement to begin with. That is to say, the existence of a requirement of personal jurisdiction suggests that the justification for universal jurisdiction for each state in the United States was found wanting on a systemic level, so it seems misguided to allow such a justification to weigh in the balance of administering the right on a retail level.

In order to be considered an interest that might outweigh the individual right to be free from foreign assertions of power—thus allowing a finding of personal jurisdiction—the state must identify something about the particular case at hand that gives rise to the interest. For example, if the defendant sold bicycle tire inflation valves that ended up in the forum state, the state may have an interest in hosting a suit to ensure that products that do harm within the state are judged according to the state's standards.

Evaluating such claims could be a difficult matter, but it will at least clear the air somewhat to eliminate the universal claims that would support the exercise of jurisdiction in all cases.

b. Broad Right, Easily Waived

Another way to conceive of the landscape of personal jurisdiction is to take a very broad interpretation of the right, while treating certain substantive behaviors as waivers of the right.[99] According to this view, the "core right" prevents all of the states that are not the defendant's residence from asserting authority over the defendant.[100] However, a court will treat a decision to, for example, sell insurance in a foreign state

99. *See* Stewart, *supra* note 82, at 18.
100. *Id.*

as a waiver of the right to avoid assertions of jurisdiction in that state, at least as to the insurance being sold.[101]

As is so often the case with attempts to address thorny legal issues, this simplifies one area of the analysis while complicating the other. Taking this approach allows one to avoid the tricky task of precisely delineating the extent of the right to be left alone, but creates the new problem of defining what constitutes a waiver, and how broadly such waivers should be interpreted.[102]

Waiver in this context is necessarily somewhat fictional. Knowing waiver of a right typically involves some kind of declaration to a government entity, such as the decision to speak to a police officer after being apprised of the right to remain silent[103] or the failure to assert a personal right at the appropriate stage of a judicial proceeding.[104]

Waiver of personal jurisdiction, on the other hand, involves primary behavior that is rarely directed at a governmental entity, and almost never involves a conscious and deliberate decision to give up the right not to be sued in the forum.[105] Usually, a court is asked to decide whether an action, taken for some other personal or business purpose, may be treated as consent. This question, it should be emphasized, cannot deal with actual consent—such an inquiry would be hopelessly circular, as a legally knowledgeable citizen would subjectively believe herself to be consenting to jurisdiction only when taking actions that courts have deemed to indicate such consent.[106] However, this does not mean that the inquiry is hopeless.

Asking, "is it fair to treat this behavior as consent to jurisdiction"—or as a submission to sovereignty, as Justice Kennedy prefers[107]—is a different question than, "is it fair to exercise jurisdiction over this defendant," even if the end result is the same. Focusing on constructive consent forces the court to find its justifications for the exercise of jurisdiction in the defendant's behavior, rather than in the state's need.

So what actions should be treated as consent to jurisdiction? Consider that the starting point is the right to be left alone by foreign

101. *Id*.
102. *Id*. at 16–17.
103. Miranda v. Arizona, 384 U.S. 436, 479 (1966).
104. FED. R. CIV. P. 12(b)(2).
105. There are of course situations where a corporation may agree to be amenable to suit in a state in exchange for a business license and the like, but those cases do not occupy much attention when it comes to the analysis of the scope of personal jurisdiction. *See* Stewart, *supra* note 82, at 16–17.
106. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 311 n.18 (1980) (Brennan, J., dissenting).
107. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011).

states. It seems only fair to require that people expecting to benefit from this right should themselves leave the foreign state alone. Someone who makes a deliberate decision to target her actions to a particular state ought to understand that by doing so she loses the right to complain about "arbitrary" assertions of power by that state over those activities.

On the other hand, analyzing the issue of personal jurisdiction through the lens of constructive consent supports the idea of partial association with a foreign sovereign.[108] That is, while it seems perfectly fair to treat the sale of widgets into a foreign state as consent to jurisdiction in a suit over the widgets, it seems like a stretch to allow the foreign state to exercise jurisdiction over unrelated suits—for example, personal injury suits over behavior occurring in a different state.[109] When the defendant's activity is not directed at the foreign state, no principle of reciprocity is available to justify an assertion of jurisdiction over the defendant.

Even this simple distinction can get tricky when one attempts to pin down the precise meaning of directing activity at the foreign state. This issue has split the Supreme Court in several cases. One contingent argues that placing an item in the "stream of commerce" that arrives in a foreign state is directing activity at a state, while the other contingent contends that only purposeful direction at the foreign state will suffice.[110] These two tests, however, do not cover the entire range of possible tests. One might also believe that any action that has effects in a foreign state constitutes a waiver of the right to be free from that state's exercise of jurisdiction.

The so-called "effects test" differs from the "stream of commerce" test in that the effects test does not cut off the creation of jurisdiction at the point of sale.[111] If an item is sold in New York and taken by the consumer to Arizona, where it allegedly causes harm due to a product defect, only the effects test would countenance jurisdiction in Arizona.

If the exercise of jurisdiction requires constructive waiver, then the effects test and stream of commerce test are difficult to justify. Constructive waiver inherently requires an analysis of fairness and the defendant's state of mind. If the defendant never even thought of the foreign state at the time that he acted, it is hard to see how his actions

108. *See* Stewart, *supra* note 82, at 21.
109. *See id.* at 22.
110. *See generally Nicastro*, 131 S. Ct. 2780; Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987).
111. *See World-Wide Volkswagen*, 444 U.S. at 305–06 (Brennan, J., dissenting).

could constitute consent to that state's exercise of jurisdiction.[112] There is a difference between an act that will certainly affect a particular state and an act that could only possibly affect that state.

C. Alternatives to the Refined Incorporation Approach

Commentators have proposed many alternatives to the Court's personal jurisdiction doctrine, including the possibility of eliminating it altogether. In this section, the Article will examine how the individual right produced by the refined incorporation approach stands up in light of these alternatives.

1. Eliminating Personal Jurisdiction

One critique of personal jurisdiction as a constitutional command is the idea that the subject matter is simply not important enough to require a constitutional command.[113] In other words, personal jurisdiction is a "solution in search of a problem"[114] that courts should either drop entirely or fold into a more general inquiry into which litigation forum is most convenient for both parties.[115]

The idea that unimportant rights generally do not receive protection under the Due Process Clause holds some merit. Consider the fact that the Third Amendment prohibition on quartering soldiers and the Fifth Amendment requirement of a grand jury indictment are among the few rights mentioned in the Bill of Rights not incorporated against the states.[116] For all of the effort expended to explain the incorporation process, it is difficult to avoid the conclusion that the reason those particular provisions have not been incorporated is because they are seen as unimportant.[117] If the personal jurisdiction requirement protects a similarly unimportant right, then the idea that personal jurisdiction springs from the incorporation of an individual right is hard to justify.

Coming up with a test for which rights are important and which are not is a little tricky. Science has yet to produce an instrument capable of detecting something as intangible as an individual right, let alone one that could weigh the importance of such a thing. It might be tempting to

112. Massive effects might be vulnerable to a sort of willful blindness exception, but the canon of cases advocating for the stream of commerce test hardly fit that description.

113. *See* Conison, *supra* note 1, at 1209.

114. *See* Perdue, *supra* note 1, at 530.

115. *See id.* at 561–62.

116. *C.f. id.* at 203–04 (concluding that there is no defensible theoretical basis for the non-incorporation of such rights).

117. *See* Perdue, *supra* note 1, at 561; Redish, *supra* note 1, at 1137.

conduct a poll of trained philosophers, but that seems unlikely to have persuasive force.[118] However, certain secondary effects associated with importance can be observed and used to infer the relative stature of any given right.

As to the Third Amendment, the issue of quartering soldiers simply does not arise very often. Whether because the constitutional command is so clear or because quartering soldiers in private homes has turned out to be an inefficient way to house troops, there has been little cause for anybody to bring a suit alleging a violation of the Third Amendment. Whatever else one might say about personal jurisdiction, the doctrine does not suffer from a lack of contested cases. Personal jurisdiction lurks as a potential issue in any civil suit and has proven an important issue with enough frequency to produce a multitude of Supreme Court opinions.[119]

The grand jury requirement is an issue that often arises yet has not led to incorporation. Here, the lack of importance has to do with the effect of the requirement: while the Founding generation may have believed that grand juries would provide a useful check on overzealous prosecutors, practical experience shows that they have little if any effect. Accordingly, the Supreme Court feels no need to incorporate a requirement that would ultimately accomplish nothing.

Personal jurisdiction does not suffer from this form of irrelevance either. While a third party observer may frequently be indifferent to the venue that hears any particular civil suit, the parties themselves often care a great deal. For example, in patent litigation, where the choice of jurisdiction is relatively unconstrained, a highly disproportionate number of plaintiffs choose to file in the Eastern District of Texas.[120] Although the Eastern District of Texas is part of the federal court system and subject to the same laws as any other court, plaintiffs' attorneys seem to believe there is an advantage in having their suits heard in that location.[121] The existence of a personal jurisdiction requirement helps prevent such a strategy from taking hold in all high stakes civil litigation.

118. Although one might argue that a poll of nine such philosophers is the actual process used in evaluating the importance of any given right, one would also be forced to concede that this process is hardly universally applauded.

119. *See infra* Part III.

120. *See* Carlos Perez-Albuerne & Gwen G. Nolan, *Eastern District of Texas-Plaintiffs' Paradise Lost?* LAW360 (Sept. 15, 2010), http://www.law360.com/articles/190606/ (reporting that in 2008, over 10% of all patent cases in the United States were filed in the Eastern District of Texas).

121. *See* Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J.L. & TECH. 193, 206 (2007).

Personal jurisdiction comes up frequently in civil cases and significantly affects how they are decided. In neither sense can personal jurisdiction be called unimportant as compared to the portions of the Bill of Rights that remain unincorporated. I would go further and claim that even a neutral third party observer should care about the right that the personal jurisdiction requirement protects. The idea that a foreign tribunal should not be able to summon an individual to be held to foreign standards and judged by foreign mores is compelling, and resonates strongly in the American tradition. The fact that the foreign state at issue may be Oregon rather than Iran lessens the need for such protection, but the very nature of a federal system recognizes that different localities have different customs and standards.

2. Divorcing Personal Jurisdiction from Due Process

Another possible complaint is the charge that the Court in *Pennoyer* simply got things wrong. On this view, whether because Justice Field had an agenda[122] or because the *Pennoyer* Court simply misunderstood existing law,[123] treating personal jurisdiction as a personal right in any way constitutes an unwarranted interpretation of the Fourteenth Amendment.[124]

Often commentators have paired this critique with an attack on the federalism theme of personal jurisdiction.[125] As they point out, a perusal of the debates surrounding the Fourteenth Amendment reveals no discussion of personal jurisdiction.[126] In addition, the Court's insistence that personal jurisdiction is an individual right is quite difficult to square with a focus on state interests.[127]

As to the intent of the drafters of the Fourteenth Amendment, one must note that. in general, a mention in the debates surrounding the Amendment has not been viewed as a prerequisite for incorporation. Nor should it have been; the debate was conducted in general terms, befitting an Amendment intended to create a general shift in the relationship between states and the federal government.[128]

122. *See generally* Adrian M. Tocklin, Pennoyer v. Neff*: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75 (1997).

123. *See* Whitten, *Due Process*, *supra* note 1, at 821.

124. *See* Conison, *supra* note 1, at 1209 (describing personal jurisdiction as "spurious constitutional law").

125. *See* Redish, *supra* note 1, at 1136–37; Drobak, *supra* note 1, at 1017.

126. *See* Redish, *supra* note 1, at 1124–26.

127. *See id.* at 1136–37.

128. *See* Amar, *supra* note 4, at 1233.

While a direct weighing of an interest in federalism indeed should not be part of the due process analysis, this does not mean that federalism is irrelevant to jurisdiction. Rather, the development of personal jurisdiction in the context of the Full Faith and Credit Clause indicates that personal jurisdiction is a fundamental right meriting Fourteenth Amendment protection and that development was heavily influenced by the concept of federalism.[129]

It is difficult to contradict the claim that the *Pennoyer* Court was doing something new. The then-existing personal jurisdiction doctrine fairly clearly established that jurisdiction existed primarily as an international law doctrine.[130] Accordingly, the doctrine primarily acted to release the forum state from being required to recognize foreign judgments; however, the doctrine did not act to prevent the forum from recognizing judgments of its own.[131] Thus, a simple "jot-for-jot" incorporation of personal jurisdiction would not allow for a successful challenge against the enforcement of a judgment by a court in the state in which it was made, as happened in *Pennoyer*.

The fact that *Pennoyer* departed from the traditional rule, however, does not mean that it was a mistake. The Reconstruction Amendments worked a massive shift in the relationship between the individual citizen, his state government, and the federal government. Where the Founding generation assumed to a certain extent that the primary threat to liberty would come from an overweening federal government, following the Civil War the concern shifted to recalcitrant state governments.[132] That change in focus drove the need for a refined incorporation process.

Jurisdictional rules, though rooted in concerns for sovereignty, always acted to protect individuals from the enforcement of invalid judgments. The Fourteenth Amendment extended that protection into the forums that had reached such invalid judgments. This was a change from the traditional rule, but that should hardly be surprising: the Fourteenth Amendment was intended to, and did, change many traditional rules.

3. Beginning from State Power

Professor Brilmayer has suggested another approach to personal jurisdiction, arguing that courts ought to view personal jurisdiction as a

129. *See supra* Parts I.A, II.B.
130. Conison, *supra* note 1, at 1103.
131. *Id*.
132. *See* Amar, *supra* note 4, at 1233.

problem of identifying the proper scope of state authority.[133] She argues that the "right of a state to assert adjudicatory . . . authority over interstate disputes or over residents of other states who claim to have insufficient contact with the forum court attempting to exercise authority" should determine the reach of personal jurisdiction.[134] On this view, "[c]ases that are outside the state's jurisdiction . . . are cases that are beyond the legitimate exercise of coercive power."[135]

One issue with such an approach is that it suggests the need for a complete theory of the legitimate exercise of state power before courts can derive a doctrine of personal jurisdiction therefrom.[136] Such a theory has been hard to come by: the question of the proper scope of state power has occupied philosophers from Plato to Rawls and has been a hotly contested issue for most of that time. If that debate requires an answer before anybody can determine the proper scope of personal jurisdiction, we could be in for a long slog.[137]

In addition, even if one were to settle that debate—or if a court were simply to pick a winning theory in the name of expedience—considerable difficulty remains in translating an abstract theory into concrete results. Adopting Rawls's veil of ignorance does not obviously lead to an answer to the question of whether New Hampshire, for example, may exercise jurisdiction over the manufacturer of widgets who sells exclusively in Vermont, but whose widgets are used to make gadgets sold in New Hampshire.[138]

Taking as a starting point an individual right developed through a refined incorporation process helps to ameliorate this problem. One subtle but important change resulting from such an analysis is to view the right from the perspective of the individual rights holder. The Supreme Court cases that put a heavy emphasis on the federalism requirement have tended to treat the individual right as merely the flip side of the limits of state power,[139] a treatment that academics continue to follow.[140]

133. Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) [hereinafter Brilmayer, *Political Theory*]; *see also* Lea Brilmayer, *Shaping and Sharing in Democratic Theory: Towards a Political Philosophy of Interstate Equality*, 15 FLA. ST. U. L. REV. 389, 411 (1987); Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1, 4–6 (1991) [hereinafter Brilmayer, *Liberalism*].

134. Brilmayer, *Political Theory*, *supra* note 133, at 294.

135. *Id*. at 295.

136. *See id*. at 294.

137. Perdue, *supra* note 1, at 546.

138. *See id*. at 547.

139. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 294 (1980) (describing how the Due Process clause "instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment" without

On one level, this is a simple tautology—the individual is naturally free from the interference that the state is forbidden to pursue—but the change in perspective to focus on individual rights as demanded by the Due Process Clause changes the form of the analysis.

First, there is a matter of emphasis, or of default assumptions. States, by nature, exercise power. When addressing the philosophical question of the proper exercise of state power, there is a sort of gravitational pull to the formulation of "the state may exercise power *unless* . . . ." That conception embeds the idea that exercising power is the default assumption and that unless something displaces that assumption the state may do what it wants. On the other hand, starting from an individual rights perspective tends towards the opposite assumption: "the individual is to be free from state interference *unless* . . . ." This represents the default assumption that the individual's right is to be respected unless some overriding concern justifies setting the right aside. Choosing the perspective from which to analyze the issue is naturally bound up in the result of the final analysis.

The idea that an individual right can be analyzed by delineating what the state may do, with the leftover area being the right of the individual, echoes the argument that the Bill of Rights was unnecessary because of the limited powers of the federal government.[141] On that view, there was no need to specify that the government may not infringe on the freedom of speech when the government had no power to restrict speech. While such an argument is logically compelling, it did not prevail. The Constitution ultimately adopted what one might call a belt-and-suspenders approach to protecting against tyranny: it created a government of limited powers and also described a list of protected individual rights. A similar approach is warranted in the matter of personal jurisdiction. While it may be useful, as an initial matter, to consider what a government may or may not do, it is also helpful to

reference to an individual right); Hanson v. Denckla, 357 U.S. 235, 251 (1958) (describing personal jurisdiction as in part "a consequence of territorial limitations on the power of the respective States").

140. *See* Brilmayer, *Political Theory*, supra note 133, at 293–95.

141. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed.,1961). Hamilton asserted:

> I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?

Id.

consider from an individual perspective what sorts of behavior ought to be guaranteed Constitutional protection.

Consider the First Amendment. There, too, it is necessarily true that the individual's freedom from governmental interference with speech is the residue left over once all of the areas of speech with which the government may interfere have been determined. But we generally do not speak of free speech rights in that manner: there are areas where the government is allowed to interfere, such as the shouting of "fire" in a crowded theater and the like; areas that are clearly protected speech; and grey areas where courts and commentators may debate whether the speech is protected.

The same paradigm should apply in analyzing personal jurisdiction. If an individual has a right not to answer to a remote state, we should not begin from a first principles analysis of state power. We should begin by asking whether the individual has done anything that justifies the removal of the protection from the foreign state.

4. A Note on Personal Jurisdiction as an Individual Right

A shared feature of the alternate approaches detailed in this section is a de-emphasis of the idea that the personal jurisdiction requirement protects an individual right.[142] The Supreme Court's occasional imprecision in describing what it is doing with the personal jurisdiction inquiry[143] may appear to lend support to this view. However, on balance, the treatment of personal jurisdiction is highly consistent with the view that it is an individual right. While it is possible for the Supreme Court to be in error in its interpretation of the Constitution, this history at least suggests as a practical matter that a retreat on the subject is unlikely.

The personal jurisdiction requirement, as developed by the Supreme Court, has all of the trappings of a personal right. The requirement is not treated as some prophylactic measure intended to prevent the state of Oregon from invading the domain of the state of California;[144] rather, it is intended to protect individuals from abusive behavior by foreign states. Although the Supreme Court has not identified the right protected by the personal jurisdiction inquiry, other than some guarantee of

142. *See* Conison, *supra* note 1, at 1193.

143. *See World-Wide Volkswagen*, 444 U.S. at 294 (describing how the Due Process clause "instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment" without reference to an individual right); *Hanson*, 357 U.S. at 251 (describing personal jurisdiction as in part "a consequence of territorial limitations on the power of the respective States").

144. As commentators have observed, it is highly unlikely in most personal jurisdiction disputes that either state government particularly cares about the result.

"fairness," both the substance of the personal jurisdiction requirement and the procedure by which it is enforced confirm that it is some kind individual right.[145]

The substance of the personal jurisdiction requirement is much more consistent with the idea that the requirement is an individual right than with the idea that the requirement is intended to pursue a purely structural interest. Although the Supreme Court has not settled on a single test for personal jurisdiction, the centerpiece for all of the recently proposed approaches is a focus on the contacts between the defendant and the forum state.[146] The Court has paid lip service to the idea that the forum state's interest in deciding a case could justify jurisdiction, but in practice it seems to be used only to disqualify exercises of jurisdiction rather than support them.[147] The interest of the defendant's home state in shielding its citizens from foreign exertions of jurisdiction has at most been obliquely protected by the invocation of the interest of the "interstate judicial system,"[148] which itself seems to be a rote part of the modern "litany of personal jurisdiction" rather than an actual factor in deciding cases.[149] The strong focus on a factor tied to individual behavior and the deprecation of factors tied to state interests is of course consistent with the protection of an individual right.

The procedural treatment of personal jurisdiction reinforces this view, particularly when it is compared to the treatment of subject matter jurisdiction. The defendant must bring any deficiency of personal jurisdiction to the court's attention.[150] Failure to timely do so will result in the waiver of the right.[151] This is exactly what one would expect if the purpose of the right is to act as a shield for the defendant: if the defendant wants to use the right, he has to invoke it; if he does not want its protection, he is free to forego it. By contrast, subject matter jurisdiction is inherently structural: the purpose is explicitly to protect the proper allocation of power between the state and federal governments, rather than any particular defendant's interest in having the

145. The Supreme Court has specifically identified the personal jurisdiction requirement as a personal right. *See* Ins. Co. of Ir. v. Compagnie Des Bauxites, 456 U.S. 694, 703 (1982). However the Court's inconsistent handling of the right over time has somewhat obscured that fundamental truth.

146. The heated dispute in the Supreme Court is about what contacts should count. *Compare* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787–90 (2011) *with Nicastro*, 131 S. Ct. at 2799–803 (Ginsburg, J., dissenting).

147. *See* Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 114 (1987).

148. *See World-Wide Volkswagen*, 444 U.S. at 292.

149. *See* Stewart, *supra* note 82, at 6.

150. *See, e.g.*, FED. R. CIV. P. 12(b)(2).

151. *See* Ins. Co. of Ir. v. Compagnie Des Bauxites, 456 U.S. 694, 703 (1982).

proper court evaluate his arguments.[152] Accordingly, no matter how badly the parties might like a federal court to decide certain issues, the court must refuse to behave in a manner that intrudes on a matter properly left for state courts to decide.[153] Individuals may not waive subject matter jurisdiction issues, and courts may even raise such issues sua sponte.[154] One would expect courts to treat the personal jurisdiction requirement the same way if it performed a similarly important role in policing interstate relations; the fact that they do not strongly suggests that the personal jurisdiction requirement protects an individual right.

Further examination of the difference in the treatment of the personal jurisdiction requirement and the subject matter jurisdiction requirement helps illuminate the idea that personal jurisdiction springs from a personal right. One might be tempted to begin and end with the observation that one doctrine evaluates the subject matter of the suit while the other evaluates the fairness of haling the defendant into court: two different problems that have historically been treated quite differently. Yet, when dealing with constitutional issues it is often rewarding to ask why certain distinctions matter while others do not. After all, both situations present an allegation that the actions of party *B* have harmed party *A*, and in both situations the court party *A* is petitioning must determine whether it may properly exercise power over the dispute.

Establishing the federal government and defining its relationship to state governments is the central concern of the Constitution.[155] That relationship has been highly fraught throughout the history of the country, at one point leading to civil war, and even today remains a contentious political issue.[156] Federal subject matter jurisdiction touches directly on the issue of when and how the federal government may directly exercise power over an individual and therefore implicates that inter-governmental relationship.

Another issue is the extent of the possible conflict between the two sovereigns. If there were no constraint on subject matter jurisdiction, federal courts could in theory absorb every case that would otherwise go to the state courts. One might even say that federal courts would likely do so, depending on the structure of removal jurisdiction in such a scenario: at the very least, all of the cases where the plaintiff expects to

152. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).
153. *See id.*
154. *See id.*
155. *See* THE FEDERALIST NO. 1 (Alexander Hamilton).
156. *See generally, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

do better in federal court would be in federal court. On the other hand, even if the requirement for personal jurisdiction were to disappear, one would expect neighboring states to usurp a relatively limited quantity of cases.

While federal-state conflicts have been the drivers behind many major constitutional issues, inter-state conflict has been much lower key. Though such conflicts exist, they have hardly been major issues on a national level.[157]

The difference in the stakes of the inter-governmental relations involved can explain the difference in the treatment of these issues on a procedural level. The relationship between the state and federal government is a highly charged issue, meaning that determinations of subject-matter jurisdiction cannot be left to the parties in a suit. On the other hand, the relationships between states are not particularly fraught, and to the extent that states do have contentious relationships, they do not usually implicate jurisdictional issues, so personal jurisdiction is left to the parties.

If the personal jurisdiction doctrine polices a jurisdictional boundary that the sovereigns involved find unimportant, one might be tempted to do away with the doctrine altogether. Or at least to greatly relax the requirements of personal jurisdiction until they operate as a sort of national forum non conveniens rule—something to police gamesmanship by litigants rather than a strict constitutional command.[158] However, such an impulse overlooks one thing that personal jurisdiction has going for it that subject matter jurisdiction lacks: the intuitive appeal of the defendant's argument. The idea that a citizen should be able to arrange her life so as to avoid the interference of the federal government is not going to get much traction with a modern audience. If the individual chooses to engage in behavior that the federal government has regulated, then it is only to be expected that the federal government will exercise jurisdiction over any resulting suit. But when it comes to personal jurisdiction, things are different: here courts must be concerned with "traditional notions of fair play and substantial justice."[159]

This is a distinction that expresses itself primarily in the substance of the two doctrines. Subject matter jurisdiction concerns itself with the primary behavior of the defendant but does not worry at all about his purpose or intent. Rather, all that matters is whether federal law governs the behavior at issue. Fairness has no place in such an inquiry. In a

157. *See, e.g.*, New Jersey v. Delaware, 291 U.S. 361 (1934).
158. *See, e.g.*, Perdue, *supra* note 1, at 572.
159. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

personal jurisdiction inquiry, on the other hand, fairness to the defendant becomes a paramount concern.

The difference in substance supports the difference in procedural treatment: the defendant's choice not to raise the issue of jurisdiction suggests that the defendant believes he will be fairly treated by the presiding court. When the jurisdictional inquiry aims to police the boundary between two sovereigns, that belief is irrelevant; on the other hand, if fairness to the defendant is the key to the jurisdictional inquiry, then that belief is dispositive.

III. THE MODERN APPROACH TO PERSONAL JURISDICTION

The Supreme Court in *Pennoyer* missed an opportunity to refine the definition of the personal jurisdiction requirement as the Court translated it from a sovereign-focused doctrine to an individual right. The Supreme Court has had the opportunity to remedy that failure, but has instead embarked on a relatively open-ended inquiry that has developed a common law of personal jurisdiction ultimately based on fairness.

Where the *Pennoyer* Court failed to address the need to translate personal jurisdiction into an individual right, the modern Court has failed to recognize that pre-existing rules of jurisdiction could serve as the basis for the development of a modern rule. In part because it has not put the two pieces together, the Court has reached the point where it is unable to generate majority opinions on contentious issues of jurisdiction.

A. International Shoe *to the Present Stalemate*

The seams started to show in the *Pennoyer* doctrine as interstate travel and commerce became more widespread, leading to the problems that the Supreme Court attempted to address in *International Shoe*.[160] Unfortunately, the Court did not do so by explicitly finishing the translation of personal jurisdiction from a requirement rooted in state to state relations to an individual right grounded in the Fourteenth Amendment. Instead, the Court suggested that it faced a binary choice between jurisdiction based on mere physical power and jurisdiction based on reasonableness and fairness, before choosing the latter course. The Court held:

> [D]ue process requires only that, in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the

160. *Id*. at 311.

> maintenance of the suit does not offend "traditional notions of fair play and substantial justice.[161]

Because the *International Shoe* Court essentially abandoned the traditional guideposts of the jurisdiction inquiry, it provided only vague guidance for lower courts to follow. The Court acknowledged that "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit and those which do not cannot be simply mechanical or quantitative."[162] The Court laid down the rule that a state may not make a judgment binding against a defendant with which the state has no contacts but otherwise left lower courts to conduct a relatively open-ended evaluation of "the quality and nature of the activity."[163]

It was left for future cases to explain what sort of contacts rendered a person fair game for an assertion of jurisdiction. In *McGee v. International Life Insurance Co.*,[164] the Court provided some guidance, explaining that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that [s]tate"[165] in the course of holding that providing life insurance to an individual in California sufficed to allow California to exercise jurisdiction over the defendant. The Court then found an exercise of jurisdiction that it did not approve of in *Hanson v. Denckla*,[166] holding:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum [s]tate . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum [s]tate.[167]

Read together, these cases seemed to be puzzling out the contours of an individual right. An individual had the right to avoid being haled into court unless that individual purposefully directed activity at the forum. Though a very slight level of activity sufficed to support an

161. *Id*. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
162. *Id.* at 319.
163. *Id*.
164. McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957).
165. *Id.* at 223. The Court further noted:

> [T]here may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process. . . . There is no contention that respondent did not have adequate notice of the suit, or sufficient time to prepare its defenses and appear.

Id. at 224.
166. Hanson v. Denckla, 357 U.S. 235 (1958).
167. *Id.* at 253.

exercise of jurisdiction, activity that reached the forum due to the unilateral acts of another was not enough.

The Court next addressed the issue in *World-Wide Volkswagen*, a case that could have been drawn from the pages of a law school exam. Plaintiffs purchased an automobile from a dealer in New York that they attempted to drive to Arizona.[168] They suffered severe injuries in a traffic accident in Oklahoma, some of which they attributed to defects in the automobile.[169] Accordingly, plaintiffs attempted to bring suit in Oklahoma against the dealer, the regional wholesaler (who sold cars in New York, New Jersey, and Connecticut), and the two Volkswagen entities that manufactured the cars in Germany and sold them throughout the United States.[170]

The Court did not reexamine the history of the jurisdiction requirement or the incorporation of the requirement through the Due Process Clause. Instead, it noted that "[t]he protection against inconvenient litigation is typically described in terms of 'reasonableness' or 'fairness'"[171] before insisting that "the reasonableness of asserting jurisdiction over the defendant must be assessed in the context of our federal system of government."[172] The Court emphasized what it felt was the structural nature of the requirement:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another [s]tate; even if the forum [s]tate has a strong interest in applying its law to the controversy; even if the forum [s]tate is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the [s]tate of its power to render a valid judgment.[173]

Standing alone, this conclusion is not dissimilar from other individual rights. States may not infringe on freedom of speech, for example, simply because it is convenient. However, *World-Wide Volkswagen* lacks—as critics have pointed out[174]—an explanation of why and how exactly state sovereignty and the federal system became elements of a test based on reasonableness and fairness.

The Court refocused its attention on the due process origins of the jurisdictional requirement a few years later in a case presenting the issue

168. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980).
169. *Id.* at 288.
170. *Id.* at 288–89.
171. *Id.* at 292.
172. *Id.* at 293 (citations omitted).
173. World-Wide Volkswagen Corp., 444 U.S. at 294 (citations omitted).
174. *See* Redish, *supra* note 1, at 1112.

of whether a court could find personal jurisdiction as a discovery sanction.[175] Confronted with a case that did not require a determination as to the fairness of attaching jurisdictional consequences to any particular primary behavior, the Court responded with a cogent discussion of the roots of personal jurisdiction, recognizing that "the requirement of personal jurisdiction represents first of all an individual right."[176] While the Court did not address the implications this fact might have as to the substance of the personal jurisdiction requirement in general—the facts of the case did not present any issues on that front—the renewed focus on the Due Process Clause rather than free-floating fairness was heartening.

Unfortunately the problems the Supreme Court confronted in developing an adequate theoretical explanation for personal jurisdiction began to prevent the Court from reaching majority opinions starting with *Asahi*.[177] The crux of the disagreement centered around how to treat the so-called "stream of commerce:" when *A* sells a part to *B*, who incorporates it into a larger product that is sold to *C*, who then sells the product in California, should *A* be subject to personal jurisdiction in California?[178] All of the Justices agreed that this particular case presented one of the rare examples where the "interests analysis" demanded a finding of no jurisdiction: the California plaintiff had settled his claims and dropped out of the suit, leaving only an issue of indemnity between a Taiwanese corporation and a Japanese corporation.[179] The plurality opinion and Brennan concurrence, however, split on the proper analysis of minimum contacts.

According to the plurality opinion written by Justice O'Connor, the "substantial connection between the defendant and the forum [s]tate necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum [s]tate."[180] The "defendant's awareness that the stream of commerce may or will sweep the product into the forum [s]tate does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum [s]tate."[181] The defendant must do something more to show that the activity is directed at the forum.

175. Ins. Co. of Ir. v. Compagnie Des Bauxites, 456 U.S. 694 (1982).
176. *Id.* at 702–03.
177. Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987).
178. In *Asahi*, the original product was a valve stem, which was used as part of a motorcycle tire that ultimately failed and caused a traffic accident.
179. *Asahi Metal,* 480 U.S. at 116.
180. *Id.* at 112.
181. *Id.* at 112.

Brennan's concurrence would have made foreseeability the touchstone of the inquiry.[182] He argued that when a participant in the stream of commerce "is aware that the final product is being marketed in the forum [s]tate, the possibility of a lawsuit there cannot come as a surprise."[183] As a matter of fairness, he argued that burdening an individual with the prospect of litigation in a state when that individual has profited from economic interaction with that state is reasonable.[184]

The split remained in the latest case presenting the stream of commerce problem, *J. McIntyre Machinery, Ltd. v. Nicastro*.[185] A British company, J. McIntyre Machinery, Ltd., sold a recycling machine used to cut metal to a company in New Jersey through its U.S. distributor.[186] Justice Kennedy's plurality opinion held that simply targeting the United States as a whole was not enough; rather, to find jurisdiction in New Jersey it was necessary to show purposeful targeting of New Jersey.[187]

In describing the jurisdictional requirement, Kennedy introduced the new concept of submission to a state's authority as part of the inquiry.[188] Kennedy described both actual consent and presence in the state at the time of service as examples of submission to state authority.[189] Purposeful availment of the privilege of conducting activities in a state constituted a "submi[ssion] to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the [s]tate."[190]

Kennedy insisted that "jurisdiction is in the first instance a question of authority rather than fairness" and described purposeful availment as a method by which one may "submit to sovereign authority."[191] While his opinion has drawn criticism,[192] I believe it is a step in the right direction.

As an initial critique, the concept of "submission" is vulnerable to the same problems that plague any attempt to ground jurisdiction in the

182. *Id.* at 117 (Brennan, J., concurring).
183. *Id.*
184. *Id.*
185. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011).
186. *Id.* at 2786.
187. *Id.* at 2790–91.
188. *Id.* at 2791.
189. *Id.* at 2787.
190. *Nicastro*, 131 S. Ct. at 2788.
191. *Id.* at 2787.
192. *See, e.g.*, John T. Parry, *Introduction: Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on* J. McIntyre Machinery v. Nicastro, 16 LEWIS & CLARK L. REV. 827, 861–63 (2012) (criticizing the focus on "submission" as a key component of jurisdiction).

concept of "consent."[193] The defendant in most cases will neither have made a conscious decision to submit to sovereign authority nor a conscious decision to consent to the exercise of jurisdiction. Accordingly a court is not seeking "consent" or "submission" but rather is determining whether implying such a state of mind is fair. If it so determines, the court will impose jurisdiction. Since the court is engaged in an inquiry that bears no relation to the defendant's actual state of mind, describing the doctrine as being based on "consent" or "submission" is arguably pointless at best and misleading at worst.

However, the search for constructive submission is far better attuned to the history and structure of the personal jurisdiction requirement than is a search for constructive consent. Looking for consent implies a search for some kind of quid pro quo or equivalent exchange. As Justice Scalia has pointed out, the exchange involved in the imposition of jurisdiction is often extremely one-sided.[194] An insistence on restraining jurisdiction to situations where it represents a fair exchange would require an extensive reworking of the doctrine.

Constructive submission, on the other hand, searches for actions by the defendant that he might reasonably believe would provoke a state to exercise power over his person. In times past, this expectation might be based on the state's physical ability to project power. Today, this would require an evaluation of whether his interaction with the state is sufficiently extensive to make such an exercise of power legitimate.

Of course, this framing of the problem leaves open the question of what sort of interactions are enough. This is where the Court should draw on the history of the jurisdictional requirement from its inception through the changes wrought by the Fourteenth Amendment in order to guide its decisions, rather than relying on individual Justice's senses of fair play. Unfortunately, in abandoning as irrelevant the history of the jurisdictional requirement, the Court left itself with nothing to guide its development of the jurisdictional test beyond principles of fairness. It is not surprising that an open ended inquiry about fairness has led to widely diverging opinions, nor that it has led to a situation where a majority of Justices cannot agree as to what is fair.

193. *Nicastro*, 131 S. Ct. at 2799 (Ginsburg, J., dissenting). Justice Ginsburg argued:

> Whatever the state of academic debate over the role of consent in modern jurisdictional doctrines, the plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful.

Id. (footnote omitted).

194. *See* Burnham v. Superior Court, 495 U.S. 604, 623 (1990) (Scalia, J.).

B. Failure of the Untethered Approach

The Supreme Court has developed an elaborate "litany" of personal jurisdiction related rules.[195] Many cases fall within the framework of the Supreme Court's majority opinions on the topic and can be decided fairly easily. However, when a difficult case arises that falls outside of that framework, the Court is left with nothing to fall back on but its sense of "fair play and substantial justice."[196]

The Court should instead focus on the development of the individual right protected by the personal jurisdiction requirement that has been stalled since *Pennoyer v. Neff*. While Justice Kennedy was right that "[f]reeform notions of fundamental fairness"[197] are an inadequate basis for a legal doctrine, his assertion that "jurisdiction is in the first instance a question of authority rather than fairness"[198] presents a false choice. Personal jurisdiction, like other doctrines developed under the Fourteenth Amendment, is first and foremost a question of individual rights.[199]

IV. IMPLICATIONS OF A REFINED INCORPORATION APPROACH TO PERSONAL JURISDICTION

Up to this point this Article has shown how a refined incorporation approach to personal jurisdiction can justify grounding the requirement in the Constitution as an individual right and that such an approach is largely consistent with the modern line of personal jurisdiction cases. In this section, the Article will describe how the refined incorporation approach suggests a positive direction for the future evolution of the personal jurisdiction doctrine.

A. The Purposeful Availment Debate

The most contentious issue currently occupying the Supreme Court's attention with regard to personal jurisdiction is the question of what minimum quantum of contact suffices to render a defendant amenable to jurisdiction in the forum state.[200] One side of the debate argues that placing an item in the "stream of commerce" that ultimately washes it into the forum, in which the item then causes an injury, should

195. Stewart, *supra* note 82, at 5–6.
196. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
197. *Nicastro*, 131 S. Ct. at 2787.
198. *Id.* at 2789.
199. *See supra* Part II.C.4.
200. Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 106 (1987); *Nicastro*, 131 S. Ct. at 2785 (2011).

be enough to sustain jurisdiction.[201] The other argues that the defendant must have also somehow purposefully targeted the forum state.[202] Approaching the issue from an individual rights perspective helps to clarify the context of the battle. In particular, courts should look to see: (1) whether the right to be left alone extend to cover this situation; (2) whether this behavior waives the right; and (3) whether the forum state has an overwhelming interest that justifies setting aside the right.

The first question addresses the extent of the right to be left alone. In particular, does the right extend to cover a state where the defendant's product is sold to consumers even if the defendant did not make any particular effort to target that state? It seems that it must. The only states that a defendant has no protection against are her home state and states where her presence is such that she is, practically speaking, at home in the jurisdiction.[203] All other states must show at least some justification to assert jurisdiction over a defendant.

One such justification would be if the defendant's behavior is sufficient to constitute constructive waiver of her rights. The particular question of what sorts of commercial behavior constitute waiver requires a determination of the necessary level of mens rea. The more restrictive trend in Supreme Court opinions would require purposeful direction of activity towards the forum state, while the less restrictive side of the split would find knowing, or perhaps even reckless, direction of activity towards the state to be sufficient.

If personal jurisdiction is grounded on the right to be left alone, it seems reasonable to require deliberate action by the defendant in order to set aside that right. After all, a constitutional right is at stake. It is bad enough to toss the right over the side in the absence of an actual, knowing waiver. In determining what activity deserves to be treated as if knowing waiver has occurred, only deliberate targeting of the forum state seems sufficient. Selling an item to somebody who does not live in the forum state simply should not suffice absent the intent that she resell to somebody in the forum state.

B. Replacing General and Specific Personal Jurisdiction

While the most active debate around personal jurisdiction focuses on the proper treatment of an item placed in the stream of commerce, the "purposeful availment" requirement is not the only scrutiny applied to

201. *Nicastro*, 131 S. Ct. at 2794–95 (2011) (Ginsburg, J., dissenting).
202. *Id.* at 2788.
203. *See supra* Part II.B.

the actions of the defendant. There is also the matter of the connection between the defendant's actions and the facts giving rise to the suit.

The level of connection is not explicitly part of the test for personal jurisdiction. Instead, there are two different tests for personal jurisdiction: actions that are not connected to the suit must satisfy the test of general jurisdiction,[204] while actions that are connected only need to satisfy the test of specific jurisdiction.[205] In effect, the existence of a connection acts as a gatekeeper that allows one to utilize the easier to satisfy specific jurisdiction test.

A plaintiff who attempts to satisfy the general jurisdiction inquiry is required to show such an extensive connection between the defendant and the forum state that it is fair to effectively treat the defendant as a citizen of the forum.[206] The benefit of doing so is that the plaintiff may then bring any suit at all against the defendant in that forum.[207] On the other hand, a plaintiff who can show a connection between the act and the suit at most need only show that the act is purposely directed at the state, but may only bring suits directly connected to the act.[208]

A question that naturally arises when presented with such a sharp dichotomy is what happens when a situation seems to straddle the borders between the tests. That is, what if there appears to be somewhat of a connection between the suit and the act in the forum, but it is not strong enough to warrant a finding of general jurisdiction? Doctrinally the answer would seem to be an easy finding of no jurisdiction: there is not enough of a connection for specific jurisdiction, and the contacts are not strong enough for general jurisdiction. However, revisiting the assumption that "connection" is a simple yes or no question will show that there is space for what one might term "intermediate jurisdiction."

1. The Need for Intermediate Jurisdiction

Before addressing the issue of personal jurisdiction directly, it is worthwhile to consider briefly the concept of connection. At first blush, it appears to be a yes or no question: is the act connected with the suit? However, the idea of connection between act and suit is somewhat analogous to the idea of familial relations. The question "is person *A* related to person *B*" appears initially to call for a simple yes or no in

204. Helicopteros Nacionales v. Hall, 466 U.S. 408, 414 (1984).

205. As commentators have noted, it is not always self-evident which contacts should qualify as "connected." *See* Brilmayer, *supra* note 3, at 82.

206. *Helicopteros Nacionales*, 466 U.S. at 414–16.

207. *Id.* at 414.

208. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011).

response. It is easy enough to answer such a question for fathers and sons, brother and sister, and even for cousins. The answer starts to get a little trickier as the analysis moves out to more distant relations: second cousins, third cousins, fourth cousins. Pushing the boundary further, we may identify *A* and *B* as both being one of the 16 million people descended from Genghis Khan. If the analysis is extended even farther back in time, larger and larger portions of the human race will share at least one common ancestor. So the inquiry of "are they related" contains within it two questions: (1) how closely are they related; and (2) is the relationship close enough to cross some indeterminate threshold to qualify under the colloquial definition of "related." The issue of connection to the suit similarly conceals an issue of magnitude behind an apparently simple binary inquiry.

One example of an intermediate level of connection would be an activity that is the same as the activity that gave rise to the suit, but not directly connected to the suit itself. For example, suppose a car manufacturer sells cars to all 50 states. A consumer purchases a car in New York and drives it to Oklahoma, where it is involved in an accident that allegedly causes harms due to a product defect. Should the consumer be able to bring a suit in Oklahoma? The manufacturer sells cars to Oklahoma and is being sued over a car that hurt somebody in Oklahoma. However, as to the actual car involved in the accident, the manufacturer only directed activity at New York.

If one were to adhere strictly to the terms of the tests laid out by the Supreme Court, it would be difficult to justify the exercise of jurisdiction by Oklahoma. As an initial matter, general jurisdiction is right out: selling a product into a state falls well short of the sort of pervasive contacts needed to justify a finding of general jurisdiction.[209] Meanwhile, although selling cars directly into a state certainly constitutes purposeful activity directed at the forum, specific jurisdiction is also going to be a tough sell. The activity directed at the forum has nothing to do with the lawsuit at hand; whether the manufacturer sells cars into Oklahoma has nothing to do with whether a particular car sold in New York was defective.

There are several possibilities available if one were inclined to try to find in favor of the plaintiff. One would be to argue roughly as follows: sure, the modern litany of cases dictate that exercises of jurisdiction need to comport with fair play and substantial justice, which means the

209. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2010). Most cases at the Supreme Court level contemplating the exercise of general jurisdiction have found it inappropriate.

defendant must have minimum contacts such that the exercise of jurisdiction be reasonable, which in turn means that the defendant must have made some purposeful direction of activity to the forum state that gives rise to the suit.[210] But all of that should be interpreted in a manner in keeping with the general principles enunciated in *International Shoe*. And at the end of the day, what could be more in keeping with the principles of fair play and substantial justice than to hale somebody into court who sells cars into Oklahoma after one of her cars has a wreck in Oklahoma? Quibbling over where the particular car in question was sold is simply nitpicking, a lawyerly attempt to distract that court from the true interests of justice.

That kind of reasoning may very well be how the Supreme Court would have dealt with the situation in *World Wide Volkswagen* had Volkswagen of America not conceded jurisdiction. However, such an approach is problematic, as illustrated by the following: suppose the car had crashed in Texas, but the plaintiff still wanted to bring suit in Oklahoma. The modified situation removes much of the instinctive appeal of the fair play argument, but it is difficult to find logical justification for a change in result. After all, if you sell cars into Oklahoma, how can a suit in Oklahoma over a defective car unfairly surprise you? The facts are easily susceptible to continued manipulations to render the fair play argument gradually less tenable: the particular model involved in the crash might not be sold in Oklahoma, or the vehicle involved in the crash might be a commercial truck while all of the vehicles sold in Oklahoma are consumer vehicles, and so on. At some point the fair play argument is no longer compelling.

Given the situation above, there are three choices: (1) leave the determination up to each individual judge or justice's personal sense of fair play; (2) simply refuse to exercise jurisdiction when the plaintiff can't meet the requirements of specific jurisdiction, strictly construed; or (3) attempt to devise a test which will refine the meaning of fair play and allow individuals to predict which situations will subject them to suit in foreign jurisdictions and which will not.

Assuming that the first two options are unappealing, all that remains is to devise a rule to separate cases that merit the exercise of "intermediate jurisdiction" from those that do not. Fortunately, the Supreme Court has provided some guidance on the matter. The Court has indicated that a very high level of activity supports the exercise of general jurisdiction with no connection between the activity and the case at hand. The Court has also held that a very strong connection between

210. *See* Stewart, supra note 82, at 6.

the activity and the case at hand supports the exercise of specific jurisdiction so long as the activity, no matter how trivial, is purposefully directed at the forum. When viewing these two tests not as separate categories of jurisdiction but rather as two poles with which to organize our inquiry, the test for intermediate jurisdiction emerges: the exercise of jurisdiction requires a combination of a connection to the case and some level of activity directed at the forum state. Taking the requirements for general jurisdiction as a starting point, as the connection to the case strengthens, the level of activity required decreases. Starting from the requirements for specific jurisdiction, as the level of activity increases, the required level of connection to the case decreases. At some point the two tests will meet in the middle of the spectrum on both connection and activity level.

One positive result of adopting this test is that it actually reduces the complexity of the jurisdictional inquiry. The current state of the law has two conceptually different methods by which to establish jurisdiction. Introducing the concept of jurisdiction at an intermediate level of specificity lets courts reduce the inquiry to a single test, with the existing categories recognized as special cases.

2. Justifying Intermediate Jurisdiction

An intermediate form of personal jurisdiction may be problematic from a due process point of view. One possible line of reasoning for the different treatment of related and unrelated contacts is rooted in the idea that the purpose of due process jurisprudence is to protect against the imposition of burdens on outsiders.[211] Outsiders who have contact with a forum can reasonably be haled into court when their contact is substantively related to a case or controversy, while a state that attempts to base jurisdiction on unrelated contacts appears to be engaging in discrimination against outsiders.[212] On the other hand, sufficiently extensive unrelated contacts suggest "that the person or corporate entity is enough of an 'insider' that he may safely be relegated to the [s]tate's political processes."[213]

Intermediate jurisdiction is more compatible with the idea of personal jurisdiction as an incorporated right. One consequence of the conclusion that personal jurisdiction derives from a right to be left alone is that the right should be set aside when, but only when, the person possessing the right does something that merits overcoming its

211. *See* Brilmayer, *Liberalism*, *supra* note 133, at 85.
212. *Id.*
213. *Id.* at 87.

protection. There is no space in such an inquiry for an artificial divide between connected and unconnected behavior based on something like which facts would be alleged in a well pleaded complaint. Rather, such an inquiry must focus on whether the individual has done something substantial enough and sufficiently connected to the cause of action to merit the exercise of jurisdiction. The kind of balanced inquiry suggested by treating personal jurisdiction as an individual right is the same sort of inquiry discussed above as a logical result of acknowledging the existence of an intermediate form of jurisdiction sitting between the current general and specific jurisdiction doctrines.

C. Implications for Substantive Due Process in General

The incorporation of rights—particularly rights not written into the Constitution—is often a contentious matter. Cases such as *Roe v. Wade*[214] and *Lochner v. New York*[215] are among the most controversial decisions ever handed down by the Supreme Court and remain the subject of intense scholarly discussion today.[216] One interesting feature of personal jurisdiction as an incorporated right is the surprising lack of controversy surrounding its existence.

However although scholars might bemoan the existence of personal jurisdiction as a constitutional doctrine, the Supreme Court has never shown any sign that it might be swept away, nor has any lower court that I am aware of ever questioned the constitutional foundations of personal jurisdiction. Considering that personal jurisdiction is as vulnerable to the critique that it is a right not written into the Constitution as are the rights at issue in *Lochner* and *Roe*, it is interesting that it seems to be such a fixed star in the constitutional sky.

One possible explanation is that personal jurisdiction is just not particularly salient. While substantial political coalitions pressed for the appeal of *Lochner* and *Roe*, there is no political constituency that is passionately in favor of extending the possible reach of state long-arm statutes. This fact is hard to deny.

Yet it might also be significant that the requirement of personal jurisdiction enjoyed a long pedigree before its incorporation as a personal right. While personal jurisdiction might not have been written into the Bill of Rights, it was a doctrine that disparate state courts and the Supreme Court essentially recited word for word in a plethora of cases in

214. Roe v. Wade, 410 U.S. 113 (1973).
215. Lochner v. New York, 198 U.S. 45 (1905).
216. *See generally, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (rev. ed. 2014).

the 80 years before the *Pennoyer* decision. It may be that the Court stands on firmer ground when it incorporates such a well-established right than when it attempts to incorporate the more speculative rights at issue in other substantive due process cases.

CONCLUSION

The requirement of personal jurisdiction is deeply rooted in American history. The Supreme Court initiated a revolution in the treatment of personal jurisdiction by shifting its justification from mediating conflicts between sovereigns to protecting individual rights. Unfortunately, the Court failed to follow up on the implications of this shift, instead embedding a relatively rigid rule into the Constitution. When it came time to update the rule, the Court, rather than inquiring into the nature of the individual right it was protecting, endorsed a relatively free form pursuit of fairness and substantial justice.

This Article has shown how a refined incorporation approach to personal jurisdiction helps to identify the individual right that the doctrine ought to protect. By conducting such a directed inquiry, courts can ground the requirement of personal jurisdiction on something other than fairness and receive direction on how to approach problems that exist outside of the well-defined rules already laid down by the Supreme Court.

If the Supreme Court were to adopt the refined incorporation view of personal jurisdiction, it would finally provide a clear answer to the question of how the Due Process Clause mandates a requirement of personal jurisdiction. Further, the additional guidance offered by such an approach may allow the Court to reach a consensus on difficult questions of personal jurisdiction in a manner that is not happening under the current pursuit of fairness and substantial justice.